FEDERAL REGISTER

Vol. 84 Thursday,
No. 220 November 14, 2019

Pages 61819–62430

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Publishing Office, is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.federalregister.gov.*

The seal of the National Archives and Records Administration authenticates the Federal Register as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at *www.govinfo.gov*, a service of the U.S. Government Publishing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 1, 1 (March 14, 1936) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Publishing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, *gpocusthelp.com.*

The annual subscription price for the **Federal Register** paper edition is $860 plus postage, or $929, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $330, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Publishing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

How To Cite This Publication: Use the volume number and the page number. Example: 84 FR 12345.

Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Publishing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

SUBSCRIPTIONS AND COPIES

PUBLIC	
Subscriptions:	
Paper or fiche	**202–512–1800**
Assistance with public subscriptions	**202–512–1806**
General online information	**202–512–1530; 1–888–293–6498**
Single copies/back copies:	
Paper or fiche	**202–512–1800**
Assistance with public single copies	**1–866–512–1800 (Toll-Free)**
FEDERAL AGENCIES	
Subscriptions:	
Assistance with Federal agency subscriptions:	
Email	*FRSubscriptions@nara.gov*
Phone	**202–741–6000**

The Federal Register Printing Savings Act of 2017 (Pub. L. 115-120) placed restrictions on distribution of official printed copies of the daily **Federal Register** to members of Congress and Federal offices. Under this Act, the Director of the Government Publishing Office may not provide printed copies of the daily **Federal Register** unless a Member or other Federal office requests a specific issue or a subscription to the print edition. For more information on how to subscribe use the following website link: *https://www.gpo.gov/frsubs.*

Printed on recycled paper.

Contents

Federal Register

Vol. 84, No. 220

Thursday, November 14, 2019

Agency for International Development
RULES
Development Acquisition Regulation:
Revisions to the Incentive Awards Program for Personal Services Contractors, 61832–61835

Agriculture Department
See Animal and Plant Health Inspection Service

Air Force Department
NOTICES
Intent to Grant an Exclusive Patent License, 61897

Animal and Plant Health Inspection Service
NOTICES
Environmental Impact Statements; Availability, etc.:
Predator Damage Management in Oregon, 61868

Centers for Disease Control and Prevention
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 61908–61909

Centers for Medicare & Medicaid Services
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 61910–61912

Civil Rights Commission
NOTICES
Meetings:
Florida Advisory Committee, 61868
Washington Advisory Committee, 61868–61869

Coast Guard
RULES
Special Local Regulation:
Mission Bay Parade of Lights, San Diego, CA, 61819

Commerce Department
See Industry and Security Bureau
See International Trade Administration
See National Oceanic and Atmospheric Administration

Commodity Futures Trading Commission
RULES
Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 61974–62277
NOTICES
Meetings; Sunshine Act, 61896

Comptroller of the Currency
RULES
Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 61974–62277

Consumer Product Safety Commission
NOTICES
Meetings; Sunshine Act, 61897

Defense Department
See Air Force Department
NOTICES
Meetings:
U.S. Strategic Command Strategic Advisory Group; Cancellation, 61897

Education Department
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
William D. Ford Federal Direct Loan Program Repayment Plan Selection Form, 61897–61898

Employee Benefits Security Administration
NOTICES
Exemption:
Credit Suisse Group AG and Its Current and Future Affiliates, including Credit Suisse AG, 61928–61940

Energy Department
PROPOSED RULES
Energy Conservation Program:
Test Procedure for Microwave Ovens, 61836–61850

Environmental Protection Agency
RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
California; South Coast Air Quality Management District; Stationary Source Permits, 61819
PROPOSED RULES
Air Quality State Implementation Plans; Approvals and Promulgations:
Texas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan: Proposal of Best Available Retrofit Technology (BART) and Interstate Visibility Transport Provisions, 61850–61863
NOTICES
Request for Nominations:
Good Neighbor Environmental Board, 61898–61899

Export-Import Bank
NOTICES
Meetings; Sunshine Act, 61899

Federal Aviation Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals:
Flight Operations Quality Assurance Program, 61962–61963
Petition for Exemption; Summary:
BFD Systems, LLC, 61963

Federal Communications Commission
RULES
Connect America Fund, 61829–61830
Improving Public Safety Communications in the 800 MHz Band, 61831–61832
PROPOSED RULES
Improving Public Safety Communications in the 800 MHz Band, 61863–61867

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 61899–61906

Federal Deposit Insurance Corporation

RULES

Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 61974–62277

NOTICES

Meetings; Sunshine Act, 61906–61907

Federal Election Commission

NOTICES

Meetings; Sunshine Act, 61907

Federal Emergency Management Agency

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
- Public Assistance Program, 61922–61923

Federal Highway Administration

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals, 61964

Federal Maritime Commission

NOTICES

Agreements Filed, 61907–61908

Federal Motor Carrier Safety Administration

NOTICES

Hours of Service of Drivers:
- Palmetto State Armory; Application for Exemption, 61964–61965

Federal Railroad Administration

NOTICES

Petition for Waiver of Compliance, 61965–61966

Federal Reserve System

RULES

Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 61974–62277

NOTICES

Change in Bank Control:
- Acquisitions of Shares of a Bank or Bank Holding Company, 61908

Food and Drug Administration

NOTICES

Guidance:
- Process to Request a Review of Food and Drug Administration's Decision Not to Issue Certain Export Certificates for Devices, 61913–61915

Meetings:
- Patient-Focused Drug Development Guidance: Incorporating Clinical Outcome Assessments into Endpoints for Regulatory Decision Making; Public Workshop, 61912–61913

Health and Human Services Department

See Centers for Disease Control and Prevention
See Centers for Medicare & Medicaid Services
See Food and Drug Administration
See Health Resources and Services Administration
See National Institutes of Health

NOTICES

Findings of Research Misconduct, 61916–61919

Health Resources and Services Administration

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
- Standardized Work Plan Form for Use with Applications to the Bureau of Health Workforce Research and Training Grants and Cooperative Agreements, 61915–61916

Homeland Security Department

See Coast Guard
See Federal Emergency Management Agency

PROPOSED RULES

Asylum Application, Interview, and Employment Authorization for Applicants, 62374–62424

U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 62280–62371

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
- Vulnerability Assessments, 61923–61924

Industry and Security Bureau

NOTICES

Action Affecting Export Privilege:
- Rasheed Al Jijakli; Correction, 61870

Order Denying Export Privileges:
- Mojtaba Biria, 61869–61870

Order:
- Ali Caby, a/k/a Alex Caby, 61870–61872
- Arash Caby, a/k/a Axel Caby, 61872–61873
- Arrowtronic, LLC, 61873–61875

Institute of Museum and Library Services

NOTICES

Agency Information Collection Activities; Proposals, Submissions, and Approvals:
- Museums Empowered: Professional Development Opportunities for Museum Staff — A Museums for America Special Initiative, 61942–61943

Interior Department

See Land Management Bureau
See National Park Service

RULES

Freedom of Information Act Regulations, 61820–61829

International Trade Administration

NOTICES

Antidumping or Countervailing Duty Investigations, Orders, or Reviews:
- Certain Lined Paper Products from India, 61887–61889
- Emulsion Styrene-Butadiene Rubber from Brazil, 61889–61891

Determination of Sales at Less Than Fair Value:
- Ceramic Tile from the People's Republic of China, 61877–61887
- Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China, 61875–61877

International Trade Commission

NOTICES

Meetings; Sunshine Act, 61926–61927

Justice Department
NOTICES
Proposed Consent Decree:
CERCLA, 61927–61928

Labor Department
See Employee Benefits Security Administration
See Occupational Safety and Health Administration

Land Management Bureau
NOTICES
Filing of Plats of Survey:
Alaska, 61924–61925

National Credit Union Administration
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 61941–61942

National Endowment for the Humanities
NOTICES
Meetings:
Humanities Panel, 61943–61944

National Foundation on the Arts and the Humanities
See Institute of Museum and Library Services
See National Endowment for the Humanities

National Highway Traffic Safety Administration
NOTICES
Grant of Petition for Temporary Exemption from Shoulder Belt Requirement for Side-Facing Seats on Motorcoaches:
Hemphill Brothers Leasing Co., 61966–61969

National Institutes of Health
NOTICES
Meetings:
Center for Scientific Review, 61920–61921
Eunice Kennedy Shriver National Institute of Child Health and Human Development, 61921
National Cancer Institute, 61920
National Center for Advancing Translational Sciences, 61919
National Institute of Environmental Health Sciences, 61920
National Institute of Mental Health, 61920
Novel and Exceptional Technology and Research Advisory Committee, 61921–61922

National Oceanic and Atmospheric Administration
NOTICES
Four Draft NOAA Science and Technology Strategies:
NOAA Unmanned Systems, Artificial Intelligence, 'Omics, and Cloud Strategies, 61891–61892
Takes of Marine Mammals:
Incidental to Seabird Research Activities in Central California, 61892–61896

National Park Service
NOTICES
National Register of Historic Places:
Pending Nominations and Related Actions, 61925–61926

Occupational Safety and Health Administration
NOTICES
Meetings:
National Advisory Committee on Occupational Safety and Health, 61940–61941

Pipeline and Hazardous Materials Safety Administration
NOTICES
Hazardous Materials:
Actions on Special Permits, 61971–61972
Applications for Modification of Special Permits, 61969–61970
Applications for New Special Permits, 61970–61971

Postal Service
NOTICES
Product Change:
Priority Mail and First-Class Package Service Negotiated Service Agreement, 61944

Presidential Documents
PROCLAMATIONS
Special Observances:
National Apprenticeship Week (Proc. 9964), 62425–62428
World Freedom Day (Proc. 9965), 62429–62430

Securities and Exchange Commission
RULES
Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds, 61974–62277
NOTICES
Self-Regulatory Organizations; Proposed Rule Changes:
LCH SA, 61947–61950
Nasdaq BX, Inc., 61956–61958
Nasdaq PHLX LLC, 61946–61947
New York Stock Exchange LLC, 61958–61960
NYSE Arca, Inc., 61951–61952, 61954–61956
The Nasdaq Stock Market LLC, 61944–61946, 61952–61954

Selective Service System
NOTICES
Agency Information Collection Activities; Proposals, Submissions, and Approvals, 61960

Social Security Administration
NOTICES
Privacy Act; Matching Program, 61960–61961

Surface Transportation Board
NOTICES
Discontinuance of Service Exemption:
CSX Transportation, Inc. in Suffolk County, VA, 61961–61962

Tennessee Valley Authority
NOTICES
Meetings; Sunshine Act, 61962

Transportation Department
See Federal Aviation Administration
See Federal Highway Administration
See Federal Motor Carrier Safety Administration
See Federal Railroad Administration
See National Highway Traffic Safety Administration
See Pipeline and Hazardous Materials Safety Administration

Treasury Department
See Comptroller of the Currency

Separate Parts In This Issue

Part II

Commodity Futures Trading Commission, 61974–62277
Federal Deposit Insurance Corporation, 61974–62277
Federal Reserve System, 61974–62277
Securities and Exchange Commission, 61974–62277
Treasury Department, Comptroller of the Currency, 61974–62277

Part III

Homeland Security Department, 62280–62371

Part IV

Homeland Security Department, 62374–62424

Part V

Presidential Documents, 62425–62430

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.

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

Proclamationss:

9964 62427
9965 62429

8 CFR

Proposed Rules:

103 62280
106 62280
204 62280
208 62374
211 62280
212 62280
214 62280
216 62280
223 62280
235 62280
236 62280
240 62280
244 62280
245 62280
245a 62280
248 62280
264 62280
274a (2 documents) 62280, 62374
301 62280
319 62280
320 62280
322 62280
324 62280
334 62280
341 62280
343a 62280
343b 62280
392 62280

10 CFR

Proposed Rules:

430 61836

12 CFR

44 61974
248 61974
351 61974

17 CFR

75 61974
255 61974

33 CFR

100 61819

40 CFR

52 61819

Proposed Rules:

52 61850
97 61850

43 CFR

2 61820

47 CFR

54 61829
90 61831

Proposed Rules:

90 61863

48 CFR

Ch. 7 61832

Rules and Regulations

Federal Register

Vol. 84, No. 220

Thursday, November 14, 2019

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2019–0861]

Special Local Regulations; Mission Bay Parade of Lights, San Diego, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the Mission Bay Parade of Lights special local regulations on the waters of Mission Bay, California on December 14, 2019. These special local regulations are necessary to provide for the safety of the participants, crew, spectators, sponsor vessels, and general users of the waterway. During the enforcement period, persons and vessels are prohibited from anchoring, blocking, loitering, or impeding within this regulated area unless authorized by the Captain of the Port, or his designated representative.

DATES: The regulations in 33 CFR 100.1101 will be enforced from 6 p.m. through 8 p.m. on December 14, 2019, for Item 6 in Table 1 of Section 100.1101.

FOR FURTHER INFORMATION CONTACT: If you have questions about this publication of enforcement, call or email Lieutenant Briana Biagas, Waterways Management, U.S. Coast Guard Sector San Diego, CA; telephone (619) 278–7656, email *D11MarineEventsSD@uscg.mil*.

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the special local regulations in 33 CFR 100.1101 for the Mission Bay Parade of Lights in Mission Bay, San Diego, CA in 33 CFR 100.1101, Table 1, Item 6 of that section from 6 p.m. until 8 p.m. on December 14, 2019. This enforcement action is being taken to provide for the safety of life on navigable waterways during the event. The Coast Guard's regulation for recurring marine events in the San Diego Captain of the Port Zone identifies the regulated entities and area for this event. During the enforcement periods and under the provisions of 33 CFR 100.1101, persons and vessels are prohibited from anchoring, blocking, loitering, or impeding within this regulated area, unless authorized by the Captain of the Port, or his designated representative. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

In addition to this document in the **Federal Register**, the Coast Guard will provide the maritime community with advance notification of this enforcement period via the Local Notice to Mariners, marine information broadcasts, and local advertising by the event sponsor.

If the Captain of the Port Sector San Diego or his designated representative determines that the regulated area need not be enforced for the full duration stated on this document, he or she may use a Broadcast Notice to Mariners or other communications coordinated with the event sponsor to grant general permission to enter the regulated area.

Dated: November 6, 2019.

D.P. Montoro,

Captain, U.S. Coast Guard, Alternate Captain of the Port San Diego.

[FR Doc. 2019–24747 Filed 11–13–19; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2019–0272; FRL–10002–12–Region 9]

Air Plan Approval; California; South Coast Air Quality Management District; Stationary Source Permits; Withdrawal

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is withdrawing a direct final rule published on September 20, 2019 because relevant adverse comments were received. The rule pertained to EPA approval of a revision to the South Coast Air Quality Management District (SCAQMD) portion of the California State Implementation Plan (SIP). EPA will take a final action on the proposed action in a separate subsequent final rulemaking.

DATES: Effective November 14, 2019, the EPA withdraws the direct final rule published at 84 FR 49465, on September 20, 2019.

FOR FURTHER INFORMATION CONTACT: Laura Yannayon, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 972–3534 or by email at *yannayon.laura@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us," and "our" refer to the EPA. On September 20, 2019 we published a direct final rule to approve a revision to the SCAQMD portion of the California SIP. Specifically, the revision pertains to SCAQMD Rule 1325 "Federal $PM_{2.5}$ New Source Review Program." The direct final rule was published without prior proposal because we anticipated no adverse comments. We stated in the direct final rule that if we received relevant adverse comments by October 21, 2019, we would publish a timely withdrawal in the **Federal Register**. We received a relevant adverse comment and accordingly are withdrawing the direct final rule. In a separate subsequent final rulemaking, we will address the comments received.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur Oxides, Volatile organic compounds.

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

Dated: November 4, 2019.

Deborah Jordan,

Acting Regional Administrator, Region IX.

[FR Doc. 2019–24687 Filed 11–13–19; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Office of the Solicitor

43 CFR Part 2

[Docket No. DOI–2018–0017]

RIN 1093–AA26

Freedom of Information Act Regulations

AGENCY: Office of the Solicitor, Interior.

ACTION: Final rule.

SUMMARY: This rule revises the regulations applicable to all of the components, bureaus and offices of the Department of the Interior (Department) that process requests for records under the Freedom of Information Act. The revisions clarify and update procedures for requesting records from the Department and procedures that the Department follows in responding to requests from the public.

DATES: This rule is effective on December 16, 2019.

FOR FURTHER INFORMATION CONTACT: Cindy Cafaro, Departmental FOIA Office, Office of the Solicitor, Department of the Interior: 202–208–5342.

SUPPLEMENTARY INFORMATION:

I. Why We Are Publishing This Rule and What it Does

The Department's Freedom of Information Act (FOIA) offices have been overwhelmed by an exponential increase in the volume and complexity of incoming FOIA requests. Between Fiscal Year (FY) 2016 and FY 2018, the number of FOIA requests received by the Department's bureaus and offices increased 30 percent overall while the number of requests received by the Office of the Secretary FOIA office (OS FOIA) increased 210 percent. During that time, the number of particularly time-consuming complex requests also increased by 55 percent for the Department overall and 355 percent for OS FOIA. The Department's effort to respond in a timely and effective manner to the increased number of requests has been further hindered by a significant increase in FOIA lawsuits, primarily brought by requesters that have not received timely responses to their requests. At the close of FY 2018, the Department was defending 129 FOIA cases compared to just 6 cases at the close of FY 2015 and 30 cases at the close of FY 2016. The lawsuits further impair the ability of the FOIA processors to do their work in an orderly and equitable manner because they impose extra duties on the FOIA processors and the litigated requests typically jump the processing queue ahead of the non-litigated requests.

To address this challenge, the Department has begun a comprehensive effort to improve the quality and capacity of the work performed by its FOIA offices that includes better organization and governance, training, technology, and staffing as set out in *Secretary's Order No. 3371.* This rule is part of that larger effort. It amends the Department's FOIA regulations to increase the capacity of the Department's FOIA offices to respond to FOIA requests in an effective, transparent, and timely manner by making the procedures for processing FOIA requests more efficient and focused on meeting the Department's statutory obligations under the FOIA.

The Final Rule also amends section 2.31(a) of the Department's regulations to conform with the decision issued by the United States Supreme Court, in *Food Marketing Institute* v. *Argus Leader Media,* 588 U.S. __(2019) on June 24, 2019 (slip opinion) (''*Argus Leader*''). The amendment strikes the criteria expressly rejected by the Supreme Court in *Argus Leader* and replaces it with the criteria articulated by the Supreme Court in that case. With respect to this one amendment, the Department is invoking the ''good cause'' exemption of the Administrative Procedure Act that provides ''when an agency finds that for good cause that public notice and comment procedures are impractical, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment.'' *See* 5 U.S.C. 553(b)(3)(B). The Department has determined that notice and comment is unnecessary with respect to this one amendment because the Department has no discretion to apply criteria other than that articulated by the Supreme Court in *Argus Leader.*

II. Comments to the Proposed Rule

On December 28, 2018, the Department published a proposed rule in the **Federal Register** (83 FR 67175) requesting comments over a 30-day period ending on January 29, 2019. Due to a technical problem with *www.regulations.gov* that occurred in mid-January, we extended the comment period an additional day to ensure interested parties had the full 30 days to submit their responses. The Department received over 65,000 submittals from industry organizations, non-governmental organizations, representatives of state governments, and private citizens that addressed virtually every change in the proposed rule. Some entities submitted comments multiple times. More than 55,000 of the comments were variations on form letters and contained similar comments. Other comments were substantive and detailed. The comments are posted at the *Federal eRulemaking* portal: *http://www.regulations.gov* and may be accessed at that website by entering DOI–2018–0017 in the search box. The Department also received comments from the Office of Government Information Services at the National Archives and Records Administration, the Office of Information Policy at the Department of Justice, and Members of Congress. After careful consideration of these comments, the Department modified the proposed changes to sections 2.3, 2.4, 2.5, 2.12, 2.13, 2.15, 2.19, 2.20, 2.24, 2.29, 2.37, 2.45, 2.48, 2.54, 2.66, and 2.70 and withdrew the proposed changes to sections 2.16, 2.17, 2.18, 2.28, 2.51, 2.57, 2.58, 2.59, and 2.62. The comments and the Department's responses are summarized below.

1. General Opposition to the Proposed Rule

A large majority of the comments submitted by non-governmental organizations, members of the public, and academia expressed general opposition to the proposed rule and many of its major proposals.

2. General Support of the Proposed Rule

Some comments generally supported the proposed rule or components of it.

3. More Time To Comment

Some comments requested additional time to comment. The Department received a large number of comments, many of which were substantive and detailed. As a result, the Department is confident that it has had the benefit of sufficient public input. We declined to extend the comment period further because the public as well as the Department will benefit from implementing the regulations as soon as possible.

4. Executive Orders and Statutory Requirements

Some comments questioned whether the rule constitutes a major federal action significantly affecting the quality of the human environment that requires a detailed statement under the National Environmental Policy Act of 1969 (NEPA). It does not. The rule amends the administrative process by which the Department receives and processes requests under the FOIA. The rule does not have a ''reasonably close causal connection'' to effects on natural or cultural resources in the environment, as required for NEPA analysis.

A comment also recommended the Department correct the citation to 43 CFR 46.210(i) for the list of categorical exclusions and extraordinary circumstances in the NEPA compliance section and the Department has done so. The rule is also subject, in part, to the exclusion at 43 CFR 46.210(b) for the category of actions, ''Internal organizational changes and facility and bureau reductions and closings,'' as it restructures the Department's FOIA program by reassigning roles among different personnel. The Department has reviewed this rule against the Department's list of extraordinary circumstances at 43 CFR 46.215, as required by 43 CFR 46.205, and has determined (as documented below) that none apply.

Comments also questioned whether this rule would increase burdens and reduce flexibility and freedom of choice for the public under Executive Order (E.O.) 13563. It will not. The rule streamlines existing regulations to increase the Department's capacity to process requests under the FOIA and provide more records to more requesters in a timely manner. Comments also noted that E.O. 13563 encourages agencies to provide comment periods of at least 60 days. This is true, but it is a suggestion, not a requirement and the 30-day comment period utilized for this rule is legally sufficient. Additionally, as discussed above, the Department received a large number of comments, many of which are substantive and detailed, indicating that the comment period was adequate. Comments questioned whether the rule violates the FOIA. The Office of the Solicitor carefully reviewed the final rule and we are confident the rule is consistent with the provisions of FOIA. Comments also questioned whether our consultation with American Indian Tribes under E.O. 13175 was sufficient. This rule does not have tribal implications that impose substantial direct compliance costs on Indian Tribal governments under the criteria in E.O. 13175. Although it not required, the Department nevertheless sought consultation with the Indian Tribe that requested it and have added a more specific discussion of our compliance with E.O. 13175 below. Other comments asked us to note that the rule does not affect our trust responsibility to tribes. We agree that it does not.

5. Federal Vacancies Reform Act and Appointments Clause

Some comments expressed concern that the proposed rule was signed by the Department's Principal Deputy Solicitor, Exercising the Authority of the Solicitor. They asserted that the Principal Deputy Solicitor does not have the authority to sign a proposed or final rule. They also asserted that he was the Acting Solicitor for an unlawfully long period of time and/or if he had not been the Acting Solicitor, he did not have authority to sign the proposed rule. The Department's Principal Deputy Solicitor, Exercising the Authority of the Solicitor is not the Acting Solicitor. Instead, he is a non-principal officer exercising a valid, non-expired delegation of the non-exclusive functions and duties of the Solicitor. As such, no timeline was exceeded and the Federal Vacancies Reform Act and Appointments Clause have not been violated. Additionally, the Principal Deputy Solicitor has the full authority to sign proposed and final rules.

6. Specific Comments on Provisions of the Proposed Rule

The following is a discussion of the substantive comments on specific provisions of the proposed rule and the Department's responses:

Section 2.2. In this section of the proposed rule, the Department updated who would provide prior approval for law enforcement exclusions, when necessary, transferring this responsibility from the Office of the Solicitor generally to the Deputy Chief FOIA Officer (DCFO) specifically. Comments expressed concern that this change would politicize access to information. This reflects a misunderstanding of the position and role of the DCFO. The DCFO is a recently created position in the Office of the Solicitor filled by a career Senior Executive Service employee to evaluate, improve, and oversee the Department's FOIA program. The rule, therefore, has not been changed based on these comments.

Sections 2.3(d), 2.5(c), 2.19(b)(2), 2.21(a), 2.37(i), 2.49(e), and 2.66. In these sections of the proposed rule, the Department updated provisions pertaining to Public Liaison functions and/or FOIA Requester Centers. These changes were driven by the 2018 Department of Justice guidance entitled *The Importance of Quality Requester Services: Roles and Responsibilities of FOIA Requester Service Centers and FOIA Public Liaisons* and reflect the changing structure of the Department's FOIA program. Comments expressed concern that the intention of the changes was to make it more complex/difficult for requesters to obtain assistance from the Department in making FOIA requests and/or to politicize the FOIA process. This is neither the intention nor the effect of the changes. The changes are intended to improve the Department's assistance to FOIA requesters by providing one level of support for routine matters (FOIA Requester Centers) and a centralized, higher level of support for matters requiring more assistance (the Public Liaison). In addition, the FOIA Requester Center and Public Liaison functions will continue to be performed by career employees. The rule, therefore, was not changed based on these comments. Some comments sought more detail in these sections, particularly section 2.66. We agree that providing additional detail and clarification in section 2.66 would be helpful and have modified the rule accordingly.

Section 2.3. In this section of the proposed rule, the Department amended paragraph (b) to require that electronic submissions of FOIA requests be made via the electronic portals listed on the Department's FOIA website rather than by email and remove the option to submit requests via facsimile. The Department also deleted the previous paragraph (c), which alerted requesters to a FOIA website that is now discussed in the amended paragraph (b). The change to paragraph (b) will enable the Department to modernize its FOIA request tracking system. The Department expects this will reduce the amount of time the bureau FOIA offices spend on data entry, reduce the number of inadvertent errors made by retyping data from one format to another, and enable staff to apply more of their time to processing requests. Comments expressed concern that this change was intended to prohibit the electronic submission of FOIA requests or hinder the submission of FOIA requests. This reflects a misunderstanding of FOIA portals as well as the intent of the Department. Requesters will still be able to submit their requests electronically and, because requesters will be required to fill in certain data fields in the portals, will be less likely to omit necessary information that must be clarified before the request can be processed. Other comments expressed concern that rural and tribal communities with limited internet access should be able to submit requests via facsimile. In response to the comments, we have modified paragraph (b) to permit all requesters to continue faxing in requests. Other comments raised concerns about the functionality of the portals, for example, whether they provide confirmation receipts and allow requesters to upload documents. We do not believe it is appropriate to include such technical specifications in the regulations, but we are in the process of upgrading our portal system and will keep this concern in mind. We will also keep in mind the importance of informing requesters of, and redirecting them to, the portals. One comment suggested adding a reference to the Department of Justice portal at *FOIA.gov* to the regulations. Accordingly, we have added this portal to our FOIA website.

Section 2.4. In this section of the proposed rule, we amended paragraph (a) and deleted paragraphs (e) and (f) to provide that we would not forward requests submitted to a particular bureau or bureau component to another bureau or component. These changes were intended to help the FOIA offices focus on meeting the Department's statutory obligations under the FOIA. Comments expressed concern that these changes would be unduly limiting and inappropriate under the FOIA. After considering those comments, we have further amended paragraph (a) to make it clear that when a bureau receives a request that is clearly intended for another bureau, the bureau will forward the request. This is consistent with 2008 Department of Justice guidance entitled *New Requirement to Route Misdirected FOIA Requests.* Additionally, the section has been amended to advise requesters that they may seek help from the appropriate FOIA contact, as discussed in section 2.3 of the regulations, or FOIA Requester Center to assist them in determining where to direct their requests. Comments also requested that we consider continuing to forward requests that are not clearly misdirected to provide requesters with excellent customer service. While we wish to provide excellent customer service to requesters, this change would thwart our goal of focusing the efforts of the Department's FOIA offices on meeting our statutory obligations to provide timely and accurate responses to FOIA requesters. We, therefore, decline to require forwarding unless a request has clearly been misdirected, but believe the addition of a reminder of the services offered by FOIA contacts and FOIA Requester Centers will help requesters obtain needed assistance in directing their requests.

Section 2.5. This section of the rule concerns how requesters describe the records they are seeking. We proposed adding language to paragraph (a) requiring requesters to identify the discrete, identifiable agency activity, operation, or program in which they are interested. The purpose of this change was to assist requesters in formulating proper requests for records reflecting the activities and functions of the Department. Comments expressed concern that this change was unclear and could unreasonably burden requesters. Upon consideration of the comments, we have withdrawn this proposed change. Paragraph (d) was also amended to notify requesters that we would not honor a request that ''requires the bureau to locate, review, redact, or arrange for inspection of a vast quantity of material.'' The purpose of this change was to encourage requesters to formulate better-targeted requests. Comments expressed concern that these changes were too inflexible, created a new standard for the description of records, might confuse FOIA processors, and were impermissible under the FOIA. We recognize that our proposed language created confusion. We have therefore withdrawn the proposed change. Also in this section, we added paragraph (e) to clarify how the Department will address requests that do not reasonably describe the records sought. Some comments stated changes to the original paragraph (d) were unnecessary. Others stated that the changes were vague, too broad, or confusing. We therefore have withdrawn this new paragraph. A comment suggested that requesters should have 60 workdays to respond when asked by the bureau FOIA offices to clarify their requests. The 20 workday standard is unchanged from our current regulations. It provides sufficient time for requesters to respond to such requests and allows the Department to close requests that requesters are not interested in clarifying within a reasonable amount of time. The rule therefore has not been changed based on this comment.

Section 2.6. In this section of the proposed rule, we amended paragraph (f) to provide refunds to requesters that overpaid fees because the bureau placed their request in the wrong fee category. A comment expressed concern that this change was arbitrary and capricious or could price requesters ''out of the market.'' As this change increases the ability of requesters to obtain refunds for incorrectly charged fees, it was not been changed based on this comment.

Section 2.12. In this section of the proposed rule, we amended paragraph (d) to clarify when the Department will engage in consultations and/or referrals as described in the proposed changes to section 2.13. The purpose of this change was to make the language of section 2.12 consistent with section 2.13. Comments expressed concern that the purpose of this change was unclear and it may prevent the Department from working with other agencies that are the ''repositories of records.'' This comment appears to misunderstand the consultation and referral process, suggesting that it is a means to collect records from entities outside the Department. As this is not the case, we did not change the rule based on this comment.

Section 2.13. In this section of the proposed rule, we amended each paragraph to clarify and simplify when and how the Department will engage in consultations and referrals. The purpose of this change was to eliminate unnecessary consultations and referrals that may delay the production of records to requesters. Comments expressed concern that we were eliminating ''common-sense requirements'' to work with other agencies to answer requests or creating exemptions to referrals and the changes may prevent the Department from working with other agencies that are the repositories of records. These comments misapprehend the purpose and impact of the change. We are not eliminating requirements to work with other agencies; rather, we are clarifying when we will engage in referrals and consultations. Additionally, as noted above, consultations and referrals are not a means to collect records from other agencies. The rule therefore was not been changed based on these comments. We did, however, clarify paragraph (b)(2) concerning records that are classified or may be appropriate for classification. Another comment suggested that this section include a protocol for exchanging information with state governments without making the records subject to disclosure under the FOIA. We do not believe records provided to the Department by state governments may be protected from disclosure under the FOIA absent statutory authority to do so and, therefore, the rule has not been changed based on this comment. Another comment suggested that when notifying a requester of a referral, we explicitly note whether the referral is for all or part of the request. We have updated and clarified paragraph (b)(3) in accordance with this comment. Another comment expressed concern about the discussion in paragraph (b)(4) concerning when a referral would be inappropriate, stating that it would allow the Department ''not to respond to citizen inquiries.'' This reflects a misunderstanding of the provision.

Eliminating unnecessary referrals will reduce unnecessary delay and enable the Department to respond more quickly to requests. Nevertheless, to address any confusion on this point, the Department has clarified this provision by replacing the word ''consult'' with ''coordinate.''

Section 2.14. In this section of the proposed rule, we added a sentence expressly providing that the bureau may modify the ordinary practice of processing requests within a given processing track on a first-in, first-out basis by imposing monthly processing limits in order to treat FOIA requesters equitably by responding to a greater number of FOIA requests each month. The proposed language was intended to allow the bureau to utilize an approach similar to that of the Federal Bureau of Investigation that was favorably acknowledged by the United States Court of Appeals for the D.C. Circuit in *National Security Counselors* v. *United States Department of Justice,* 848 F.3d 467, 471–72 (D.C. Cir. 2017). Comments expressed concern this change would limit the number of FOIA requests a requester may submit in a given month, monthly processing limits are not authorized by the FOIA, and the approach is unprecedented. Although we do not believe the proposed change would have limited the number of requests that may be submitted in a given month or that it is not authorized under the FOIA, we recognize that the proposed language created confusion and have therefore withdrawn it.

Section 2.15. In this section of the proposed rule, we amended paragraph (c) to clarify the Department's multitrack processing provisions. The purpose of these changes was to clarify how multitrack processing works in the Department and to re-name the ''Exceptional/Voluminous'' track as that name was two words long and had created some confusion. Some comments objected to the premise of multitrack processing, stating the amendments attempted to the change the statutory timelines of the FOIA. Some comments questioned wording choices and/or sought clarification. As multitrack processing is expressly authorized by the FOIA (5 U.S.C. 552(a)(6)(D)(i)), the comments challenging the premise of multitrack processing did not result in a change to the rule. However, based on the comments, we added an introductory phrase to provide additional clarity and transparency as to how we assign particular requests to particular tracks. The additional language clarifies we place requests in processing tracks based on how long it would generally take to process them, not based on how long it will actually take to process them due to other factors, such as existing backlogs.

Sections 2.16, 2.18, 2.19, 2.28, 2.37, 2.51, 2.57, 2.58, 2.59, and 2.62. In these sections of the proposed rule, we proposed changing the phrase ''time limit'' to ''time frame.'' The purpose of this change was to address concerns that this language confused requesters about timing issues. Comments suggested the change would create more confusion about timing issues and was perceived as inconsistent with the language of the FOIA (for example, 5 U.S.C. 552(a)(4)(A)(viii)(II)(aa)). Upon consideration of the comments, we found the changes were not consistent with our purpose and have withdrawn them.

Section 2.17. In the proposed rule, we removed this section to be consistent with proposed changes to section 2.4. Upon consideration of the comments and in light of the final changes to section 2.4, (discussed above), this change is no longer required and we have withdrawn it.

Section 2.20. In this section of the proposed rule, we amended paragraphs (a), (b), and (c) to clarify when and how the Department will grant expedited processing consistent with the statutory requirements in the FOIA. Comments raised concerns that the changes would harm the FOIA requester community by improperly raising the bar for expedited processing. These comments misapprehend the purpose or effect of the proposed changes. The changes underscore the legal standard for expedited processing established by the United States Court of Appeals for the D.C. Circuit in *Al-Fayed* v. *Central Intelligence Agency.,* 254 F.3d 300 (D.C. Cir. 2001) to assist the FOIA requester community to craft appropriate expedited processing requests. The changes will also help ensure requesters do not receive processing ahead of all other non-expedited requesters unless they qualify under the legal standard. We therefore have not changed the rule based on these comments. However, we further revised paragraph (c) to address what happens when only a portion of a request qualifies for expedited processing. Comments also raised concerns that the change to paragraph (a)(2)(iii), removing a phrase concerning breaking news, would harm transparency, lead to attempts to limit media requests, and was contrary to the public interest. Upon consideration of the comments, we are revising rather than removing this phrase to clarify that we will process expedited processing requests in accordance with the caselaw noted above and the legislative history of the FOIA. Comments also raised concerns about the requirement to consult with the Office of the Solicitor on grants of expedited processing, suggesting that it will allow political interference. This concern is misguided. Attorneys in the Office of the Solicitor are in the best position to apply the legal standard for expedited processing based on their legal expertise. Accordingly, this section was not been changed based on these comments.

Section 2.23. In this section of the proposed rule, we added a phrase to paragraph (c) to allow bureaus to make certain routine withholdings without consulting the Office of the Solicitor. Comments raised concerns this was an attempt at political interference and that this provision could prevent the FOIA offices from seeking attorney guidance on non-routine matters. We believe this reflects a misunderstanding of both the role of the Office of the Solicitor and the purpose of the proposed change. Currently, the Office of the Solicitor must approve all withholdings to ensure that they are legally justified. The amendments would permit the Office of the Solicitor to pre-approve routine withholdings such as the redaction of social security numbers pursuant to Exemption 6, rather than requiring legal review of those withholdings. This change will enable the FOIA processors and the Department's attorneys to use their time more efficiently and process records that contain routine withholdings more quickly. The rule therefore has not been changed based on these comments. One comment suggested that we issue preapprovals in the form of memoranda that are readily available to the public and cited in response letters. While we decline to include this suggested process in the regulations, we are considering how best to make information concerning the preapproval of routine withholdings available to the public.

Section 2.24. In this section of the proposed rule, we added a phrase to paragraph (b)(4) noting that a bureau will not provide an estimate of the volume of records withheld when it does not have or could not locate any responsive records. The purpose of this change is to acknowledge that we cannot provide an estimate of volume when we do not locate responsive records. Comments suggested this change was awkward and/or unnecessary. Although it may seem obvious that the bureaus cannot provide an estimate of volume when they do not have or cannot locate responsive records, confusion has arisen on this point in the past. The rule therefore has not been changed based on these comments. We also added a phrase to paragraph (b)(5) stating that the name and title of the attorney consulted would not be included in a denial notification when the withholding was made pursuant to a preapproval authorized in section 2.23(c). Comments expressed concern that this change favored secrecy over transparency. Upon consideration of the comments, we have withdrawn this proposed change as inconsistent with our purpose for the rule.

Section 2.27. In this section of the proposed rule, we added the term ''due diligence'' to paragraph (a), to provide that bureaus must exercise due diligence to promptly notify submitters when we receive a FOIA request for submitter information that may be confidential. This change is necessary because it is not always possible to notify the submitter. For example, an individual submitter may have died or a business submitter may have closed since submitting the records. The Department's current regulations require without exception that the Department notify submitters. Inserting a due diligence standard permits the Department to discontinue its efforts to notify submitters when such efforts are futile. We believe the FOIA community will benefit from this change because it will allow the Department to move forward with processing requests after it has exercised due diligence in seeking to contact submitters. A comment asked for a definition of due diligence in this context. What constitutes due diligence will vary based on the circumstances. The rule therefore was not been changed based on this comment. Another comment recommended amending the provision to permit the Office of the Solicitor to preapprove the withholding of certain categories of information under Exemption 4 without consulting with the submitter of the information. Another comment requested we communicate with submitters only through email (particularly when we must contact a voluminous number of submitters). These comments concern parts of the section and rule that we are not proposing to amend. The rule therefore was not changed based on these comments.

Section 2.29. In this section of the proposed rule, we added a new paragraph (c) to provide that a bureau will not notify a submitter of a request for their possibly confidential information when the bureau has exercised due diligence to do so, but was unsuccessful. One comment suggested we add language to the section providing that we will not notify the submitter under specific circumstances (for example, when the submitter has provided ''false contact information''). We believe our existing language is sufficiently broad and it is unnecessary to list specific circumstances, as recommend by this comment.

Section 2.45. In this section of the proposed rule, we replaced a phrase in paragraph (a) and removed paragraph (f) to clarify and streamline the factors we consider when evaluating fee waiver requests. Comments raised concerns that the changes were ''pointlessly specific,'' arbitrary, disadvantageous to requesters, could price requesters ''out of the market,'' were contrary to the FOIA, and/or were unduly restrictive. Upon consideration of the comments, we have concluded that the change concerning verification in paragraph (a) was not helpful and have withdrawn it. We have also concluded that removing paragraph (f) would lead to confusion rather than useful streamlining and have withdrawn that proposed change. The remaining change in paragraph (a) clarifies the factors we consider when evaluating fee waiver requests. As this information will assist requesters to formulate better fee waiver justifications, we are not changing this aspect of the rule.

Section 2.48. In this section of the proposed rule, we amended and/or redesignated a number of paragraphs in an effort to clarify how we evaluate fee waiver requests. Comments raised concerns that the changes reflected an attempt to create increased requirements for eligibility, an undue burden, unduly restrict the granting of fee waivers to requesters, and/or could price requesters ''out of the market.'' The purpose of this change was to clarify when the Department will grant fee waivers consistent with the statutory requirement in the FOIA. This clarification will help the FOIA requester community by helping them effectively prepare fee waiver requests. The rule therefore was not been changed based on these comments. Comments raised concerns that the addition of the word ''significantly'' to paragraph (a)(2) was unreasonably burdensome. This change mirrors the language of the FOIA (5 U.S.C. 552(a)(4)(A)(iii)) and, therefore, the rule has not been changed based on these comments. Comments raised concerns that changes to paragraph (a)(2)(i) were inaccurate, arbitrary, and imposed an unlawful burden upon requesters. Some of these comments raised particular concerns about the phrase ''public domain,'' stating it was unclear and unhelpful. Based on these comments, we have removed this phrase and amended the paragraph to clearly state the factors we consider when deciding whether the content of a record is meaningfully informative. A comment raised concerns that changes to paragraph (a)(2)(iv) might only allow subject matter experts to be eligible for a fee waiver. While subject matter expertise is a longstanding factor in receiving a fee waiver, it is not dispositive. The rule therefore has not been changed based on this comment. Comments expressed concern that the changes to paragraph (b) allow the Department to speculate about the commercial interest or activities of a requester rather than focusing on the intended use of the information. Comments also suggested this paragraph is confusing. After considering these comments, we revised the proposed language to make it clear that the bureaus consider the intended use of the information. A comment to paragraph (b)(5)(ii) recommended that the Department expand the circumstances in which a requester must demonstrate the intended use of the information to make various decisions and notifications required by Exemption 4 of the FOIA. As we do not generally use the fee waiver information discussed in this section to inform our Exemption 4 decisions and notifications, the rule was not changed based on this comment.

Section 2.49. In this section of the proposed rule, we added a new paragraph (a)(3). The purpose of this change was to clarify that requesters will not receive fee estimates until their requests are perfected. A comment stated this change would allow the Department to forgo providing notice to requesters of anticipated fees. We believe this comment reflects a misapprehension of the proposed change. Paragraph (a) simply clarifies that the bureaus will not provide fee notices to requesters until the requests are perfected. Another comment stated that the amendment could potentially price requesters ''out of the market.'' As the change will not impact fees or other costs incurred by requesters, the rule has not been changed based on this comment. Another comment asked if the current (a)(3) would be replaced with the new (a)(3). It will not, the old (a)(3) is becoming the new (a)(4).

Section 2.54. In this section of the proposed rule, we modified language in paragraph (a) to streamline and clarify our aggregation procedures. Comments expressed concerns that the changes were confusing, arbitrary, could price requesters ''out of the market,'' would permit the Department to make value judgments, and/or could conflict with existing fee guidelines on aggregation issued by the Office of Management and Budget (OMB) in 1987. Based upon these comments, we revised the changes to paragraph (a) and added a new paragraph (c) to make it clear when we will aggregate requests for administrative purposes (such as placement in processing tracks) versus when we will do so for fee purposes in accordance with the OMB Fee Guidelines.

Section 2.70. In this section of the proposed rule, we modified the definition of ''Educational Institution'' to allow more requesters to qualify for this advantaged fee category consistent with *Sack* v. *Department of Defense,* 823 F.3d 687 (D.C. Cir. 2016). A comment expressed concern that this change was arbitrary and capricious or could price requesters ''out of the market.'' This comment reflects a misunderstanding of the change as it will enable additional requesters to qualify for this advantaged fee category. Additionally, this classification is just one of many elements of our determination to charge fees to a particular requester for a particular request. The rule therefore has not been changed based on this comment. We also added a phrase to the definition of ''Multitrack Processing,'' to provide more information to requesters about how the multitrack process works. A comment stated the change ''appears to codify Interior's problematic practice of delaying responses to FOIA requests until a requester files a complaint in court.'' This reflects a misunderstanding of the proposed change as well as the concept of multitrack processing. Multitrack processing is expressly authorized by the FOIA (5 U.S.C. 552(a)(6)(D)(i)) and is not a means of delaying responses to FOIA requests until litigation is filed. This comment therefore did not result in a change to the rule. We also proposed modifying the definition of ''Record'' to track recent Federal court decisions and the 2017 Department of Justice guidance entitled *Defining a ''Record'' under the FOIA.* The change was intended to enable the Department to target the records requesters are seeking and avoid unnecessary processing of non-responsive material. Comments suggested the new wording was unclear or circular, was contrary to the FOIA, could hinder requesters from obtaining information sought, and/or mirrored Privacy Act language. The purpose of the change was to inform the public that the Department would apply the Department of Justice guidance as well as pertinent case law, but we have withdrawn the language as it was unnecessary and created confusion. We also modified the definition of ''Representative of the News Media,'' by adding a sentence to clarify when employing editorial skills will be a requirement. Comments expressed concern that this change was unduly narrowing, noting that legitimate news outlets often disseminate raw data as part of larger editorial projects. Based upon these comments, we have modified the definition to address that circumstance. A comment expressed concern that this change was arbitrary and capricious or could price requesters ''out of the market.'' This comment is misguided, as the change in the definition simply clarifies a preexisting legal requirement. Accordingly, the rule was not changed based on this comment.

7. Comments Outside the Scope of This Rulemaking

Some comments concerned sections of the regulations or issues that we did not raise in the proposed rule. Those comments did not lead to changes to the rule with the exception of one comment discussed in the Technical and Procedural Comments section below.

C. Technical and Procedural Comments

Sections 2.6(b), 2.12(d), 2.13(c), 2.17, and 2.29(c) have received minor technical amendments to fix typographical errors and/or make clarifications.

III. Compliance With Laws and Executive Orders

1. Regulatory Planning and Review (Executive Orders 12866 and 13563)

E.O. 12866 provides that the Office of Information and Regulatory Affairs will review all significant rules. The Office of Information and Regulatory Affairs has waived its review of the final rule and therefore has not made a significance determination.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive Order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

2. Regulatory Flexibility Act

The Department of the Interior certifies that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

3. Small Business Regulatory Enforcement Fairness Act

This is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

4. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. This rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

5. Takings (E.O. 12630)

In accordance with E.O. 12630, this rule does not have significant takings implications. A takings implication assessment is not required.

6. Federalism (E.O. 13132)

In accordance with E.O. 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. It would not substantially and directly affect the relationship between the Federal and state governments. A federalism summary impact statement is not required.

7. Civil Justice Reform (E.O. 12988)

In accordance with E.O. 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

8. Consultation With Indian Tribes (E.O. 13175)

Under the criteria in E.O. 13175, we have evaluated this rule and determined that it would not have substantial direct effects on one or more Indian tribes, the relationship between the Federal government and Indian Tribes or the distribution of power and responsibilities between the Federal government and Indian Tribes (Executive Order 13175, 65 FR 67429, 67429 (Nov. 6, 2000)). While the rule would simplify the rulemaking process, we do not foresee that it will create any obstacles to Tribes that wish to comment on future Department rulemakings.

9. Paperwork Reduction Act

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget under the Paperwork Reduction Act is not required.

10. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (NEPA) is not required. Pursuant to Department Manual 516 DM 2.3A(2), Section 1.10 of 516 DM 2, Appendix 1 excludes from documentation in an environmental assessment or impact statement ''policies, directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature; or the environmental effects of which are too broad, speculative or conjectural to lend themselves to meaningful analysis and will be subject late to the NEPA process, either collectively or case-by-case.''

11. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required. This rule will not have a significant effect on the nation's energy supply, distribution, or use.

12. Clarity of This Regulation

We are required by E.O.s 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

List of Subjects in 43 CFR Part 2

Administrative practice and procedure, Classified information, Courts, Freedom of information Government employees; Privacy.

For the reasons stated in the preamble, the Department of the Interior amends part 2 of title 43 of the Code of Federal Regulations as follows:

PART 2—FREEDOM OF INFORMATION ACT; RECORDS AND TESTIMONY

■ 1. The authority citation for part 2 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 553; 31 U.S.C. 3717; 43 U.S.C. 1460, 1461.

Subpart A—Introduction

§ 2.2 [Amended]

■ 2. In § 2.2, remove the words ''Office of the Solicitor'' and add in their place ''Deputy Chief FOIA Officer''.

Subpart B—How To Make a Request

■ 3. Amend § 2.3 by:
■ a. Revising paragraph (b) to read as set out below.
■ b. Removing paragraph (c).
■ c. Redesignating paragraph (d) as paragraph (c).
■ d. In newly redesignated paragraph (c), removing the words ''FOIA Public Liaison'' and adding in its place ''FOIA Requester Center''.

The revision reads as follows:

§ 2.3 Where should you send a FOIA request?

* * * * *

(b) To make a request for Department records, you must write directly to the bureau that you believe maintains those records by utilizing the written forms of submission listed on the Department's FOIA website, *https://www.doi.gov/foia*, or utilizing physical or facsimile addresses of an appropriate FOIA contact, located at *http://www.doi.gov/foia/contacts.*

* * * * *

■ 4. Amend § 2.4 by:
■ a. Revising paragraph (a) t, and
■ b. Removing paragraphs (e) and (f).

The revision reads as follows:

§ 2.4 Does where you send your request affect its processing?

(a) A request to a particular bureau or a bureau component (for example, a request addressed to a regional or field office) will be presumed to seek only records from that particular bureau or component. A request will not be forwarded to another bureau or component unless it is clear on the face of your request that it was misdirected. For example, if you address your request to an appropriate FOIA contact in the National Park Service and ask for records concerning a specific park, but your request is delivered to the Fish and Wildlife Service, your request was clearly misdirected. In such a case, a FOIA contact in the receiving bureau or component will route the request to a FOIA contact in the proper bureau or component. If you need assistance determining where to send a request, you may seek assistance from the bureau's designated FOIA contact or FOIA Requester Center (see § 2.66 of this part).

* * * * *

§ 2.5 [Amended]

■ 5. In § 2.5 (c), remove the words ''FOIA Public Liaison'' and add in its place the words ''FOIA Requester Center''.

■ 6. Amend § 2.6 by:
■ a. Revising (b) introductory text, and
■ b. In paragraph (f) add the words ''or placement in a different fee category'' after ''partial fee waiver''.

The revision reads as follows:

§ 2.6 How will fee information affect the processing of your request?

* * * * *

(b) If, after taking into consideration your fee category entitlements (see § 2.39 of this part), the bureau anticipates processing costs will exceed $50.00 (see § 2.37(g) of this part) and these processing costs exceed the amount you have agreed to pay or you did not agree in writing to pay processing fees or request a fee waiver, the bureau will notify you:

* * * * *

Subpart C—Processing Requests

§ 2.12 [Amended]

■ 7. In paragraph (d), remove the words ''it did not create or that another bureau or a Federal agency is substantially concerned with'' and add in their place ''primarily concern another bureau or Federal Government agency that is subject to FOIA''.

■ 8. Revise § 2.13 to read as follows:

§ 2.13 How do consultations and referrals work?

(a) When a bureau (other than the Office of Inspector General) locates responsive records that primarily concern another bureau or Federal Government agency that is subject to FOIA, the bureau will determine whether that bureau or agency would be better able to determine whether the record is exempt from disclosure.

(b) If the bureau processing the request believes that another bureau or agency would be better able to determine whether the record is exempt from disclosure, the bureau will contact that bureau or agency to determine whether it should refer the record to that bureau or agency or consult with that bureau or agency.

(1) If the bureau processing the request refers a record to another bureau or agency, that other bureau or agency will respond to you directly about that record. If the bureau processing the request consults with another bureau or agency, the bureau processing the request will respond to you directly.

(2) If the bureau receives a request for records that another agency has classified under any applicable executive order concerning record classification, or that the bureau believes may be appropriate for classification by another agency, it will refer the request for those records to that agency for response.

(3) Whenever a bureau refers any part of the responsibility for responding to a request to another bureau or agency, it will:

(i) Document the referral;

(ii) Maintain a copy of the referred record; and

(iii) Notify you in writing of the referral, including whether all or part of your request has been referred, the name of the bureau or agency to which the record was referred, and that bureau or agency's FOIA contact information.

(4) If disclosure of the identity of the agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemption that protects ongoing law enforcement investigations, a referral would be inappropriate and the bureau will coordinate with the agency instead.

(c) When a bureau receives a referral, the bureau will assign the referral to the appropriate processing track as described in § 2.15 of this part and process it according to the date that the consulting or referring bureau or agency received your request as described in § 2.14 of this part.

(d) Bureaus may establish written agreements with other bureaus or agencies to eliminate the need for consultations or referrals for particular types of records.

Subpart D—Timing of Responses to Requests

§ 2.15 [Amended]

■ 10. Amend § 2.15 by:

■ a. In paragraph (c), add the following words ''assigned according to the expected complexity of the collection/review/production process of each request and'' after the words ''tracks are'';

■ b. In paragraphs (c)(1), (2), (3), and (4) remove the word ''will'' and add in its place the words ''would generally''; and

■ c. In paragraph (c)(4), remove the words ''Exceptional/Voluminous'' and add in their place the word ''Extraordinary''.

§ 2.17 [Amended]

■ 11. In § 2.17, remove ''(e)'' and add in its place ''(a)''.

§ 2.19 [Amended]

■ 12. In § 2.19, amend paragraph (b)(2) by removing the words ''its FOIA Public Liaison'', and adding in their place the words ''the FOIA Public Liaison''.

■ 13. Revise § 2.20 to read as follows:

§ 2.20 When will expedited processing be provided and how will it affect your request?

(a) The bureau will provide expedited processing upon request if you demonstrate to the satisfaction of the bureau that there is a compelling need for the records. The following circumstances demonstrate a compelling need:

(1) Failure to expedite the request could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(2) There is an urgency to inform the public about an actual or alleged Federal Government activity and the request is made by a person primarily engaged in disseminating information.

(i) In most situations, a person primarily engaged in disseminating information will be a representative of the news media.

(ii) If you are not a full time member of the news media, to qualify for expedited processing here, you must establish that your main professional activity or occupation is information dissemination, although it need not be your sole occupation.

(iii) The requested information must be the type of information that has particular value that will be lost if not disseminated quickly; this ordinarily refers to a breaking news story that concerns a matter of public exigency.

(iv) Information of historical interest only or information sought for litigation or commercial activities would not qualify, nor would a news media deadline unrelated to breaking news.

(b) If you seek expedited processing, you must submit a statement that:

(1) Explains in detail how all elements and subcomponents of your request meets each element of one or both of the criteria in paragraph (a) of this section; and

(2) Certifies that your explanation is true and correct to the best of your knowledge and belief.

(c) You may ask for expedited processing of your request by writing to the appropriate FOIA contact in the bureau that maintains the records requested any time before the bureau issues its final response to your request. Bureaus will consult with the Office of the Solicitor before granting expedited processing requests and responses to you will include the name and title of the Office of the Solicitor or Office of General Counsel attorney consulted. If only a portion of your request would qualify for expedited processing, we will:

(1) Assign the portion of the request that qualifies for expedited processing a new processing number and place it in the expedited processing track as described in § 2.15;

(2) Place the remainder of the request that does not qualify for expedited processing into the appropriate processing track as described in § 2.15; and

(3) Inform you of the basis for the partial denial of expedited processing and your right to file an appeal as set forth in § 2.20(g) of this subpart.

(d) When making a request for expedited processing of an administrative appeal, submit the request to the appropriate deciding official for FOIA appeals.

(e) The bureau must notify you of its decision to grant or deny expedited processing within 10 calendar days of receiving an expedited processing request.

(f) If expedited processing is granted, the request will be given priority, placed in the processing track for expedited requests, and be processed as soon as practicable.

(g) If expedited processing is denied, the bureau will:

(1) Inform you of the basis for the denial, including an explanation of why the expedited processing request does not meet the Department's expedited processing criteria under this section; and

(2) Notify you of the right to appeal the decision on expedited processing in accordance with the procedures in subpart H of this part.

(h) If you appeal the bureau's expedited processing decision, that portion of your appeal (if it is properly formatted under § 2.59) will be processed before appeals that do not challenge expedited processing decisions.

(i) If the bureau has not responded to the request for expedited processing within 10 calendar days, you may file an appeal (for nonresponse in accordance with § 2.57(a)(8)).

Subpart E—Responses to Requests

§ 2.21 [Amended]

■ 14. In § 2.21(a), remove the words ''its FOIA Public Liaison'' and add in their place the words ''the FOIA Public Liaison''.

§ 2.23 [Amended]

■ 15. In § 2.23(c), remove the word ''record'' and add in its place the words ''record (unless the Office of the Solicitor has expressly preapproved such a withholding)''.

§ 2.24 [Amended]

■ 16. In § 2.24(b)(4), after the word ''unless'' add the words ''the bureau notes that it does not have or could not locate responsive records or that including''.

Subpart F—Handling Confidential Information

§ 2.27 [Amended]

■ 17. In § 2.27(a), add the words ''exercise due diligence to'' following the word ''must''.

■ 18. Amend § 2.29 by:

■ a. In paragraph (a), removing the word ''or'' after the '';''.

■ b. In paragraph (b), adding the words ''or prohibited'' after the word ''required'' and change the existing period to ''; or''.

■ c. Adding a new paragraph (c).

The addition reads as follows:

§ 2.29 When will the bureau not notify a submitter of a request for their possibly confidential information?

* * * * *

(c) The bureau has exercised due diligence to notify the submitter, but its efforts were unsuccessful.

§ 2.31 [Amended]

■ 19. In § 2.31, revise paragraph (a) to read as set out below.

§ 2.31 What must a submitter include in a detailed Exemption 4 objection statement?

(a) To rely on Exemption 4 as a basis for nondisclosure, the submitter must explain why the information is confidential information. To do this, the submitter must provide a detailed written statement that explains why the information is a trade secret or, if the information is not a trade secret, certification that the information is both customarily and actually treated as private by the owner of the information. The statement must also include any available background on whether the information was provided to the government under an assurance that the government would keep it private.

* * * * *

Subpart G—Fees

§ 2.37 [Amended]

■ 20. In paragraph (i), remove the words ''FOIA Public Liaison'' and add in their place the words ''FOIA Requester Center''.

§ 2.45 [Amended]

■ 21. In § 2.45 paragraph (a), remove the words ''based on all available information'' and add in their place the words ''considering the information you have provided''.

§ 2.47 [Amended]

■ 22. In § 2.47 paragraph (d), remove the number ''30'' and add in its place the number ''90''.

■ 23. Revise § 2.48 to read as follows:

§ 2.48 How will the bureau evaluate your fee waiver request?

(a) In deciding whether your fee waiver request meets the requirements of § 2.45(a)(1) of this subpart, the bureau will consider the criteria listed in paragraphs (a)(1) through (a)(4) of this section. You must address and meet each of these criteria in order to demonstrate that you are entitled to a fee waiver.

(1) How the records concern the operations or activities of the Federal government. The subject of the request must concern discrete, identifiable agency activities, operations, or programs with a connection that is direct and clear, not remote or attenuated.

(2) How disclosure is likely to contribute significantly to public understanding of those operations or activities, including:

(i) How the contents of the records are meaningfully informative. The disclosure of information that is already readily available to you from other sources or easily accessible to the public, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding and the bureau informs you of where the requested information is already available;

(ii) What the logical connection is between the content of the records and the operations or activities of the Federal government;

(iii) How disclosure will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to your individual understanding;

(iv) Your expertise in the subject area as well as your identity, vocation, qualifications, and your plan to disclose the information in a manner that will be informative to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to furthering your individual understanding;

(v) Your ability and intent to disseminate the information to a reasonably broad audience of persons interested in the subject (for example, how and to whom you intend to disseminate the information). If we have categorized you as a representative of the news media under § 2.38, we will presume you have this ability and intent;

(vi) Whether the records would confirm or clarify data that has been released previously; and

(vii) How the public's understanding of the subject in question will be enhanced to a significant extent by the disclosure.

(b) In deciding whether the fee waiver request meets the requirements in § 2.45(a)(2) of this subpart, the bureau will consider any commercial interest of yours that would be furthered by the requested disclosure. To determine whether disclosure of the requested records is primarily in your commercial interest (based on your intended use of the information), the bureau will consider:

(1) Whether the requested disclosure would further any commercial interest of yours.

(2) If you have a commercial interest, the bureau must determine whether that is the primary interest furthered by the request by balancing the commercial interest against the public interest in disclosure of the records. When the requirements of paragraph (a) are satisfied and any commercial interest is not the primary interest furthered by the request, this balancing test shows a waiver or reduction of fees is justified. Bureaus ordinarily will presume that, when a news media requester has satisfied paragraph (a) above, the request is not primarily in the commercial interest of the requester.

(3) You are encouraged to provide explanatory information regarding these considerations.

(4) The bureau will not find that disclosing the requested records will be primarily in your commercial interest where the public interest is greater than any identified commercial interest in disclosure.

(5) If you have a commercial interest that would be furthered by disclosure, explain how the public interest in disclosure would be greater than any commercial interest you may have in the documents.

(i) Your identity, vocation, and intended use of the requested records are all factors to be considered in determining whether disclosure would be primarily in your commercial interest.

(ii) If you are a representative of a news media organization seeking records as part of the news gathering process, we will ordinarily presume that the public interest outweighs your commercial interest. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(iii) If you represent a business/corporation/association or you are an attorney representing such an organization, we will presume that your commercial interest outweighs the public interest unless you demonstrate otherwise.

■ 24. Amend § 2.49 by:

■ a. Removing the word ''or'' from paragraph (a)(2);

■ b. Redesignating paragraph (a)(3) as (4);

■ c. Adding a new paragraph (a)(3);

■ d. In the newly redesignated paragraph (a)(4), removing the word ''previously'' and adding in its place the word ''already''; and

■ e. In paragraph (e), removing the words ''FOIA Public Liaison'' and adding in their place the words ''FOIA Requester Center''.

The addition reads as follows:

§ 2.49 When will you be notified of anticipated fees?

(a) * * *

(3)Your request does not reasonably describe the records sought and/or does not explicitly state that you will pay all fees associated with the processing of the request, that you will pay fees up to a specified amount, and/or that you are seeking a fee waiver; or

* * * * *

■ 25. In § 2.54, add paragraph (c) to read as set out below:

§ 2.54 When will the bureau combine or aggregate requests?

* * * * *

(c) The bureau may administratively aggregate requests without charging fees accordingly when it reasonably believes you, or a group of requesters acting in concert with you, are dividing a single request into a series of requests on a single subject or related subjects.

(1) The bureau may presume that multiple requests on a single subject or related subjects made within a 30-day period are dividing a single request into a series of requests.

(2) The bureau may administratively aggregate requests separated by a longer period only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved.

Subpart I—General Information

■ 26. Revise § 2.66 as follows:

§ 2.66 What are FOIA Requester Centers and the FOIA Public Liaison?

(a) FOIA Requester Centers typically serve as your first point of contact for questions about how the FOIA works. Before and after you make a request, FOIA Requester Centers can assist you by:

(1) Identifying information that is already posted and available;

(2) Informing you about the types of records maintained by the bureau;

(3) Providing guidance on formulating effective requests;

(4) Describing the Department's various processing tracks and the average processing times for the various tracks;

(5) Answering questions about expedited processing standards and the FOIA's fee provisions; and

(6) Answering questions about the status of an existing request.

(b) The FOIA Public Liaison is responsible for:

(1) Assisting in reducing delays;

(2) Increasing transparency and understanding of the status of requests; and

(3) Assisting in the resolution of disputes between you and the agency.

(c) If you need further information or assistance after contacting the applicable FOIA Requester Center and the FOIA Public Liaison, you may wish to seek dispute resolution services from the Office of Government Information Services.

(d) Contact information for the FOIA Requester Centers and FOIA Public Liaison is available at *https://www.doi.gov/foia/foiacenters.*

■ 27. Amend § 2.70 by:

■ a. In the definition of ''Educational institution'', add a new sentence after the first sentence;

■ b. In the definition of ''Multitrack processing'', after the words ''first-in/first-out basis'' add the words '', but other factors, such as litigation, may affect the sequence and/or timing of processing''; and

■ c. In the definition of ''Representative of the news media'', add a new sentence after the first sentence.

§ 2.70 What definitions apply to subparts A through I of this part?

* * * * *

Educational institution * * * Teachers (if they demonstrate how the requested records will further their teaching, scholarly research, or production of scholarly works) and students (if they demonstrate how the requested records will further their coursework or other school-sponsored activities) may also qualify as an educational institution for the purposes of this definition. * * *

* * * * *

Representative of the news media * * * Simply distributing copies of released records, electronically or otherwise, does not qualify as using editorial skills to turn the raw materials into a distinct work. * * *

* * * * *

Dated: October 24, 2019.

Rachel Spector,

Deputy Chief Freedom of Information Act Officer.

[FR Doc. 2019–23783 Filed 11–13–19; 8:45 am]

BILLING CODE 4310–10–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 54

[WC Docket No. 10–90; FCC 18–176]

Connect America Fund

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: In this document, the Federal Communications Commission (Commission) announces that the Office of Management and Budget (OMB) has approved, for a period of three years, an information collection associated with the rules for the Connect America Fund contained in the Commission's *Connect America Fund Order,* FCC 18–176. This document is consistent with the *Connect America Fund Order,* which stated that the Commission would publish a document in the **Federal Register** announcing the effective date of the revised information collection requirement.

DATES: The amendment to § 54.316 published at 84 FR 4711, February 19, 2019, is effective November 14, 2019.

FOR FURTHER INFORMATION CONTACT: Alexander Minard, Wireline

Competition Bureau at (202) 418–7400 or TTY (202) 418–0484. For additional information concerning the Paperwork Reduction Act information collection requirements contact Nicole Ongele at (202) 418–2991 or via email at *Nicole.Ongele@fcc.gov*.

SUPPLEMENTARY INFORMATION: The Commission submitted revised information collection requirements for review and approval by OMB, as required by the Paperwork Reduction Act (PRA) of 1995, on August 20, 2019. OMB approved the revised information collection requirements on November 5, 2019. The information collection requirements are contained in the Commission's *Connect America Fund Order,* FCC 18–176, published at 84 FR 4711, February 19, 2019. The OMB Control Number is 3060–1228. The Commission publishes this document as an announcement of the effective date of the rules published on February 19, 2019. If you have any comments on the burden estimates listed in the following, 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, 3060–1228, in your correspondence. The Commission will also accept your comments via email at *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* 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 Commission is notifying the public that it received OMB approval on November 5, 2019, for the amendment to 47 CFR 54.316 published at 84 FR 4711, February 19, 2019. 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 3060–1228. 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: 3060–1228.

OMB Approval Date: November 5, 2019.

OMB Expiration Date: November 30, 2022.

Title: Connect America Fund—High Cost Portal Filing.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities, not-for-profit institutions.

Number of Respondents and Responses: 1,599 unique respondents; 3,730 responses.

Estimated Time per Response: 8 hours–60 hours.

Frequency of Response: On occasion, quarterly reporting requirements, annual reporting requirements, one-time reporting requirement and recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 151–154, 155, 201–206, 214, 218–220, 251, 252, 254, 256, 303(r), 332, 403, 405, 410, and 1302.

Total Annual Burden: 68,607 hours.

Total Annual Cost(s): No Cost.

Nature and Extent of Confidentiality: We note that USAC must preserve the confidentiality of certain data obtained from respondents; must not use the data except for purposes of administering the universal service programs or other purposes specified by the Commission; and must not disclose data in company-specific form unless directed to do so by the Commission. Respondents may request materials or information submitted to the Commission or the Administrator believed confidential to be withheld from public inspection under 47 CFR 0.459 of the FCC's rules.

Privacy Act Impact Assessment: No impact(s).

Needs and Uses: The Commission will use the information collected under this information collection to address the requirement that certain carriers now have increased broadband deployment reporting obligations about their locations which meet their broadband deployment public interest obligations via an electronic portal (''portal''). This collection also addresses additional offers of model-based support. With the new additional offers, there will be more carriers subject to the model-based deployment milestones and fewer carriers remaining on legacy support.

In March 2016, the Commission adopted an order reforming its universal service support program in areas served by rate-of-return carriers. Connect America Fund et al., WC Docket Nos. 10–90 et al., Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 16–33 (*2016 Rate-of-Return Order*). In May 2016, the Commission adopted rules to implement a competitive bidding process for Phase II of the Connect America Fund. Connect America Fund et al., WC Docket Nos. 10–90 et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 16–64 (*Phase II Auction Order*). In August 2016, the Commission adopted a plan tailored to certain carriers, both fixed and mobile, serving Alaska. Connect America Fund et al., WC Docket No. 10–90 et al., Report and Order and Further Notice of Proposed Rulemaking, FCC 16–115 (*Alaska Plan Order*). In January 2017 the Commission adopted an order which granted New York State waiver of the Connect America Phase II auction program rules, subject to certain conditions. Connect America Fund et al., WC Docket Nos. 10–90 et al., FCC 17–2 (*New York Auction Order*). Also, in December 2018, the Commission adopted reforms that included additional offers of model-based support and increased broadband deployment obligations. Connect America Fund et al., WC Docket No. 10–90 et al., Report and Order, Further Notice of Proposed Rulemaking and Order on Reconsideration, FCC 18–176 (*2018 Rate-of-Return Order*).

The *2016 Rate-of-Return Order* required that the Universal Service Administrative Company (USAC) establish the portal so that carriers could file their location data with the portal starting in 2017. The *2016 Rate-of-Return Order* required all recipients of Phase II model-based support and rate-of-return carriers to submit geocoded location data and related certifications to the portal. Recipients of Phase II model-based support had been required to file such information in their annual reports due by July 1. The *Phase II Auction Order, Alaska Plan Order,* and *New York Auction Order* require carriers to build-out networks capable of meeting their public interest obligations and report, to an online portal, locations to which auction winners had deployed such networks. The *Alaska Plan Order* also made portal reporting requirements for carriers to submit fiber/microwave middle-mile network maps.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2019–24658 Filed 11–13–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[WT Docket No. 02–55]

Improving Public Safety Communications in the 800 MHZ Band

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) streamlines our rules and procedures to accelerate the successful conclusion of the Commission's 800 MHz band reconfiguration program, or rebanding. The 800 MHz rebanding initiative is a 14-year, $3.6 billion program, involving Sprint Corporation (Sprint) and 800 MHz licensees. At the conclusion of this initiative, public safety, critical infrastructure and other 800 MHz licensees will operate in a reconfigured 800 MHz band free of the interference that plagued first responders' mission-critical communications before the Commission instituted rebanding in the 800 MHz Report and Order.

DATES: Effective December 16, 2019.

FOR FURTHER INFORMATION CONTACT: Roberto Mussenden, Policy and Licensing Division, Public Safety and Homeland Security Bureau, (202) 418–1428.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking in WT Docket No. 02–55, FCC 19–108, released on October 28, 2019. The document is available for download at *http://fjallfoss.fcc.gov/edocs_public/*. The complete text of this document is also available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY–A257, Washington, DC 20554. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *FCC504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

1. In the Order, the Commission directs the 800 MHz Transition Administrator to streamline its closing process going forward to provide that, when Sprint and an individual licensee have completed physical reconfiguration and there are no unresolved disputes between them, closing of the band reconfiguration process for that licensee will be deemed final upon Sprint's delivery of the executed completion certification to the Transition Administrator and the Transition Administrator acknowledging receipt by letter to the licensee. Upon completion of these steps, the licensee will have no further rebanding obligations to Sprint, the Transition Administrator, or the Commission, and will no longer have recourse to Transition Administrator mediation or the Commission's processes for rebanding-related matters.

2. To promote facilitation of the dispute resolution process established in the 800 MHz Report and Order, we direct licensees to provide notice of any unresolved dispute to the Transition Administrator and Sprint within 20 business days of the effective date of this Order. Thereafter, the licensee and Sprint must enter mediation as directed by the Transition Administrator, pursuant to the Commissions' rules. We direct the Transition Administrator to hold mediation sessions each weekday, except for federal holidays. If agreement is not reached after 10 mediation sessions, the designated mediator, within 5 business days, will forward the mediation record to the Bureau for decision. On notification to the parties by the Transition Administrator that the record has been submitted, the parties have 5 business days to submit statements of position. No responsive pleadings will be accepted. If a licensee does not participate in mediation, does not submit a timely statement of position to the Bureau, or does not file a timely petition for reconsideration, application for review, or petition for a de novo hearing following a Bureau order adjudicating the dispute, the licensee will be deemed by the Bureau to have completed rebanding, and all of its rights under the Commission's 800 MHz rebanding orders, including, without limitation, the right to the Transition Administrator's dispute resolution process and reimbursement of costs, will be terminated.

3. Licensees that have completed physical reconfiguration as of the effective date of this Order, have no unresolved dispute with Sprint, but have not provided a completion certification to Sprint must submit an executed completion certification to Sprint within 20 business days of the effective date of this Order. Upon verification from Sprint that, despite the completion of physical reconfiguration and the absence of any disputes related to costs and expenditures, a licensee has not timely provided a completion certification as required, the Bureau will deem the licensee to have completed rebanding and all of its rights under the Commission's 800 MHz rebanding orders, including, without limitation, the right to the Transition Administrator's dispute resolution process and reimbursement of costs, will be terminated.

4. Finally, consistent with the streamlining steps taken above, we adopt an expedited closing process applicable to those licensees that have not completed physical reconfiguration as of the effective date of the instant Order. Upon completion of physical reconfiguration, such licensees will have 45 calendar days to either, (1) complete cost reconciliation and submit an executed completion certification to Sprint, or (2) notify the Transition Administrator of any unresolved dispute with Sprint regarding their reconfiguration. Licensees will then be subject to the expedited closing or dispute resolution procedures described above, as applicable.

5. We direct the Transition Administrator to revise its processes and documentation in accordance with the foregoing and we modify our procedures accordingly. Notice and comment are not necessary here because the changes that streamline the filings required of the parties to rebanding agreements and the process by which we direct the Transition Administrator to review those filings are ''rules of agency organization, procedure, or practice.''

Procedural Matters

A. Paperwork Reduction Act of 1995 Analysis

6. The Order document does not contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13.

B. Report to Congress

7. The Commission will not send a copy of this Report and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because the Commission did not adopt any rules of particular applicability.

Ordering Clause

8. Accordingly, *It is ordered* that, pursuant to sections 4(i), 4(j), 301, 303, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 301, 303, and 403, the Order *is hereby adopted*.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2019–24657 Filed 11–13–19; 8:45 am]

BILLING CODE 6712–01–P

AGENCY FOR INTERNATIONAL DEVELOPMENT

48 CFR Chapter 7

RIN 0412–AA93

Agency for International Development Acquisition Regulation (AIDAR): Revisions to the Incentive Awards Program for Personal Services Contractors (PSCs)

AGENCY: U.S. Agency for International Development.

ACTION: Final rule.

SUMMARY: The rule amends the AIDAR's provisions that pertain to incentive awards for personal services contracts with individuals.

DATES: *Effective Date:* December 16, 2019.

FOR FURTHER INFORMATION CONTACT: Richard E. Spencer, Procurement Analyst, Telephone: (202) 567–4781 or email: *rspencer@usaid.gov* for clarification of content or information pertaining to status or publication schedules. All communications regarding this rule must cite AIDAR RIN No. 0412–AA93.

SUPPLEMENTARY INFORMATION:

A. Proposed Rule and Requests for Comment

USAID published a proposed rule in the **Federal Register** at 84 FR 9739 on March 18, 2019. The public comment period ended May 17, 2019, and the Agency received no comments on the proposed rule. Therefore, USAID is publishing this final rule without change.

B. Background

Over the last 27 years, USAID has awarded personal services contracts to individuals as necessary for the Agency to carry out its mission in the United States and overseas. USAID awards PSCs with individuals based on multiple authorities: (1) Section 636(a)(3) of the Foreign Assistance Act of 1961, as amended (FAA, Section 2396 of Title 22 of the United States Code [U.S.C.]), for personal services abroad; (2) annual appropriations for Foreign Operations for a maximum number of PSCs in the United States (*e.g.,* Section 7057(g) of Division K of Pub. L. 114–113 for Fiscal Year 2016); or (3) program-specific provisions of the FAA, the Food for Peace Act, or an appropriations act that authorizes the use of a broad range of implementation authorities toward those programmatic purposes ''notwithstanding any other provision of law'' (*e.g.,* FAA Section 491, Section 2292 of Title 22 of the U.S.C., which authorizes international assistance ''to alleviate human suffering caused by natural and manmade disasters . . .'').

As of September 2015, approximately eight (8) percent of USAID's total workforce were U.S. PSCs, and 47 percent were cooperating-country or third-country national (CCN or TCN) PSCs. The Agency's overseas local staff are CCNPSCs, with the exception of a very few remaining Foreign Service National (FSN) direct-hire employees.

Since the Agency depends on PSCs as part of its workforce for its operations, USAID seeks to recognize and motivate excellence in the performance of their contracts. Because PSCs are not authorized to participate in programs administered by the Office of Personnel Management (OPM), in May 2004, then-Administrator Andrew Natsios used the Agency's discretionary authority to establish a separate incentive-awards program for PSCs, distinct from the Agency's incentive awards program authorized by OPM for the Agency's U.S. Direct-Hire (USDH) employees (see 5 U.S.C. 4501 *et seq.* regarding incentive-awards programs for ''superior accomplishment'' by employees within the definitions of 5 U.S.C. 2105 and 5 CFR part 451). The Administrator approved a deviation from Appendix D of the AIDAR to expand the non-monetary incentive-awards program for PSCs to include limited monetary awards such as ''On The Spot'' or Special Act cash and Time-Off awards. The Agency implemented the revised monetary incentive-awards program for PSCs under USAID Acquisition and Assistance Policy Directive (AAPD 04–15) issued on October 15, 2004, which authorized USPSCs, and certain TCNPSCs on an exceptional basis, to be eligible for these three types of monetary incentive awards under programs managed by USAID's Missions, Bureaus, or Independent Offices (M/B/IOs).

In March 2015, USAID's Special Awards Committee (SAC) conducted a review of the Agency's awards program for its USDH employees. Following that review, on December 22, 2015, then-Acting Administrator Alfonso Lenhardt approved a deviation to further expand the Agency's PSC Incentive Awards program to include additional types of monetary and non-monetary awards similar to those provided to USAID's USDH employees.

To implement the incentive-awards programs for PSCs as approved by the Agency in 2004 and 2015, this final rule revises Appendices D and J of the AIDAR to replace the deviations approved in 2004 and 2015 and make them permanent.

C. Discussion

This final rule amends the AIDAR to establish a separate monetary and non-monetary incentive-awards program to recognize and reward individual PSCs for their contributions to the accomplishment of USAID's mission, goals, and objectives.

Based on Statute—Section 636(a)(3) of the FAA, as amended; and by regulation—Appendices D and J of the AIDAR, PSCs are not allowed to participate in any program administered by OPM. Recognition of individual accomplishments by PSCs has been limited to non-monetary incentive awards and certificates of appreciation. However, based on deviations and policy directives signed by the Administrator and Acting Administrator in 2004 and 2015, respectively, USAID established an interim, separate incentive-awards program to make PSCs eligible to receive incentive awards similar to those available under the Agency's incentive-awards program for USDH employees.

USAID implements its incentive-awards program for USDH employees under parameters set in Chapter 491 of the Agency's Automated Directives System (ADS). The Agency will incorporate the new PSC incentive-awards program authorized by this final rule into Appendices D and J of the AIDAR and implement it as described in USAID's PSC policy in ADS Chapter 309. Where appropriate, this incentive-awards program will closely parallel the program for USDH employees. The Agency will make any incentive award payments from the same source of funding used for each individual PSC's contract, and in all cases separately from the pool of funds maintained for incentive awards for USAID USDH employees. Recognizing that PSCs receive an annual pay-comparability adjustment similar to what U.S. Direct-Hires receive, as well as an annual within-grade salary increase for work evaluated at the ''satisfactory performance'' level, Agency policy requires that these incentive awards be for performance or a special act that goes above and beyond the minimum satisfactory performance required under a contract. USAID will recognize and encourage exceptional performance by

PSCs when they perform special acts or create innovations that contribute to efficiency, economy, or other improvements in U.S. Government operations, in the same way USAID recognizes superior performance by its USDH employees. The proportion of PSCs who receive cash awards at a M/B/IO or at the Agency level, and the total amount of the incentive awards, will be consistent with, and will not exceed, the Agency's existing policy for incentive awards to USDH employees, as set by USAID's Senior Management.

The Agency's internal policies in ADS Chapter 309 describe the criteria for each incentive award, any cash or other limitations associated with each incentive award, how a PSC's supervisor(s) or others may nominate individuals, and how such nominations are reviewed and recommended for approval. Nominations for the annual Agency-level incentive awards generally follow the same procedures, and use the same documentation, as currently required for USAID's USDH employees.

Regulatory Basis

Since the Agency depends on PSCs and their contributions, and as the statute, Section 636(a)(3) of the FAA of 1961, as amended, and the regulation, Appendix D of the AIDAR, do not permit PSCs to participate in OPM-administered programs, the Administrator has decided to use the Agency's discretionary authority to establish a separate monetary incentive-awards program for its PSCs. This incentive-awards program is distinct and separate from the Agency's incentive-awards program for USDH employees described in ADS Chapter 491. Additionally, this final AIDAR rule establishes an incentive-awards program that is different from FAR Subpart 16.4 (Incentive Contracts), as the Agency's PSC contracts are with individuals, and these contracts do not provide profit or fees. The details of this incentive award program are available in a Mandatory Reference to ADS Chapter 309, 309mab—''Incentive Awards Program for Personal Services Contracts with Individuals,'' accessible on the Agency website.

D. Impact Assessment

(1) Regulatory Planning and Review. Under Executive Order (E.O.) 12866, the Office of Information and Regulatory Affairs (OIRA) has designated the final rule ''not significant,'' and therefore it is not subject to review by the Office of Management and Budget (OMB). OMB/OIRA has determined that this Rule is not an ''economically significant regulatory action'' under Section 3(f)(1) of E.O. 12866. This final rule is not a major rule under Section 804 of Title 5 of the U.S.C.

This rule codifies the Agency's deviations to date from the current rule in the Code of Federal Regulations (CFR). The costs calculated in this section are based on upper-end estimates to illustrate the potential impact of this final rule from the baseline costs of the current rule. Under this final rule, incentive awards paid to USPSCs at the level of USAID's Missions, Bureaus, and Independent Offices (M/B/IO), and TCNPSCs with exceptions to be paid on the General Schedule (GS) scale (*i.e.,* ''excepted TCNPSCs'') for FY 2014–2015 averaged $86,158 per year based on historical data provided by the Office of the Chief Financial Officer (M/CFO) in the Bureau for Management. The administrative and processing costs for these awards averaged $47,865. Therefore, the total estimated cost for M/B/IO awards is estimated at $134,023 per Fiscal Year.

For ''Agency-level'' incentive awards issued from USAID headquarters, the total estimated amount that could be paid to all selected PSCs (U.S., TCN, and CCN) is $160,000 per Fiscal Year, assuming nominations are approved for every incentive award. This figure is based on an estimated payout for all of 31 possible cash-award amounts listed in ADS 309mab.

As the Agency-level headquarters incentive awards program is new, and there are no historical data for such incentive awards paid to PSCs, USAID used historical data for incentive awards to U.S. Direct-Hires, as provided by USAID's Office of Human Capital and Talent-Management (HCTM) for estimating the administrative and processing costs. On that basis, administrative and processing costs are estimated at $118,525 per Fiscal Year labor for nominations, selection panels, and the processing of incentive awards, plus the costs of ceremony events for a volume of PSC incentive awards equivalent to those given to USDH employees. Also, as PSCs are eligible for fewer categories of Agency-level incentive awards than are USDH staff, the Agency pro-rated the costs accordingly. Therefore, the total estimated cost for Agency-level incentive awards from headquarters is $278,525 per Fiscal Year.

Based on the above, the M/B/IO awards and Agency-level incentive award issues at headquarters are estimated together estimated to cost $412,547 per Fiscal Year.

Note that for incentive awards at the Mission level for CCN and TCN PSCs, AIDAR Appendix J authorizes such awards in accordance with the local compensation plan at each USAID Mission overseas through the ''Joint Special Embassy'' awards program. While this final rule revises the title of the Mission incentive-awards program by using current terminology, this rule does not otherwise affect the authority for this long-established incentive awards program for CCN and TCN PSCs. Therefore, there are no increased cost implications for such incentive awards under this rule, as it only updates the title of the program under AIDAR Appendix J.

Overall, USAID's awards program affects approximately 5,200 individual PSCs based on USAID's staffing numbers for FY2015 (*i.e.,* 775 PSCs and more than 4,470 CCNand TCN PSCs). The costs to implement this rule are justified, as the Agency depends on PSCs as large part of its workforce. Given that USAID PSCs are an important and flexible supplement for the Agency's dynamic operations, this rule provides the Agency the ability to recognize and motivate excellence in the performance of its contractors. Additionally, because these incentives were previously approved at the highest levels of Agency management, USAID deemed the costs to implement this rule as a necessary business decision to promote excellent performance by PSCs.

As a regulatory matter, the cost of the rule-making process to incorporate this final rule into the regulation is also justified. The AIDAR appendices include all the compensation and benefits available under personal services contracts. Therefore, the Agency needs this rule to keep the regulation consistent, complete, and transparent to industry, other U.S. Government Departments and Agencies, and the general public.

(2) Regulatory Flexibility Act. This final rule will not have an impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, Section 601 of Title 5 of the U.S.C., *et seq.* Therefore, USAID has not performed an Initial Regulatory Flexibility Analysis.

(3) Paperwork Reduction Act. This final rule does not establish a new collection of information that requires the approval of OMB under the Paperwork Reduction Act (Chapter 35 of Title 44 of the U.S.C.).

List of Subjects in Appendices D and J of Chapter 7 of Title 48 of the CFR

Government procurement.

For the reasons discussed in the preamble, USAID amends Chapter 7 of Title 48 of the CFR under the authority of Section 621 of Public Law 87–195, 75

Stat. 445, (Section 2381 of Title 22 of the U.S.C.), as amended; E.O. 12163, Sept. 29, 1979, 44 *Federal Reg*ister 56673; and Title 3 of the CFR, 1979 Comp., p. 435, as follows:

CHAPTER 7—AGENCY FOR INTERNATIONAL DEVELOPMENT

■ 1. Appendix D is amended as follows:

■ a. In Section 4, by revising paragraph (f);

■ b. In Section 10 entitled, ''Form USAID 1420–36, ''Cover Page'' and ''Schedule'', in the Table of Contents under the heading General Provisions, reserve numbers 27 and 28, and add 29 to the list of provisions;

■ c. In Section 11 entitled, ''Optional Schedule With a U.S. Citizen or U.S. Resident Alien'', in the Table of Contents, under the heading General Provisions, reserve numbers 27 and 28, and add 29 to the list of provisions;

■ d. In Section 12:

■ i. Revise the heading, ''General Provisions'';

■ ii. Remove the heading, ''Contract with a U.S. Citizen or a U.S. Resident Alien for Personal Services Abroad'';

■ iii. Amend the Index of Clauses by reserving clause numbers 27 and 28, and add clause 29, ''Incentive Awards''; and

■ e. By adding a parenthetical authority citation at the end of the appendix.

The revision and addition read as follows:

Appendix D to Chapter 7—Direct USAID Contracts With a U.S. Citizen or a U.S. Resident Alien for Personal Services Abroad

* * * * *

4. Policy

* * * * *

(f) *Incentive awards.* U.S. personal services contractors are not eligible to participate in, or be funded under, the incentive-awards program administered by the Office of Personnel Management (OPM) for USAID U.S. direct-hire employees in accordance with section 636(a) of the Foreign Assistance Act of 1961, as amended. U.S. personal services contractors are eligible to receive certain monetary and non-monetary incentive awards as authorized under this section. All nominations for incentive awards must be approved by a U.S. direct-hire employee, who is either the contractor's supervisor or is at the next higher level within the Mission/Bureau/Independent Office (M/B/IO). The list of incentive awards and detailed eligibility, nomination, and approval processes are specified in internal Agency policies in Chapter 309 of Automated Directive System (ADS), available on the USAID website. These awards will be funded from the authorizations used to fund the specific contract.

* * * * *

10. Form USAID 1420–36, ''Cover Page'' and ''Schedule''.

* * * * *

27. [Reserved]
28. [Reserved]
29. Incentive Awards

* * * * *

11. Optional Schedule With a U.S. Citizen or U.S. Resident Alien

* * * * *

27. [Reserved]
28. [Reserved]
29. Incentive Awards

* * * * *

12. General Provisions for a Contract With a U.S. Citizen or a U.S. Resident Alien for Personal Services Abroad

* * * * *

Index of Clauses

* * * * *

27. [Reserved]
28. [Reserved]
29. Incentive Awards

* * * * *

29. Incentive Awards

[Insert the following clause in all USPSC contracts.]

Incentive Awards (Date)

The contractor is eligible to receive certain monetary and non-monetary USAID incentive awards in accordance with the AIDAR and USAID internal policy.

* * * * *

(Authority: Section 621 of Public Law. 87–195, 75 Stat. 445, (Section 2381 of Title 22 of the U.S.C.), as amended; E.O. 12163, Sept. 29, 1979, 44 **Federal Register** 56673; and Title 3 of the CFR, 1979 Comp., p. 435)

■ 2. Appendix J is amended as follows:

■ a. In section 4:

■ i. By revising paragraph (c)(1);

■ ii. In paragraph (c)(2)(i), by removing ''TCN or CCN'' and adding in its place ''CCN or TCN'' and removing the reference ''4c(2)(ii)'' and adding in its place the reference ''4(c)(2)(ii)'';

■ iii. In paragraph (c)(2)(ii) introductory text, by removing the words ''FSNs which includes CCNs and TCNs,'' adding in their place ''CCNs and TCNs,'' and revising the second sentence.

■ iv. In paragraph (c)(2)(ii)(A), by removing the words ''foreign national employee'' and adding in its place the words ''CCN or TCN personal services contractor'';

■ v. In paragraph (c)(2)(ii)(B), by revising the first sentence;

■ vi. In paragraph (c)(2)(iii), by removing the words ''compensation plan for each'' and adding in its place the words ''local compensation plan for each Mission'';

■ vii. By revising paragraphs (c)(2)(v) and (vii) and (c)(3); and

■ viii. In Paragraph (c)(4), by removing ''CCN and TCN PSCs'' and adding in its place ''CCN and TCN personal services contractors,'' removing the words ''Contracting Officer,'' and adding in their place the words ''contracting officer.''

■ b. In section 12, General Provisions for a Contract with a Cooperating Country National or with a Third-Country National for Personal Services, revise item 19.

■ c. By adding a parenthetical authority citation at the end of the appendix.

The revisions and addition read as follows:

Appendix J—Direct USAID Contracts With a Cooperating Country National and With a Third-Country National for Personal Services Abroad

* * * * *

4. Policy

* * * * *

(c) * * *

(1) *General.* For the purpose of any law administered by the U.S. Office of Personnel Management (OPM), USAID personal services contractors are not to be regarded as employees of the U.S. Government, are not included under any retirement or pension program of the U.S. Government, and are not eligible for the Incentive-Awards Program covered by Uniform Department of State/USAID regulations. Each USAID Mission is expected to participate in an interagency Mission incentive awards program. Additionally, CCN and TCN personal services contractors are eligible to receive certain USAID monetary and non-monetary incentive awards as authorized under this section. See paragraph (3) of this section for incentive awards.

(2) * * *

(ii) * * * The plan is each post's official system of position classification and pay, which consists of the local salary schedule including salary rates, statements that authorize fringe benefit payments, and other pertinent facets of compensation for CCNs and TCNs. * * *

* * * * *

(B) Section 4 of Appendix D of this chapter, entitled, ''Policy,'' sections (c) ''Withholdings and Fringe Benefits,'' (d) ''Resident Hire U.S. Personal Services Contractors,'' (e) ''Determining Salary for Personal Services Contractors,'' (f) ''Incentive Awards,'' (g) ''Annual Salary Increase,'' (h) ''Pay Comparability Adjustment,'' and (i) ''Subcontracting.'' * * *

* * * * *

(v) CCN and TCN personal services contractors are eligible for allowances and differentials as provided under the post's local compensation plan.

* * * * *

(vii) CCNs and TCNs retired from the U.S. Government may be awarded personal services contracts without any reduction in, or offset against, their U.S. Government annuity.

(3) *Incentive Awards.* (i) All CCN and TCN personal services contractors of the Foreign

Affairs Community are eligible for an interagency Mission incentive awards program. The Joint Country Awards Committee administers each post's (Embassy) awards program, including the establishment of procedures for submission, review, and approval of proposed awards.

(ii) CCN and TCN personal services contractors are also eligible to receive certain monetary and non-monetary USAID incentive awards. The list of incentive awards, eligibility, nomination, and approval processes are specified in internal Agency policies in ADS Chapter 309, available on the USAID website. These awards will be funded from the authorizations used to fund the PSC contract, and not from funds allocated for the OPM-administered awards program for USAID U.S. direct-hire employees.

(iii) Meritorious step increases for USAID CCN and TCN personal services contractors may be authorized provided the granting of such increases is the general practice locally.

* * * * *

12. General Provisions for a Contract With a Cooperating Country National or With a Third Country National for Personal Services

* * * * *

19. Incentive Awards

[Insert the following clause in all CCN and TCN contracts paid under the local compensation plan.]

Incentive Awards (Date)

(a) CCN and TCN personal services contractors of the Foreign Affairs Community are eligible for an interagency Mission incentive awards program. The program is administered by each post's (Embassy) Joint Country Awards Committee.

(b) CCN and TCN personal services contractors are also eligible to receive certain monetary and non-monetary USAID incentive awards in accordance with the AIDAR and USAID internal policy.

(c) Meritorious Step Increases.

CCNs and TCN personal services contractors paid under the local compensation plan are eligible to receive meritorious step increases provided the granting of such increases is the general practice locally.

* * * * *

(Authority: Section 621 of, Public Law. 87–195, 75 Stat. 445, (Section 2381 of Title 22 of the U.S.C. 2381), as amended; E.O. 12163, Sept. 29, 1979, 44 **Federal Register** 56673; and Title 3 of the CFR, 1979 Comp., p. 435)

Mark A. Walther,

Acting Chief Acquisition Officer.

[FR Doc. 2019–20501 Filed 11–13–19; 8:45 am]

BILLING CODE 6116–01–P

Proposed Rules

Federal Register

Vol. 84, No. 220

Thursday, November 14, 2019

DEPARTMENT OF ENERGY

10 CFR Part 430

[EERE–2017–BT–TP–0024]

RIN 1904–AE01

Energy Conservation Program: Test Procedure for Microwave Ovens

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of proposed rulemaking and announcement of public meeting.

SUMMARY: The U.S. Department of Energy (''DOE'') proposes to amend the existing test procedure for microwave ovens to provide additional specification for the test conditions related to microwave oven clock displays and microwave ovens with network functions. DOE is also proposing editorial changes to add a section title inadvertently omitted and to revise two incorrect cross-references. As part of this proposal, DOE is announcing a public meeting to collect comments and data on its proposal.

DATES:

Meeting: DOE will hold a webinar on November 14, 2019, from 10:00 a.m. to 1:00 p.m. See section V, ''Public Participation,'' for webinar registration information, participant instructions, and information about the capabilities available to webinar participants. If no participants register for the webinar then it will be cancelled.

Comments: Written comments and information are requested and will be accepted before and after the public meeting, but no later than January 13, 2020. See section V, ''Public Participation,'' for details.

ADDRESSES: Interested persons are encouraged to submit comments using the Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the instructions for submitting comments. Alternatively, interested persons may submit comments, identified by docket number EERE–2017–BT–TP–0024, by any of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

(2) *Email: MWO2017TP0024@ee.doe.gov.* Include the docket number and/or RIN in the subject line of the message.

(3) *Postal Mail:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, Mailstop EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–1445. If possible, please submit all items on a compact disc (''CD''), in which case it is not necessary to include printed copies.

(4) *Hand Delivery/Courier:* Appliance and Equipment Standards Program, U.S. Department of Energy, Building Technologies Office, 950 L'Enfant Plaza SW, Suite 600, Washington, DC 20024. Telephone: (202) 287–1445. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimilies (faxes) will be accepted. For detailed instructions on submitting comments and additional information on the rulemaking process, see section V of this document.

Docket: The docket, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at *http://www.regulations.gov.* All documents in the docket are listed in the *http://www.regulations.gov.* index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available.

The docket web page can be found at *https://www.regulations.gov/docket?D=EERE-2017-BT-TP-0024.* The docket web page will contain simple instructions on how to access all documents, including public comments, in the docket. See section V of this document for information on how to submit comments through *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT:

Dr. Stephanie Johnson, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–2J, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–1943. Email: *MWO2017TP0024@ee.doe.gov.*

Ms. Celia Sher, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 287–6122. Email: *Celia.Sher@hq.doe.gov.*

For further information on how to submit a comment, review other public comments and the docket, or participate in the webinar, contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *ApplianceStandardsQuestions@ee.doe.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Authority and Background
  A. Authority
  B. Background
  1. Active Mode Amendments
  2. Standby Mode Amendments
II. Synopsis of the Notice of Proposed Rulemaking
III. Discussion
  A. Scope of Coverage
  B. Active Mode Test Methods
  C. Standby Mode and Off Mode Test Methods
  1. Displays and Clocks
  2. Connected Functions
  D. Section Title and Cross-Reference
  E. Integrated Annual Energy Consumption Metric
  F. Test Procedure Costs, Harmonization, and Other Topics
  1. Test Procedure Costs and Impact
  2. Harmonization with Industry Standards
  3. Other Test Procedure Topics
  G. Compliance Date and Waivers
IV. Procedural Issues and Regulatory Review
  A. Review Under Executive Order 12866
  B. Review Under Executive Orders 13771 and 13777
  C. Review Under the Regulatory Flexibility Act
  D. Review Under the Paperwork Reduction Act of 1995
  E. Review Under the National Environmental Policy Act of 1969
  F. Review Under Executive Order 13132
  G. Review Under Executive Order 12988
  H. Review Under the Unfunded Mandates Reform Act of 1995
  I. Review Under the Treasury and General Government Appropriations Act, 1999
  J. Review Under Executive Order 12630
  K. Review Under Treasury and General Government Appropriations Act, 2001
  L. Review Under Executive Order 13211
  M. Review Under Section 32 of the Federal Energy Administration Act of 1974
  N. Description of Materials Incorporated by Reference
V. Public Participation

A. Submission of Comments
B. Issues on Which DOE Seeks Comment
VI. Approval of the Office of the Secretary

I. Authority and Background

Microwave ovens are included in the list of ''covered products'' for which DOE is authorized to establish and amend energy conservation standards and test procedures. (42 U.S.C. 6292(a)(10)) DOE's energy conservation standards for microwave ovens are currently prescribed at Title 10 of the Code of Federal Regulations (''CFR'') part 430.32(j). DOE's test procedures for microwave ovens are prescribed at 10 CFR 430.23(i) and appendix I to subpart B of 10 CFR part 430 (''Appendix I''). The following sections discuss DOE's authority to establish test procedures for microwave ovens and relevant background information regarding DOE's consideration of test procedures for this product.

A. Authority

The Energy Policy and Conservation Act, as amended (''EPCA''),[1] among other things, authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317) Title III, Part B [2] of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles, which sets forth a variety of provisions designed to improve energy efficiency. These products include microwave ovens, the subject of this document. (42 U.S.C. 6292(a)(10))

The energy conservation program under EPCA consists essentially of four parts: (1) Testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of EPCA include definitions (42 U.S.C. 6291), energy conservation standards (42 U.S.C. 6295), test procedures (42 U.S.C. 6293), labeling provisions (42 U.S.C. 6294), and the authority to require information and reports from manufacturers (42 U.S.C. 6296).

The Federal testing requirements consist of test procedures that manufacturers of covered products must use as the basis for: (1) Certifying to DOE that their products comply with the applicable energy conservation standards adopted pursuant to EPCA (42 U.S.C. 6295(s)), and (2) making representations about the efficiency of those consumer products (42 U.S.C. 6293(c)). Similarly, DOE must use these test procedures to determine whether the products comply with relevant standards promulgated under EPCA. (42 U.S.C. 6295(s))

Federal energy efficiency requirements for covered products established under EPCA generally supersede State laws and regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297) DOE may, however, grant waivers of Federal preemption for particular State laws or regulations, in accordance with the procedures and other provisions of EPCA. (42 U.S.C. 6297(d))

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered products. EPCA requires that any test procedures prescribed or amended under this section be reasonably designed to produce test results which measure energy efficiency, energy use or estimated annual operating cost of a covered product during a representative average use cycle or period of use and not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3))

In addition, EPCA requires that DOE amend its test procedures for all covered products to integrate measures of standby mode and off mode energy consumption. (42 U.S.C. 6295(gg)(2)(A)) Standby mode and off mode energy consumption must be incorporated into the overall energy efficiency, energy consumption, or other energy descriptor for each covered product unless the current test procedures already account for and incorporate standby and off mode energy consumption or such integration is technically infeasible. If an integrated test procedure is technically infeasible, DOE must prescribe a separate standby mode and off mode energy use test procedure for the covered product, if technically feasible. (42 U.S.C. 6295(gg)(2)(A)(ii)) Any such amendment must consider the most current versions of the International Electrotechnical Commission (''IEC'') Standard 62301 [3] and IEC Standard 62087 [4] as applicable. (42 U.S.C. 6295(gg)(2)(A))

If DOE determines that a test procedure amendment is warranted, it must publish proposed test procedures and offer the public an opportunity to present oral and written comments on them. (42 U.S.C. 6293(b)(2)) EPCA also requires that, at least once every 7 years, DOE evaluate test procedures for each type of covered product, including microwave ovens, to determine whether amended test procedures would more accurately or fully comply with the requirements for the test procedures not to be unduly burdensome to conduct and be reasonably designed to produce test results that reflect energy efficiency, energy use, and estimated operating costs during a representative average use cycle or period of use. (42 U.S.C. 6293(b)(1)(A)) If the Secretary determines, on his own behalf or in response to a petition by any interested person, that a test procedure should be prescribed or amended, the Secretary shall promptly publish in the **Federal Register** proposed test procedures and afford interested persons an opportunity to present oral and written data, views, and arguments with respect to such procedures. The comment period on a proposed rule to amend a test procedure shall be at least 60 days and may not exceed 270 days. In prescribing or amending a test procedure, the Secretary shall take into account such information as the Secretary determines relevant to such procedure, including technological developments relating to energy use or energy efficiency of the type (or class) of covered products involved. (42 U.S.C. 6293(b)(2)) If DOE determines that test procedure revisions are not appropriate, DOE must publish its determination not to amend the test procedures. DOE is publishing this notice of proposed rulemaking (''NOPR'') in satisfaction of the 7-year review requirement specified in EPCA. (42 U.S.C. 6293(b)(1)(A))

B. Background

DOE's existing test procedure for microwave ovens appears at Appendix I, titled ''Uniform Test Method for Measuring the Energy Consumption of Cooking Products''. For reasons discussed in the following sections, the current microwave oven test procedure does not include active mode and measures energy use only in standby mode and off mode. Before today, DOE issued four documents related to possible amendments to the test procedure: A NOPR in 2013, two requests for information (in 2011 and 2018), and a notice of data availability in 2012.

1. Active Mode Amendments

DOE originally established the test procedure for microwave ovens on May 10, 1978, based on a 1975 version of the industry standard developed by the IEC. 43 FR 20120. DOE amended the original test procedure in an October 3, 1997

[1] All references to EPCA in this document refer to the statute as amended through America's Water Infrastructure Act of 2018, Public Law 115–270 (Oct. 23, 2018).

[2] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

[3] IEC 62301, ''Household electrical appliances—Measurement of standby power'' (Edition 2.0, 2011–01).

[4] IEC 62087, ''Methods of measurement for the power consumption of audio, video, and related equipment'' (Edition 3.0, 2011–04).

final rule that measured active mode energy use only and was based on an updated version of IEC Standard 705—Second Edition 1988 and Amendment 2—1993, ''Methods for Measuring the Performance of Microwave Ovens for Households and Similar Purposes'' (''IEC 705''). 62 FR 51976. On July 22, 2010, DOE published a final rule in which it repealed the regulatory test procedure for measuring the cooking efficiency of microwave ovens. 75 FR 42579 (''July 2010 Repeal Final Rule''). In the July 2010 Repeal Final Rule, DOE determined that the existing microwave oven test procedure did not produce representative and repeatable test results. 75 FR 42579, 42580. DOE stated at that time that it was unaware of any test procedures that had been developed that addressed these concerns. 75 FR 42579, 42581.

On October 24, 2011, DOE published a request for information (''RFI'') to inform its consideration of active mode testing methodologies for microwave ovens (''October 2011 RFI''). 76 FR 65631. DOE specifically sought information, data, and comments regarding representative and repeatable methods for measuring the energy use of microwave ovens in active mode, particularly for the microwave-only and convection-microwave cooking (*i.e.,* microwave plus convection and any other means of cooking) modes.

To inform its consideration of a test procedure for the microwave oven active mode, DOE conducted testing to evaluate potential methods for measuring the active mode energy use for these products, including the microwave-only, convection-only, and convection-microwave cooking modes. On June 5, 2012, DOE published a notice of data availability (''June 2012 NODA'') to present test results and analytical approaches that DOE was considering for potential amendments to the microwave oven test procedure and to request additional comment and information on these results. 77 FR 33106. In the June 2012 NODA, DOE presented test results from microwave-only, convection-only, and convection-microwave cooking mode testing using water loads, food simulation mixtures, and real food loads. DOE also presented test results from testing of the convection-only cooking mode using the aluminum test block specified in the DOE conventional oven test procedure then in effect.[5]

On February 4, 2013, DOE published a NOPR (''February 2013 NOPR'') in which it proposed adding provisions to measure active mode energy use for microwave ovens, including microwave-only ovens and convection microwave ovens. 78 FR 7940. For measuring the energy use in microwave-only cooking mode, DOE proposed test methods based on the November 2011 draft version of IEC 60705, ''Household microwave ovens—Methods for measuring performance.'' 78 FR 7940, 7942. DOE also proposed provisions for measuring the energy use of convection microwave ovens in convection-only cooking mode based on the test procedure for conventional ovens in Appendix I. *Id.* DOE further proposed to calculate the energy use of convection-microwave cooking mode for convection microwave ovens by apportioning the microwave-only cooking mode and convection-only cooking mode energy consumption measurements based on typical consumer use. *Id.*

The IEC issued an updated version of IEC 60705, ''Household microwave ovens—Methods for measuring performance'' Edition 4.1 on June 30, 2014 (''IEC 60705 Ed. 4.1'').

On January 18, 2018, DOE published an RFI (''January 2018 RFI'') describing the current requirements for the microwave oven test procedure and requesting information on several topics including the feasibility of pursuing active cooking mode and fan-only mode test methods for microwave-only ovens and convection microwave ovens. 83 FR 2566. DOE discussed the previous active mode test procedure proposal from the February 2013 NOPR and requested interested parties to provide updated data and information. This NOPR addresses the comments received in response to the January 2018 RFI regarding active mode for microwave ovens. DOE is not proposing an active mode test procedure.

The interested parties that submitted relevant comments to DOE in response to the January 2018 RFI are listed in Table I–1.[6]

TABLE I–1—JANUARY 2018 RFI WRITTEN COMMENTS

Organization(s)	Reference in this NOPR	Organization type
Appliance Standards Awareness Project (''ASAP''), American Council for an Energy-Efficient Economy (''ACEEE''), Consumer Federation of America (''CFA''), Consumers Union (''CU''), National Consumer Law Center (''NCLC''), Northeast Energy Efficiency Partnerships (''NEEP''), Northwest Energy Efficiency Alliance (''NEEA''), and Northwest Power and Conservation Council (''NPCC'').	Joint Commenters	Efficiency Organizations.
Association of Home Appliance Manufacturers	AHAM	Trade Association.
GE Appliances, a Haier Company	GE	Manufacturer.
Karla Quezada	Karla Quezada	Consumer.
Whirlpool Corporation	Whirlpool	Manufacturer.

On May 30, 2018, the IEC issued an additional amendment to IEC 60705, which it consolidated into a version entitled Edition 4.2. The changes in this amendment related to the definition of rounding and the determination of usable and overall volume of the microwave oven.

2. Standby Mode Amendments

As discussed, DOE is required to amend the test procedures for covered products to address standby mode and off mode energy consumption and to integrate such energy consumption into the energy descriptor for that product unless the current test procedure already fully account for such consumption. (42 U.S.C. 6295(gg)(2)(A)) If integration is technically infeasible, DOE must prescribe a separate standby mode and off mode energy use test procedure, if technically feasible. *Id.* Any such amendment must consider the most current versions of IEC 62301

[5] The DOE conventional oven test procedure in Appendix I was later repealed in a final rule published on December 16, 2016. 81 FR 91418. DOE determined that the conventional oven test procedure did not accurately represent consumer use, as it favored conventional ovens with low thermal mass and did not capture cooking performance-related benefits due to increased thermal mass of the oven cavity. 81 FR 91418, 91423–91424.

[6] In addition to the five commenters listed in the table, DOE received two comments that were submitted anonymously and not relevant to the microwave oven test procedure. These comments will not be addressed.

''Household electrical appliances—Measurement of standby power,'' and IEC 62087 ''Methods of measurement for the power consumption of audio, video, and related equipment.'' *Id.*

On March 9, 2011, DOE published an interim final rule (''March 2011 Interim Final Rule'') amending the test procedure for microwave ovens. 76 FR 12825. The March 2011 Interim Final Rule incorporated by reference IEC 62301 First Edition 2005–06 (''IEC 62301 (First Edition)'') to establish test conditions and testing procedures for measuring the average standby mode and average off mode power consumption. 76 FR 12825, 12828. As authorized by EPCA, DOE also added definitions of ''active mode,'' ''standby mode,'' and ''off mode'' based on the definitions provided in IEC 62301 Edition 2.0 2011–01 (''IEC 62301 (Second Edition)''). 76 FR 12825, 12836. In addition, DOE adopted language to clarify the application of IEC 62301 (First Edition) to measuring standby mode and off mode power. Specifically, DOE defined the test duration for units under test in which the measured standby mode power consumption of the microwave oven displays varies depending on the time-of-day displayed on the clock. 76 FR 12825, 12828.

The amendments adopted in the March 2011 Interim Final Rule became effective on April 8, 2011. 76 FR 12825, 12925. However, DOE noted that to ensure that the amended test procedure adequately addresses the EPCA requirement to consider the most recent version of IEC 62301, and recognizing that the IEC issued IEC 62301 (Second Edition) in January of 2011, DOE issued the microwave oven test procedure as an interim final rule and offered an additional 180-day comment period to consider whether any changes should be made to the interim final rule in light of publication of IEC 62301 (Second Edition). 76 FR 12825, 12830–12831. DOE stated that it would consider these comments and, to the extent necessary, publish a final rulemaking incorporating any changes. *Id.*

Based in part on public comment, DOE further analyzed IEC 62301 (Second Edition). DOE subsequently published a final rule on January 18, 2013 (''January 2013 Final Rule''), amending the test procedure for microwave ovens to reference certain provisions of IEC 62301 (Second Edition), along with clarifying language, for the measurement of standby mode and off mode energy use. 78 FR 4015. For only those microwave oven basic models with power consumption that varies as a function of the time displayed, DOE maintained the existing use of IEC 62301 (First Edition) for measuring standby mode power to minimize manufacturer burden. 78 FR 4015, 4021. DOE also determined that microwave ovens combined with other appliance functionality satisfy the definition of ''microwave oven'' at 10 CFR 430.2, but due to a lack of data and other information, did not adopt provisions to measure the standby mode and off mode energy use of the microwave oven component of these combined cooking products.[7] 78 FR 4015, 4022.

In the January 2018 RFI, DOE requested information on the current status of technology for network functions in microwave ovens, which may affect the standby mode energy consumption. This NOPR addresses the comments received in response to the January 2018 RFI regarding standby mode for microwave ovens and proposes minor amendments to the standby mode test procedures.

II. Synopsis of the Notice of Proposed Rulemaking

In this NOPR, DOE proposes to update Appendix I with (1) requirements for both the clock display and network functionality when testing standby and off mode and (2) technical corrections. DOE does not propose adding an active mode measurement.

In particular, for the standby and off mode test procedure, DOE proposes requiring that (1) any clock display is turned on and remains on during testing, unless the clock display powers down automatically and the product provides no option for the consumer to prevent the display from powering down automatically; and (2) any network function is disabled during testing, if it is possible to do so by means provided in the manufacturer's user manual. If disabling is not possible, the energy use associated with network functionality should not be reported to DOE and will not be used to determine compliance with DOE energy conservation standards. DOE also proposes editorial changes to add a section title inadvertently left out of the test procedure and to revise two incorrect cross-references.

DOE has tentatively determined that the proposed test procedure would not be unduly burdensome. DOE's proposed actions are summarized in Table II–1 and addressed in detail in section III of this document.

TABLE II–1—SUMMARY OF CHANGES IN PROPOSED TEST PROCEDURE RELATIVE TO CURRENT TEST PROCEDURE

Current DOE test procedure	Proposed test procedure	Attribution
References paragraph 5.2 of IEC 62301 (Second Edition), which specifies that the product must be tested in accordance with manufacturer's instructions or using default settings if no instructions are available. If there are no instructions and if default settings are not indicated, then the microwave oven is tested as supplied.	Specifies that the microwave oven must be tested with the clock display on, regardless of the manufacturer's instruction or default setting or supplied setting, unless the clock display powers down automatically and the product provides no setting that allows the consumer to prevent such automatic power down.	To improve representativeness.

[7] Appendix I defines ''combined cooking product'' as a household cooking appliance that combines a cooking product with other appliance functionality, which may or may not include another cooking product. Combined cooking products include the following products: Conventional range, microwave/conventional cooking top, microwave/conventional oven, and microwave/conventional range.

TABLE II–1—SUMMARY OF CHANGES IN PROPOSED TEST PROCEDURE RELATIVE TO CURRENT TEST PROCEDURE—Continued

Current DOE test procedure	Proposed test procedure	Attribution
Does not explicitly specify configuration of a network function, if present. References paragraph 5.2 of IEC 62301 (Second Edition), which specifies that the product must be tested in accordance with manufacturer's instructions or using default settings if no instructions are available. If there are no instructions and if default settings are not indicated, then the microwave oven is tested as supplied. In DOE's previous test procedures for microwaves, however, DOE determined that it would not measure network functionality energy use. In particular, DOE specifically determined in its 2012 test procedure not to include provisions for measuring energy use in network functionality (77 FR 65942, 65953–54 (Oct. 31, 2012), and DOE's most recent test procedure for microwaves did not address network functionality (81 FR 91418; Dec. 16, 2016).	Specifies that if present, the network function must be disabled.	To improve repeatability and comparability of results.
Section title inadvertently left out and two cross-references are incorrect.	Section title added, and cross-references corrected	To improve readability.

III. Discussion

In the January 2018 RFI, DOE sought feedback on several topics such as the feasibility of pursuing an active mode test method for microwave ovens, industry trends for connected appliances, and microwave oven standby mode setup. 83 FR 2566. DOE received several comments in response to the January 2018 RFI. In the following sections, DOE discusses the issues identified in previous rulemakings, comments received from stakeholders in response to specific topics in the January 2018 RFI, and DOE's responses to these comments.

DOE also received general comments in response to the January 2018 RFI. AHAM stated that the current test procedure is accurate, repeatable, and reproducible, and is not unduly burdensome to conduct, and therefore urged DOE to issue a determination that the test procedure does not need to be amended. (AHAM, No. 4 at p. 2)[8] GE and Whirlpool supported AHAM's comments in their entirety. (GE, No. 3 at p. 1; Whirlpool, No. 5 at p. 1) Whirlpool additionally commented that the current microwave oven test procedure is clear, with no major issues identified with repeatability, reproducibility, representativeness, or test burden. (Whirlpool, No. 5 at p. 1)

As discussed in the following sections, DOE has identified several amendments that it has initially determined are warranted to ensure the repeatability of the test procedure and the representativeness of the results.

AHAM commented that if DOE determines that amendments to the existing test procedure are warranted, any final rule for an amended test procedure should be issued before DOE initiates any standards rulemaking. According to AHAM, engineering analysis and sound policy conclusions can only be based on a known, final test procedure that all stakeholders have had the opportunity to use to evaluate design options and proposed standard levels. (AHAM, No. 4 at p. 2) AHAM further requested that DOE not publish a standards RFI or framework document until at least 180 days after a test procedure final rule publishes that would be used to determine compliance with any final standards. (AHAM, No. 4 at p. 2)

DOE recognizes that a finalized test procedure allows interested parties to provide more effective comments on proposed standards. Further, if the test procedure is finalized sufficiently in advance of the issuance of proposed standards, manufacturers will have experience using the new test procedure, which may provide additional insights into the proposed standards. As discussed, this NOPR is proposing amendments to the microwave oven test procedure, not the energy conservation standard, which is outside the scope of this rulemaking.

A. Scope of Coverage

This rulemaking applies to microwave ovens, which DOE defines as a category of cooking products which is a household cooking appliance consisting of a compartment designed to cook or heat food by means of microwave energy, including microwave ovens with or without thermal elements designed for surface browning of food and convection microwave ovens. This includes any microwave oven(s) component of a combined cooking product. 10 CFR 430.2. DOE is not proposing to amend the scope of the current microwave oven test procedure.

B. Active Mode Test Methods

As discussed in section I.B.1 of this document, in the July 2010 Repeal Final Rule, DOE repealed the active mode test provisions originally established in Appendix I because they did not produce representative and repeatable measurements of microwave oven energy use in active mode. 75 FR 42579. DOE proposed in the February 2013 NOPR to add provisions to the microwave oven test procedure in Appendix I for measuring energy use in microwave-only cooking mode based on the November 2011 draft version of IEC 60705. 78 FR 7940, 7946. AHAM commented on the February 2013 NOPR that it "fully supports harmonization with IEC 60705. But DOE should not base the U.S. test procedure on a draft of that standard. Instead, DOE should wait to harmonize with the final IEC 60705." (AHAM, EERE–2010–BT–TP–0023, No. 18 at p. 4) On June 30, 2014, IEC published IEC 60705 Ed. 4.1. Therefore, in the January 2018 RFI, DOE sought additional feedback on active mode test methods, including data and information that may not have been available at the time of the previous rulemaking. 83 FR 2566, 2570–2572 (Jan. 18, 2018)

In response to the January 2018 RFI, AHAM commented that adding an active mode measurement would

[8] A notation in the form "AHAM, No. 4 at p. 2" identifies a written comment: (1) Made AHAM; (2) recorded in document number 4 that is filed in the docket of this test procedure rulemaking (Docket No. EERE–2017–BT–TP–0024, available for review at *http://www.regulations.gov*); and (3) which appears on page 2 of document number 4.

significantly increase test burden, contrary to the EPCA requirement that the test procedure not be unduly burdensome to conduct. AHAM explained that adding an active mode measurement would increase the test time by as much as five to six times the current test time of about 2 hours, an increase which AHAM believes is significant. AHAM estimated that each active mode test would likely require 2 hours, and because three beaker sizes would each be tested twice, the total test time would be about 12 hours. Further, AHAM stated that an active mode measurement would require new laboratory equipment and could require new or updated facilities due to the additional test time and test requirements. According to AHAM, for example, manufacturer and third-party laboratories would likely need to build new laboratories to be able to maintain the current capacity, given the longer test time. AHAM also commented that it is not aware of companies currently conducting an active mode test procedure, so by requiring such methodology, DOE would be imposing new burden on companies. Therefore, AHAM stated that DOE should not amend the test procedure at this time. (AHAM, No. 4 at pp. 2–3) GE commented that the energy costs associated with active mode functionalities do not justify the burden and cost imposed on manufacturers to perform an active mode test. (GE, No. 3 at p. 1) GE commented that, based on a U.S. average electricity kilowatt-hour price of about 12 cents, a typical consumer using microwave-only cooking mode would consume energy costing less than 75 cents per month. (GE, No. 3 at p. 2)

AHAM also commented that an active mode test procedure would de-harmonize the United States with the rest of the world. Even though IEC 60705 Ed. 4.1 measures active mode, no country requires active mode testing for regulatory purposes to AHAM's knowledge. AHAM stated that this was particularly problematic because microwave ovens, perhaps more than any other home appliance, are global products. (AHAM, No. 4 at pp. 1, 3)

Further, AHAM commented that standards for active mode would not be economically justified. AHAM, referencing an April 8, 2009 final rule (''April 2009 Standards Final Rule'', 74 FR 16040), stated that DOE has previously found that the energy savings and emissions reductions would be outweighed by the large decrease in the net present value of consumer impacts (with almost all consumers experiencing net cost), the economic burden on many consumers, and the large capital conversion costs that could result in a reduction in industry net present value. AHAM does not believe this analysis would produce different results now. (AHAM, No. 4 at p. 3) AHAM further added that to its knowledge, no technology is currently available to reduce energy use in the active mode for either microwave-only ovens or convection microwave ovens. (AHAM, No. 4 at pp. 3–4)

Conversely, the Joint Advocates supported an active mode test procedure, stating that DOE's analysis from the February 2013 NOPR showed that, on average, active mode energy consumption is almost 90 percent of microwave oven energy use. (Joint Advocates, No. 8 at pp.1–2) These commenters stated that an active mode test procedure would provide valuable consumer purchasing information, allowing manufacturers to distinguish efficient products, some of which may contain features that increase consumer utility. (Joint Advocates, No. 8 at pp. 1–2) The Joint Advocates believe that technologies may be available to significantly improve efficiency in active mode, specifically solid-state radio-frequency (''RF'') components, which may also provide greater consumer utility in terms of more even heating and longer lifetimes. Without a test procedure, the Joint Advocates believe that manufacturers do not have a way to distinguish the potential improved performance. (Joint Advocates, No. 8 at p. 2)

To measure the energy consumption of microwave ovens in the microwave-only cooking mode, the Joint Advocates supported the use of IEC 60705 Ed. 4.1. (Joint Advocates, No. 8 at p. 2) They cited results that DOE presented in the February 2013 NOPR, which were based on a draft version of the IEC 60705 standard, showing minimal test-to-test variation for each water load size.[9] Further, the Joint Advocates stated that the European Committee for Electrotechnical Standardization's (''CENELEC'') round robin testing that evaluated the IEC 60705 standard found it to be repeatable and reproducible as well. (Joint Advocates, No. 8 at pp. 2–3) Karla Quezada supported harmonizing with the IEC 60705 Ed. 4.1 standard unless it would delay a test that may be useful with current technology and devices. (Karla Quezada, No. 2 at p. 2)

In this document, DOE is not proposing any updates to Appendix I to measure microwave oven energy use in active mode. As stated, EPCA requires that test procedures for microwave ovens be reasonably designed to produce test results which measure energy efficiency or energy use during a representative average use cycle or period of use, and not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) DOE has initially determined that an active mode measurement for microwave ovens would be unduly burdensome at this time. DOE finds at this point that the expected increase in testing cost resulting from increased testing time and the potential need for new laboratory equipment and facility upgrades would not be justified especially because DOE previously determined in the April 2009 Standards Final Rule that an energy conservation standard for microwave oven active mode would not be technologically feasible and economically justified. 74 FR 16040, 16087. In the context of evaluating the microwave test procedure, the circumstances that led to the determination in the April 2009 Final Rule have not changed substantially at this time.

Regarding the potential use of solid-state Radio Frequency (''RF'') technologies, based on a review of the current state of the technology, this is still a new technology that is not commercially available in the United States. At present, it is unclear whether IEC 60705 Ed. 4.2 would provide results that are representative of an average use cycle, in a repeatable manner, for microwave ovens using solid-state RF technologies.

C. Standby Mode and Off Mode Test Methods

1. Displays and Clocks

In the January 2018 RFI, DOE requested feedback on certain topics related to microwave oven displays and clocks. DOE requested information about whether the standby mode and off mode test procedure should be amended, specifically for microwave ovens with an option to turn the display on or off. DOE also requested data on the difference in standby power consumption with the display turned on and off, as well as consumer usage data on how frequently consumers power off the clock display when this option is available, and how much consumers value a microwave oven clock display

[9] IEC 60705 requires that the active mode energy consumption of a microwave oven be evaluated by heating three distinct known quantities of water (275g, 350g and 1000g, also called water loads) through multiple temperature gradients and measuring the cumulative energy required for the water to attain the final temperature. The resulting data is used to generate an energy consumption metric for microwave ovens.

that is capable of remaining powered on at all times. DOE also requested information regarding how manufacturer instructions for the initial setup of the microwave oven differ from the default as-shipped settings, and the merits of requiring initial setup in accordance with manufacturer instructions versus requiring testing using the default settings. 83 FR 2566, 2572.

AHAM commented that the existing standby mode and off mode test procedure is repeatable, reproducible, representative, not unduly burdensome to conduct, and does not need to be amended at this time. AHAM believes that without available data suggesting the standby mode and off mode test procedure should be amended, DOE should not change it. (AHAM, No. 4 at pp. 1, 8) AHAM further stated that the current standby and off mode test is consistent with how other products are tested (*i.e.,* the test unit is set up consistent with manufacturer instructions, and if no instructions are available, the default settings are used). AHAM urged DOE not to deviate from this approach, especially without supporting data. (AHAM, No. 4 at pp. 8–9) Karla Quezada commented that although manufacturers contend that the energy consumption of the microwave oven clock display is negligible, the aggregate of such small individual energy consumptions may result in meaningful cost to the consumer. (Karla Quezada, No. 2 at pp. 2–3) For the reasons discussed in the remainder of this section, DOE is proposing additional direction to the standby mode and off mode test procedure for microwave ovens, which it has initially determined will improve the representativeness and reproducibility of the test results.

For microwave ovens that provide an option to turn the display on or off, the existing requirements in section 2.1.3 of Appendix I specify that these ovens are to be tested in accordance with manufacturer's instructions, and if no instructions are available, using the factory or ''default'' settings, or if such settings are not indicated, testing the microwave oven as supplied. Section 3.1.3.1 of Appendix I further specifies that for microwave ovens in which power varies as a function of displayed time in standby mode (*e.g.,* as with microwave ovens with a clock that uses seven-segment light emitting diode (''LED'') displays), the clock time must be set to 3:23 prior to taking measurements. However, to ensure that testing is more representative of microwave ovens that display the clock time, DOE is proposing to explicitly specify that the clock display must be on during testing unless the clock display powers down automatically and the product provides no option for the consumer to prevent the display from powering down automatically. In a prior energy conservation standard proposed rulemaking, manufacturers stated that consumers expect that a microwave oven equipped with a display should show clock time while in standby mode. 73 FR 62034, 62080 (Oct. 17, 2008). Accordingly, DOE proposes that for microwave ovens that provide consumers the ability to turn the clock on or off, the unit must be set up such that the clock display remains on at all times during testing, unless the clock powers down automatically and the product provides no available setting for the consumer to prevent the automatic powering-down of the clock. The requirement to set up the clock and for the clock to remain on would apply regardless of manufacturer instruction, the default setting, or the supplied setting (as specified in paragraph 5.2 of IEC 62301 (Second Edition), which is referenced in section 2.1.3 of Appendix I for setup instructions).

DOE requests comment on the proposed updates to keep the clock display on during testing, unless the clock powers down automatically with no setting to allow the consumer to override this feature, and whether these updates would result in additional test burden. DOE also requests comment on consumer habits regarding the use of clock displays that can be optionally turned on or off.

2. Connected Functions

In the January 2018 RFI, DOE requested information on whether to amend the standby mode and off mode test procedure to address microwave ovens that have network functions, such as Bluetooth® technology, including information for suitable test methods.[10] DOE also requested information on whether any microwave ovens currently on the market include internet connections to allow for additional control functions, including the utility of this functionality, potential energy impacts, and the appropriate energy-related settings to use for testing. 83 FR 2566, 2573 (Jan. 18, 2018)

AHAM asserted that the current microwave oven test procedure does not require measuring network functionality. According to AHAM, these features are still developing, as are consumers' use and understanding of them, and regulating them now would likely stifle innovation and could, in some cases, prevent manufacturers from including such features. It stated that connected appliances and the market for them are in the early stages of development. AHAM stated that meaningful data on consumer use are unavailable due to limited market penetration. (AHAM, No. 4 at p. 9) AHAM further stated that it opposes amending the test procedure to account for newly developing features such as connected functions without national, statistically significant field data on consumer use. In order to avoid stifling this new area of innovation and its potential energy savings benefits, and to reduce the cumulative regulatory burden already experienced by the appliance industry, AHAM urged DOE not to revise the test procedure to account for the energy use of connected functions. (AHAM, No. 4 at p. 9) According to AHAM, connected features operate with different capabilities and may have energy saving benefits to consumers. It stated that connected appliances can play a critical role in increasing the energy efficiency of the grid and can be used by utilities to increase demand response by peak load shifting as well as facilitate increased penetration of renewable sources of power. (AHAM, No. 4 at p. 9) GE commented that DOE's regulation of network functionality or other modes involving networked features would impede technology advances in microwave cooking products and the ''Internet of Things.'' (GE, No. 3 at p. 3)

The Joint Advocates commented that as connected products are introduced to the market, the energy use of these features should be captured to encourage manufacturers to provide these features with low power consumption, which would benefit consumers. (Joint Advocates, No. 8 at p. 1) These commenters recommended that DOE require the measurement of energy use associated with Bluetooth® or internet connections. If the energy use of connected features is not captured in the test procedure, the Joint Advocates asserted that consumers will not have information about these features' energy use, and manufacturers that develop ways to provide these features with low power consumption will not be able to distinguish their products in the market. (Joint Advocates, No. 8 at p. 3) The Joint Advocates stated that at least one manufacturer offers a unit that uses Bluetooth® technology, and multiple manufacturers have plans to introduce ''connected microwave ovens.'' (Joint Advocates, No. 8 at p. 3)

[10] A ''network'' in this context includes communication between two or more separate independently powered devices or products.

DOE recently published an RFI on the emerging smart technology appliance and equipment market. 83 FR 46886 (Sept. 17, 2018). In that RFI, DOE sought information to better understand market trends and issues in the emerging market for appliances and commercial equipment that incorporate smart technology. DOE's intent in issuing the RFI was to ensure that DOE did not inadvertently impede such innovation in fulfilling its statutory obligations in setting efficiency standards for covered products and equipment. In this NOPR, DOE seeks comment on the same issues presented in the RFI as they may be applicable to microwave ovens.

DOE is aware of microwave ovens with connected functionality that use either Bluetooth® or Wi-Fi to communicate with other cooking products, such as a range, or with a consumer, either via voice commands or a smartphone or tablet. Under DOE's current regulations, the standby energy use of a microwave oven would be affected by whether the network function is active. Section 2.1.3 of Appendix I generally specifies that a microwave oven must be installed in accordance with paragraph 5.2 of IEC 62301 (Second Edition), which states that the product must be prepared and setup in accordance with manufacturer's instructions, and if no instructions for use are available, then factory or default settings must be used, or if such settings are not indicated, the product must be tested as supplied. However, the current microwave oven test procedure does not state how to configure a network function, regardless of whether such instructions are provided in the manufacturer's instructions. For a unit that is connected to the internet, the speed and configuration of an internet connection could also impact the energy consumed by the device. Also, based on a review of manufacturer websites and user manuals of various appliances, as well as testing conducted at DOE and third-party laboratories, connected features are implemented in a variety of ways across different brands. Further, the design and operation of these features is continuously evolving as the nascent market begins to grow for these products.

To further ensure the repeatability and comparability of test results between models, and consistent with the 2018 ''smart products'' RFI, DOE is proposing that connected features be disabled during testing. Because these features are relatively new and their presence in the market and use in field is limited, DOE does not have enough information to indicate what would constitute a representative configuration. Without this information, requiring testing with the network function enabled would be inappropriate. Specifically, in this NOPR, DOE proposes that microwave ovens that are equipped with a network function, such as Bluetooth® technology or the capability for internet connectivity (*i.e.,* ''connected microwave ovens''), are to be tested with the network function disabled during testing. If a network function cannot be disabled per manufacturer's instructions in the owner's manual (*e.g.,* by pressing a button on the microwave oven's control panel), DOE proposes that the energy use of such network functions need not be reported to DOE nor used in determining compliance with the applicable energy conservation standard. However, DOE recognizes there are alternative approaches to address the issue of microwaves that cannot turn the network functionality off. One such approach would be to require the energy use of the network feature be measured and subtracted from the standby mode energy measurement. DOE additionally requests comment on this alternative approach.

DOE proposes to clarify that section 2.1.3 of Appendix I, which specifies that a microwave oven must be installed in accordance with paragraph 5.2 of IEC 62301 (Second Edition), does not apply with respect to measuring the energy use of network functions. Paragraph 5.2 states, in part, that the product must be prepared and setup in accordance with manufacturer's instructions, and if no instructions for use are available, then factory or default settings must be used, or if such settings are not indicated, the product must be tested as supplied. In DOE's previous test procedures for microwaves, however, DOE determined that it would not measure network functionality energy use. In particular, DOE specifically determined in its 2012 test procedure not to include provisions for measuring energy use in network functionality (77 FR 65942, 65953–54 (Oct. 31, 2012), and DOE's most recent test procedure for microwaves did not address network functionality (81 FR 91418; Dec. 16, 2016).

DOE requests comment on the proposed requirements for testing microwave ovens with network functions disabled, including its alternative approach of subtracting the energy used by the network functions from the standby mode energy consumption measurement, where network functions cannot be disabled.

D. Integrated Annual Energy Consumption Metric

EPCA requires DOE to incorporate the active mode, standby mode, and off mode energy use values into a single energy use metric, unless it is technically infeasible to do so. (42 U.S.C. 6295(gg)(2)(A)) Accordingly, in the January 2018 RFI, DOE requested input on methods for calculating an integrated annual energy use metric for microwave ovens. DOE also requested data on the consumer usage habits for each available operating mode for microwave ovens. 83 FR 2566, 2569–2570, 2573 (Jan. 18, 2018)

AHAM commented that because it opposes including active mode measurements in the microwave oven test procedure, it did not have feedback at this time on an integrated metric. AHAM also commented that it is not aware of any updated consumer usage data for microwave oven active modes. (AHAM, No. 4 at p. 10)

As discussed, DOE is not proposing an active mode test method for microwave ovens in this NOPR. As such, consideration of an integrated metric is moot, and DOE is not proposing to make any changes to the existing metric for microwave oven energy consumption.

DOE requests comment on maintaining the current metric for microwave oven energy consumption.

E. Section Title and Cross-Reference

DOE is proposing to add a title to distinguish test procedure provisions regarding the power supply and to correct two cross-references. DOE is proposing to insert ''2.2.2 Gas supply'' in Appendix I prior to general energy supply specifications for cooking products related to gas burner adjustments, natural gas, propane, and test gas. This title would provide parallel organization with the electrical supply provisions in section 2.2.1 of Appendix I and would improve readability. Additionally, in two places the current test procedure cites section 1.15 of Appendix I for the definition of ''inactive mode.'' The definition for ''inactive mode'' is at section 1.14. DOE is proposing to correct these cross-references to avoid potential confusion. [Update this section if section 2.2.2.1–4 is removed prior to this NOPR being published]

F. Test Procedure Costs, Harmonization, and Other Topics

1. Test Procedure Costs and Impact

EPCA requires that test procedures proposed by DOE not be unduly burdensome to conduct. In this NOPR, DOE proposes that a microwave oven clock display be turned on, notwithstanding the requirements in section 2.1.3 of Appendix I, which references paragraph 5.2 of IEC 62301 (Second Edition). That is, DOE proposes the following changes from the current requirements of section 2.1.3 of Appendix I: The unit would not be installed according to manufacturer instructions, default setting, or supplied setting if necessary to ensure that the clock display remains on unless the microwave oven automatically powers down the clock display and the product provides no setting that allows the consumer to prevent the clock display from powering down automatically. DOE also proposes to clarify that a unit with a network function be tested with the network function disabled during testing. DOE has tentatively determined that these proposed amendments would not be unduly burdensome for manufacturers to conduct.

The proposed amendments would not impact the scope of the test procedure (*i.e.,* the proposal would not require manufacturers to test microwave ovens that are not already required to be tested). DOE has tentatively determined that the proposed amendments would not alter the measured energy efficiency/energy use of microwave ovens.

To evaluate whether any microwave oven would require retesting if DOE finalized the direction to keep the clock display on at all times during testing, if possible, DOE sought to identify whether any microwave ovens that are currently required to be tested with the clock display off would be tested with the clock display on under the proposal in this document. DOE reviewed all microwave ovens that are currently certified as having standby power less than 0.5 watts in DOE's Compliance Certification Database.[11] DOE selected 0.5 watts as the threshold value to investigate because during testing and investigation conducted during the previous microwave oven energy conservation standards final rule (78 FR 36316; published on June 17, 2013), DOE observed that a standby power consumption of 0.5 watts or less typically indicates that the microwave oven uses more efficient components or that the microwave oven clock display is off.

DOE identified 50 models of microwave ovens with standby power less than 0.5 watts. Of those identified microwave ovens that had user manuals available online or that DOE tested in-house (comprising a total of 35 of the 50 initially identified models), DOE reviewed the user manuals of these models to determine the status of the microwave oven clock display required under the current test procedure as compared to the status of the microwave oven clock display if tested under the proposed procedure. For the models with manuals available online, 31 user manuals either specify that the microwave oven has an LED display or describe one of the features of the display screen as the capability to display the clock time when the microwave oven is not in use. The manuals also include instructions to setup the clock time.

Given that these 31 models of microwave ovens have LED clock displays and/or instructions for setup of the clock time in the user manuals, both the current test procedure and the test procedure as proposed in this NOPR would require the microwave oven clock display to be on during testing. As noted, section 3.1.3.1 of Appendix I requires setting the clock to 3:23 before testing any unit with a power draw that varies based on the displayed time. The current procedure also requires setting up each unit according to manufacturer instructions prior to testing. Section 2.1.3 of Appendix I. These 31 models of microwave ovens are currently required to be tested with the microwave oven display clock on during testing, which would not change if DOE adopted the proposal in this NOPR.

For the remaining four models of microwave ovens that have online user manuals, the user manual did not contain instructions to set up the clock time, nor any image indicating a means on the microwave oven's control panel to configure the clock. In these instances, the user manuals identified the microwave ovens as having an auto-power down feature that shuts off the display, and the product provides no option to disable this feature; thus, these units would continue to be tested with the clock display off under the proposed direction in this document.

Based on this review of the 35 models of microwave ovens with available user manuals, DOE did not identify any microwave oven that would require retesting under the proposed requirement to always keep the clock display on during testing unless the clock display powers down automatically and the product provides no option for the consumer to prevent the display from powering down automatically. Therefore, based on this review of 35 microwave ovens, DOE has tentatively determined that this proposal would not have any cost burden associated with it. DOE requests comment on its analysis that the proposal to keep the clock display on at all times, if possible, would not impact manufacturers because no microwave ovens would require retesting or recertification. DOE also requests information on microwave ovens that allow the consumer to turn the clock on and off, and the manufacturer instructions provided and/or default conditions in such instances.

Similarly, the proposed additional direction for testing microwave ovens equipped with a network function with the function disabled would not affect any measured standby power for current products. In DOE's previous test procedures for microwaves, DOE determined that it would not measure network functionality energy use. As additional information, DOE reviewed the user manuals of microwave ovens that have network functions and are currently available in the market. For the microwave oven that operates on Bluetooth®, DOE observed that this function is ''off'' as shipped, and a user would need to turn it on manually to use it. Similarly, for microwave ovens that connect via Wi-Fi, users needed to manually enable the Wi-Fi connection after setting up the unit. Therefore, the proposal would not change the requirements for testing any of these microwave ovens with a network function.

DOE requests comment on its understanding of the impact and associated costs of the proposed test procedure.

2. Harmonization With Industry Test Methods

The test procedure for microwave ovens at Appendix I incorporates by reference certain provisions of IEC 62301 (Second Edition) regarding test conditions, equipment, setup, and methods for measuring standby mode and off mode power consumption. DOE seeks comment on the degree to which the DOE test procedure should consider and be harmonized further with IEC 62301 (Second Edition).

DOE also notes, as discussed, the IEC issued IEC 60705 Ed. 4.2, but DOE is not proposing to incorporate it either in whole or in part. DOE seeks comment on whether and to what degree DOE should consider and harmonize the Federal test procedure for microwaves with IEC 60705 Ed. 4.2.

DOE also requests comment on the benefits and burdens of adopting any other industry/voluntary consensus-

[11] U.S. Department of Energy's Compliance Certification Database. Last accessed December 26, 2018. *https://www.regulations.doe.gov/certification-data/products.html#q=Product_Group_s%3A**.

based or other appropriate test method, without modification.

3. Other Test Procedure Topics

In addition to the issues identified earlier in this document, DOE also welcomes comment on any other aspect of the existing test procedure for microwave ovens not already addressed by the specific areas identified in this document. DOE particularly seeks information that would improve the representativeness of the test procedure, as well as information that would help DOE create a procedure that would limit manufacturer test burden through streamlining or simplifying testing requirements. Comments regarding repeatability and reproducibility are also welcome.

DOE notes that under Executive Order 13771, ''Reducing Regulation and Controlling Regulatory Costs,'' Executive Branch agencies such as DOE must manage the costs associated with the imposition of expenditures required to comply with Federal regulations. See 82 FR 9339 (Feb. 3, 2017). Consistent with that Executive Order, DOE encourages the public to provide input on measures DOE could take to lower the cost of its regulations applicable to microwave ovens consistent with the requirements of EPCA.

G. Compliance Date and Waivers

EPCA prescribes that all representations of energy efficiency and energy use, including those made on marketing materials and product labels, must be made in accordance with an amended test procedure, beginning 180 days after publication of such a test procedure final rule in the **Federal Register**. (42 U.S.C. 6293(c)(2)) If DOE were to publish an amended test procedure, EPCA provides an allowance for individual manufacturers to petition DOE for an extension of the 180-day period if the manufacturer may experience undue hardship in meeting the deadline. (42 U.S.C. 6293(c)(3)) To receive such an extension, petitions must be filed with DOE no later than 60 days before the end of the 180-day period and must detail how the manufacturer will experience undue hardship. *Id.*

Upon the compliance date of an amended test procedure, should DOE issue such an amendment, any waivers that had been previously issued and are in effect that pertain to issues addressed by the amended test procedure are terminated. 10 CFR 430.27(h)(2). Recipients of any such waivers would be required to test the products subject to the waiver according to the amended test procedure as of the compliance date of the amended test procedure. At present, there are no waivers that address test procedure issues that would be addressed by the amendments proposed in this document.

DOE proposes to remove the introductory note in Appendix I. The introductory note references the June 14, 2017 date after which any representations related to energy or power consumption of cooking products must be based upon results generated under the test procedure. As this date has passed, the introductory note is no longer needed.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

The Office of Management and Budget (''OMB'') has determined that test procedure rulemakings do not constitute ''significant regulatory actions'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (''OIRA'') in the OMB.

B. Review Under Executive Orders 13771 and 13777

On January 30, 2017, the President issued Executive Order (''E.O.'') 13771, ''Reducing Regulation and Controlling Regulatory Costs.'' E.O. 13771 stated the policy of the executive branch is to be prudent and financially responsible in the expenditure of funds, from both public and private sources. E.O. 13771 stated it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.

Additionally, on February 24, 2017, the President issued E.O. 13777, ''Enforcing the Regulatory Reform Agenda.'' E.O. 13777 required the head of each agency designate an agency official as its Regulatory Reform Officer (''RRO''). Each RRO oversees the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms, consistent with applicable law. Further, E.O. 13777 requires the establishment of a regulatory task force at each agency. The regulatory task force is required to make recommendations to the agency head regarding the repeal, replacement, or modification of existing regulations, consistent with applicable law. At a minimum, each regulatory reform task force must attempt to identify regulations that:

(i) Eliminate jobs, or inhibit job creation;

(ii) Are outdated, unnecessary, or ineffective;

(iii) Impose costs that exceed benefits;

(iv) Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;

(v) Are inconsistent with the requirements of Information Quality Act, or the guidance issued pursuant to that Act, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or

(vi) Derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.

DOE initially concludes that this rulemaking is consistent with the directives set forth in these executive orders. This proposed rule is estimated to result in no costs. Therefore, if finalized as proposed, this rule is expected to be an E.O. 13771 other action.

C. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (''IRFA'') for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website: *http://energy.gov/gc/office-general-counsel.*

DOE reviewed this proposed rule to amend the test procedures for microwave ovens under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. DOE has tentatively determined that this proposed test procedure, if adopted, would not significantly increase the costs to microwave oven manufacturers.

DOE uses the Small Business Administration's (''SBA'') small business size standards to determine whether manufacturers qualify as small businesses, which are listed by the

North American Industry Classification System (''NAICS''). The SBA considers a business entity to be a small business, if, together with its affiliates, it employs less than a threshold number of workers specified in 13 CFR part 121. The 2017 NAICS code for microwave ovens is 335220, major household appliance manufacturing. The threshold number for NAICS code 335220 is 1,500 employees. This employee threshold includes all employees in a business's parent company and any other subsidiaries.

Most of the manufacturers supplying microwave ovens are either large multinational corporations or overseas microwave original equipment manufacturers (''OEMs'') that manufacture microwave ovens sold under another company's brand. DOE conducted a focused inquiry into small business manufacturers of products covered by this rulemaking. DOE primarily used DOE's Compliance Certification Database for microwave ovens to create a list of companies that sell microwave ovens covered by this rulemaking in the United States. DOE also used the California Energy Commission's database, Modernized Appliance Efficiency Database System, to correlate brands with OEMs. DOE identified a total of 48 distinct companies that manufacture or import microwave ovens in the United States.

DOE then reviewed these companies to determine whether the entities met the SBA's definition of ''small business'' and screened out any companies that do not manufacture products covered by this rulemaking, do not meet the definition of a ''small business,'' or are foreign-owned and operated. Based on this review, DOE has identified one potential small business that manufactures microwave ovens in the United States. Through this analysis, DOE has determined the expected effects of this rulemaking on this covered small business and whether an IRFA was needed (*i.e.,* whether DOE could certify that this rulemaking would not have a significant impact).

As previously stated, the proposal to amend the test procedure for microwave ovens by requiring that the clock display be on at all times during testing, unless the product provides no available setting to allow the consumer to prevent the clock display from powering down automatically, should not impact any of the microwave oven models with available user manuals identified by DOE. Further, the proposed additional direction for testing microwave ovens equipped with a network function with any connected functionality disabled would not affect the small business manufacturer because they do not make microwave ovens with network functions.

Therefore, DOE concludes that the impacts of the test procedure amendments proposed in this NOPR would not have a ''significant economic impact on a substantial number of small entities,'' and that the preparation of an IRFA is not warranted. DOE will transmit the certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

DOE seeks comment on its conclusion that one small business manufactured microwave ovens in the United States, with fewer than 1,500 total employees. Additionally, DOE requests comment on its determination that the proposed amendments would not have a significant economic impact on this small business.

D. Review Under the Paperwork Reduction Act of 1995

Manufacturers of microwave ovens must certify to DOE that their products comply with any applicable energy conservation standards. To certify compliance, manufacturers must first obtain test data for their products according to the DOE test procedures, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including microwave ovens. (See generally 10 CFR part 429.) The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (''PRA''). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 35 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

E. Review Under the National Environmental Policy Act of 1969

DOE is analyzing this proposed regulation in accordance with the National Environmental Policy Act (NEPA) and DOE's NEPA implementing regulations (10 CFR part 1021). DOE's regulations include a categorical exclusion for rulemakings interpreting or amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended. 10 CFR part 1021, subpart D, Appendix A5. DOE anticipates that this rulemaking qualifies for categorical exclusion A5 because it is an interpretive rulemaking that does not change the environmental effect of the rule and otherwise meets the requirements for application of a categorical exclusion. See 10 CFR 1021.410. DOE will complete its NEPA review before issuing the final rule.

F. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (Aug. 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this proposed rule and has determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297(d)) No further action is required by Executive Order 13132.

G. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden reduction. Section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation (1) clearly specifies the preemptive effect, if any, (2) clearly specifies any effect on existing Federal law or regulation, (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction, (4) specifies the retroactive effect, if any, (5) adequately defines key terms, and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

H. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (''UMRA'') requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820; also available at *http://energy.gov/gc/office-general-counsel*. DOE examined this proposed rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

I. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This proposed rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

J. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights'' 53 FR 8859 (March 18, 1988) that this proposed regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

K. Review Under Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

L. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

The proposed regulatory action to amend the test procedure for measuring the energy efficiency of microwave ovens is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

M. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Public Law 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; FEAA) Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (''FTC'') concerning the impact of the commercial or industry standards on competition.

The proposed modifications to the test procedure for microwave ovens in this NOPR do not incorporate any new commercial standard.

N. Description of Materials Incorporated by Reference

In this NOPR, DOE is not proposing to incorporate by reference any new industry standard. The incorporation by reference of IEC 62301 (Second Edition) in appendix I to subpart B has already been approved by the Director of the

Federal Register and there are no proposed changes in the NOPR.

V. Public Participation

A. Participating in the Webinar

The time and date of the webinar are listed in the **DATES** section at the beginning of this document. If no participants register for the webinar then it will be cancelled. Webinar registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE's website: [*https://energy.gov/eere/buildings/public-meetings-and-comment-deadlines*]. Participants are responsible for ensuring their systems are compatible with the webinar software.

Additionally, you may request an in-person meeting to be held prior to the close of the request period provided in the **DATES** section of this document. Requests for an in-person meeting may be made by contacting Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *Appliance_Standards_Public_Meetings@ee.doe.gov*.

B. Procedure for Submitting Prepared General Statements for Distribution

Any person who has plans to present a prepared general statement may request that copies of his or her statement be made available at the public meeting. Such persons may submit requests, along with an advance electronic copy of their statement in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format, to the appropriate address shown in the **ADDRESSES** section at the beginning of this notice. The request and advance copy of statements must be received at least one week before the public meeting and may be emailed, hand-delivered, or sent by mail. DOE prefers to receive requests and advance copies via email. Please include a telephone number to enable DOE staff to make a follow-up contact, if needed.

C. Conduct of Public Meeting

DOE will designate a DOE official to preside at the public meeting and may also use a professional facilitator to aid discussion. The meeting will not be a judicial or evidentiary-type public hearing, but DOE will conduct it in accordance with section 336 of EPCA (42 U.S.C. 6306). A court reporter will be present to record the proceedings and prepare a transcript. DOE reserves the right to schedule the order of presentations and to establish the procedures governing the conduct of the public meeting. After the public meeting and until the end of the comment period, interested parties may submit further comments on the proceedings and any aspect of the rulemaking.

The public meeting will be conducted in an informal, conference style. DOE will present summaries of comments received before the public meeting, allow time for prepared general statements by participants, and encourage all interested parties to share their views on issues affecting this rulemaking. Each participant will be allowed to make a general statement (within time limits determined by DOE), before the discussion of specific topics. DOE will permit, as time permits, other participants to comment briefly on any general statements.

At the end of all prepared statements on a topic, DOE will permit participants to clarify their statements briefly and comment on statements made by others. Participants should be prepared to answer questions by DOE and by other participants concerning these issues. DOE representatives may also ask questions of participants concerning other matters relevant to this rulemaking. The official conducting the public meeting will accept additional comments or questions from those attending, as time permits. The presiding official will announce any further procedural rules or modification of the above procedures that may be needed for the proper conduct of the public meeting.

A transcript of the public meeting will be included in the docket, which can be viewed as described in the *Docket* section at the beginning of this notice. In addition, any person may buy a copy of the transcript from the transcribing reporter.

D. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule before or after the public meeting, but no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this proposed rule.

Submitting comments via *http://www.regulations.gov*. The *http://www.regulations.gov* web page will require you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to *http://www.regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (''CBI'')). Comments submitted through *http://www.regulations.gov* cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through *http://www.regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *http://www.regulations.gov* provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery, or postal mail. Comments and documents submitted via email, hand delivery, or mail also will be posted to *http://www.regulations.gov*. If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information on a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery, please provide all items on a CD, if feasible. It is not necessary to submit printed copies. No facsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English and free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. According to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery two well-marked copies: One copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked non-confidential with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

E. Issues on Which DOE Seeks Comment

Although DOE welcomes comments on any aspect of this proposal, DOE is particularly interested in receiving comments and views of interested parties concerning the following issues:

(1) DOE requests comment on the proposed updates related to keeping the microwave oven clock display on during standby mode testing, unless the product provides no available setting to allow the consumer to prevent the clock display from powering down automatically, and whether these updates would result in additional test burden. DOE also requests comment on consumer habits regarding the use of clock displays that can be optionally turned on or off. See section III.C.1 of this document.

(2) DOE requests comment on the proposed requirements for testing microwave ovens with network function. See section III.C.2 of this document.

(3) DOE requests comment on maintaining the current metric for microwave oven energy consumption. See section III.D of this document.

(4) DOE requests comment on its analysis that the proposal to keep the clock display on at all times, if possible, would not impact manufacturers because no microwave ovens would require retesting or recertification. DOE also requests information on microwave ovens that allow the consumer to turn the clock on and off, the manufacturer instructions provided and/or default conditions in such instances, and how such models are currently tested. See section III.F.1 of this document.

(5) DOE requests comment on its understanding of the impact and associated costs of the proposed test procedure. See section III.F.1 of this document.

(6) DOE seeks comment on whether and to what degree DOE should consider and harmonize the Federal test procedure for microwaves with IEC 60705 Ed. 4.2. DOE also requests comment on the benefits and burdens of adopting any industry/voluntary consensus-based or other appropriate test procedure, without modification. See section III.F.2 of this document.

(7) DOE seeks comment on its conclusion that one small business manufactures microwave ovens in the United States, with fewer than 1,500 total employees. Additionally, DOE requests comment on its determination that the proposed amendments would not have a significant economic impact on this small business. See section IV.C of this document.

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed rule.

List of Subjects in 10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Signed in Washington, DC, on October 17, 2019.

Alexander N. Fitzsimmons,

Acting Deputy Assistant Secretary for Energy Efficiency, nergy Efficiency and Renewable Energy.

For the reasons stated in the preamble, DOE is proposing to amend part 430 of Chapter II of Title 10, Code of Federal Regulations as set forth below:

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 2. Appendix I to Subpart B of Part 430 is amended by:

■ a. Removing the introductory note;

■ b. Revising section 2.1.3;

■ c. Adding section 2.2.2; and

■ d. Revising sections 3.2.1.2 and 3.2.2.

The revisions and addition read as follows:

Appendix I to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Cooking Products

* * * * *

2.1.3 *Microwave ovens, excluding any microwave oven component of a combined cooking product.* Install the microwave oven in accordance with the manufacturer's instructions and connect to an electrical supply circuit with voltage as specified in section 2.2.1 of this appendix. Install the microwave oven in accordance with Section 5, Paragraph 5.2 of IEC 62301 (Second Edition) (incorporated by reference; see § 430.3), disregarding the provisions regarding batteries and the determination, classification, and testing of relevant modes. If the microwave oven can communicate through a network (*e.g.,* Bluetooth® or internet connection), disable the network function, if it is possible to disable it by means provided in the manufacturer's user manual, for the duration of testing. If disabling is not possible, the energy use associated with such network functions should not be reported to DOE and will not be used to determine compliance with DOE energy conservation standards. The clock display must be on, regardless of manufacturer's instructions or default setting or supplied setting. The clock display must remain on during testing, unless the clock display powers down automatically with no option for the consumer to override this function. Install a watt meter in the circuit that meets the requirements of section 2.8.1.2 of this appendix.

* * * * *

2.2.2 *Gas supply.*

* * * * *

3.2.1.2 *Conventional cooking top standby mode and off mode power except for any conventional cooking top component of a combined cooking product.* Make measurements as specified in section 3.1.1.1 of this appendix. If the conventional cooking top is capable of operating in inactive mode, as defined in section 1.14 of this appendix, measure the average inactive mode power of the conventional cooking top, P_{IA}, in watts as specified in section 3.1.1.1.1 of this appendix. If the conventional cooking top is capable of operating in off mode, as defined in section 1.17 of this appendix, measure the average off mode power of the conventional cooking top, P_{OM}, in watts as specified in section 3.1.1.1.2 of this appendix.

3.2.2 *Combined cooking product standby mode and off mode power.* Make measurements as specified in section 3.1.2 of this appendix. If the combined cooking product is capable of operating in inactive mode, as defined in section 1.14 of this appendix, measure the average inactive mode power of the combined cooking product, P_{IA}, in watts as specified in section 3.1.2.1 of this appendix. If the combined cooking product is capable of operating in off mode, as defined in section 1.17 of this appendix, measure the average off mode power of the combined cooking product, P_{OM}, in watts as specified in section 3.1.2.2 of this appendix.

* * * * *

[FR Doc. 2019–24331 Filed 11–13–19; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 97

[EPA–R06–OAR–2016–0611; FRL–10001–85–Region 6]

Promulgation of Air Quality Implementation Plans; State of Texas; Regional Haze and Interstate Visibility Transport Federal Implementation Plan: Proposal of Best Available Retrofit Technology (BART) and Interstate Visibility Transport Provisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: In this supplemental notice of proposed rulemaking (SNPRM), the Environmental Protection Agency (EPA) is supplementing the proposal published on August 27, 2018 to affirm the Agency's October 2017 Federal Implementation Plan (FIP), which partially approved the 2009 Texas Regional Haze State Implementation Plan (SIP) submission and promulgated a Federal Implementation Plan (FIP) for Texas to address certain outstanding Clean Air Act (CAA) regional haze requirements. The October 2017 FIP established the Texas SO_2 Trading Program, an intrastate trading program for certain electric generating units (EGUs) in Texas, as a Best Available Retrofit Technology (BART) alternative for sulfur dioxide (SO_2). In response to certain comments received on the August 2018 proposal to affirm the October 2017 FIP, we are proposing revisions to the Texas SO_2 Trading Program, including provisions for penalties on the total annual SO_2 emissions from sources covered by the rule exceeding a proposed assurance level.

DATES: Comments must be received on or before January 13, 2020.

Public Hearing: A public hearing, if requested, will be held in Room 5220, 1201 Elm Street, Suite 500, Dallas, Texas 75270 on December 9, 2019 beginning at 1:00 p.m. If you wish to request a hearing and present testimony or attend the hearing, you should notify, on or before November 27, 2019, Ms. Jennifer Huser, Air and Radiation Division (ARSH), Environmental Protection Agency Region 6, 1201 Elm Street, Suite 500; telephone number: (214) 665–7347; email address: *huser.jennifer@epa.gov.* Oral testimony will be limited to 5 minutes each. The hearing will be strictly limited to the subject matter of the proposal, the scope of which is discussed below. Any member of the public may file a written statement by the close of the comment period. Written statements (duplicate copies preferred) should be submitted to Docket ID No. EPA–R06–OAR–2016–0611, at the address listed above for submitted comments. The hearing location and schedule will be posted on EPA's web page at *https://www.epa.gov/publicnotices/notices-search/location/Texas.* Verbatim English—language transcripts of the hearing and written statements will be included in the rulemaking docket. If no requests for a public hearing are received by close of business on November 27, 2019, a hearing will not be held, and this announcement will be made on the web page at the address shown above.

For additional logistical information regarding the public hearing please see the **SUPPLEMENTARY INFORMATION** section of this action.

ADDRESSES: Submit your comments, identified by Docket No. EPA–R06–OAR–2016–0611, at *http://www.regulations.gov* or via email to *R6_TX-BART@epa.gov.*

Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

Docket: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at the EPA Region 6, 1201 Elm Street, Suite 500, Dallas, Texas 75270. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available at either location (*e.g.,* CBI).

FOR FURTHER INFORMATION CONTACT: Jennifer Huser, Air and Radiation Division, Environmental Protection Agency, Region 6, 1201 Elm Street, Suite 500, Dallas, Texas 75270, telephone 214–665–7347; email address *Huser.Jennifer@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document wherever "we," "us," or "our" is used, we mean the EPA.

A public hearing, if requested, will provide interested parties the opportunity to present information and opinions to us concerning our proposal. Interested parties may also submit written comments, as discussed in the proposal. Written statements and supporting information submitted during the comment period will be considered with the same weight as any oral comments and supporting information presented at the public hearing. We will not respond to comments during the public hearing. When we publish our final action, we will provide written responses to all significant oral and written comments received on our proposal.

At the public hearing, the hearing officer may limit the time available for each commenter to address the proposal to three minutes or less if the hearing officer determines it to be appropriate. We will not be providing equipment for commenters to show overhead slides or make computerized slide presentations. Any person may provide written or oral comments and data pertaining to our proposal at the public hearing. Verbatim English—language transcripts of the hearing and written statements will be included in the rulemaking docket.

Table of Contents

I. Background
II. Public Comment
III. Texas SO_2 BART Alternative Trading Program
A. Proposed Changes to Specific Texas SO_2 Trading Program Features
1. Addition of Assurance Provisions
2. Revision of Supplemental Allowance Pool Allocation Provisions
3. Termination of Opt-In Provisions
4. Revision of Allowance Recordation Provisions
B. Interstate Visibility Transport
IV. Supplemental Proposed Action
V. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Overview, Executive Order 13563: Improving Regulation and Regulatory Review
B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs
C. Paperwork Reduction Act
D. Regulatory Flexibility Act
E. Unfunded Mandates Reform Act (UMRA)
F. Executive Order 13132: Federalism
G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use
J. National Technology Transfer and Advancement Act (NTTAA)
K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

I. Background

On August 27, 2018, we proposed to affirm our October 2017 FIP and provided an opportunity to comment on relevant aspects of the rule, as well as other specified related issues.[1] To address the SO_2 BART requirements for EGUs, we proposed to affirm our October 2017 FIP, which relied on an intrastate SO_2 trading program as a BART alternative for certain EGUs in Texas (''Texas SO_2 Trading Program''). We proposed to affirm our approval of the portion of the 2009 Texas Regional Haze SIP that addresses the BART requirement for EGUs for particulate matter (PM). We also proposed to affirm our determination that the BART alternatives addressing SO_2 and nitrogen oxides (NO_X) BART at Texas' EGUs were adequate to satisfy the interstate visibility transport requirements for the following national ambient air quality standards (NAAQS): (1) 1997 8-hour ozone; (2) 1997 $PM_{2.5}$ (annual and 24-hour); (3) 2006 $PM_{2.5}$ (24-hour); (4) 2008 8-hour ozone; (5) 2010 1-hour NO_2; and (6) 2010 1-hour SO_2. The August 2018 proposal contains more detailed discussion of previous EPA actions on Texas Regional Haze and the rationale for our proposed action to affirm.

The comment period on the August 2018 proposal closed on October 26, 2018. We received timely comments on the proposal, and we will address all comments received on the original proposal and on this supplemental proposal in our final action.

II. Public Comment

We are reopening the public comment period with respect to the specific proposed changes in this notice. Comments are due January 13, 2020. EPA is not reopening the comment period for any other aspects of our August 2018 proposal. Comments should be limited to the items discussed in this supplemental proposal.

III. Texas SO_2 BART Alternative Trading Program

A. Proposed Changes to Specific Texas SO_2 Trading Program Features

In this supplemental proposal, EPA proposes to make four sets of amendments to the Texas SO_2 Trading Program: (1) The addition of assurance provisions; (2) revisions to the Supplemental Allowance Pool allocation provisions; (3) termination of the opt-in provisions; and (4) revision of the allowance recordation provisions. The four subsections of this section discuss each of these proposed sets of amendments in turn, along with the associated rationales. In general, these proposed changes, if finalized, would strengthen our finding in October 2017,[2] which we proposed to affirm in August 2018, that the Texas SO_2 Trading Program will result in SO_2 emission levels from Texas EGUs that are similar to or less than the emission levels from Texas EGUs that would have been realized had Texas continued to participate in the SO_2 trading program under the Cross-State Air Pollution Rule (CSAPR).[3]

The proposed changes to the Texas SO_2 Trading Program would be implemented through revisions to the existing regulations at 40 CFR part 97, subpart FFFFF. A redline/strike-out document showing subpart FFFFF with the proposed revisions has been added to the docket for this proposed action.

1. Addition of Assurance Provisions

In the August 2018 proposal, EPA proposed to affirm that the Texas SO_2 Trading Program is an appropriate SO_2 BART alternative for EGUs in Texas on the basis that the program ''will achieve greater reasonable progress than BART towards restoring visibility, consistent with the June 2012 'CSAPR better than BART' and September 2017 'CSAPR still better than BART' determinations.''[4] (Further background on those determinations is set forth in the August 2018 proposal.) In support, EPA explained that the Texas SO_2 Trading Program, despite some difference in the scope of coverage of EGUs, would be comparable in stringency to, if not more stringent than, the CSAPR SO_2 trading program as applied to Texas sources.[5] EPA further explained that its analysis of the stringency of the CSAPR program was premised on the CSAPR program's structure of state emission budgets plus ''assurance levels.''[6]

In each of the CSAPR trading programs, EPA set an assurance level for each state in order to ensure that, despite the broad, interstate trading region, emissions reductions would be achieved appropriately in a geographically distributed way commensurate with states' ''good neighbor'' obligations as determined by EPA through its analysis under CAA section 110(a)(2)(D)(i)(I).[7] EPA set these assurance levels for states by first establishing a ''variability limit'' as a percentage of each state's total emission budget in order to account for year-to-year variability in the amount of fossil fuel combusted to produce electricity required to meet customer demand. EPA then set the amount of each state's assurance level as the sum of the state's budget and its variability limit.[8] If a state's sources' emissions exceed the statewide assurance level, the emissions above that level are ''penalized'' through a three-to-one allowance surrender ratio.[9] The CSAPR assurance levels are thus designed to provide the sources in each state with a strong incentive not to exceed a state-specific target in any compliance period, consistent with the state-specific nature of the good neighbor obligations, while providing

[1] 83 FR 43586 (August 27, 2018). Additional information regarding the regulatory background of the CAA and regional haze requirements can be found in the October 2017 FIP, 82 FR 48324 (Oct. 17, 2017), and our January 2017 notice of proposed rulemaking for Texas Regional Haze, 82 FR 912 (Jan. 4, 2017).

[2] 82 FR 48324, 48329.

[3] *See* 83 FR at 43599.

[4] *Id.* at 43590.

[5] *Id.* at 43591–92.

[6] *Id.* at 43594–95.

[7] 76 FR 48208, 48265–66 (Aug. 8, 2011).

[8] *Id.* at 48266–68.

[9] 83 FR at 43594–95.

flexibility to respond to year-to-year variability in electricity demand.[10]

The Texas SO_2 Trading Program, as promulgated in October 2017, does not include an assurance level. In contrast to CSAPR, the Texas SO_2 Trading Program does not allow for sources to purchase allowances from sources in other states. Therefore, the number of allowances available to the Texas sources is limited by the total number of allowances allocated under the program. While this limits the average annual emissions under the program, we recognize, as discussed in further detail below, that the potential use of banked allowances and allowances allocated from the Supplemental Allowance Pool could result in potentially significant year-to-year variability in emissions. Therefore, the EPA is proposing to add an assurance level provision to the Texas SO_2 Trading Program in order to maintain consistency with the CSAPR program and to provide additional support for our determination that SO_2 emissions under the Texas SO_2 Trading Program will remain below the requisite level on an annual basis. In order to explain our proposed determination of the appropriate stringency at which to set the assurance level, in this supplemental proposal we will first review our prior analysis of the stringency of the Texas SO_2 Trading Program in the August 27, 2018 notice. We will then summarize the relevant public comments EPA received on this issue in response to that notice, and propose an appropriate assurance level based on our review of the information.

In the August 2018 proposal, we summarized relevant Texas-related aspects of the 2011 proposed and 2012 final ''CSAPR better than BART'' rulemaking.[11] We described how, for purposes of comparing the impacts of CSAPR and BART nationwide in the 2011 proposed rule, EPA initially used a model projection of 266,600 tons for Texas EGUs' annual SO_2 emissions under the CSAPR program.[12] We then explained that because of intervening increases in some CSAPR emissions budgets—including an increase of 50,517 tons in the CSAPR SO_2 budget for Texas—EPA conducted a sensitivity analysis for the 2012 final rule to assess the effects of the CSAPR budget adjustments, making a conservative assumption that SO_2 emissions from Texas EGUs under CSAPR could potentially increase by the full amount of the Texas budget increase, or up to 317,100 tons per year (266,600 + 50,517).[13] Finally, we noted the results of that sensitivity analysis, namely that CSAPR was expected to provide for greater reasonable progress than BART nationwide even with potential SO_2 emissions from Texas EGUs under CSAPR as high as 317,100 tons.[14]

In our August 2018 proposal, EPA used this benchmark (317,100 tons of SO_2 emissions per year) to gauge whether the Texas SO_2 Trading Program was sufficiently stringent for EPA to continue to rely on the BART-alternative analysis we conducted in the 2012 ''CSAPR better than BART'' rulemaking. EPA found that the ''annual average emissions'' under the Texas SO_2 Trading Program would remain below the 317,100 tons-per-year benchmark relied upon in the 2012 sensitivity analysis, because the yearly allocation to Texas EGUs under the Texas SO_2 Trading Program was 238,393 tons of allowances, plus 10,000 tons allocated to the Supplemental Allowance Pool.[15] Although there may be some year-to-year variability in emissions, EPA reasoned that variability for units within the Texas program would be constrained by the number of banked allowances and the number of allowances that can be allocated in a control period from the Supplemental Allowance Pool. (Annual allocations from the Supplemental Allowance Pool are limited to 54,711 tons.) The total number of allowances that can be allocated in a single year is therefore 293,104, which is the sum of the 238,393-ton budget for existing units plus 54,711. EPA further explained that certain sources that had been subject to the CSAPR program, but which are not covered by the Texas SO_2 Trading Program, emitted less than 27,500 tons of SO_2 in 2016 and their emissions were not projected to significantly increase from this level. Taking into account these figures, as well as recent emissions data, EPA concluded that ''annual average EGU emissions'' under the Texas SO_2 Trading Program were anticipated to remain ''well below'' the 317,100 ton per year benchmark and would be similar to emissions anticipated under CSAPR. Relying on this information, EPA concluded that the weight of evidence supported the conclusion that the Texas SO_2 Trading Program met the requirements of a BART alternative.[16]

Commenters on the August 2018 proposal identified several specific concerns with the Texas SO_2 Trading Program. EPA has considered these comments, and they inform this supplemental proposal. Stated broadly, these commenters are concerned that the Texas SO_2 Trading Program is insufficiently stringent to meet the requirements for a BART alternative under 40 CFR 51.308(e)(2). Commenters specifically questioned EPA's reliance on the 317,100-ton benchmark and argued that the Texas SO_2 Trading Program would, unlike source-specific BART control requirements, allow for emissions to increase compared to recent emission levels. Commenters also identified the availability of supplemental allowances, the issuance of allocations to already-retired units, the general method of allocating allowances, and the availability of unlimited allowance banking as features which, according to them, undermine the stringency of the Texas SO_2 Trading Program.

EPA proposes to reaffirm its finding that the current Texas SO_2 Trading Program budget, in general, compares favorably in stringency to the CSAPR SO_2 trading program. Further, certain features of the Texas SO_2 Trading Program that were raised as concerns by commenters, such as allocations to retired units and use of allowance banking, are consistent with elements of the CSAPR trading programs. However, EPA recognizes that the current Texas SO_2 Trading Program, unlike CSAPR, does not impose an ''assurance level''—a total level of annual emissions above which units in the program would be penalized with a higher allowance surrender ratio (*i.e.,* a three-to-one rate) than the one-to-one ratio that applies to emissions below the assurance level. In EPA's analysis summarized above, EPA relied on the number of allowances allocated annually to indicate ''average'' annual emission levels. This analysis did not account for the variability in emissions due to the availability of banking or the build-up of allowances through allocations to retired units. Although these features are available to sources participating in the CSAPR programs, their effect on emissions in

[10] For more information on assurance levels in the CSAPR program, see U.S. EPA, Cross-State Air Pollution Rule (CSAPR) Fact Sheet—Assurance Provisions, available at *https://www.epa.gov/sites/production/files/2016-05/documents/fact_sheet_assurance_provisions_0.pdf* and in the docket for this action.

[11] *See* 83 FR at 43594–95 (citing 77 FR 33642 (June 7, 2012)).

[12] *See* Technical Support Document for Demonstration of the Transport Rule as a BART Alternative, Docket ID No. EPA–HQ–OAR–2011–0729–0014 (December 2011), available in the docket for this action, at table 2–4.

[13] *See* Sensitivity Analysis Accounting for Increases in Texas and Georgia Transport Rule State Emissions Budgets, Docket ID No. EPA–HQ–OAR–2011–0729–0323 (May 29, 2012), available in the docket for this action.

[14] 83 FR at 43595.

[15] *Id.* at 43598.

[16] *Id.* at 43602.

that program is significantly constrained by the program's assurance provisions.

Although assurance levels in the CSAPR program were, as discussed above, originally implemented to meet requirements relevant to interstate transport under the good neighbor provision, this feature of the program was also relevant to the BART-alternative analysis for CSAPR because the presence of the three-for-one penalty provision established a practical upper bound on each state's emissions in each year of the program. This informed the level of emissions EPA could project with confidence under the CSAPR program when determining whether it could serve as a BART alternative. EPA recognizes that, in the absence of an assurance level for the Texas SO_2 Trading Program, there are no analogous means of guaranteeing that emissions would remain below a certain amount on an annual basis. The resulting growth in the number of allowances available for use in future years, without some constraint on annual emissions, could in theory impact the stringency of the program in terms of annual emissions for purposes of the BART-alternative analysis.

Therefore, EPA is proposing to add an assurance level to the Texas SO_2 Trading Program. EPA is proposing to set the assurance level using the same methodology applied in the original CSAPR rulemaking.[17] There, for each state covered by a given CSAPR program, EPA analyzed the historical year-to-year variability in the total annual quantity of fossil fuel consumed to generate electricity in the state. From this analysis, EPA developed for each state a statistical percentage measure representing, at a 95% confidence level, the maximum expected one-year deviation from average annual fossil fuel consumption for electricity generation. EPA used the highest of these state-specific statistical percentage measures for any state covered by a given CSAPR program to define ''variability limits'' for all the states covered by the program, where each state's variability limit was computed as that specific state's emissions budget multiplied by the highest of the state-specific statistical percentage measures for all the states in the program. EPA proposes here to set the assurance level for the Texas SO_2 Trading Program by relying on the same analysis and methodology that were used to set assurance levels in the original CSAPR rulemaking. This approach maintains consistency with the methodology used for the CSAPR programs while accounting for the fact that the Texas SO_2 Trading Program is intrastate-only (*i.e.,* does not permit interstate trading). On a state-specific basis for Texas, EPA determined in the CSAPR rulemaking that the statistical percentage measure representing the maximum expected one-year deviation from the state's average annual fossil fuel consumption for electricity generation was seven percent.[18] Applying that same percentage to the current Texas SO_2 Trading Program budget, EPA proposes to set the variability limit for Texas at 16,688 tons, which is seven percent of the trading budget of 238,393 tons. The proposed assurance level is the sum of the budget and the variability limit, or 255,081 tons. EPA proposes to amend the Texas SO_2 Trading Program's regulations to impose a penalty surrender ratio of three allowances for each ton of emissions in any year in excess of the 255,081-ton assurance level, and to impose the penalty proportionately to emissions from those groups of sources represented by a common designated representative that emit in excess of the groups' annual allocations of allowances. These requirements are in nearly all respects identical to the CSAPR program's assurance provisions. The specific amendments to the regulatory text are described in more detail below.

In addition to being consistent with the original CSAPR methodology for setting assurance levels, EPA also believes that an assurance level set at 255,081 is appropriate for the Texas SO_2 Trading Program because, if finalized, it will provide further support for our October 2017 finding that the Texas SO_2 Trading Program will result in SO_2 emission levels from Texas EGUs that are similar to or less than the emission levels from Texas EGUs that would have been realized from participation in the SO_2 trading program under CSAPR. At an assurance level of 255,081 tons of emissions annually, EPA has high confidence that emissions will be below the amount assumed in the BART-alternative sensitivity analysis utilized for the 2012 CSAPR-better-than-BART determination (*i.e.,* 317,100 tons), and thus visibility levels at Class I areas impacted by sources in Texas are anticipated to be at least as good as the levels projected in the 2012 analysis that assumed Texas would be in the larger CSAPR SO_2 trading program.[19] In reaching that conclusion, EPA includes in its analysis a reasonable estimate of projected emissions from units that would have been in the CSAPR program, but are not in the Texas SO_2 Trading Program. EPA proposes to use a more conservative (*i.e.,* higher) estimate of these emissions than in its August 2018 proposal. We propose to assume that these units will emit 35,000 tons of SO_2 annually based on a maximum annual emission level of 34,129 tons over the past five years (2014–2018) and considering that several of these units have recently shut down or have been announced for shutdown in the near future.[20] Adding that amount to the assurance level of 255,081 tons yields 290,081 tons. Assuming this figure represents a firm upper bound on annual SO_2 emissions from the relevant EGUs in Texas, this is less than the 317,100 ton figure EPA had demonstrated was acceptable in the original 2012 CSAPR analysis, as discussed above and in the August 2018 proposal.[21] We note that, as demonstrated in Table 1, SO_2 emissions from power plants in Texas are currently well below the Texas SO_2 Trading Program budget of 238,293 tons (as well as the proposed assurance level of 255,081 tons) and are anticipated to continue to decrease due to the low cost of natural gas and increasing renewable energy production.[22]

[17] *See* Power Sector Variability Final Rule TSD (July 2011), available at *https://www.epa.gov/csapr/power-sector-variability-final-rule-tsd* and in the docket for this action.

[18] *Id.*

[19] Two organizations have filed a petition for reconsideration of EPA's September 29, 2017 determination that CSAPR continues to satisfy the BART-alternative analysis under 40 CFR 51.308(e)(4) notwithstanding certain changes to the geographic scope of the program, including the removal of Texas from the CSAPR program for annual SO_2 and NOx emissions. *See* Sierra Club and National Parks Conservation Association, Petition for Partial Reconsideration of Interstate Transport of Fine Particulate Matter: Revision of Federal Implementation Plan Requirements for Texas, 82 FR 45481 (Sept. 29, 2017); EPA–HQ–OAR–2016–0598; FRL09968–46–OAR (dated Nov. 28, 2017). EPA is not proposing to address that determination through this action, and EPA is not addressing or revisiting the larger reaffirmation of the BART-alternative analysis for CSAPR at issue in that separate action taken in September 2017. EPA intends to take action at a later date responding to the petition for reconsideration in that matter.

[20] *See* ''Texas EGU SO_2 emissions, 2014–2018.xlsx'', available in the docket for this action. Sandow Station units 5A and 5B have been permanently retired. AEP has announced retirement of Oklaunion by September 2020. Gibbons Creek is currently not operating although it has not been officially retired.

[21] *See* ''Sensitivity Analysis Accounting for Increases—EPA–HQ–OAR–2011–0729–0323'' available in the docket for this action.

[22] *http://www.ercot.com/content/wcm/lists/144927/2018_LTSA_Report.pdf.*

TABLE 1—RECENT SO_2 EMISSIONS TRENDS IN TEXAS
[Tons]

	2014	2015	2016	2017	2018
Texas total EGU emissions	343,425	260,138	245,799	275,993	211,025
Participating sources' emissions	309,296	236,754	218,291	245,870	179,628
Non-participating sources' emissions	34,129	23,384	27,509	30,124	31,397

EPA also notes that the addition of an assurance level guaranteeing that SO_2 emissions can be expected to remain below a certain level each year has the effect of also addressing a number of other specific concerns about the Texas SO_2 Trading Program raised by commenters. In particular, to the extent that commenters claimed the program would be inadequately stringent due to the allowance allocation methodology, including allocations to retired units, or due to the Supplemental Allowance Pool or allowance banking, these concerns are effectively rendered moot by the addition of the assurance level. This is because when a mass-based trading program includes a ''cap'' on overall annual emissions, as the Texas SO_2 Trading Program would with the addition of the proposed assurance provisions, that overall ''cap'' on emissions set by the program (here, the assurance level) effectively determines the stringency of the program in each year. How allowances to emit are allocated annually within that overall cap, and whether allowances may be banked across years by certain market participants, will not impact the annual stringency of the program as a whole. Allocations to retired units and the availability of banking are important to ensure market stability, avoid perverse incentives, and potentially aid in sources' operational planning.[23] With the addition of an assurance level, the potential risk of an undue relaxation of the annual stringency in the program is minimized, because sources will remain strongly incentivized to keep annual emissions below the level at which the three-for-one surrender penalty is imposed. The effectiveness of assurance levels in guaranteeing the stringency of trading programs has been borne out in CSAPR, where no state's sources' emissions have exceeded a state's assurance level to-date.[24]

EPA requests comment on its proposal to add assurance provisions to the Texas SO_2 Trading Program. EPA also requests comment on its proposal to set the assurance level at 255,081 tons. The specific mechanics for the addition of this feature to the program are discussed in more detail below.

EPA proposes to make the assurance level effective beginning with the 2021 compliance period and for each period thereafter. The proposed assurance provisions would be implemented through the addition of new provisions at multiple locations in the Texas SO_2 Trading Program regulations at 40 CFR part 97, subpart FFFFF (40 CFR 97.901 through 97.935). In § 97.902, new definitions of several terms used in the assurance provisions (''assurance account,'' ''common designated representative,'' ''common designated representative's assurance level,'' and ''common designated representative's share'') would be added. New § 97.906(c)(2) and (c)(3)(ii) would set forth the central requirement of the assurance provisions—namely, that if SO_2 emissions from all covered sources in 2021 or any subsequent year collectively exceed the program's assurance level, then the owners and operators of the groups of sources determined to be responsible for the collective exceedance would be required to surrender allowances totaling twice the amount of the exceedance by a specified deadline, in addition to the allowances surrendered to account for the sources' total emissions. New § 97.910(b) and (c) would establish the variability limit that would be added to the trading program budget to determine the amount of the assurance level. New § 97.920(b) would provide for the establishment of assurance accounts, when appropriate, to hold the additional allowances to be surrendered. New § 97.925 would set forth additional procedures for EPA's administration of and sources' compliance with the assurance provisions.

Besides the addition of the new provisions just described, in §§ 97.906 and 97.920, several existing paragraphs would be renumbered and internal cross-references would be updated to reflect the added and renumbered paragraphs. Finally, revisions would be made to existing language at §§ 97.902 (definitions of ''general account'' and ''Texas SO_2 Trading Program allowance deduction''), 97.906(b)(2), 97.913(c), 97.926(b), 97.928(b), and renumbered 97.906(c)(4)(ii) to integrate the new assurance provisions with various existing provisions of the Texas program regulations.

The language of the proposed revisions to the Texas SO_2 Trading Program regulations would generally parallel the analogous language from the CSAPR regulations at 40 CFR part 97, subparts AAAAA through EEEEE, streamlined to reflect the Texas program's narrower applicability (*i.e.,* specific units located only in Texas, excluding any new units built either in Texas or in Indian country within Texas' borders). The only substantive differences from the analogous CSAPR assurance provisions concern the approach used to impute allocation amounts—for use in apportioning responsibility for any collective exceedance of the assurance level—to any units that do not receive actual allowance allocations from the trading program budget. Under CSAPR, the only units potentially in this situation are new units that do not receive allowance allocations from the CSAPR new unit set-asides, and the CSAPR regulations include a methodology for computing unit-specific imputed allocation amounts based on several data elements relating to the new units' design and potential operation.[25] In contrast, under the Texas SO_2 Trading Program, the only units potentially in this situation would be existing units that have ceased operation for an extended period, thereby losing their allocations from the trading budget under § 97.911(a), and that subsequently resume operation.[26]

[23] *See* CSAPR Update Final Rule, 81 FR 74506, 74559, 74566 (Oct. 26, 2016) (discussing rationales for these features in the context of the CSAPR Update ozone season NO_X trading program).

[24] *See* 2017 and 2018 CSAPR Budgets Emissions and Assurance Levels Spreadsheets, *available at* U.S. EPA, CSAPR Assurance Provision, *https://www.epa.gov/csapr/csapr-assurance-provision.* Copies of the spreadsheets, fact sheet, and web page are also provided in the docket for this action.

[25] *See, e.g.,* paragraph (3) of the definition of ''common designated representative's share'' at 40 CFR 97.702.

[26] Although the owners and operators of a unit in this situation might receive an allocation of allowances from the Supplemental Allowance Pool under § 97.912 based in part on the unit's emissions following resumption of operations, under the Texas program assurance provisions as proposed, any allocations of allowances from the Supplemental Allowance Pool would not be

Because the Texas SO_2 Trading Program regulations already identify the unit-specific allowance allocations that these units would formerly have received from the trading budget, the proposed Texas SO_2 Trading Program assurance provisions would use these previously established amounts for purposes of assurance provision calculations instead of requiring new imputed allocation amounts to be computed according to the more complex methodology in the CSAPR assurance provisions. The simpler approach proposed for the Texas SO_2 Trading Program assurance provisions appears at paragraph (2) of the proposed new definition of ''common designated representative's assurance level'' in § 97.902.

The simpler approach we are proposing for determining any imputed allocation amounts allows for some additional simplifications elsewhere in the proposed Texas SO_2 Trading Program assurance provisions. The CSAPR assurance provisions include regulatory text addressing the submission of data required to compute the imputed allocation amounts and the consequences of appeals relating to EPA's use of the data; the CSAPR provisions also call for issuance of an initial notice in advance of the required data submissions. Because under the proposed Texas SO_2 Trading Program assurance provisions the specific imputed allocation amounts would already be stated in the regulations, analogous provisions addressing data submissions and appeals are unnecessary and the contents of the initial notice can be consolidated into a later notice. Consequently, the corresponding paragraphs of the proposed Texas SO_2 Trading Program assurance provisions at proposed new § 97.925(b)(1)(ii), (b)(2)(i), and (b)(6)(ii) would contain no regulatory language and instead appear as ''reserved.''

2. Revision of Supplemental Allowance Pool Allocation Provisions

Section 97.912 of the existing Texas SO_2 Trading Program regulations establishes how allowances are allocated from the Supplemental Allowance Pool to sources (collections of participating units at a facility) that have reported total emissions for that control period exceeding the total amounts of allowances allocated to the participating units at the source for that control period (before any allocation from the Supplemental Allowance Pool). While all other sources required to participate in the trading program have flexibility to transfer allowances among multiple participating units under the same owner/operator when planning operations, Coleto Creek consists of only one coal-fired unit, and at the time of our October 2017 FIP, was the only coal-fired unit in Texas owned and operated by Dynegy. To provide this source additional flexibility, under the current program, Coleto Creek is allocated its maximum supplemental allocation from the Supplemental Allowance Pool as long as there are sufficient allowances in the Supplemental Allowance Pool available for allocation, and its actual allocation will not be reduced in proportion with any reductions made to the supplemental allocations to other sources. In our August 2018 proposal, we noted that Dynegy has merged with Vistra, which owns other units that are subject to the trading program. In the August 2018 proposal, we solicited comment on eliminating this additional flexibility for Coleto Creek in light of the recent change in ownership, and we received no adverse comments on such a change. In this SNPRM, we propose to make this change to the regulations.

Some commenters on the August 2018 proposal supported an analogous further change to the methodology for allocating allowances from the Supplemental Allowance Pool. These commenters observed that any owner with multiple sources has the ability to use surplus allowances allocated to one source to cover emissions from its other sources that exceed those other sources' base allowance allocations. Based on this observation, the commenters expressed the view that it would be more equitable to make allocations from the Supplemental Allowance Pool in proportion to each owner's total emissions in excess of the owner's total base allowance allocations instead of in proportion to each individual source's emissions in excess of the individual source's base allowance allocation. EPA agrees that this change would be equitable and notes that it would also be consistent with the rationale for eliminating the special flexibility in the existing regulations for Coleto Creek. Accordingly, EPA proposes to amend the Supplemental Allowance Pool allocation provisions to reflect this further change in the allocation methodology.

The proposed modifications to the methodology for allocating allowances from the Supplemental Allowance Pool would be implemented through several revisions to §§ 97.911 and 97.912. In § 97.912, paragraph (a) would be edited to limit applicability of the current allocation methodology to the 2019 and 2020 control periods, and a new paragraph (b) would be added setting forth the revised allocation methodology proposed for the control periods in 2021 and subsequent years. Two existing paragraphs of the section would be renumbered to accommodate the new paragraph (b), and internal cross-references would be updated to reflect the renumbering and to integrate the provisions of the revised allocation methodology with other existing provisions.

Proposed new § 97.912(b)(1) of the revised allocation methodology sets forth a procedure for assigning units into groups under common ownership called ''affiliated ownership groups.'' Under the proposed procedure, the group assignments would remain constant unless and until revised by EPA to reflect an ownership transfer. The proposed initial group assignments for all covered units are specified in a proposed new column that would be added to the existing allowance allocation table in § 97.911(a)(1).

Finally, consistent with the existing language in renumbered § 97.912(d) capping the number of allowances that can be allocated from the Supplemental Allowance Pool for any given control period, non-substantive revisions to §§ 97.911(a)(2) and (c)(5) would clarify that allowances from the trading budget that are transferred to the Supplemental Allowance Pool are not necessarily ''allocated under'' § 97.912, but instead are made available for ''potential allocation in accordance with'' § 97.912.

EPA requests comment on the proposed revisions to the Supplemental Allowance Pool allocation provisions.

3. Termination of Opt-In Provisions

Under § 97.904(b) of the existing Texas SO_2 Trading Program regulations, the EPA provided an opportunity for any other unit in the State of Texas that was previously subject to the CSAPR SO_2 Group 2 Trading Program and would have received an allowance allocation under that program to opt into the Texas SO_2 Trading Program. Under § 97.911(b), a unit that opts into the Texas SO_2 Trading Program would receive the same allowance allocation that it would have received under the CSAPR SO_2 Group 2 Trading Program. These allowance allocations would be in addition to the allocations to other units from the Texas SO_2 Trading Program budget and would therefore increase the total number of allowances available under the program. As of the date of this supplemental proposal, no source has notified EPA of intent to opt into the Texas SO_2 Trading Program.

considered when apportioning responsibility for a collective exceedance of the assurance level.

A commenter on the August 2018 proposal asserted that the opt-in provision weakened the functional equivalence of the Texas SO_2 Trading Program to CSAPR. The commenter cited EPA's determination not to include opt-in provisions in the CSAPR trading programs on the basis that opt-in provisions would undermine achievement of the CSAPR program's emission reduction objectives. The commenter also cited EPA's discussion of the reasons for this determination, including the difficulty of distinguishing new emission reductions from reductions that opt-in sources would have made anyway, and the consequent likelihood that the amounts of allowances allocated to the sources would exceed their starting emissions levels. The allocations to the sources opting in would thus introduce ''extra'' allowances into the CSAPR trading programs, increasing the quantity of allowances available to be traded to other sources and thereby decreasing the programs' stringency.[27] EPA believes that these considerations about potentially introducing ''extra'' allowances also apply to the current opt-in provisions in the Texas SO_2 Trading Program. Therefore, consistent with this supplemental proposal's overall objective of strengthening our finding that the Texas SO_2 Trading Program will result in SO_2 emission levels from Texas EGUs that are similar to or less than the emission levels from Texas EGUs that would have been realized from participation in the SO_2 trading program under CSAPR, EPA proposes to terminate the opt-in provisions in the Texas SO_2 Trading Program.

EPA requests comment on the proposed termination of the opt-in provisions. EPA also solicits comment as to what other relevant provisions in the Texas SO_2 Trading Program may offset the expressed concerns with the opt-in provisions.

The proposed termination of the opt-in provisions would be implemented through revisions in three locations. In § 97.904(b)(2), revised language would provide that the opportunity to participate in the Texas SO_2 Trading Program by opting in is available only for the 2019 and 2020 control periods. Revisions to §§ 97.911(b) and 97.921(d) would similarly provide that allowance allocations to opt-in units could be made and recorded only for the 2019 and 2020 control periods.

[27] *See generally* 76 FR at 48276.

4. Revision of Allowance Recordation Provisions

Under § 97.921(a) of the existing Texas SO_2 Trading Program regulations, ''[t]he Administrator may delay recordation of Texas SO_2 Trading Program allowances for the specified control periods if the State of Texas submits a SIP revision before the recordation deadline.'' Similarly, under § 97.921(b), ''[t]he Administrator may delay recordation of the Texas SO_2 Trading Program allowances for the applicable control periods if the State of Texas submits a SIP revision by May 1 of the year of the applicable recordation deadline under this paragraph.'' In this SNPRM, we are proposing to amend the language in the recordation provisions such that the Administrator can delay recordation in the event that Texas submits a SIP revision *and EPA takes final action to approve it.* These revisions are necessary to ensure that the program remains fully operational unless it is replaced by a SIP revision that is approved by EPA as meeting the SO_2 BART requirements for the covered units.

The proposed amendment to condition any exceptions to scheduled allowance recordation activities on EPA's approval, rather than Texas' submission, of a SIP revision would be implemented through revisions to three paragraphs of § 97.921. In § 97.921(a), the existing language providing for a possible delay of recordation activities scheduled for November 1, 2018, would be deleted without replacement; the language is moot because the recordation date has already passed. In § 97.921(b), which governs future recordation of allowances allocated from the trading budget under § 97.911(a), the existing language would be revised to provide that future recordation activities will take place as scheduled unless provided otherwise in EPA's approval of a SIP revision replacing the provisions of subpart FFFFF. The same revised condition would also be added to § 97.921(c), which governs future recordation of allowances allocated from the Supplemental Allowance Pool under § 97.912.

EPA requests comment on the proposed revisions to the allowance recordation provisions.

B. Interstate Visibility Transport

In our August 2018 proposal, we proposed to affirm that Texas' participation in CSAPR to satisfy NOx BART and the Texas SO_2 Trading Program fully addresses Texas' interstate visibility transport obligations for the following six NAAQS: (1) 1997 8-hour ozone; (2) 1997 $PM_{2.5}$ (annual and 24-hour); (3) 2006 $PM_{2.5}$ (24-hour); (4) 2008 8-hour ozone; (5) 2010 1-hour NO_2; and (6) 2010 1-hour SO_2.[28] The basis of this proposed affirmation was our determination in the October 2017 FIP that the regional haze measures in place for Texas are adequate to ensure that emissions from the State do not interfere with measures to protect visibility in nearby states because the emission reductions are consistent with the level of emissions reductions relied upon by other states during consultation and when setting their reasonable progress goals. As discussed in our August 2018 proposal, the 2009 Texas Regional Haze SIP relied on CAIR to meet SO_2 and NO_X BART requirements for EGUs. Under CAIR, Texas EGU sources were projected to emit approximately 350,000 tons of SO_2 annually. In today's SNPRM, EPA proposes to make four revisions to strengthen the Texas SO_2 Trading Program and increase its consistency with CSAPR, including the addition of an assurance level consistent with the 2012 CSAPR demonstration. As discussed elsewhere in this SNPRM, Texas EGU annual SO_2 emissions for sources covered by the trading program would be constrained by the assurance level of 255,081 tons. Including an estimated 35,000 tons per year of emissions from units not covered by the Texas SO_2 Trading Program yields 290,081 tons of SO_2, well below the 350,000-ton emissions projection for Texas sources under CAIR or the 317,100-ton emissions benchmark for Texas sources under CSAPR discussed in section III.A.1. Additionally, the October 2017 FIP relies on CSAPR as an alternative to EGU BART for NO_X, which exceeds the NO_X emission reductions from Texas relied upon by other states during consultation. Because the proposed revisions to the Texas SO_2 Trading Program in this SNPRM would make the program consistent with or below those emission levels relied upon by other states during consultation, we believe these revisions provide further support for our earlier finding that the BART alternatives in the October 2017 FIP result in emission reductions adequate to satisfy the requirements of CAA section 110(a)(2)(D)(i)(II) with respect to visibility for the six identified NAAQS. We invite comment on how the proposed revisions in this SNPRM impact our August 2018 proposal to affirm our October 2017 determination regarding Texas' visibility transport

[28] 83 FR at 43593, 43604, and 43605.

obligations with respect to the NAAQS identified above.

IV. Supplemental Proposed Action

In this SNPRM, EPA proposes to make four sets of amendments to the Texas SO_2 Trading Program: (1) The addition of assurance-level provisions; (2) revisions to the Supplemental Allowance Pool allocation provisions; (3) termination of the opt-in provisions; and (4) revision of the allowance recordation provisions. The proposed changes to the Texas SO_2 Trading Program would be implemented through revisions to the existing regulations at 40 CFR part 97, subpart FFFFF. A redline/strike-out document showing subpart FFFFF with the proposed revisions has been added to the docket for this proposed action.

In this proposed action we are only soliciting comment on the four proposed revisions to the Texas SO_2 Trading Program, and how those proposed changes impact our August 2018 proposal to affirm that (1) the Texas SO_2 Trading Program will result in SO_2 emission levels from Texas EGUs that are similar to or less than the emission levels from Texas EGUs that would have been realized from participation in the SO_2 trading program under CSAPR, and (2) Texas' interstate visibility transport obligations with respect to six NAAQS (listed in the preceding section) are satisfied. The EPA is not reopening the comment period on any other aspect of the August 2018 proposal. The EPA will not respond to comments received during the reopened comment period outside the above-defined scope. We will respond to all comments received on this SNPRM and our August 2018 proposal to affirm our October 2017 FIP in a single final rulemaking.

V. Statutory and Executive Order Reviews

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

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

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This proposed action is not an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

C. Paperwork Reduction Act

This proposed action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities for the Texas SO_2 Trading Program as part of the most recent information collection request renewal for the CSAPR trading programs and has assigned OMB control number 2060–0667. This proposed action would not change any information collection requirements for any entity affected underthe Texas SO_2 Trading Program.

D. Regulatory Flexibility Act

I certify that this proposed action will not have a significant impact on a substantial number of small entities. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. This proposed rule does not impose any requirements or create impacts on small entities. This proposed action to modify a FIP action previously issued under Section 110 of the CAA will not create any new requirement with which small entities must comply. Accordingly, it affords no opportunity for the EPA to fashion for small entities less burdensome compliance or reporting requirements or timetables or exemptions from all or part of the rule. The fact that the CAA prescribes that various consequences (*e.g.*, emission limitations) may or will flow from this action does not mean that the EPA either can or must conduct a regulatory flexibility analysis for this action. We have therefore concluded that this proposed action will have no net regulatory burden for all directly regulated small entities.

E. Unfunded Mandates Reform Act (UMRA)

This proposed action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U. S. C. 1531–1538, and does not significantly or uniquely affect small governments.

F. Executive Order 13132: Federalism

This proposed action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

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

This proposed rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments. Thus, Executive Order 13175 does not apply to this rule.

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

Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks [29] applies to any rule that: (1) Is determined to be economically significant as defined under Executive Order 12866; and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. EPA interprets E.O. 13045 as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under Section 5–501 of the E.O. has the potential to influence the regulation. This proposed action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this proposed action present a disproportionate risk to children. This proposed action is not subject to E.O. 13045 because it implements specific standards established by Congress in statutes. However, to the extent this proposed rule will limit emissions of SO_2, the proposed rule will have a beneficial effect on children's health by reducing air pollution.

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

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

J. National Technology Transfer and Advancement Act (NTTAA)

This proposed action does not involve technical standards.

[29] 62 FR 19885 (Apr. 23, 1997).

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

The EPA believes that this proposed action does *not* have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). We have determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. The proposed rule limits emissions of SO_2 from certain facilities in Texas.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur dioxides, Visibility, Interstate transport of pollution, Regional haze, Best available retrofit technology.

40 CFR Part 97

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Reporting and recordkeeping requirements, Sulfur dioxides.

Dated: November 1, 2019.

David Gray,

Acting Regional Administrator, Region 6.

For the reasons stated in the preamble, Part 97 of chapter I of title 40 of the Code of Federal Regulations is proposed to be amended as follows:

PART 97—FEDERAL NO_X BUDGET TRADING PROGRAM, CAIR NO_X AND SO_2 TRADING PROGRAMS, CSAPR NO_X AND SO_2 TRADING PROGRAMS, AND TEXAS SO_2 TRADING PROGRAM

■ 1. The authority citation for Part 97 is revised to read as follows:

Authority: 42 U. S. C. 7401, 7403, 7410, 7426, 7491, 7601, and 7651, *et seq.*

Subpart FFFFF—TEXAS SO_2 TRADING PROGRAM

■ 2. Section 97.902 is amended by:

■ a. In the definitions of ''Acid Rain Program'', ''Allowance Management System'', and ''Allowance Management System account'', capitalizing the first three words;

■ b. Adding in alphabetical order a definition of ''Assurance account'';

■ c. In the definition of ''authorized account representative'', capitalizing the word ''trading'' the first time it appears;

■ d. Adding in alphabetical order definitions of ''Common designated representative'', ''Common designated representative's assurance level'', and ''Common designated representative's share''; and

■ e. Revising the definitions of ''General account'' and ''Texas SO_2 Trading Program allowance deduction''.

The additions and revisions read as follows:

§ 97.902 Definitions.

* * * * *

Assurance account means an Allowance Management System account, established by the Administrator under § 97.925(b)(3) for certain owners and operators of a group of one or more Texas SO_2 Trading Program sources and units, in which are held Texas SO_2 Trading Program allowances available for use for a control period in a given year in complying with the Texas SO_2 Trading Program assurance provisions in accordance with §§ 97.906 and 97.925.

* * * * *

Common designated representative means, with regard to a control period in a given year, a designated representative where, as of April 1 immediately after the allowance transfer deadline for such control period, the same natural person is authorized under §§ 97.913(a) and 97.915(a) as the designated representative for a group of one or more Texas SO_2 Trading Program sources and units.

Common designated representative's assurance level means, with regard to a specific common designated representative and control period in a given year for which the State assurance level is exceeded as described in § 97.906(c)(2)(iii):

(1) The amount (rounded to the nearest allowance) equal to the sum of the total amount of Texas SO_2 Trading Program allowances allocated for such control period under § 97.911, or deemed to have been allocated under paragraph (2) of this definition, to the group of one or more Texas SO_2 Trading Program units having the common designated representative for such control period multiplied by the sum for such control period of the Texas SO_2 Trading Program budget under § 97.910(a)(1) and the variability limit under § 97.910(b) and divided by the sum of the total amount of Texas SO_2 Trading Program allowances allocated for such control period under § 97.911, or deemed to have been allocated under paragraph (2) of this definition, to all Texas SO_2 Trading Program units;

(2) Provided that, in the case of a Texas SO_2 Trading Program unit that operates during, but has no amount of Texas SO_2 Trading Program allowances allocated under § 97.911 for, such control period, the unit shall be treated, solely for purposes of this definition, as being allocated the amount of Texas SO_2 Trading Program allowances shown for the unit in § 97.911(a)(1).

Common designated representative's share means, with regard to a specific common designated representative for a control period in a given year and the total amount of SO_2 emissions from all Texas SO_2 Trading Program units during such control period, the total tonnage of SO_2 emissions during such control period from the group of one or more Texas SO_2 Trading Program units having the common designated representative for such control period.

* * * * *

General account means an Allowance Management System account, established under this subpart, that is not a compliance account or an assurance account.

* * * * *

Texas SO_2 Trading Program allowance deduction or *deduct Texas SO_2 Trading Program allowances* means the permanent withdrawal of Texas SO_2 Trading Program allowances by the Administrator from a compliance account (*e.g.,* in order to account for compliance with the Texas SO_2 Trading Program emissions limitation) or from an assurance account (*e.g.,* in order to account for compliance with the assurance provisions under §§ 97.906 and 97.925).

* * * * *

§ 97.904 [Amended]

■ 3. Section 97.904 is amended in paragraph (b)(2) by removing the text ''Program, provided'' and adding in its place the text ''Program for the control periods in years before 2021, provided''.

■ 4. Section 97.906 is amended by:

■ a. In paragraph (b)(2), adding after the text ''emissions limitation'' the text ''and assurance provisions'';

■ b. Redesignating paragraphs (c)(2) through (6) as paragraphs (c)(3) through (7) and adding a new paragraph (c)(2);

■ c. Redesignating the text of newly redesignated paragraph (c)(3) after the paragraph heading as paragraph (c)(3)(i) and adding a new paragraph (c)(3)(ii);

■ d. In newly redesignated paragraph (c)(4)(ii), removing the text "paragraph (c)(1)(ii)(A)" and adding in its place the text "paragraphs (c)(1)(ii)(A) and (c)(2)(i) through (iii)".

The additions read as follows:

§ 97.906 General provisions.

* * * * *

(c) * * *

(2) *Texas SO_2 Trading Program assurance provisions.* (i) If total SO_2 emissions during a control period in a given year from all Texas SO_2 Trading Program units at Texas SO_2 Trading Program sources exceed the State assurance level, then the owners and operators of such sources and units in each group of one or more sources and units having a common designated representative for such control period, where the common designated representative's share of such SO_2 emissions during such control period exceeds the common designated representative's assurance level for such control period, shall hold (in the assurance account established for the owners and operators of such group) Texas SO_2 Trading Program allowances available for deduction for such control period under § 97.925(a) in an amount equal to two times the product (rounded to the nearest whole number), as determined by the Administrator in accordance with § 97.925(b), of multiplying—

(A) The quotient of the amount by which the common designated representative's share of such SO_2 emissions exceeds the common designated representative's assurance level divided by the sum of the amounts, determined for all common designated representatives for such sources and units for such control period, by which each common designated representative's share of such SO_2 emissions exceeds the respective common designated representative's assurance level; and

(B) The amount by which total SO_2 emissions from all Texas SO_2 Trading Program units at Texas SO_2 Trading Program sources for such control period exceed the State assurance level.

(ii) The owners and operators shall hold the Texas SO_2 Trading Program allowances required under paragraph (c)(2)(i) of this section, as of midnight of November 1 (if it is a business day), or midnight of the first business day thereafter (if November 1 is not a business day), immediately after the year of such control period.

(iii) Total SO_2 emissions from all Texas SO_2 Trading Program units at Texas SO_2 Trading Program sources during a control period in a given year exceed the State assurance level if such total SO_2 emissions exceed the sum, for such control period, of the Texas SO_2 Trading Program budget under § 97.910(a)(1) and the variability limit under § 97.910(b).

(iv) It shall not be a violation of this subpart or of the Clean Air Act if total SO_2 emissions from all Texas SO_2 Trading Program units at Texas SO_2 Trading Program sources during a control period exceed the State assurance level or if a common designated representative's share of total SO_2 emissions from the Texas SO_2 Trading Program units at Texas SO_2 Trading Program sources during a control period exceeds the common designated representative's assurance level.

(v) To the extent the owners and operators fail to hold Texas SO_2 Trading Program allowances for a control period in a given year in accordance with paragraphs (c)(2)(i) through (iii) of this section,

(A) The owners and operators shall pay any fine, penalty, or assessment or comply with any other remedy imposed under the Clean Air Act; and

(B) Each Texas SO_2 Trading Program allowance that the owners and operators fail to hold for such control period in accordance with paragraphs (c)(2)(i) through (iii) of this section and each day of such control period shall constitute a separate violation of this subpart and the Clean Air Act.

(3) * * *

(ii) A Texas SO_2 Trading Program unit shall be subject to the requirements under paragraph (c)(2) of this section for the control period starting on January 1, 2021 and for each control period thereafter.

* * * * *

■ 5. Section 97.910 is amended by:

■ a. Revising the section heading; and

■ b. Adding paragraphs (b) and (c).

The revision and additions read as follows:

§ 97.910 Texas SO_2 Trading Program budget, Supplemental Allowance Pool budget, and variability limit.

* * * * *

(b) The variability limit for the Texas SO_2 Trading Program budget for the control periods in 2021 and thereafter is 16,688 tons.

(c) The Texas SO_2 Trading Program budget in paragraph (a)(1) of this section does not include any tons in the Supplemental Allowance Pool budget in paragraph (a)(2) of this section or the variability limit in paragraph (b) of this section.

■ 6. Section 97.911 is amended by:

■ a. Revising paragraph (a)(1);

■ b. In paragraph (a)(2), removing the text "allocated under the Texas Supplemental Allowance Pool under 40 CFR 97.912." and adding in its place the text "transferred to the Texas Supplemental Allowance Pool for potential allocation in accordance with § 97.912.";

■ c. In paragraph (b)(1), removing the text "SO_2 allocation" and adding in its place the text "allocation", and adding after the text "each year" the text "before 2021"; and

■ d. In paragraph (c)(5), removing the text "under 40 CFR 97.912." and adding in its place the text "for potential allocation in accordance with § 97.912.".

The revision reads as follows:

§ 97.911 Texas SO_2 Trading Program allowance allocations.

(a)(1) Except as provided in paragraph (a)(2) of this section, Texas SO_2 Trading Program allowances from the Texas SO_2 Trading Program budget will be allocated, for the control periods in 2019 and each year thereafter, as provided in Table 1 to this paragraph (a)(1):

TABLE 1 TO PARAGRAPH (a)(1)—TEXAS SO_2 TRADING PROGRAM ALLOCATIONS

Texas SO_2 trading program units	ORIS code	Texas SO_2 trading program allocation (tons)	Affiliated ownership group
Big Brown Unit 1	3497	8,473	Vistra Energy.
Big Brown Unit 2	3497	8,559	Vistra Energy.
Coleto Creek Unit 1	6178	9,057	Vistra Energy.
Fayette/Sam Seymour Unit 1	6179	7,979	Lower Colorado River Authority/City of Austin.
Fayette/Sam Seymour Unit 2	6179	8,019	Lower Colorado River Authority/City of Austin.

TABLE 1 TO PARAGRAPH (a)(1)—TEXAS SO_2 TRADING PROGRAM ALLOCATIONS—Continued

Texas SO_2 trading program units	ORIS code	Texas SO_2 trading program allocation (tons)	Affiliated ownership group
Graham Unit 2	3490	226	Vistra Energy.
H W Pirkey Power Plant Unit 1	7902	8,882	American Electric Power.
Harrington Unit 061B	6193	5,361	Xcel Energy.
Harrington Unit 062B	6193	5,255	Xcel Energy.
Harrington Unit 063B	6193	5,055	Xcel Energy.
JT Deely Unit 1	6181	6,170	City of San Antonio.
JT Deely Unit 2	6181	6,082	City of San Antonio.
Limestone Unit 1	298	12,081	NRG Energy.
Limestone Unit 2	298	12,293	NRG Energy.
Martin Lake Unit 1	6146	12,024	Vistra Energy.
Martin Lake Unit 2	6146	11,580	Vistra Energy.
Martin Lake Unit 3	6146	12,236	Vistra Energy.
Monticello Unit 1	6147	8,598	Vistra Energy.
Monticello Unit 2	6147	8,795	Vistra Energy.
Monticello Unit 3	6147	12,216	Vistra Energy.
Newman Unit 2	3456	1	El Paso Electric.
Newman Unit 3	3456	1	El Paso Electric.
Newman Unit 4	3456	2	El Paso Electric.
Sandow Unit 4	6648	8,370	Vistra Energy.
Sommers Unit 1	3611	55	City of San Antonio.
Sommers Unit 2	3611	7	City of San Antonio.
Stryker Unit ST2	3504	145	Vistra Energy.
Tolk Station Unit 171B	6194	6,900	Xcel Energy.
Tolk Station Unit 172B	6194	7,062	Xcel Energy.
WA Parish Unit WAP4	3470	3	NRG Energy.
WA Parish Unit WAP5	3470	9,580	NRG Energy.
WA Parish Unit WAP6	3470	8,900	NRG Energy.
WA Parish Unit WAP7	3470	7,653	NRG Energy.
Welsh Power Plant Unit 1	6139	6,496	American Electric Power.
Welsh Power Plant Unit 2	6139	7,050	American Electric Power.
Welsh Power Plant Unit 3	6139	7,208	American Electric Power.
Wilkes Unit 1	3478	14	American Electric Power.
Wilkes Unit 2	3478	2	American Electric Power.
Wilkes Unit 3	3478	3	American Electric Power.

* * * * *

■ 7. Section 97.912 is amended by:

■ a. In paragraph (a) introductory text, removing the text ''each control period in 2019 and thereafter,'' and adding in its place the text ''the control periods in 2019 and 2020,'';

■ b. In paragraph (a)(1), removing the text ''each subsequent February 15,'' and adding in its place the text ''February 15, 2021,'';

■ c. In paragraph (a)(3)(ii)(A), removing the text ''paragraph (b)'' and adding in its place the text ''paragraph (d)'';

■ d. In paragraph (a)(3)(ii)(B), removing the text ''paragraph (b)'' wherever it appears and adding in its place the text ''paragraph (d)'';

■ e. In paragraph (a)(3)(iii), removing the text ''paragraph (b)'' and adding in its place the text ''paragraph (d)'';

■ f. Redesignating paragraphs (a)(4) and (b) as paragraphs (c) and (d) and adding a new paragraph (b); and

■ g. In newly redesignated paragraph (d), adding after the text ''paragraph (a)(3)(iii)'' the text ''or (b)(4)(ii)''.

The addition reads as follows:

§ 97.912 Texas SO_2 Trading Program Supplemental Allowance Pool.

* * * * *

(b) For each control period in 2021 and thereafter, the Administrator will allocate Texas SO_2 Trading Program allowances from the Texas SO_2 Trading Program Supplemental Allowance Pool as follows:

(1) For each control period, the Administrator will assign each Texas SO_2 Trading Program unit to an affiliated ownership group reflecting the unit's ownership as of December 31 of the control period. The affiliated ownership group assignments for each control period will be as shown in § 97.911(a)(1) except that the Administrator will revise the assignments, based on the information required to be submitted in accordance with § 97.915(c) and any other information available to the Administrator, as necessary to reflect any ownership transfer resulting in a 50% or greater ownership share of a unit being held by a new owner that the Administrator determines is not affiliated with the previous holder of a 50% or greater ownership share of the unit.

(2) No later than February 15, 2022 and each subsequent February 15, the Administrator will review all the quarterly SO_2 emissions reports provided under § 97.934(d) for each Texas SO_2 Trading Program unit for the previous control period. The Administrator will identify each affiliated ownership group of Texas SO_2 Trading Program units as of December 31 of such control period for which the total amount of emissions reported for the units in the group for that control period exceeds the total amount of allowances allocated to the units in the group for that control period under § 97.911.

(3) For each affiliated ownership group of Texas SO_2 Trading Program units identified under paragraph (b)(2) of this section, the Administrator will calculate the amount by which the total amount of reported emissions for that control period exceeds the total amount

of allowances allocated for that control period under § 97.911.

(4)(i) The Administrator will allocate and record allowances from the Supplemental Allowance Pool as follows:

(A) If the total for all such affiliated ownership groups of the amounts calculated under paragraph (b)(3) of this section is less than or equal to the total number of allowances in the Supplemental Allowance Pool available for allocation under paragraph (d) of this section, then the Administrator will allocate and record in the compliance accounts for the sources at which the units in each such group are located a total amount of allowances from the Supplemental Allowance Pool equal to the amount calculated for the group under paragraph (b)(3) of this section.

(B) If the total for all such affiliated ownership groups of the amounts calculated under paragraph (b)(3) of this section is greater than the total number of allowances in the Supplemental Allowance Pool available for allocation under paragraph (d) of this section, then the Administrator will calculate each such group's allocation of allowances from the Supplemental Allowance Pool by dividing the amount calculated under paragraph (b)(3) of this section for the group by the sum of the amounts calculated under paragraph (b)(3) of this section for all such groups, then multiplying by the number of allowances in the Supplemental Allowance Pool available for allocation under paragraph (d) of this section and rounding to the nearest allowance. The Administrator will then record the calculated allocations of allowances in the applicable compliance accounts.

(C) When an affiliated ownership group receives an allocation of allowances under paragraph (b)(4)(i)(A) or (B) of this section, each unit in the group whose emissions during the control period for which allowances are being allocated exceed the amount of allowances allocated to the unit under § 97.911 will receive a share of the group's allocation. The Administrator will compute each such unit's share by dividing the amount of the unit's emissions during the control period exceeding the unit's allocation under § 97.911 by the sum for all such units of the amounts of the units' emissions during the control period exceeding the units' allocations under § 97.911, then multiplying by the group's allocation under paragraph (b)(4)(i)(A) or (B) of this section and rounding to the nearest allowance.

(ii) Any unallocated allowances remaining in the Supplemental Allowance Pool after the allocations determined under paragraph (b)(4)(i) of this section will be maintained in the Supplemental Allowance Pool. These allowances will be available for allocation by the Administrator in subsequent control periods to the extent consistent with paragraph (d) of this section.

* * * * *

■ 8. Section 97.913 is amended by revising paragraph (c) to read as follows:

§ 97.913 Authorization of designated representative and alternate designated representative.

* * * * *

(c) Except in this section, § 97.902, and §§ 97.914 through 97.918, whenever the term ''designated representative'' (as distinguished from the term ''common designated representative'') is used in this subpart, the term shall be construed to include the designated representative or any alternate designated representative.

■ 9. Section 97.920 is amended by:

■ a. Revising the section heading;

■ b. Redesignating paragraphs (b) through (d) as paragraphs (c) through (e) and adding a new paragraph (b);

■ c. In newly redesignated paragraph (c)(2)(i) introductory text, removing the text ''paragraph (b)(1)'' and adding in its place the text ''paragraph (c)(1)'';

■ d. In newly redesignated paragraph (c)(2)(ii), removing the text ''paragraph (b)(5)'' and adding in its place the text ''paragraph (c)(5)'';

■ e. In newly redesignated paragraphs (c)(3)(i) and (ii), removing the text ''paragraph (b)(1)'' and adding in its place the text ''paragraph (c)(1)'';

■ f. In newly redesignated paragraph (c)(4)(i), removing the text ''paragraph (b)(1)'' wherever it appears and adding in its place the text ''paragraph (c)(1)'';

■ g. In newly redesignated paragraph (c)(4)(ii), removing the text ''paragraph (b)(4)(i)'' and adding in its place text ''paragraph (c)(4)(i)'';

■ h. In newly redesignated paragraph (c)(5)(iii) introductory text and paragraph (c)(5)(iii)(C), removing the text ''paragraph (b)(5)(i)'' and adding in its place the text ''paragraph (c)(5)(i)'';

■ i. In newly redesignated paragraph (c)(5)(iii)(D), removing the text ''97.920(b)(5)(iv)'' and adding in its place the text ''97.920(c)(5)(iv)'';

■ j. In newly redesignated paragraph (c)(5)(iii)(E), removing the text ''97.920(b)(5)(iv),'' and adding in its place the text ''97.920(c)(5)(iv),'', and removing the text ''97.920(b)(5)'' and adding in its place the text ''97.920(c)(5)'';

■ k. In newly redesignated paragraph (c)(5)(iv), removing the text ''paragraph (b)(5)(iii)'' and adding in its place the text ''paragraph (c)(5)(iii)'';

■ l. In newly redesignated paragraph (c)(5)(v), removing the text ''paragraph (b)(5)(iii)(D)'' and adding in its place the text ''paragraph (c)(5)(iii)(D)'', and removing the text ''paragraph (b)(5)(iv)'' and adding in its place the text ''paragraph (c)(5)(iv)'';

■ m. In newly redesignated paragraph (d), removing the text ''paragraphs (a) and (b)'' and adding in its place the text ''paragraphs (a), (b), and (c)''; and

■ n. In newly redesignated paragraph (e), removing the text ''paragraphs (b)(2)(ii) and (b)(5)'' and adding in its place the text ''paragraphs (c)(2)(ii) and (c)(5)''.

The revision and addition read as follows:

§ 97.920 Establishment of compliance accounts, assurance accounts, and general accounts.

* * * * *

(b) *Assurance accounts.* The Administrator will establish assurance accounts for certain owners and operators and States in accordance with § 97.925(b)(3).

* * * * *

■ 10. Section 97.921 is amended by:

■ a. In paragraph (a), removing the second sentence;

■ b. Revising paragraphs (b) and (c); and

■ c. In paragraph (d), removing the text ''July 1 of each year thereafter,'' and adding in its place the text ''July 1, 2020,''.

The revision reads as follows:

§ 97.921 Recordation of Texas SO_2 Trading Program allowance allocations.

* * * * *

(b) By July 1, 2019, the Administrator will record in each Texas SO_2 Trading Program source's compliance account the Texas SO_2 Trading Program allowances allocated to the Texas SO_2 Trading Program units at the source in accordance with § 97.911(a) for the control period in the fourth year after the year of the applicable recordation deadline under this paragraph, unless provided otherwise in the Administrator's approval of a SIP revision replacing the provisions of this subpart.

(c) By February 15, 2020, and February 15 of each year thereafter, the Administrator will record in each Texas SO_2 Trading Program source's compliance account the allowances allocated from the Texas SO_2 Trading Program Supplemental Allowance Pool in accordance with § 97.912 for the control period in the year of the applicable recordation deadline under this paragraph, unless provided otherwise in the Administrator's approval of a SIP revision replacing the provisions of this subpart.

* * * * *

■ 11. Section 97.925 is added to read as follows:

§ 97.925 Compliance with Texas SO_2 Trading Program assurance provisions.

(a) *Availability for deduction.* Texas SO_2 Trading Program allowances are available to be deducted for compliance with the Texas SO_2 Trading Program assurance provisions for a control period in a given year by the owners and operators of a group of one or more Texas SO_2 Trading Program sources and units only if the Texas SO_2 Trading Program allowances:

(1) Were allocated for a control period in a prior year or the control period in the given year or in the immediately following year; and

(2) Are held in the assurance account, established by the Administrator for such owners and operators of such group of Texas SO_2 Trading Program sources and units under paragraph (b)(3) of this section, as of the deadline established in paragraph (b)(4) of this section.

(b) *Deductions for compliance.* The Administrator will deduct Texas SO_2 Trading Program allowances available under paragraph (a) of this section for compliance with the Texas SO_2 Trading Program assurance provisions for a control period in a given year in accordance with the following procedures:

(1) By June 1, 2022 and June 1 of each year thereafter, the Administrator will:

(i) Calculate the total SO_2 emissions from all Texas SO_2 Trading Program units at Texas SO_2 Trading Program sources during the control period in the year before the year of this calculation deadline and the amount, if any, by which such total SO_2 emissions exceed the State assurance level as described in § 97.906(c)(2)(iii).

(ii) [Reserved]

(2) If the calculations under paragraph (b)(1)(i) of this section indicate that the total SO_2 emissions from all Texas SO_2 Trading Program units at Texas SO_2 Trading Program sources during such control period exceed the State assurance level as described in § 97.906(c)(2)(iii):

(i) [Reserved]

(ii) By August 1 immediately after the deadline for the calculations under paragraph (b)(1)(i) of this section, the Administrator will calculate, for such control period and each common designated representative for such control period for a group of one or more Texas SO_2 Trading Program sources and units, the common designated representative's share of the total SO_2 emissions from all Texas SO_2 Trading Program units at Texas SO_2 Trading Program sources, the common designated representative's assurance level, and the amount (if any) of Texas SO_2 Trading Program allowances that the owners and operators of such group of sources and units must hold in accordance with the calculation formula in § 97.906(c)(2)(i). By each such August 1, the Administrator will promulgate a notice of data availability of the results of the calculations under this paragraph and paragraph (b)(1)(i) of this section, including separate calculations of the SO_2 emissions from each Texas SO_2 Trading Program source.

(iii) The Administrator will provide an opportunity for submission of objections to the calculations referenced by the notice of data availability required in paragraph (b)(2)(ii) of this section.

(A) Objections shall be submitted by the deadline specified in such notice and shall be limited to addressing whether the calculations referenced in the notice required under paragraph (b)(2)(ii) of this section are in accordance with § 97.906(c)(2)(iii), §§ 97.906(b) and 97.930 through 97.935, the definitions of ''common designated representative'', ''common designated representative's assurance level'', and ''common designated representative's share'' in § 97.902, and the calculation formula in § 97.906(c)(2)(i).

(B) The Administrator will adjust the calculations to the extent necessary to ensure that they are in accordance with the provisions referenced in paragraph (b)(2)(iii)(A) of this section. By October 1 immediately after the promulgation of such notice, the Administrator will promulgate a notice of data availability of the calculations incorporating any adjustments that the Administrator determines to be necessary and the reasons for accepting or rejecting any objections submitted in accordance with paragraph (b)(2)(iii)(A) of this section.

(3) The Administrator will establish one assurance account for each set of owners and operators referenced, in the notice of data availability required under paragraph (b)(2)(iii)(B) of this section, as all of the owners and operators of a group of Texas SO_2 Trading Program sources and units having a common designated representative for such control period and as being required to hold Texas SO_2 Trading Program allowances.

(4)(i) As of midnight of November 1 immediately after the promulgation of each notice of data availability required in paragraph (b)(2)(iii)(B) of this section, the owners and operators described in paragraph (b)(3) of this section shall hold in the assurance account established for them and for the appropriate Texas SO_2 Trading Program sources and Texas SO_2 Trading Program units under paragraph (b)(3) of this section a total amount of Texas SO_2 Trading Program allowances, available for deduction under paragraph (a) of this section, equal to the amount such owners and operators are required to hold with regard to such sources and units as calculated by the Administrator and referenced in such notice.

(ii) Notwithstanding the allowance-holding deadline specified in paragraph (b)(4)(i) of this section, if November 1 is not a business day, then such allowance-holding deadline shall be midnight of the first business day thereafter.

(5) After November 1 (or the date described in paragraph (b)(4)(ii) of this section) immediately after the promulgation of each notice of data availability required in paragraph (b)(2)(iii)(B) of this section and after the recordation, in accordance with § 97.923, of Texas SO_2 Trading Program allowance transfers submitted by midnight of such date, the Administrator will determine whether the owners and operators described in paragraph (b)(3) of this section hold, in the assurance account for the appropriate Texas SO_2 Trading Program sources and Texas SO_2 Trading Program units established under paragraph (b)(3) of this section, the amount of Texas SO_2 Trading Program allowances available under paragraph (a) of this section that the owners and operators are required to hold with regard to such sources and units as calculated by the Administrator and referenced in the notice required in paragraph (b)(2)(iii)(B) of this section.

(6) Notwithstanding any other provision of this subpart and any revision, made by or submitted to the Administrator after the promulgation of the notice of data availability required in paragraph (b)(2)(iii)(B) of this section for a control period in a given year, of any data used in making the calculations referenced in such notice, the amounts of Texas SO_2 Trading Program allowances that the owners and operators are required to hold in accordance with § 97.906(c)(2)(i) for such control period shall continue to be such amounts as calculated by the Administrator and referenced in such notice required in paragraph (b)(2)(iii)(B) of this section, except as follows:

(i) If any such data are revised by the Administrator as a result of a decision in or settlement of litigation concerning such data on appeal under part 78 of this chapter of such notice, or on appeal under section 307 of the Clean Air Act of a decision rendered under part 78 of this chapter on appeal of such notice, then the Administrator will use the data as so revised to recalculate the amounts of Texas SO_2 Trading Program allowances that owners and operators are required to hold in accordance with the calculation formula in § 97.906(c)(2)(i) for such control period with regard to the Texas SO_2 Trading Program sources and Texas SO_2 Trading Program units involved, provided that such litigation under part 78 of this chapter, or the proceeding under part 78 of this chapter that resulted in the decision appealed in such litigation under section 307 of the Clean Air Act, was initiated no later than 30 days after promulgation of such notice required in paragraph (b)(2)(iii)(B) of this section.

(ii) [Reserved]

(iii) If the revised data are used to recalculate, in accordance with paragraph (b)(6)(i) of this section, the amount of Texas SO_2 Trading Program allowances that the owners and operators are required to hold for such control period with regard to the Texas SO_2 Trading Program sources and Texas SO_2 Trading Program units involved—

(A) Where the amount of Texas SO_2 Trading Program allowances that the owners and operators are required to hold increases as a result of the use of all such revised data, the Administrator will establish a new, reasonable deadline on which the owners and operators shall hold the additional amount of Texas SO_2 Trading Program allowances in the assurance account established by the Administrator for the appropriate Texas SO_2 Trading Program sources and Texas SO_2 Trading Program units under paragraph (b)(3) of this section. The owners' and operators' failure to hold such additional amount, as required, before the new deadline shall not be a violation of the Clean Air Act. The owners' and operators' failure to hold such additional amount, as required, as of the new deadline shall be a violation of the Clean Air Act. Each Texas SO_2 Trading Program allowance that the owners and operators fail to hold as required as of the new deadline, and each day in such control period, shall be a separate violation of the Clean Air Act.

(B) For the owners and operators for which the amount of Texas SO_2 Trading Program allowances required to be held decreases as a result of the use of all such revised data, the Administrator will record, in all accounts from which Texas SO_2 Trading Program allowances were transferred by such owners and operators for such control period to the assurance account established by the Administrator for the appropriate Texas SO_2 Trading Program sources and Texas SO_2 Trading Program units under paragraph (b)(3) of this section, a total amount of the Texas SO_2 Trading Program allowances held in such assurance account equal to the amount of the decrease. If Texas SO_2 Trading Program allowances were transferred to such assurance account from more than one account, the amount of Texas SO_2 Trading Program allowances recorded in each such transferor account will be in proportion to the percentage of the total amount of Texas SO_2 Trading Program allowances transferred to such assurance account for such control period from such transferor account.

(C) Each Texas SO_2 Trading Program allowance held under paragraph (b)(6)(iii)(A) of this section as a result of recalculation of requirements under the Texas SO_2 Trading Program assurance provisions for such control period must be a Texas SO_2 Trading Program allowance allocated for a control period in a year before or the year immediately following, or in the same year as, the year of such control period.

§ 97.926 [Amended]

■ 12. Amend § 97.926 paragraph (b) by adding after the text "§ 97.924," the text "§ 97.925,".

§ 97.928 [Amended]

■ 13. Amend § 97.928 paragraph (b) by removing the text "a compliance account," and adding in its place the text "a compliance account or an assurance account,".

§ 97.931 [Amended]

■ 14. Amend § 97.931 paragraph (d)(3) introductory text by removing after the text "is replaced by" the text "with".

[FR Doc. 2019–24286 Filed 11–13–19; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[WT Docket No. 02–55; FCC 19–108]

Improving Public Safety Communications in the 800 MHz Band

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document the Commission takes steps to streamline our rules and procedures to accelerate the successful conclusion of the Commission's 800 MHz band reconfiguration program, or rebanding. The document seeks comment on the proposed rule deletions.

DATES: Comments are due on or before December 16, 2019 and reply comments are due on or before December 30, 2019.

ADDRESSES: You may submit comments, identified by WT Docket No. 02–55, by any of the following methods:

- *Federal Communications Commission's website: http://fjallfoss.fcc.gov/ecfs2/.* Follow the instructions for submitting comments.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Roberto Mussenden, Policy and Licensing Division, Public Safety and Homeland Security Bureau, (202) 418–1428.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking in WT Docket No. 02–55, FCC 19–108, released on October 28, 2019. The complete text of this document is available for download at *http://fjallfoss.fcc.gov/edocs_public/.* The complete text of this document is also available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW, Room CY–A257, Washington, DC 20554. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *FCC504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

Synopsis

1. In the Notice of Proposed Rulemaking (*NPRM*), the Commission, recognizing that it has determined that Sprint did not reap an economic windfall from the spectrum award that Sprint received in exchange for undertaking the financial obligation to support 800 MHz rebanding, proposes eliminating the rule that requires an annual auditing of Sprint's rebanding expenditures by the 800 MHz Transition Administrator. The *NPRM* seeks comment on proposed procedures for eliminating the requirement that each rebanding agreement be reviewed and

approved by the 800 MHz Transition Administrator.

2. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments in WT Docket No. 02–55 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). *See 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.

• All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW, Room TW–A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.

• Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.

• U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW, Washington, DC 20554.

Accessible Formats: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

3. Commenters who file information that they believe should be withheld from public inspection may request confidential treatment pursuant to § 0.459 of the Commission's rules. Commenters should file both their original comments for which they request confidentiality and redacted comments, along with their request for confidential treatment. Commenters should not file proprietary information electronically. See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, Report and Order, 13 FCC Rcd 24816 (1998), Order on Reconsideration, 14 FCC Rcd 20128 (1999). Even if the Commission grants confidential treatment, information that does not fall within a specific exemption pursuant to the Freedom of Information Act (FOIA) must be publicly disclosed pursuant to an appropriate request. See 47 CFR 0.461; 5 U.S.C. 552. We note that the Commission may grant requests for confidential treatment either conditionally or unconditionally. As such, we note that the Commission has the discretion to release information on public interest grounds that does fall within the scope of a FOIA exemption.

4. 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 Section 1.1206(b). In proceedings governed by Section 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.

Procedural Matters

A. Initial Regulatory Flexibility Analysis

5. The Initial Regulatory Flexibility Analysis required by section 604 of the Regulatory Flexibility Act, 5 U.S.C. 604, is included in Appendix B of the *NPRM.*

6. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Notice of Proposed Rulemaking (*NPRM*). Written public comments are requested on this IRFA. Comments must be filed by the same dates as listed on the first page of the *NPRM* and must have a separate and distinct heading designating them as responses to this IRFA. 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**.

B. Need for, and Objectives of, the Proposed Rules

7. The Commission initiates this rulemaking proceeding to seek comment on certain proposals designed to improve the efficiency of the 800 MHz band reconfiguration process set out in the 800 MHz Report and Order, and to advance the conclusion the rebanding process. The Commission initiated the 800 MHz rebanding program to alleviate harmful interference to 800 MHz public safety radio systems caused by their proximity in the band to the 800 MHz commercial cellular system operated by Sprint Corporation (Sprint). To increase the spectral separation between Sprint and public safety, Sprint was required to relocate its system to spectrum at the upper end of the band and public safety licensees were relocated to the lower end of the band. Sprint was also required to pay the accumulated relocation costs of public safety licensees as well as its own relocation costs, and in exchange Sprint received a separate block of spectrum outside of the 800 MHz band from the Commission. At the outset of the rebanding program, the Commission

imposed an ''anti-windfall'' obligation on Sprint to ensure that Sprint did not reap an economic windfall from the spectrum award that Sprint received in exchange for undertaking the financial obligation to support 800 MHz rebanding.

8. In the Order the Commission eliminates certain obligations imposed on the 800 MHz Transition Administrator which are no longer necessary in light of the Public Safety and Homeland Security Bureau's order determining that Sprint no longer is responsible for making a windfall payment to the Treasury. The changes apply to 800 MHz licensees that either (a) have not completed the rebanding process; or (b) having completed the rebanding process have not fulfilled the contract-closing obligations imposed on them by the Commission's rules and their Frequency Reconfiguration Agreements (FRAs) with Sprint. The changes make relatively small adjustments to the policies that affect 800 MHz Private Land Mobile Radio (PLMR) licensees. Additionally, the changes will also apply to the 800 MHz Transition Administrator and Sprint, which as discussed below are not small entities for purposes of the RFA.

9. The Commission tentatively concludes that the changes proposed in the Sixth FNPRM are necessary to accelerate the conclusion of the rebanding proceeding initiated in 2002, thereby lessening the logistic and economic burdens that certain procedures impose on the Commission, the 800 MHz Transition Administrator and Sprint. The Commission's objectives are to improve the rebanding process now that certain procedures no longer are necessary and confer no benefit on the parties to 800 MHz rebanding.

C. Legal Basis

10. The proposed action is authorized under pursuant sections 4(i),4(j), 301, 303, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i),154(j), 301, 303, and 403.

D. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

11. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules. The RFA generally defines the term ''small entity'' as encompassing the terms ''small business,'' ''small organization,'' and ''small governmental entity.'' 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 Small Business Administration (SBA).

12. Small Businesses, Small Organizations, and Small Governmental Jurisdictions. Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the SBA's Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States which translates to 28.8 million businesses.

13. Next, the type of small entity described as a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' Nationwide, as of Aug 2016, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).

14. Finally, the small entity described as a ''small governmental jurisdiction'' is defined generally as ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' U.S. Census Bureau data from the 2012 Census of Governments indicates that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number there were 37,132 General purpose governments (county, municipal and town or township) with populations of less than 50,000 and 12,184 Special purpose governments (independent school districts and special districts) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category shows that the majority of these governments have populations of less than 50,000. Based on this data we estimate that at least 49,316 local government jurisdictions fall in the category of ''small governmental jurisdictions.''

15. Public Safety Radio Licensees. As a general matter, Public Safety Radio Pool licensees include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services. Because of the vast array of public safety licensees, the Commission has not developed a small business size standard specifically applicable to public safety licensees. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications. The appropriate size standard for this category under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more. Thus under this category and the associated size standard, the Commission estimates that the majority of firms can be considered small.

16. Private Land Mobile Radio Licensees. Private land mobile radio (PLMR) systems serve an essential role in a vast range of industrial, business, land transportation, and public safety activities. Companies of all sizes operating in all U.S. business categories use these radios. Because of the vast array of PLMR users, the Commission has not developed a small business size standard specifically applicable to PLMR users. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite) which encompasses business entities engaged in radiotelephone communications. The appropriate size standard for this category under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more. Thus under this category and the associated size standard, the Commission estimates that the majority of PLMR Licensees are small entities.

17. According to the Commission's records, a total of approximately 400,622 licenses comprise PLMR users. Of this number there are a total of approximately 3,174 PLMR licenses in the 4.9 GHz band; 29,187 PLMR licenses in the 800 MHz band; and 3,374 licenses in the frequencies range 173.225 MHz to 173.375 MHz. The Commission does not require PLMR licensees to disclose information about number of employees and does not have information that

could be used to determine how many PLMR licensees constitute small entities under this definition. The Commission however believes that a substantial number of PLMR licensees may be small entities despite the lack of specific information.

18. Specialized Mobile Radio Licenses. The Commission awards ''small entity'' bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years. The Commission awards ''very small entity'' bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years. The SBA has approved these small business size standards for the 900 MHz Service. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995 and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997 and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band. A second auction for the 800 MHz band conducted in 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.

19. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels was conducted in 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band and qualified as small businesses under the $15 million size standard. In an auction completed in 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded. Of the 22 winning bidders, 19 claimed small business status and won 129 licenses. Thus, combining all four auctions, 41 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small businesses.

20. In addition, there are numerous incumbent site-by-site SMR licenses and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. In addition, we do not know how many of these firms have 1,500 or fewer employees, which is the SBA-determined size standard. We assume, for purposes of this analysis, that all of the remaining extended implementation authorizations are held by small entities, as defined by the SBA.

21. Wireless Telecommunications Carriers (except Satellite). This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had employment of 999 or fewer employees and 12 had employment of 1000 employees or more. Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities.

22. The Commission's own data—available in its Universal Licensing System—indicate that, as of August 31, 2018 there are 265 Cellular licensees. The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services. Of this total, an estimated 261 have 1,500 or fewer employees, and 152 have more than 1,500 employees. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

23. The requirements that the Commission proposes to eliminate in the Sixth FNPRM will not impose new or additional reporting, recordkeeping, or other compliance obligations on a substantial number of small entities. Nor will small entities be required to hire attorneys, engineers, consultants, or other professionals to comply with the proposed rule change, if adopted. Small entities that are 800 MHz licensees participating in the rebanding program who have negotiated FRAs with Sprint will no longer be required to have any costs/payments covered in the FRA or in any FRA amendments pre-approved by the TA which should yield them the benefit of faster completion of their rebanding process requirement.

F. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

24. 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 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.

25. The *NPRM* is deregulatory in nature and will not have a significant economic impact on a substantial number of small entities. As mentioned above small entities should benefit the proposed rule elimination with faster completion of their rebanding process. Faster completion should result in cost savings for such entities. The alternative of continuing to require a pre-approval requirement which is no longer needed would impose unnecessary burdens on and would not further or facilitate prompt completion of the rebanding process. We note in the Sixth FNPRM that we will to continue to require 800 MHz licensees to get pre-approval from the TA for any non-payment related FRA amendments and to have the Bureau address any payment related issues that arise from FRA amendments. However, to assist in the Commission's evaluation of the economic impact on small entities, and to better explore options and alternatives, the Commission has sought comment from the parties on these matters. The Commission expects to more fully consider the economic impact and alternatives for small entities following the review of comments and recommendations filed in response to

the Sixth FNPRM. proposed rules will not affect any small entities.

G. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

26. None.

Procedural Matters

A. Paperwork Reduction Act of 1995 Analysis

27. The Notice of Proposed Rulemaking document does not contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13.

Ordering Clauses

28. Accordingly, *it is ordered* that, pursuant to sections 4(i), 4(j), 301, 303, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 301, 303, and 403,the Notice of Proposed Rulemaking *is hereby adopted.*

29. *It is further ordered* that pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on the *NPRM* on or before December 16, 2019 and reply comments on or before December 30, 2019.

List of Subjects in 47 CFR Part 90

Radio.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 90 as follows:

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

■ 1. The authority citation for part 90 continues to read as follows:

Authority: 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7), 1401–1473.

§ 90.676 [Amended]

■ 2. Amend § 90.676 by removing and reserving paragraph (b)(4).

[FR Doc. 2019–24670 Filed 11–13–19; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register

Vol. 84, No. 220

Thursday, November 14, 2019

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2019–0076]

Environmental Impact Statement for Predator Damage Management in Oregon

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service plans to prepare an environmental impact statement analyzing alternatives for predator damage management in Oregon.

FOR FURTHER INFORMATION CONTACT: Mr. Kevin Christensen, Assistant State Director, Wildlife Services, APHIS, USDA, 3414 Del Webb Ave, Salem, OR 97301; (503) 329–9819.

SUPPLEMENTARY INFORMATION: The Animal and Plant Health Inspection Service (APHIS) intends to prepare an environmental impact statement (EIS) to address alternatives for APHIS Wildlife Services' involvement in managing damage and threats to livestock and other domestic animals, agricultural resources, property, natural resources, and human health and safety associated with predators in Oregon. The scope of the EIS is intended to include management of damage and conflicts associated with coyotes, gray wolves, black bears, mountain lions, bobcats, red foxes, striped skunks, raccoons, badgers, Virginia opossum, feral and free-ranging dogs, feral and free-ranging cats, spotted skunks, gray fox, and weasels.

We anticipate initiating public scoping for the EIS in the spring of 2020. Once completed, the EIS will replace APHIS Wildlife Services' existing environmental assessments on predator and wolf damage management in Oregon.

To receive notices regarding this project or other Wildlife Services NEPA projects, please register at *https://public.govdelivery.com/accounts/USDAAPHIS/subscriber/new.*

Done in Washington, DC, this 7th day of November 2019.

Kevin Shea,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2019–24720 Filed 11–13–19; 8:45 am]

BILLING CODE 3410–34–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Florida 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 that the Florida Advisory Committee (Committee) will hold a meeting on Tuesday November 26, 2019, at 3:00 p.m. (Eastern) for the purpose of discussing next steps in hearing testimony regarding voting rights in Florida.

DATES: The meeting will be held on Tuesday November 26, 2019, from 3:00–4:30 p.m. Eastern.

Public Call Information: Dial: 800–353–6461, Conference ID: 8501912.

FOR FURTHER INFORMATION CONTACT: Melissa Wojnaroski, DFO, at *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 above listed toll-free call-in number. 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.

Written comments may be mailed to the Regional Program Unit Office, U.S. Commission on Civil Rights, 230 S Dearborn St., Suite 2120, Chicago, IL 60604. They may also be faxed to the Commission at (312) 353–8324 or may be emailed to Carolyn Allen at *callen@usccr.gov.* Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Florida Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Program Unit at the above email or street address.

Agenda

Welcome and Roll Call
Discussion: Voting Rights in Florida
Public Comment
Adjournment

Dated: November 7, 2019.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2019–24685 Filed 11–13–19; 8:45 am]

BILLING CODE 6335–01–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Washington 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 Washington Advisory Committee (Committee) will hold a series of meetings via teleconference on Monday December 2, 2019 from 12:30–1:30 p.m. Pacific Time, and Thursday December 19 from 1:30–2:30 p.m. Pacific Time, for the purpose of discussing the Committee's proposed forthcoming topic of study: Voting Rights in Washington.

DATES: The meetings will be held on

- Monday December 2, 2019, at 12:30 p.m. Pacific Time.
- Thursday December 19, 2019, at 1:30 p.m. Pacific Time.

Public Call Information: Dial: 800–353–6461, Conference ID: 2306868.

FOR FURTHER INFORMATION CONTACT: Melissa Wojnaroski, DFO, at *mwojnaroski@usccr.gov* or 312–353–8311.

SUPPLEMENTARY INFORMATION: Members of the public may listen to the discussion. This meeting is available to the public through the above listed toll free number. 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, 230 S Dearborn, Suite 2120, Chicago, IL 60604. They may also be faxed to the Commission at (312) 353–8324, or emailed to Angelica Trevino at *atrevino@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* under the Commission on Civil Rights, Washington Advisory Committee link. Persons interested in the work of this Committee are also directed to the Commission's website, *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 Washington
Public Comment
Adjournment

Dated: November 7, 2019.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2019–24701 Filed 11–13–19; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

In the Matter of: Mojtaba Biria, Bassumer Strasse 65, 28816 Stuhr, Germany; Order Denying Export Privileges

On August 14, 2019, in the U.S. District Court for the Northern District of New York, Mojtaba Biria (''Biria'') was convicted of violating the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.* (2012)) (''IEEPA''). Specifically, Biria was convicted of violating IEEPA by willfully conspiring to export and causing to be exported from the United States to Germany gas turbine parts, with knowledge that such goods were intended specifically for re-exportation directly and indirectly to Iran, without having first obtained the required U.S. Government authorization. Biria was sentenced to time served, a fine of $5,000, and an assessment of $100.

The Export Administration Regulations (''EAR'' or ''Regulations'') are administered and enforced by the U.S. Department of Commerce's Bureau of Industry and Security (''BIS'').[1] Section 766.25 of the Regulations provides, in pertinent part, that the ''Director of [BIS's] Office of Exporter Services, in consultation with the Director of [BIS's] Office of Export Enforcement, may deny the export privileges of any person who has been convicted of a violation of . . . the International Emergency Economic Powers Act (50 U.S.C 1701–1706).'' 15 CFR 766.25(a). The denial of export privileges under this provision may be for a period of up to 10 years from the date of the conviction. 15 CFR 766.25(d).[2] In addition, pursuant to Section 750.8 of the Regulations, BIS's Office of Exporter Services may revoke any BIS-issued licenses in which the person had an interest at the time of his/her conviction.[3]

BIS received notice of Biria's conviction for violating IEEPA and, pursuant to Section 766.25 of the Regulations, provided notice and an opportunity for Biria to make a written submission to BIS. To date, BIS has not received a written submission from Biria.

Based upon my review and consultations with BIS's Office of Export Enforcement, including its Director, and the facts available to BIS, I have decided to deny Biria's export privileges under the Regulations for a period of 10 years from the date of Biria's conviction. I have also decided to revoke any BIS-issued licenses in which Biria had an interest at the time of his conviction.

Accordingly, *it is hereby ordered:*

First, from the date of this Order until August 14, 2029, Mojtaba Biria, with a last known address at Bassumer Strasse 65, 28816 Stuhr, Germany, and when acting for or on his behalf, his successors, assigns, employees, agents or representatives (''the Denied Person''), may not directly or indirectly participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

[1] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2019). The Regulations originally issued under the Export Administration Act of 1979, as amended, 50 U.S.C. 4601–4623 (Supp. III 2015) (''EAA''), which lapsed on August 21, 2001. The President, through Executive Order 13,222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which was extended by successive Presidential Notices, continued the Regulations in full force and effect under the International Emergency Economic Powers Act, 50 U.S.C. 1701, *et seq.* (2012) (''IEEPA''). On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which includes the Export Control Reform Act of 2018, 50 U.S.C. 4801–4852 (''ECRA''). While Section 1766 of ECRA repeals the provisions of the EAA (except for three sections which are inapplicable here), Section 1768 of ECRA provides, in pertinent part, that all rules and regulations that were made or issued under the EAA, including as continued in effect pursuant to IEEPA, and were in effect as of ECRA's date of enactment (August 13, 2018), shall continue in effect according to their terms until modified, superseded, set aside, or revoked through action undertaken pursuant to the authority provided under ECRA.

[2] *See also* Section 11(h) of the EAA, 50 U.S.C. 4610(h) (Supp. III 2015); Sections 1760(e) and 1768 of ECRA, 50 U.S.C. 4819 and 4826; and note 1, *supra.*

[3] *See* notes 1 and 2, *supra.*

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

Second, no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any other person, firm, corporation, or business organization related to Biria by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order in order to prevent evasion of this Order.

Fourth, in accordance with Part 756 of the Regulations, Biria may file an appeal of this Order with the Under Secretary of Commerce for Industry and Security. The appeal must be filed within 45 days from the date of this Order and must comply with the provisions of Part 756 of the Regulations.

Fifth, a copy of this Order shall be delivered to Biria and shall be published in the **Federal Register**.

Sixth, this Order is effective immediately and shall remain in effect until August 14, 2029.

Issued this 7th day of November 2019.

Karen H. Nies-Vogel,

Director, Office of Exporter Services.

[FR Doc. 2019–24737 Filed 11–13–19; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Action Affecting Export Privilege: Rasheed Al Jijakli; Correction

Summary: In the **Federal Register** of Monday, October 7, 2019, the Bureau of Industry and Security published an Order denying the export privileges of Rasheed Al Jijakli. The Order inadvertently referenced the U.S. District Court as the ''U.S. District Court for the Middle District of Georgia'' instead of the ''United States District Court for the Central District of California''. This notice is being published to correct the name of the U.S. District Court.

Correction:

In the **Federal Register** of Monday, October 7, 2019, in FR Doc. 2019–21745, on page 53405, in the first full paragraph of the third column, the correct name of the U.S. District Court should read as follows ''. . . in the U.S. District Court for the Central District of California . . .''

Issued this 7th day of November 2019.

Karen H. Nies-Vogel,

Director, Office of Exporter Services.

[FR Doc. 2019–24738 Filed 11–13–19; 8:45 am]

BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Case No. 18–BIS–0002]

In the Matter of: Ali Caby, a/k/a ''Alex'' Caby, Blvd. James Boucher 91, Apt. 13, Floor 4, Lozenets, Sofia, Bulgaria 1407, et al., Respondents; Order Relating to Ali Caby, a/k/a ''Alex'' Caby

The Bureau of Industry and Security, U.S. Department of Commerce (''BIS''), has notified Ali Caby, a/k/a ''Alex'' Caby, of Sofia, Bulgaria, that it has initiated an administrative proceeding against him pursuant to Section 766.3 of the Export Administration Regulations (the ''Regulations''),[1] through the issuance of a Charging Letter alleging that Ali Caby, Arash Caby, Marjan Caby, AW-Tronics LLC, (''AW-Tronics'') and Arrowtronic, LLC (''Arrowtronic'') (collectively, ''Respondents'') violated the Regulations as follows:

Charge 1 15 CFR 764.2(d)—Conspiracy

Beginning as early as in or about September 2013, and continuing through in or about March 2014, Respondents conspired and acted in concert with others, known and unknown, to bring about one or more acts that constitute a violation of the Regulations. The purpose and object of the conspiracy was to unlawfully export goods from the United States through transshipment points to Syria, including to Syrian Arab Airlines (''Syrian Air''), the flag carrier airline of Syria and a Specially Designated Global Terrorist (''SDGT''), and in doing so evade the prohibitions and licensing requirements of the Regulations and avoid detection by U.S. law enforcement.

[1] The Regulations originally issued under the Export Administration Act of 1979, as amended, 50 U.S.C. 4601–4623 (Supp. III 2015) (''the EAA''), which lapsed on August 21, 2001. The President, through Executive Order 13,222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which was extended by successive Presidential Notices, continued the Regulations in full force and effect under the International Emergency Economic Powers Act, 50 U.S.C. 1701, *et seq.* (2012) (''IEEPA''). On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which includes the Export Control Reform Act of 2018, 50 U.S.C. 4801–4852 (''ECRA''). While Section 1766 of ECRA repeals the provisions of the EAA (except for three sections which are inapplicable here), Section 1768 of ECRA provides, in pertinent part, that all rules and regulations that were made or issued under the EAA, including as continued in effect pursuant to IEEPA, and were in effect as of ECRA's date of enactment (August 13, 2018), shall continue in effect according to their terms until modified, superseded, set aside, or revoked through action undertaken pursuant to the authority provided under ECRA. The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2018). The charged violation occurred in 2013–2014. The Regulations governing the violation at issue are found in the 2013–2014 versions of the Code of Federal Regulations (15 CFR parts 730–774 (2013–2014)). The 2019 Regulations set forth the procedures that apply to this matter.

Pursuant to Section 746.9 of the Regulations, a license is required for the export or reexport to Syria of all items subject to the Regulations, except food and medicine classified as EAR99. Furthermore, pursuant to Section 744.12 of the Regulations, a license is required to export or reexport items subject to the Regulations to SDGTs. Syrian Air was designated as an SDGT on May 16, 2013 (see 78 FR 32304, May 29, 2013), under authority granted to the Department of the Treasury by Executive Order 13,224, and was at all times pertinent hereto (and remains) listed as an SDGT.

At all pertinent times, AW-Tronics and Arrowtronic were active limited liability companies incorporated in the State of Florida. Documentary evidence and email correspondence shows that AW-Tronics personnel represented to various transaction parties that AW-Tronics and Arrowtronic (collectively, ''AW-Tronics/Arrowtronic'') were the same company. Arash Caby was listed on Florida corporate records as a Managing Member of AW-Tronics at the time of the violations. From January 2014 until its most recent annual report in January 2017, Ali Caby was listed on Florida corporate records as the registered agent of AW-Tronics. AW-Tronics/Arrowtronic has maintained offices in Miami, Florida and Sofia, Bulgaria, as well as other locations.

As part of the conspiracy, the co-conspirators used electronic mail (email) and other forms of communication to communicate with each other between the United States, Bulgaria, United Arab Emirates (UAE), and Syria. Under their scheme, co-conspirators would purchase from U.S. suppliers or vendors items subject to the Regulations for export to Syrian Air in Syria, including aircraft parts and equipment, and would provide materially false or misleading documents and information to conceal the illegal exports. In furtherance of the conspiracy, they also would arrange for payment for the illegal exports to be made using third-party companies to transfer payments between the co-conspirators. Overall, between in or about September 2013 and in or about March 2014, Respondents engaged in multiple transactions with Syrian Air involving the export of aircraft parts and equipment subject to the Regulations from the Miami office of AW-Tronics/Arrowtronic to Syrian Air's transshipment point in Dubai, United Arab Emirates. These items were actually intended for, and some or all were ultimately delivered to, Syrian Air in Syria.

During the conspiracy, Ali Caby managed the Bulgaria office of AW-Tronics/Arrowtronic, while Arash Caby managed its Miami office, and Marjan Caby was its internal auditor. In furtherance of the conspiracy, each of these respondents exchanged numerous emails with other AW-Tronics/Arrowtronic employees authorizing or otherwise discussing the above-described exports to Syrian Air. These email communications included, for example, instructions that were designed to prevent U.S. law enforcement from detecting the unlawful exports to Syria and to allow them to continue by changing the routing of exports from AW-Tronics/Arrowtronic's Miami, Florida office. In March 2014, United States Customs and Border Protection seized a shipment of micro switches that, according to Electronic Export Information (EEI) filed in the Automated Export System, was destined for Syrian Air in the UAE, when, in fact, the ultimate destination was Syria. On March 5, 2014, Marjan Caby sent an email to AW-Tronics/Arrowtronic logistics employees, copying Alex Caby, that explained, ''We will . . . have packages stopped by the US Customs and Border Control [and] have a case file like this for the same client[,]'' and provided instructions stating, ''NOTHING WILL BE SHIPPED TO CLIENTS IN THE MIDDLE EAST FROM THE USA OFFICE. WE HAVE TO SEND TO BG [Bulgaria] THEN TO CLIENT.'' (Emphasis in original). ''SYRIA'' was specifically listed as one country for which Respondents would use Bulgaria as a transshipment point. (Same).

In so doing, Ali Caby, a/k/a Alex Caby, Arash Caby, a/k/a ''Axel'' Caby, Marjan Caby, AW-Tronics, LLC, and Arrowtronic, LLC violated Section 764.2(d) of the Regulations, for which they are jointly and severally liable.

Whereas, BIS and Ali Caby have entered into a Settlement Agreement pursuant to Section 766.18(b) of the Regulations, whereby they agreed to settle this matter in accordance with the terms and conditions set forth therein;

Whereas, I have taken into consideration the plea agreement entered into by Ali Caby with the U.S. Attorney's Office for the Southern District of Florida, and the sentence imposed against him following or upon the entry of his guilty plea and conviction (''the plea agreement and sentence''); and

Whereas, I have approved of the terms of the Settlement Agreement;

It is therefore ordered:

First, for the period of six (6) years from the date of this Order Ali Caby, a/k/a ''Alex'' Caby, with a last known address of Blvd. James Boucher 91, Apt. 13, Floor 4, Lozenets, Sofia, Bulgaria 1407, and when acting for or on his behalf, his successors, assigns, representatives, agents, or employees (hereinafter collectively referred to as the ''Denied Person''), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported to or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

Second, no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States, or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, any licenses issued under the Regulations in which Ali Caby has an interest as of the date of this Order shall be revoked by BIS.

Fourth, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any person, firm, corporation, or business organization related to the Denied Person by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of this Order.

Fifth, the six-year denial period set forth above shall be active for a period of four years from the date of this Order. As authorized by Section 766.18(c) of the Regulations, the remaining two years of the denial period shall be suspended during a probationary period of two years under this Order, and shall thereafter be waived, provided that Ali Caby has committed no other violation of the Export Control Reform Act of 2018 (''ECRA''),[2] or the Regulations or any order, license or authorization issued under ECRA or the Regulations. If Ali Caby commits another violation of ECRA or the Regulations or any order, license or authorization issued under ECRA or the Regulations during the six-year denial period under this Order, the two-year suspended portion of this Order may be modified or revoked by BIS. If the suspension is modified or revoked, BIS may extend the active denial period until up to six years from the date of this Order when the activation occurs during the first four years from the date of this Order. BIS may extend the active denial period until up to two years from the date of the activation when the activation occurs more than four years from the date of this Order.

Sixth, Ali Caby shall not take any action or make or permit to be made any public statement, directly or indirectly, denying the allegations in the Charging Letter or this Order.

Seventh, the Charging Letter, the Settlement Agreement, and this Order shall be made available to the public.

Eighth, this Order shall be served on Ali Caby and shall be published in the **Federal Register**.

This Order, which constitutes the final agency action in this matter related to Ali Caby, is effective immediately.

Douglas R. Hassebrock,

Director, Office of Export Enforcement, performing the non-exclusive functions and duties of the Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 2019–24742 Filed 11–13–19; 8:45 am]

BILLING CODE P

[2] See note 1, *supra.*

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

In the Matter of: Arash Caby, a/k/a ''Axel'' Caby, 7405 SW 79CT, Miami, FL 33143, et al., Respondents, Case No. 18–BIS–0002; Order Relating to Arash Caby, a/k/a ''Axel'' Caby

The Bureau of Industry and Security, U.S. Department of Commerce (''BIS''), has notified Arash Caby, a/k/a ''Axel'' Caby, of Miami, Florida, that it has initiated an administrative proceeding against him pursuant to Section 766.3 of the Export Administration Regulations (the ''Regulations''),[1] through the issuance of a Charging Letter alleging that Arash Caby, Ali Caby, Marjan Caby, AW-Tronics LLC, (''AW-Tronics'') and Arrowtronic, LLC (''Arrowtronic'') (collectively, ''Respondents'') violated the Regulations as follows:

Charge 1 15 CFR 764.2(d)—Conspiracy

Beginning as early as in or about September 2013, and continuing through in or about March 2014, Respondents conspired and acted in concert with others, known and unknown, to bring about one or more acts that constitute a violation of the Regulations. The purpose and object of the conspiracy was to unlawfully export goods from the United States through transshipment points to Syria, including to Syrian Arab Airlines (''Syrian Air''), the flag carrier airline of Syria and a Specially Designated Global Terrorist (''SDGT''), and in doing so evade the prohibitions and licensing requirements of the Regulations and avoid detection by U.S. law enforcement.

Pursuant to Section 746.9 of the Regulations, a license is required for the export or reexport to Syria of all items subject to the Regulations, except food and medicine classified as EAR99. Furthermore, pursuant to Section 744.12 of the Regulations, a license is required to export or reexport items subject to the Regulations to SDGTs. Syrian Air was designated as an SDGT on May 16, 2013 (see 78 FR 32304, May 29, 2013), under authority granted to the Department of the Treasury by Executive Order 13,224, and was at all times pertinent hereto (and remains) listed as an SDGT.

[1] The Regulations originally issued under the Export Administration Act of 1979, as amended, 50 U.S.C. 4601–4623 (Supp. III 2015) (''the EAA''), which lapsed on August 21, 2001. The President, through Executive Order 13,222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), which was extended by successive Presidential Notices, continued the Regulations in full force and effect under the International Emergency Economic Powers Act, 50 U.S.C. 1701, *et seq.* (2012) (''IEEPA''). On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which includes the Export Control Reform Act of 2018, 50 U.S.C. 4801–4852 (''ECRA''). While Section 1766 of ECRA repeals the provisions of the EAA (except for three sections which are inapplicable here), Section 1768 of ECRA provides, in pertinent part, that all rules and regulations that were made or issued under the EAA, including as continued in effect pursuant to IEEPA, and were in effect as of ECRA's date of enactment (August 13, 2018), shall continue in effect according to their terms until modified, superseded, set aside, or revoked through action undertaken pursuant to the authority provided under ECRA. The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2018). The charged violation occurred in 2013–2014. The Regulations governing the violation at issue are found in the 2013–2014 versions of the Code of Federal Regulations (15 CFR parts 730–774 (2013–2014)). The 2019 Regulations set forth the procedures that apply to this matter.

At all pertinent times, AW-Tronics and Arrowtronic were active limited liability companies incorporated in the State of Florida. Documentary evidence and email correspondence shows that AW-Tronics personnel represented to various transaction parties that AW-Tronics and Arrowtronic (collectively, ''AW-Tronics/Arrowtronic'') were the same company. Arash Caby was listed on Florida corporate records as a Managing Member of AW-Tronics at the time of the violations. From January 2014 until its most recent annual report in January 2017, Ali Caby was listed on Florida corporate records as the registered agent of AW-Tronics. AW-Tronics/Arrowtronic has maintained offices in Miami, Florida and Sofia, Bulgaria, as well as other locations.

As part of the conspiracy, the co-conspirators used electronic mail (email) and other forms of communication to communicate with each other between the United States, Bulgaria, United Arab Emirates (UAE), and Syria. Under their scheme, co-conspirators would purchase from U.S. suppliers or vendors items subject to the Regulations for export to Syrian Air in Syria, including aircraft parts and equipment, and would provide materially false or misleading documents and information to conceal the illegal exports. In furtherance of the conspiracy, they also would arrange for payment for the illegal exports to be made using third-party companies to transfer payments between the co-conspirators. Overall, between in or about September 2013 and in or about March 2014, Respondents engaged in multiple transactions with Syrian Air involving the export of aircraft parts and equipment subject to the Regulations from the Miami office of AW-Tronics/Arrowtronic to Syrian Air's transshipment point in Dubai, United Arab Emirates. These items were actually intended for, and some or all were ultimately delivered to, Syrian Air in Syria.

During the conspiracy, Ali Caby managed the Bulgaria office of AW-Tronics/Arrowtronic, while Arash Caby managed its Miami office, and Marjan Caby was its internal auditor. In furtherance of the conspiracy, each of these respondents exchanged numerous emails with other AW-Tronics/Arrowtronic employees authorizing or otherwise discussing the above-described exports to Syrian Air. These email communications included, for example, instructions that were designed to prevent U.S. law enforcement from detecting the unlawful exports to Syria and to allow them to continue by changing the routing of exports from AW-Tronics/Arrowtronic's Miami, Florida office. In March 2014, United States Customs and Border Protection seized a shipment of micro switches that, according to Electronic Export Information (EEI) filed in the Automated Export System, was destined for Syrian Air in the UAE, when, in fact, the ultimate destination was Syria. On March 5, 2014, Marjan Caby sent an email to AW-Tronics/Arrowtronic logistics employees, copying Alex Caby, that explained, ''We will . . . have packages stopped by the US Customs and Border Control [and] have a case file like this for the same client[,]'' and provided instructions stating, ''NOTHING WILL BE SHIPPED TO CLIENTS IN THE

MIDDLE EAST FROM THE USA OFFICE. WE HAVE TO SEND TO BG [Bulgaria] THEN TO CLIENT.'' (Emphasis in original). ''SYRIA'' was specifically listed as one country for which Respondents would use Bulgaria as a transshipment point. (Same).

In so doing, Ali Caby, a/k/a Alex Caby, Arash Caby, a/k/a ''Axel'' Caby, Marjan Caby, AW-Tronics, LLC, and Arrowtronic, LLC violated Section 764.2(d) of the Regulations, for which they are jointly and severally liable.

Whereas, BIS and Arash Caby have entered into a Settlement Agreement pursuant to Section 766.18(b) of the Regulations, whereby they agreed to settle this matter in accordance with the terms and conditions set forth therein;

Whereas, I have taken into consideration the plea agreement entered into by Arash Caby with the U.S. Attorney's Office for the Southern District of Florida, and the sentence imposed against him following or upon the entry of his guilty plea and conviction (''the plea agreement and sentence''); and

Whereas, I have approved of the terms of the Settlement Agreement;

It is therefore ordered:

First, for the period of six (6) years from the date of this Order, Arash Caby, a/k/a ''Axel'' Caby, with a last known address of 7405 SW 79CT, Miami, FL 33143, and when acting for or on his behalf, his successors, assigns, representatives, agents, or employees (hereinafter collectively referred to as the ''Denied Person''), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported to or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

Second, no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States, or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, any licenses issued under the Regulations in which Arash Caby has an interest as of the date of this Order shall be revoked by BIS.

Fourth, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any person, firm, corporation, or business organization related to the Denied Person by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of this Order.

Fifth, the six-year denial period set forth above shall be active for a period of four years from the date of this Order. As authorized by Section 766.18(c) of the Regulations, the remaining two years of the denial period shall be suspended during a probationary period of two years under this Order, and shall thereafter be waived, provided that Arash Caby has committed no other violation of the Export Control Reform Act of 2018 (''ECRA''),[2] or the Regulations or any order, license or authorization issued under ECRA or the Regulations. If Arash Caby commits another violation of ECRA or the Regulations or any order, license or authorization issued under ECRA or the Regulations during the six-year denial period under this Order, the two-year suspended portion of this Order may be modified or revoked by BIS. If the suspension is modified or revoked, BIS may extend the active denial period until up to six years from the date of this Order when the activation occurs during the first four years from the date of this Order. BIS may extend the active denial period until up to two years from the date of the activation when the activation occurs more than four years from the date of this Order.

[2] See note 1, *supra.*

Sixth, Arash Caby shall not take any action or make or permit to be made any public statement, directly or indirectly, denying the allegations in the Charging Letter or this Order.

Seventh, the Charging Letter, the Settlement Agreement, and this Order shall be made available to the public.

Eighth, this Order shall be served on Arash Caby and shall be published in the **Federal Register**.

This Order, which constitutes the final agency action in this matter related to Arash Caby, is effective immediately.

Issued this 6th day of November 2019.

Douglas R. Hassebrock,

Director, Office of Export Enforcement, performing the non-exclusive functions and duties of the Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 2019–24739 Filed 11–13–19; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Case No. 18–BIS–0002]

In the Matter of: Arrowtronic, LLC, 7405 SW 79CT, Miami, FL 33143, et al., Respondents; Order Relating to Arrowtronic, LLC

The Bureau of Industry and Security, U.S. Department of Commerce (''BIS''), has notified Arrowtronic, LLC, of Miami, Florida, (''Arrowtronic'') that it has initiated an administrative proceeding against it pursuant to Section 766.3 of the Export Administration Regulations (the ''Regulations''),[1] through the issuance of

[1] The Regulations originally issued under the Export Administration Act of 1979, as amended, 50 U.S.C. 4601–4623 (Supp. III 2015) (''the EAA''), which lapsed on August 21, 2001. The President, through Executive Order 13,222 of August 17, 2001

Continued

a Charging Letter alleging that Arrowtronic, Ali Caby, Arash Caby, Marjan Caby, and AW-Tronics LLC (''AW-Tronics'') (collectively, ''Respondents'') violated the Regulations as follows:

Charge 1 15 CFR 764.2(d)—Conspiracy

Beginning as early as in or about September 2013, and continuing through in or about March 2014, Respondents conspired and acted in concert with others, known and unknown, to bring about one or more acts that constitute a violation of the Regulations. The purpose and object of the conspiracy was to unlawfully export goods from the United States through transshipment points to Syria, including to Syrian Arab Airlines (''Syrian Air''), the flag carrier airline of Syria and a Specially Designated Global Terrorist (''SDGT''), and in doing so evade the prohibitions and licensing requirements of the Regulations and avoid detection by U.S. law enforcement.

Pursuant to Section 746.9 of the Regulations, a license is required for the export or reexport to Syria of all items subject to the Regulations, except food and medicine classified as EAR99. Furthermore, pursuant to Section 744.12 of the Regulations, a license is required to export or reexport items subject to the Regulations to SDGTs. Syrian Air was designated as an SDGT on May 16, 2013 (see 78 FR 32304, May 29, 2013), under authority granted to the Department of the Treasury by Executive Order 13,224, and was at all times pertinent hereto (and remains) listed as an SDGT.

At all pertinent times, AW-Tronics and Arrowtronic were active limited liability companies incorporated in the State of Florida. Documentary evidence and email correspondence shows that AW-Tronics personnel represented to various transaction parties that AW-Tronics and Arrowtronic (collectively, ''AW-Tronics/Arrowtronic'') were the same company. Arash Caby was listed on Florida corporate records as a Managing Member of AW-Tronics at the time of the violations. From January 2014 until its most recent annual report in January 2017, Ali Caby was listed on Florida corporate records as the registered agent of AW-Tronics. AW-Tronics/Arrowtronic has maintained offices in Miami, Florida and Sofia, Bulgaria, as well as other locations.

As part of the conspiracy, the co-conspirators used electronic mail (email) and other forms of communication to communicate with each other between the United States, Bulgaria, United Arab Emirates (UAE), and Syria. Under their scheme, co-conspirators would purchase from U.S. suppliers or vendors items subject to the Regulations for export to Syrian Air in Syria, including aircraft parts and equipment, and would provide materially false or misleading documents and information to conceal the illegal exports. In furtherance of the conspiracy, they also would arrange for payment for the illegal exports to be made using third-party companies to transfer payments between the co-conspirators. Overall, between in or about September 2013 and in or about March 2014, Respondents engaged in multiple transactions with Syrian Air involving the export of aircraft parts and equipment subject to the Regulations from the Miami office of AW-Tronics/Arrowtronic to Syrian Air's transshipment point in Dubai, United Arab Emirates. These items were actually intended for, and some or all were ultimately delivered to, Syrian Air in Syria.

During the conspiracy, Ali Caby managed the Bulgaria office of AW-Tronics/Arrowtronic, while Arash Caby managed its Miami office, and Marjan Caby was its internal auditor. In furtherance of the conspiracy, each of these respondents exchanged numerous emails with other AW-Tronics/Arrowtronic employees authorizing or otherwise discussing the above-described exports to Syrian Air. These email communications included, for example, instructions that were designed to prevent U.S. law enforcement from detecting the unlawful exports to Syria and to allow them to continue by changing the routing of exports from AW-Tronics/Arrowtronic's Miami, Florida office. In March 2014, United States Customs and Border Protection seized a shipment of micro switches that, according to Electronic Export Information (EEI) filed in the Automated Export System, was destined for Syrian Air in the UAE, when, in fact, the ultimate destination was Syria. On March 5, 2014, Marjan Caby sent an email to AW-Tronics/Arrowtronic logistics employees, copying Alex Caby, that explained, ''We will . . . have packages stopped by the US Customs and Border Control [and] have a case file like this for the same client[,]'' and provided instructions stating, ''NOTHING WILL BE SHIPPED TO CLIENTS IN THE MIDDLE EAST FROM THE USA OFFICE. WE HAVE TO SEND TO BG [Bulgaria] THEN TO CLIENT.'' (Emphasis in original). ''SYRIA'' was specifically listed as one country for which Respondents would use Bulgaria as a transshipment point. (Same).

In so doing, Ali Caby, a/k/a Alex Caby, Arash Caby, a/k/a ''Axel'' Caby, Marjan Caby, AW-Tronics, LLC, and Arrowtronic, LLC violated Section 764.2(d) of the Regulations, for which they are jointly and severally liable.

Whereas, BIS and Arrowtronic have entered into a Settlement Agreement pursuant to Section 766.18(b) of the Regulations, whereby they agreed to settle this matter in accordance with the terms and conditions set forth therein; and

Whereas, I have approved of the terms of the Settlement Agreement; *it is therefore ordered*:

First, For the period of six (6) years from the date of this Order Arrowtronic, LLC, with a last known address of 7405 SW 79CT, Miami, FL 33143, and when acting for or on its behalf, its successors, assigns, director, officers, representatives, agents, or employees (hereinafter collectively referred to as the ''Denied Person''), may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported to or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or engaging in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or from any other activity subject to the Regulations.

Second, no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that

(3 CFR, 2001 Comp. 783 (2002)), which was extended by successive Presidential Notices, continued the Regulations in full force and effect under the International Emergency Economic Powers Act, 50 U.S.C. 1701, *et seq.* (2012) (''IEEPA''). On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which includes the Export Control Reform Act of 2018, 50 U.S.C. 4801–4852 (''ECRA''). While Section 1766 of ECRA repeals the provisions of the EAA (except for three sections which are inapplicable here), Section 1768 of ECRA provides, in pertinent part, that all rules and regulations that were made or issued under the EAA, including as continued in effect pursuant to IEEPA, and were in effect as of ECRA's date of enactment (August 13, 2018), shall continue in effect according to their terms until modified, superseded, set aside, or revoked through action undertaken pursuant to the authority provided under ECRA. The Regulations are currently codified in the Code of Federal Regulations at 15 CFR parts 730–774 (2018). The charged violation occurred in 2013–2014. The Regulations governing the violation at issue are found in the 2013–2014 versions of the Code of Federal Regulations (15 CFR parts 730–774 (2013–2014)). The 2019 Regulations set forth the procedures that apply to this matter.

has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States, or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, any licenses issued under the Regulations in which Arrowtronic has an interest as of the date of this Order shall be revoked by BIS.

Fourth, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any person, firm, corporation, or business organization related to the Denied Person by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of this Order.

Fifth, Arrowtronic shall not take any action or make or permit to be made any public statement, directly or indirectly, denying the allegations in the Charging Letter or this Order.

Sixth, the Charging Letter, the Settlement Agreement, and this Order shall be made available to the public.

Seventh, this Order shall be served on Arrowtronic and shall be published in the **Federal Register**.

This *order,* which constitutes the final agency action in this matter related to Arrowtronic, is effective immediately.

Issued this 30th day of October, 2019.

Douglas R. Hassebrock,

Director, Office of Export Enforcement, performing the non-exclusive functions and duties of the Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 2019–24741 Filed 11–13–19; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–106]

Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China: Amended Preliminary Determination of Sales at Less Than Fair Value

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) is amending the preliminary determination of the less-than-fair-value investigation of wooden cabinets and vanities and components thereof (wooden cabinets and vanities) from the People's Republic of China (China) to correct significant ministerial errors.

DATES: Applicable November 14, 2019.

FOR FURTHER INFORMATION CONTACT: Kabir Archuletta, Rachel Greenberg, or Eliza Siordia, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2593, (202) 482–0652, or (202) 482–3878, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 9, 2019, Commerce published in the **Federal Register** the *Preliminary Determination,*[1] and completed the disclosure of all calculation materials to interested parties. On October 8, 2019, MJB Supply (Dalian) Co., Ltd, Shouguang Honsoar Imp. & Exp. Trading Co., Ltd, and Nantong Ouming Wood Co., Ltd. (collectively, D&H SRA Companies), and Zhong Shan King Yuandun Wood Products Co., Ltd. (Zhong Shan) timely filed ministerial error allegations regarding the *Preliminary Determination.*[2]

Period of Investigation

The period of investigation is July 1, 2018 through December 31, 2018.

Scope of Investigation

The product covered by this investigation is wooden cabinets and vanities from China. For a complete description of the scope of this investigation, *see* the appendix to this notice.

Legal Authority

Commerce will analyze any comments received and, if appropriate, correct any significant ministerial error by amending the preliminary determination according to 19 CFR 351.224(e). A ministerial error is defined in 19 CFR 351.224(f) as ''an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial.''[3] A significant ministerial error is defined as a ministerial error, the correction of which, either singly or in combination with other errors, would result in: (1) A change of at least five absolute percentage points in, but not less than 25 percent of, the weighted-average dumping margin calculated in the original (erroneous) preliminary determination; or (2) a difference between a weighted-average dumping margin of zero or *de minimis* and a weighted-average dumping margin of greater than *de minimis* or vice versa.[4]

Analysis of Ministerial Error Allegation

On October 8, 2019, certain separate rate respondents submitted ministerial error allegations. The respondents claim that Commerce should have granted Zhong Shan a separate rate; that clerical errors were made with respect to the names of the producers for exporters MJB Supply (Dalian) Co., Ltd, and Shouguang Honsoar Imp. & Exp. Trading Co., Ltd; and an ''also known as'' company name for the exporter/producer combination Nantong Ouming Wood Co., Ltd should have been included. Commerce has reviewed the record and finds that Zhong Shan's allegation is not ministerial in nature as the *Preliminary Determination* demonstrates our intent and our reasoning as to why Zhong Shan was not eligible for a separate rate.[5] However, we do agree that we made certain clerical errors on the producer/

[1] *See Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less than Fair Value, Postponement of Final Determination and Extension of Provisional Measures,* 84 FR 54106 (October 9, 2019) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* D&H SRA Companies' Letter, ''Wooden Cabinets and Vanities from the People's Republic of China: Ministerial Error Comments to Correct Spelling of Company Names,'' dated October 8, 2019; *see also* Zhong Shan's Letter, ''Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Ministerial Error Comments—Prelim Determination,'' dated October 8, 2019.

[3] *See also* section 735(e) of the Tariff Act of 1930, as amended (the Act).

[4] *See* 19 CFR 351.224(g).

[5] *See Preliminary Determination* PDM at 17–19.

exporter list for separate rate recipients constituting significant ministerial errors within the meaning of 19 CFR 351.224(f) and (g).[6] These errors are significant because the rate applicable to these separate rate respondents, as a result of the errors, is the China-wide rate of 262.18 percent, rather than the separate rate of 39.25 percent. The difference in these two rates exceeds the significant ministerial error threshold established in 19 CFR 351.224(g)(1) because correction of these errors results in a change of at least five absolute percentage points.

Amended Preliminary Determination

Commerce preliminarily determines that the following amended weighted-average dumping margins exist for the period July 1, 2018 through December 31, 2018:

Exporter	Producer	Estimated weighted average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets) (percent)
MJB Supply (Dalian) Co., Ltd	Mulin City Bamiantong Linyeju Jisen Wood	39.25	28.71
Shouguang Honsoar Imp. & Exp. Trading Co., Ltd	Shandong Honsoar Cabinet Materials Co., Ltd	39.25	28.71
Nantong Ouming Wood Co., Ltd., also known as Nantong Ouming Wood Industry Co., Ltd.	Nantong Ouming Wood Co., Ltd., also known as Nantong Ouming Wood Industry Co., Ltd.	39.25	28.71

Amended Cash Deposits and Suspension of Liquidation

The collection of cash deposits and suspension of liquidation will be revised according to the rates calculated in this amended preliminary determination, in accordance with sections 733(d) and (f) of the Act, and 19 CFR 351.224. Because the rates are decreasing from the *Preliminary Determination,* the amended cash deposit rates will be effective retroactively to October 9, 2019, the date of publication of the *Preliminary Determination.* Parties will be notified of this determination, in accordance with sections 733(d) and (f) of the Act.

International Trade Commission Notification

In accordance with section 733(f) of the Act, we will notify the International Trade Commission of our amended preliminary determination.

Notification to Interested Parties

This amended preliminary determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.224(e).

Dated: November 6, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

Scope of the Investigation

The merchandise subject to this investigation consists of wooden cabinets and vanities that are for permanent installation (including floor mounted, wall mounted, ceiling hung or by attachment of plumbing), and wooden components thereof. Wooden cabinets and vanities and wooden components are made substantially of wood products, including solid wood and engineered wood products (including those made from wood particles, fibers, or other wooden materials such as plywood, strand board, block board, particle board, or fiberboard), or bamboo. Wooden cabinets and vanities consist of a cabinet box (which typically includes a top, bottom, sides, back, base blockers, ends/end panels, stretcher rails, toe kicks, and/or shelves) and may or may not include a frame, door, drawers and/or shelves. Subject merchandise includes wooden cabinets and vanities with or without wood veneers, wood, paper or other overlays, or laminates, with or without non-wood components or trim such as metal, marble, glass, plastic, or other resins, whether or not surface finished or unfinished, and whether or not completed.

Wooden cabinets and vanities are covered by the investigation whether or not they are imported attached to, or in conjunction with, faucets, metal plumbing, sinks and/or sink bowls, or countertops. If wooden cabinets or vanities are imported attached to, or in conjunction with, such merchandise, only the wooden cabinet or vanity is covered by the scope.

Subject merchandise includes the following wooden component parts of cabinets and vanities: (1) Wooden cabinet and vanity frames (2) wooden cabinet and vanity boxes (which typically include a top, bottom, sides, back, base blockers, ends/end panels, stretcher rails, toe kicks, and/or shelves), (3) wooden cabinet or vanity doors, (4) wooden cabinet or vanity drawers and drawer components (which typically include sides, backs, bottoms, and faces), (5) back panels and end panels, (6) and desks, shelves, and tables that are attached to or incorporated in the subject merchandise.

Subject merchandise includes all unassembled, assembled and/or ''ready to assemble'' (RTA) wooden cabinets and vanities, also commonly known as ''flat packs,'' except to the extent such merchandise is already covered by the scope of antidumping and countervailing duty orders on *Hardwood Plywood from the People's Republic of China. See Certain Hardwood Plywood Products from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order,* 83 FR 504 (January 4, 2018); *Certain Hardwood Plywood Products from the People's Republic of China: Countervailing Duty Order,* 83 FR 513 (January 4, 2018). RTA wooden cabinets and vanities are defined as cabinets or vanities packaged so that at the time of importation they may include: (1) Wooden components required to assemble a cabinet or vanity (including drawer faces and doors); and (2) parts (*e.g.,* screws, washers, dowels, nails, handles, knobs, adhesive glues) required to assemble a cabinet or vanity. RTAs may enter the United States in one or in multiple packages.

Subject merchandise also includes wooden cabinets and vanities and in-scope components that have been further processed in a third country, including but not limited to one or more of the following: Trimming, cutting, notching, punching, drilling, painting, staining, finishing, assembly, or any other processing that would not otherwise remove the merchandise from the scope of the investigation if performed in the country of manufacture of the in-scope product.

Excluded from the scope of this investigation, if entered separate from a wooden cabinet or vanity are:

(1) Aftermarket accessory items which may be added to or installed into an interior of a cabinet and which are not considered a structural or core component of a wooden cabinet or vanity. Aftermarket accessory items may be made of wood, metal, plastic, composite material, or a combination thereof that can be inserted into a cabinet and which are utilized in the function of organization/accessibility on the interior of a cabinet; and include:

- Inserts or dividers which are placed into drawer boxes with the purpose of organizing

[6] *See* Memorandum, ''Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Ministerial Error Allegations in the Preliminary Determination,'' dated concurrently with this notice (Ministerial Error Memorandum).

or dividing the internal portion of the drawer into multiple areas for the purpose of containing smaller items such as cutlery, utensils, bathroom essentials, *etc.*

- Round or oblong inserts that rotate internally in a cabinet for the purpose of accessibility to foodstuffs, dishware, general supplies, *etc.*

(2) Solid wooden accessories including corbels and rosettes, which serve the primary purpose of decoration and personalization.

(3) Non-wooden cabinet hardware components including metal hinges, brackets, catches, locks, drawer slides, fasteners (nails, screws, tacks, staples), handles, and knobs.

(4) Medicine cabinets that meet all of the following five criteria are excluded from the scope: (1) Wall mounted; (2) assembled at the time of entry into the United States; (3) contain one or more mirrors; (4) be packaged for retail sale at time of entry; and (5) have a maximum depth of seven inches.

Also excluded from the scope of this investigation are:

(1) All products covered by the scope of the antidumping duty order on *Wooden Bedroom Furniture from the People's Republic of China. See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture from the People's Republic of China,* 70 FR 329 (January 4, 2005).

(2) All products covered by the scope of the antidumping and countervailing duty orders on *Hardwood Plywood from the People's Republic of China. See Certain Hardwood Plywood Products from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order,* 83 FR 504 (January 4, 2018); *Certain Hardwood Plywood Products from the People's Republic of China: Countervailing Duty Order,* 83 FR 513 (January 4, 2018).

Imports of subject merchandise are classified under Harmonized Tariff Schedule of the United States (HTSUS) statistical numbers 9403.40.9060 and 9403.60.8081. The subject component parts of wooden cabinets and vanities may be entered into the United States under HTSUS statistical number 9403.90.7080. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this investigation is dispositive.

[FR Doc. 2019–24732 Filed 11–13–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–108]

Ceramic Tile From the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Negative Critical Circumstances Determination, and Postponement of Final Determination

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that ceramic tile from the People's Republic of China (China) is being, or is likely to be, sold in the United States at less than fair value (LTFV). The period of investigation (POI) is October 1, 2018 through March 31, 2019. Interested parties are invited to comment on this preliminary determination.

DATES: Applicable November 14, 2019.

FOR FURTHER INFORMATION CONTACT: Heather Lui or Paul Walker, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0016 or (202) 482–0413, respectively.

SUPPLEMENTARY INFORMATION:

Background

This preliminary determination is made in accordance with section 733(b) of the Tariff Act of 1930, as amended (the Act). Commerce published the notice of initiation of this investigation on May 8, 2019.[1] On September 5, 2019, Commerce postponed the preliminary determination of this investigation and the revised deadline is now November 6, 2019.[2] For a complete description of the events that followed the initiation of this investigation, *see* the Preliminary Decision Memorandum.[3] A list of topics included in the Preliminary Decision Memorandum is included as Appendix II to this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov*, and to all parties in the Central Records Unit, room B8024 of the main Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/*.

Scope of the Investigation

The product covered by this investigation is ceramic tile from China. For a complete description of the scope of this investigation, *see* Appendix I.

Scope Comments

In accordance with the preamble to Commerce's regulations,[4] the *Initiation Notice* set aside a period of time for parties to raise issues regarding product coverage (*i.e.,* scope).[5] Certain interested parties commented on the scope of the investigation as it appeared in the *Initiation Notice.* For a summary of the product coverage comments and rebuttal responses submitted to the record for this investigation, and accompanying discussion and analysis of all comments timely received, *see* the Preliminary Scope Decision Memorandum.[6] The scope case briefs were due on October 15, 2019, 30 days after the publication of the *Ceramic Tile from China Preliminary CVD Determination.*[7] There will be no further opportunity for comments on scope-related issues.[8]

[1] *See Ceramic Tile from the People's Republic of China: Initiation of Less-Than-Fair-Value Investigation,* 84 FR 20093 (May 8, 2019) (*Initiation Notice*).

[2] *See Ceramic Tile from the People's Republic of China: Postponement of Preliminary Determinations in the Less-Than-Fair-Value Investigations,* 84 FR 46711 (September 5, 2019).

[3] *See* Memorandum, ''Decision Memorandum for the Preliminary Determination in the Less Than Fair Value Investigation of Ceramic Tile from the People's Republic of China,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997).

[5] *See Initiation Notice.*

[6] *See* Memorandum, ''Ceramic Tile from the People's Republic of China: Scope Comments Decision Memorandum for the Preliminary Determinations,'' dated September 6, 2019 (Preliminary Scope Decision Memorandum).

[7] The scope case briefs were due 30 days after the publication of *Ceramic Tile from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, Preliminary Negative Critical Circumstances Determination, and Alignment of Final Determination with Final Antidumping Duty Determination,* 84 FR 48125 (September 12, 2019) (*Ceramic Tile from China Preliminary CVD Determination*). *See* the Preliminary Scope Decision Memorandum at 3. In accordance with Commerce's practice, where a deadline falls on a weekend or federal holiday, the appropriate deadline is the next business day. *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 2930, As Amended,* 70 FR 24533 (May 10, 2005).

[8] Parties were already permitted the opportunity to file scope case briefs. Case briefs, other written comments, and rebuttal briefs should not include scope-related issues. *See* Preliminary Scope Decision Memorandum at 3.

Methodology

Commerce is conducting this investigation in accordance with section 731 of the Act. Commerce has calculated export prices in accordance with section 772(a) of the Act. Because China is a non-market economy, within the meaning of section 771(18) of the Act, Commerce has calculated normal value in accordance with section 773(c) of the Act. In addition, pursuant to section 776(a) and (b) of the Act, Commerce has relied on facts otherwise available, with adverse inferences, for the China-wide entity. For a full description of the methodology underlying Commerce's preliminary determination, *see* the Preliminary Decision Memorandum.

Preliminary Negative Determination of Critical Circumstances

In accordance with section 733(e)(1) of the Act, Commerce preliminarily determines that information provided in the critical circumstances allegation does not demonstrate the existence of critical circumstances with respect to imports of ceramic tile from China. For a full description of the methodology and results of Commerce's analysis, *see* the Preliminary Decision Memorandum.

Combination Rates

In the *Initiation Notice,*[9] Commerce stated that it would calculate producer/exporter combination rates for the respondents that are eligible for a separate rate in this investigation. Policy Bulletin 05.1 describes this practice.[10] In this investigation, we calculated producer/exporter combination rates for respondents eligible for separate rates.

Preliminary Determination

Commerce preliminarily determines that the following estimated weighted-average dumping margins exist:

Exporter	Producer	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets) (percent)
Belite Ceramics (Anyang) Co., Ltd	Belite Ceramics (Anyang) Co., Ltd./Beilitai (Tianjin) Tile Co., Ltd./Tianjin Honghui Creative Technology Co., Ltd.	244.26	233.72
Foshan Sanfi Import & Export Co., Ltd	Guangdong Sanfi Ceramics Group Co., Ltd	114.49	103.95
Anatolia Tile & Stone Inc	Hubei ASA Ceramics Co., Ltd	178.20	167.66
	Guangdong Bode Fine Building Material Co., Ltd.	178.20	167.66
	Foshan Mona Decoration Material Co., Ltd. (DBA Guang Dong Bo Hua Ceramics Co., Ltd.).	178.20	167.66
	Heyuan Dongyuan Eagle Branch Ceramics Ltd	178.20	167.66
	Foshan Gold Medal Ceramics International Trade Co., Ltd.	178.20	167.66
	Greens Patio Workshop Co., Ltd	178.20	167.66
	Fujian Huatai Group Co., Ltd	178.20	167.66
	Foshan Tianyao Ceramics Co., Ltd	178.20	167.66
	Foshan Ibel Import and Export Ltd	178.20	167.66
	Max Glory International Limited	178.20	167.66
	Foshan Leo Import and Export Trading Co., Ltd	178.20	167.66
	Guangdong Mona Lisa Trading Co., Ltd	178.20	167.66
	Foshan Amosa International Business Company.	178.20	167.66
	Foshan Yonglie Export and Import Company Limited.	178.20	167.66
	Elegance International Inc.	178.20	167.66
	Foshan International Trade Co., Ltd	178.20	167.66
	Foshan Rhino Building Materials Co., Ltd	178.20	167.66
	Foshan Romantic Ceramics Co., Ltd	178.20	167.66
	Heyuan Romantic Ceramics Co., Ltd	178.20	167.66
	Pingxiang Dacheng Ceramics Technology Co., Ltd.	178.20	167.66
	Jingdezhen Seed Ceramic Co., Ltd	178.20	167.66
	Foshan Xinfu Imp. & Exp. Co., Ltd	178.20	167.66
	Foshan Nah Hai Sky Glass Mosaic Limited	178.20	167.66
	Super Building Material Co., Ltd. (Xiamen)	178.20	167.66
	Foshan Tong Hai International Import and Export Trading Corporation Limited.	178.20	167.66
	Rabbit Song Building Material Co., Ltd	178.20	167.66
Beilitai (Tianjin) Tile Co., Ltd	Beilitai (Tianjin) Tile Co., Ltd	178.20	167.66
	Belite Ceramics (Anyang) Co., Ltd	178.20	167.66
	Tianjin Honghui Creative Technology Co., Ltd	178.20	167.66
China Stone Limited	Qingyuan MegaCera Ceramic Co., Ltd	178.20	167.66
	Foshan Kovic Import and Export Co., Ltd	178.20	167.66
Dongguan City Wonderful Ceramics Industrial Park Co., Ltd	Dongguan City Wonderful Ceramics Industrial Park Co., Ltd.	178.20	167.66
Dongguan City Wonderful Decoration Materials Co., Ltd	Dongguan City Wonderful Decoration Materials Co., Ltd.	178.20	167.66

[9] *See Initiation Notice* at 20097.

[10] *See* Enforcement and Compliance's Policy Bulletin No. 05.1, regarding, ''Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries,'' (April 5, 2005) (Policy Bulletin 05.1), available on Commerce's website at *http://enforcement.trade.gov/policy/bull05-1.pdf.*

Exporter	Producer	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets) (percent)
Dox Building Materials Co., Limited	White Rabbit Ceramics Co., Ltd	178.20	167.66
	Rabbit Song Building Material Co., Ltd	178.20	167.66
Elegance International Inc	Tegaote Ceramics Co., Ltd	178.20	167.66
	Foshan Nanhai District Zhengbin New Materials Co., Ltd.	178.20	167.66
Foshan Advance Import and Export Co., Ltd	Foshan Xinlianfa Ceramics Co., Ltd	178.20	167.66
Foshan Ant Buying Service Co., Ltd	Foshan Xindonglong Ceramic Co., Ltd	178.20	167.66
	Foshan Shiwan Yulong Ceramic Co., Ltd	178.20	167.66
	Heshan Heqiang Art China & Dinnerware Co., Ltd.	178.20	167.66
	Foshan Kingfer Building Material Co., Ltd	178.20	167.66
	Luoding Junhua Ceramics Industrial Co., Ltd	178.20	167.66
	Foshan Xinamei Material Co., Ltd	178.20	167.66
	Foshan Be Tf Fu Decorative Material Co., Ltd	178.20	167.66
	Foshan Verona Borde Co., Ltd	178.20	167.66
	Jiangmen Xuri Ceramic Co., Ltd	178.20	167.66
	Foshan Yongzhuo Material Co., Ltd	178.20	167.66
	Sihui Jiefeng Material Co., Ltd	178.20	167.66
	Foshan Caidian Material Co., Ltd	178.20	167.66
Foshan Artist Ceramics Co., Ltd	Sheng Taoju Ceramics	178.20	167.66
	Zhaoqing Langfeng Ceramics Co., Ltd	178.20	167.66
	Zhong Rong Ceramic Building Materials Co., Ltd.	178.20	167.66
	Foshan Xindonglong Ceramic Co., Ltd	178.20	167.66
	Guangxi Jinmen Building Material Co., Ltd	178.20	167.66
	Fujian Lvdao Ecology Technology Co., Ltd	178.20	167.66
	Guangdong Fangxiang Ceramic Co., Ltd	178.20	167.66
	Foshan Nanhai Yuda Ceremics Co., Ltd	178.20	167.66
	Xinxing County Jin Mali Ceramics Co., Ltd	178.20	167.66
	Foshan Chancheng Lijiahua Ceramics Co., Ltd	178.20	167.66
	Foshan City Nanhai Junhong Ceramic Decoration Material Co., Ltd.	178.20	167.66
Foshan Atpalas Ceramics Co., Ltd	Foshan Yuanzhen Building Materials Co., Ltd	178.20	167.66
Foshan CTC Group Co., Ltd	Guangdong Jiajun Ceramics Co., Ltd	178.20	167.66
Foshan Disong Trading Co., Ltd	Zhaoqing Xinciyu Ceramics Co., Ltd	178.20	167.66
Foshan Dolphin Trading Co., Ltd	Foshan Shiwan Yulong Ceramic Co., Ltd	178.20	167.66
	Si Hui Jiefeng Decoration Materials Co., Ltd	178.20	167.66
	Dongguan City Wonderful Ceramics Industrial Park Co., Ltd.	178.20	167.66
	Luoding Junhua Ceramics Industrial Co., Ltd	178.20	167.66
	Guangdong Bode Fine Building Material Co., Ltd.	178.20	167.66
	Kaiping Tilee's Building Materials Co., Ltd	178.20	167.66
	Zhuhai Xuri Ceramics Co., Ltd	178.20	167.66
	Foshan Top Black Ceramics Co., Ltd	178.20	167.66
	Guangdong Xinruncheng Ceramics Co., Ltd	178.20	167.66
	Heyuan Romantic Ceramics Co., Ltd	178.20	167.66
	Guangdong Xiejin Ceramics Co., Ltd	178.20	167.66
	Liling Dolphin Ceramics Co., Ltd	178.20	167.66
	Foshan Oceano Ceramics Co., Ltd	178.20	167.66
	Kaiping Lihang Building Materials Co., Ltd	178.20	167.66
	Hunan Tianxin Technology Co., Ltd	178.20	167.66
	Oyg Glass Spar Decoration Materials Co., Ltd	178.20	167.66
Foshan Dongpeng Ceramic Co., Ltd	Qingyuan Nafuna Ceramics Co., Ltd	178.20	167.66
	Fengcheng Dongpeng Ceramics Co., Ltd	178.20	167.66
	Lixian Xinpeng Ceramic Co., Ltd	178.20	167.66
	Foshan Donghuashengchang New Material Co., Ltd.	178.20	167.66
Foshan Dongxin Economy And Trade Co., Ltd	Zhangzhou Aoli Ceramic Development Co., Ltd	178.20	167.66
Foshan Eiffel Ceramic Co., Ltd	Foshan Bubuking Decorating Techniques Co., Ltd.	178.20	167.66
	Guangdong Shenghui Ceramics Co., Ltd	178.20	167.66
	Qingyuan Baoshima Ceramics Co., Ltd	178.20	167.66
Foshan Eminent Industry Development Co., Ltd	Foshan Huanqiu Ceramics Co., Ltd	178.20	167.66
Foshan Everstone Import & Export Co., Ltd	Foshan Gani Ceramics Co., Ltd	178.20	167.66
Foshan Gani Ceramics Co., Ltd	Qingyuan Gani Ceramics Co., Ltd	178.20	167.66
Foshan Gold Medal Ceramics International Trade Co., Ltd	Guangdong Goldmedal Ceramics Co., Ltd	178.20	167.66
Foshan Griffiths Building Material Ltd	Foshan Lihua Ceramics Co., Ltd	178.20	167.66
Foshan Hudson Economics And Trade Co., Ltd	Guangdong Kito Ceramics Group Co., Ltd	178.20	167.66
	Foshan Shiwan Eagle Brand Ceramic Co., Ltd	178.20	167.66

Exporter	Producer	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets) (percent)
	Guangdong Overland Ceramics Co., Ltd	178.20	167.66
	Guangdong Bode Fine Building Material Co., Ltd.	178.20	167.66
	Foshan Yuanmei Craft Ceramics Factory	178.20	167.66
	Foshan Nanhai Yuheng Decorative Material Co., Ltd.	178.20	167.66
	Guangzhou Cowin New Materials Co., Ltd	178.20	167.66
	Guangdong Kito Trading Co., Ltd	178.20	167.66
Foshan Ibel Import And Export Ltd	Foshan Ibel Import And Export Ltd	178.20	167.66
Foshan International Trade Co., Ltd	Foshan B&W Ceramics Co., Ltd	178.20	167.66
	Fogang Tongqing Ceramics Co., Ltd	178.20	167.66
Foshan Junjing Industrial Co., Ltd	Foshan Chancheng Oldenburg Ceramics Co., Ltd.	178.20	167.66
	Guangdong Baiqiang Ceramics Co., Ltd	178.20	167.66
	Foshan Huicheng Building Material Co., Ltd	178.20	167.66
	Guangdong Jiamei Ceramics Co., Ltd	178.20	167.66
	Fujian Nan'an Baoda Building Material Co., Ltd	178.20	167.66
	Guangdong Bode Fine Building Material Co., Ltd.	178.20	167.66
	Foshan Jialeshi Building Material Co., Ltd	178.20	167.66
	Foshan Jialeshi Building Material Co., Ltd	178.20	167.66
Foshan Kiva Ceramics Co., Ltd	Guangdong Xinruncheng Ceramic Co., Ltd	178.20	167.66
	Foshan Nanhai Yuda Ceramic Co., Ltd	178.20	167.66
	Guangdong Shenghui Ceramic Co., Ltd	178.20	167.66
	Guangdong Kito Ceramic Trading Co., Ltd	178.20	167.66
	Zhaoqing Jincheng Ceramic Co., Ltd	178.20	167.66
	Guangdong Yongsheng Ceramic Co., Ltd	178.20	167.66
	Foshan Jialeshi Building Materials Co., Ltd	178.20	167.66
	Guangxi Yaou Ceramics Co., Ltd	178.20	167.66
	Foshan Nanhai Xinya Ceramic Co., Ltd	178.20	167.66
Foshan Leo Import and Export Trading Co., Ltd	Foshan Jingmeida Ceramics Procuct Co., Ltd	178.20	167.66
	Fujian Yuekai Building Materials Industry Co., Ltd.	178.20	167.66
	Guangxi Hengxi Building Materials Co., Ltd	178.20	167.66
	Foshan Shiwan Yulong Ceramic Co., Ltd	178.20	167.66
	Chaoyang Rongfu Ceramics Co., Ltd	178.20	167.66
	Xianning Xianzhuanjiang Building Materials Co., Ltd.	178.20	167.66
	Jiangxi Jingcheng Ceramics Co., Ltd	178.20	167.66
	Jiangxi Wifi Ceramics Co., Ltd	178.20	167.66
	Guangdong Jiajun Ceramics Co., Ltd	178.20	167.66
	Foshan Giania Ceramics Co., Ltd	178.20	167.66
Foshan Ligaote Ceramics Co., Ltd	Foshan Ligaote Ceramics Co., Ltd	178.20	167.66
Foshan Livin Ceramics Co., Ltd	Zhaoqing Jinhang Ceramics Co., Ltd	178.20	167.66
	Cenxi Lianchuang Ceramics Co., Ltd	178.20	167.66
Foshan Mainland Import and Export Co., Ltd	Fujian Nanan Baoda Building Materials Co., Ltd	178.20	167.66
	Fujian Jinjiang Baoda Ceramics Co., Ltd	178.20	167.66
	Nan'an Xiejin Building Material Commercial Firm.	178.20	167.66
	Nan'an Xiejin Building Materials Co., Ltd	178.20	167.66
	Fujian Honghua Group Co., Ltd	178.20	167.66
	Fujian Xindezhou Ceramics Co., Ltd	178.20	167.66
Foshan Medici Building Material Co., Ltd	Chaoyang Rongfu Ceramic Tile Co., Ltd	178.20	167.66
	Jianping Jinzheng Ceramic Tile Co., Ltd	178.20	167.66
	Fujian Yuekai Building Material Co., Ltd	178.20	167.66
	Fuzhou Hengyu Ceramic Tile Co., Ltd	178.20	167.66
	Fujian Minqing Ouya Ceramic Tile Co., Ltd	178.20	167.66
	Foshan Lazio Building Material Co., Ltd	178.20	167.66
	Zhaoqing Gaoyao Guangfu Ceramic Tile Co., Ltd.	178.20	167.66
Foshan Muzzi Decor And Tile Co., Ltd	Pingxiang Dacheng Ceramics Technologies Co., Ltd.	178.20	167.66
Foshan Oceanland Ceramics Co., Ltd	Foshan Super Ceramics Co., Ltd	178.20	167.66
	Qingyuan Baoshima Ceramic Co., Ltd	178.20	167.66
	Xinxing Jianxing Ceramics Co., Ltd	178.20	167.66
	Enping Quansheng Ceramics Co., Ltd	178.20	167.66
	Guangdong Shenghui Ceramics Co., Ltd	178.20	167.66
Foshan Paramount Import and Export Co., Ltd	Foshan Ligaote Ceramics Co., Ltd	178.20	167.66
	Foshan Nanhai District Energy Building Material Co., Ltd.	178.20	167.66

Exporter	Producer	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets) (percent)
	Foshan Shiwan Yulong Ceramic Co., Ltd	178.20	167.66
	Luoding Junhua Ceramics Industrial Co., Ltd	178.20	167.66
	Guangdong Bode Fine Building Material Co., Ltd.	178.20	167.66
Foshan Porcelain Plaza Trading Co., Ltd	Foshan Ottima Ceramic Co., Ltd	178.20	167.66
	Foshan Dongpeng Ceramic Co., Ltd	178.20	167.66
	Jinjiang City Zhongrong Ceramic Building Material Co., Ltd.	178.20	167.66
	Foshan Bannilu Ceramic Co., Ltd	178.20	167.66
	Foshan Yibaiwang Building Material Co., Ltd	178.20	167.66
Foshan Qualicer Industrial Co., Ltd	Guangzhou Cowin New Materials Co., Ltd	178.20	167.66
Foshan Rainbow Color Export & Import Co., Ltd	Heshan Heqiang Art China & Dinnerware Co., Ltd.	178.20	167.66
	Jiangmen Xuri Ceramic Co., Ltd	178.20	167.66
	Foshan Shiwan Yulong Ceramic Co., Ltd	178.20	167.66
	Foshan Jingmeida Ceramic Products Co., Ltd	178.20	167.66
	Foshan Ligao Ceramic Co., Ltd	178.20	167.66
Foshan Rhino Building Materials Co., Ltd	Guangdong Gold Medal Ceramics Co., Ltd	178.20	167.66
	Chaoyang Rong Fu Ceramic Co., Ltd	178.20	167.66
Foshan Romantic Ceramics Co., Ltd	Heyuan Romantic Ceramics Co., Ltd	178.20	167.66
	Pingxiang Dacheng Ceramics Technology Co., Ltd.	178.20	167.66
Foshan Saiguan Import & Export Co., Ltd	Saifei (Guangdong) New Materials Co., Ltd	178.20	167.66
FoShan San Honore Imp & Exp CO., LTD	Quanzhou Zhiran Ceramics Company Ltd	178.20	167.66
	Fujian Zunwei Ceramics Company Ltd	178.20	167.66
Foshan Sanden Enterprise Co., Ltd	Tegaote Ceramics Co., Ltd	178.20	167.66
	Zhaoqing Langfeng Ceramics Co., Ltd	178.20	167.66
	Guangzhou Cowin New Materials Co., Ltd	178.20	167.66
	Foshan Chengke New Material Co., Ltd	178.20	167.66
	Foshan Jingmeida Ceramics Co., Ltd	178.20	167.66
Foshan Shangking Group Co., Ltd	Guangdong Qianghui (QHTC) Ceramics Co., Ltd.	178.20	167.66
Foshan Shiwan Yulong Ceramic Co., Ltd	Foshan Shiwan Yulong Ceramic Co., Ltd	178.20	167.66
Foshan Sincere Building Materials Co., Ltd	Foshan City Lihua Ceramic Co., Ltd	178.20	167.66
	Enping City Huachang Ceramic Co., Ltd	178.20	167.66
Foshan Soaraway Industrial Co., Ltd	Foshan Shiwan Yulong Ceramic Co., Ltd	178.20	167.66
	Foshan Tai-Decor Decoration Materials Co., Ltd.	178.20	167.66
Foshan Sumso Construction Materials Co., Ltd	Foshan Laili Ceramics Co., Ltd	178.20	167.66
Foshan Sundare Building Materials Co., Ltd	Foshan Qingyuan Baoshima Co., Ltd	178.20	167.66
	Foshan New Henglong Polished Tiles Co., Ltd	178.20	167.66
	Foshan Nanhai Xinyiya Decoration Materials Co., Ltd.	178.20	167.66
Foshan Sunvin Ceramics Co., Ltd	Sihui Jie Feng Decoration Materials Co., Ltd	178.20	167.66
Foshan Tbs Trading Co., Ltd	Foshan Jiameisheng Ceramic Co., Ltd	178.20	167.66
	Qingyuan Xinjinshan Ceramics Co., Ltd	178.20	167.66
	Zhuhai Xuri Ceramics Co., Ltd	178.20	167.66
	Foshan Elephome Ceramics Co., Ltd	178.20	167.66
	Jinjiang Zhongrong Ceramics Of Build Material Co., Ltd.	178.20	167.66
	Quanzhou Yuanlong Building Materials Development Co., Ltd.	178.20	167.66
	Fujian Honghua Group Co., Ltd	178.20	167.66
	Foshan Nanhai Jinzhilan Decoration Material Co., Ltd.	178.20	167.66
	Jinjiang Guoxing Ceramic Building Material Co., Ltd.	178.20	167.66
	Guangdong Yongsheng Ceramics Co., Ltd	178.20	167.66
	Heyuan Romanic Ceramics Co., Ltd	178.20	167.66
	Zhaoqing Jinhang Ceramics Co., Ltd	178.20	167.66
	Foshan Yibao Ceramics Co., Ltd	178.20	167.66
	Qingyuan Ouya Ceramic Co., Ltd	178.20	167.66
	Foshan Top Black Ceramics Co., Ltd	178.20	167.66
	Guangdong Jialian Enterprise Ceramics Co., Ltd.	178.20	167.66
	Sihui City Xin Quan Ye Ceramics Co., Ltd	178.20	167.66
	Guangdong Hemei Ceramic Co., Ltd	178.20	167.66
	Fujian Jinjiang Lianxing Building Materials Co., Ltd.	178.20	167.66
	Foshan New Yidian Ceramic Co., Ltd	178.20	167.66

Exporter	Producer	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets) (percent)
Foshan Tianyao Ceramics Co., Ltd	Guangdong Sihui Kedi Ceramics Co., Ltd	178.20	167.66
Foshan Uni-Depot Porcelanico Co., Ltd	Guangdong Tianbi Ceramics Co., Ltd	178.20	167.66
Foshan United Export Co., Ltd	Guangdong Shenghui Ceramics Co., Ltd	178.20	167.66
	Guangdong Zhongsheng Ceramics Co., Ltd	178.20	167.66
	Fujian Honghua Group Co., Ltd	178.20	167.66
	Guangdong Godbet Ceramics Co., Ltd	178.20	167.66
	Fujian Nan'an Baoda Building Material Co., Ltd	178.20	167.66
	Zhangzhou City Aoli Ceramic Development Co. Ltd.	178.20	167.66
Foshan Viewgres Co., Ltd	Guangdong Bohua Ceramics Co., Ltd	178.20	167.66
	Shandong Tongyi Ceramics Science & Technology Co., Ltd.	178.20	167.66
	Shandong Green Ceramics Co., Ltd	178.20	167.66
	Ginca Ceramics Co., Ltd	178.20	167.66
	Xiejin Ceramics Co., Ltd	178.20	167.66
	Foshan Yigao Ceramic Co., Ltd	178.20	167.66
	Enping City Huachang Ceramic Company Limited.	178.20	167.66
	Guangzhou Cowin New Materials Co., Ltd	178.20	167.66
	Kaiping Kunen Building Materials Co., Ltd	178.20	167.66
Foshan Walton Building Materials Co., Ltd	Belite Ceramics (Anyang) Co., Ltd	178.20	167.66
	Lianxing Ceramics Co., Ltd	178.20	167.66
	Foshan Yibao Ceramics Co., Ltd	178.20	167.66
	Foshan Gaosheng Building Materials Co., Ltd	178.20	167.66
	Foshan Shiwan Eagle Brand Ceramic Co., Ltd	178.20	167.66
	Xingning Toscana Ceramics Co., Ltd	178.20	167.66
Foshan Winbill Trading Company Limited	Guangdong Yonghang Advanced Materials Industrial Co., Ltd.	178.20	167.66
Foshan Yinghui Industrial Co., Ltd	Heshan Heqiang Art China & Dinnerware Co., Ltd.	178.20	167.66
Fujian Minmetals Cbm Co., Ltd	Fujian Minqing Ouya Ceramic Tile Co., Ltd	178.20	167.66
	Xinxing Jianxing Ceramics Co., Ltd	178.20	167.66
	Tianjin Belite Ceramics Co., Ltd. Foshan Branch.	178.20	167.66
Fujian Minqing Hao Ye Ceramics Co., Ltd	Fujian Minqing Hao Ye Ceramics Co., Ltd	178.20	167.66
Fuzhou Shuangxin Ceramic Co., Ltd	Fujian Xindezhou Ceramic Co., Ltd	178.20	167.66
	Fujian Nan'an Baoda Building Material Co., Ltd	178.20	167.66
	Fujian Zhuangyi Building Material Co., Ltd	178.20	167.66
	Zhangzhou Aoli Ceramic Development Co., Ltd	178.20	167.66
Gearex Corporation	Kaiping Tilee's Building Materials Co., Ltd	178.20	167.66
	Foshan Oceano Ceramics Co., Ltd	178.20	167.66
	Jingdezhen Oceano Ceramics Co., Ltd	178.20	167.66
	Guangdong Xinruncheng Ceramics Co., Ltd	178.20	167.66
	Foshan Kioro Trade Co., Ltd	178.20	167.66
	Zhaoqing Xinhe Ceramics Co., Ltd	178.20	167.66
	Fogang Tongqing Ceramics Co., Ltd	178.20	167.66
	Foshan Bolier Building Materials Co., Ltd	178.20	167.66
	Guandong Kasor Ceramics Technology Co., Ltd.	178.20	167.66
	Max Glory International Ltd	178.20	167.66
	Rongfu Ceramics Co., Ltd	178.20	167.66
	Tegaote Ceramics Co., Ltd	178.20	167.66
	Elegance International Inc	178.20	167.66
	Foshan Shiwan Yulong Ceramic Co., Ltd	178.20	167.66
	Foshan Top-Black Ceramic Co., Ltd	178.20	167.66
	Kim Hin Ceramics (Shanghai) Co., Ltd	178.20	167.66
	Jiangxi Province Shiwan Huanqiu Ceramics Co., Ltd.	178.20	167.66
	Foshan Huanqiu Ceramics Co., Ltd	178.20	167.66
	Foshan Leo Import And Export Trading Co., Ltd	178.20	167.66
	Gearex Technical Ceramic Kun Shan Co., Ltd	178.20	167.66
Global Trading Co., Ltd	Guangdong Kito Ceramic Trading Co., Ltd	178.20	167.66
Guangdong Bode Fine Building Material Co	Guangdong Bode Fine Building Material Co	178.20	167.66
Guangdong Jiajun Ceramics Co., Ltd	Guangdong Jiajun Ceramics Co., Ltd	178.20	167.66
Guangdong Jiamei Ceramics Co., Ltd	Guangdong Jiamei Ceramics Co., Ltd	178.20	167.66
Guangdong Jinying Import & Export Co., Ltd	Guangdong Sheng Hui Ceramics Co., Ltd	178.20	167.66
	Xingning Toscana Ceramics Co., Ltd	178.20	167.66
	Guangdong Jialian Enterprise Ceramics Co., Ltd.	178.20	167.66
	Jiangxi Shiwan Huanqiu Ceramics Co., Ltd	178.20	167.66

Exporter	Producer	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets) (percent)
Guangdong Kito Ceramics Group Co., Ltd	Jingdezhen Kito Ceramic Co., Ltd	178.20	167.66
	Foshan Sanshui Kito Ceramic Co., Ltd	178.20	167.66
	Guangdong Gold Medal Ceramics Co., Ltd	178.20	167.66
Guangdong Monalisa Trading Co., Ltd	Monalisa Group Co., Ltd	178.20	167.66
Guangdong Overland Ceramics Co., Ltd	Guangdong Overland Ceramics Co., Ltd	178.20	167.66
Guangdong Winto Ceramics Co., Ltd	Guangdong Homeway Ceramics Co., Ltd	178.20	167.66
Hangzhou Nabel China Co., Ltd	Deqing Nabel Co., Ltd	178.20	167.66
Heyuan Dongyuan Eagle Brand Ceramic Co., Ltd	Heyuan Dongyuan Eagle Brand Ceramic Co., Ltd.	178.20	167.66
Hoe Hin Building Materials Co., Limited	Foshan liangjian ceramics Co., Limited	178.20	167.66
	Guangdong Bode Fine Building Material	178.20	167.66
	Kaipingkunenbuilding Materials Co., Ltd	178.20	167.66
	Zhaoqing Langfeng Ceramics Co., Ltd	178.20	167.66
	Kaiping Tilee's Building Materials Co	178.20	167.66
	Foshan Shanghui decoration material Co., Ltd	178.20	167.66
	Tegaote Ceramics Co., Ltd	178.20	167.66
	Fogang Tongqing Ceramics Co., Ltd	178.20	167.66
	Guangdong Xinruncheng Ceramics Co., Ltd	178.20	167.66
	Guangdong Simpire Building Material Co., Ltd	178.20	167.66
	Foshan Newyidian Ceramic Co., Ltd	178.20	167.66
	Foshan Shiwan Yulong Ceramic Co; Ltd	178.20	167.66
Hong Kong Kito Cerarnic Co., Limited	Guangdong Kito Ceramics Group Co., Ltd	178.20	167.66
	Jingdezhen Kito Ceramic Co., Ltd	178.20	167.66
	Foshan Sanshui Kito Ceramic Co., Ltd	178.20	167.66
	Guangdong Gold Medal Ceramics Co., Ltd	178.20	167.66
JDD Industry Co., Limited	Guangdong KITO Ceramics Group Co., Ltd	178.20	167.66
	Guangdong KITO Trading Co., Ltd	178.20	167.66
	Guangdong Bode Fine Building Material Co., Ltd.	178.20	167.66
	White Rabbit Ceramics Co., Ltd	178.20	167.66
	Guangdong Xinruncheng Ceramics Co., Ltd	178.20	167.66
	Heyuan Dongyuan Eagle Brand Ceramic Co., Ltd.	178.20	167.66
	Enping Jingye Ceramic Co., Ltd	178.20	167.66
	Guangdong Shenghui Ceramics Co., Ltd	178.20	167.66
	Zhaoqing Guoshi Enterprise Mingjia Ceramics Co., Ltd.	178.20	167.66
	Fogang Tongqing Ceramics Co., Ltd	178.20	167.66
	Guangdong Overland Ceramics Co., Ltd	178.20	167.66
	Dongguan City Wonderful Ceramics Industrial Park Co., Ltd.	178.20	167.66
	Dongguan City Wonderful Decoration Materials Co., Ltd.	178.20	167.66
	Guangdong Jiamei Ceramics Co., Ltd	178.20	167.66
	Jiangxi Hemei Ceramics Co., Ltd	178.20	167.66
	GuangDong Simpire Building Materials Co., Ltd	178.20	167.66
	Fujian Chaosheng Ceramics Co., Ltd	178.20	167.66
	Guangdong Tianbi Ceramics Co., Ltd	178.20	167.66
Jiangxi Wifi Ceramics Co., Ltd	Jiangxi Sun Ceramics Co., Ltd	178.20	167.66
Jingdezhen Kito Ceramic Co., Ltd	Jingdezhen Kito Ceramic Co., Ltd	178.20	167.66
	Guangdong Gold Medal Ceramic Co., Ltd	178.20	167.66
Jingdezhen Seed Ceramic Co., Ltd	Jingdezhen Seed Ceramic Co., Ltd	178.20	167.66
Kaiping City China Trade Import & Export Co., Ltd	Kaiping Tilee's Building Materials Co., Ltd	178.20	167.66
Kertiles (Foshan) Inc	Guangdong Shenghui Ceramics Co., Ltd	178.20	167.66
	Bite Mosaic Co., Ltd	178.20	167.66
	Foshan Nanhai Suode Mosaic Co., Ltd	178.20	167.66
	Guangdong Xinruncheng Ceramics Co., Ltd	178.20	167.66
	Foshan Jialeshi Building Co., Ltd	178.20	167.66
	Foshan Lailida Ceramics Co., Ltd	178.20	167.66
	Love Song Mosaic Co., Ltd	178.20	167.66
	Linyi Aoda Ceramic Co., LTD	178.20	167.66
	Toptiles International Shangdong Limited	178.20	167.66
	Linyi Lianshun Cermaics Co., Ltd	178.20	167.66
	Foshan Nanhai Yuda Ceramics Co., Ltd	178.20	167.66
	Guangdong Yonghang New Materials Industry Co., Ltd.	178.20	167.66
	Guangdong Yongsheng Ceramics Co., Ltd	178.20	167.66
	Foshan Viewgres Co., Ltd	178.20	167.66
	Shandong Lion king Ceramics Science & Technology Company., Ltd.	178.20	167.66

Exporter	Producer	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets) (percent)
	Quanzhou Minmetals Huayi Trading Co., Ltd	178.20	167.66
	Heyuan Dongyuan Eagle Brand Ceramics Co., Ltd.	178.20	167.66
	Foshan Liangjian Ceramics Co., Ltd	178.20	167.66
	Foshan Bull Ceramics Co., Ltd	178.20	167.66
	Foshan Huiya Ceramics Co., Ltd	178.20	167.66
	Foshan Jinmali Ceramics Co., Ltd	178.20	167.66
	Shandong Qidu Ceramics Co., Ltd	178.20	167.66
	Shandong Jiabao Ceramics Co., Ltd	178.20	167.66
	Foshan Huan Qiu Ceramics	178.20	167.66
	Jiangmen Xuri Ceramics Co., Ltd	178.20	167.66
Kim Hln Ceramics (Shanghai) Co., Ltd	KIM HIN CERAMICS (SHANGHAI) CO., LTD	178.20	167.66
Mcmarmocer Ceramics Limited	Guangdong Yonghang New Materials Industry Co., Ltd.	178.20	167.66
	Guangdong Owenlai Ceramics Co., Ltd	178.20	167.66
	Guangdong High Microcrystal Technology Co., Ltd.	178.20	167.66
	Foshan Shiwan Yulong Ceramics Co., Ltd	178.20	167.66
Megacera Incorporation Limited	Foshan Giance Trading Co., Ltd	178.20	167.66
	Foshan Accuwealth Trading Co., Ltd	178.20	167.66
Modern Home Ceramics Co., Limited	Zibo Fengxia Ceramics Co., Ltd	178.20	167.66
	Zibo Jin Yi Ceramics Co., Ltd	178.20	167.66
Nanning Ying Jin Ling Trade Co., Ltd	Saifei (Guangdong) New Materials Co., Ltd	178.20	167.66
	Guangdong Fuqiang Ceramic Co., Ltd	178.20	167.66
	Foshan Rongyi Construction Materials Co., Ltd	178.20	167.66
	Foshan Cizun Ceramics Co., Ltd	178.20	167.66
	Guangdong Xie Jin Ceramics Co., Ltd	178.20	167.66
New Zhong Yuan Ceramics Import & Export Co., Ltd. of Guangdong.	Southern Building Materials and Sanitary Co., Ltd of Qingyuan City.	178.20	167.66
	Guangdong Luxury Micro-Crystal Stone Technology Co., Ltd.	178.20	167.66
	Jiangxi Fuligao Ceramics Co., Ltd	178.20	167.66
	Hubei Baojiali Ceramics Co., Ltd	178.20	167.66
Porschelain Building Materials Co., Ltd	Guangdong Gold Medal Ceramics Co., Ltd	178.20	167.66
Qingdao Oriental Bright Trading Co., Ltd	Zibo Fengxia Ceramics Co., Ltd	178.20	167.66
	Zibo Jin Yi Ceramics Co., Ltd	178.20	167.66
Quanzhou Lans Ceramic Products Co., Ltd	Fujian Tilechina Industrial Co., Ltd	178.20	167.66
	Quanzhou Yuanlong Building Materials Development Co., Ltd.	178.20	167.66
	Fujian Likai Ceramic Co., Ltd	178.20	167.66
	Fujian Jinjiang Jincheng Ceramics Co., Ltd	178.20	167.66
Rabbit Song Building Material Co., Ltd	White Rabbit Ceramics Co., Ltd	178.20	167.66
Shandong Kingstone Ceramics Co., Ltd	Shandong Lianzhong Ceramics Co., Ltd	178.20	167.66
	Shandong Shunwei Ceramics Co., Ltd	178.20	167.66
	Zibo Xinyijin Ceramic Technology Co., Ltd	178.20	167.66
Shanghai Gaudimila Import & Exporter Co., Ltd	Shanghai Gaudimila Construction Materials Co., Ltd.	178.20	167.66
Sinorock (Jiangxi) Co., Ltd	Fujian Huatai Group Co., Ltd	178.20	167.66
Stota Ceramics Co., Ltd	Xingning Toscana Ceramics Co., Ltd	178.20	167.66
	Foshan Xinyidian Colored Ceramics Co.,Ltd	178.20	167.66
	Foshan Sanshui Kaililai Craft Products Co., Ltd	178.20	167.66
	Gaoyao Tegaote Chinaware Co., Ltd	178.20	167.66
	Guangdong Shenghui Ceramics Co., Ltd	178.20	167.66
	Foshan Yitao Building Materials Co., Ltd	178.20	167.66
	Foshan Hangxin Building Materials Co., Ltd	178.20	167.66
	Foshan Saize Decorative Materials Co., Ltd	178.20	167.66
	Foshan Nanhai Suode Glass Technics Co., Ltd	178.20	167.66
	Jiangmen Huatao Ceramics Co., Ltd	178.20	167.66
Temgoo International Trading Limited	Xinxing Jianxing Ceramics Co., Ltd	178.20	167.66
	Xinxingxian Yinghao Ceramics Co., Ltd	178.20	167.66
	Zhaoqingshi Gaoyaoqu Xingda Ceramics Co., Ltd.	178.20	167.66
	Foshan Skyplanet Import & Export Co., Ltd	178.20	167.66
The Tile Shop (Beijing) Trading Company, Ltd	Belite Ceramics (Anyang) Co., Ltd	178.20	167.66
	Foshan Xindonglong Ceramic Co., Ltd	178.20	167.66
	Quality Tile Co., Ltd	178.20	167.66
Super Building Material Co., Ltd. (Xiamen)	Xiamen Aidi Building Materials Industry Co., Ltd	178.20	167.66
	Zhangzhou Sage Building Material Technology Co., Ltd.	178.20	167.66

Exporter	Producer	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets) (percent)
	Zhangzhou Huitai Building Materials Technology Co., Ltd.	178.20	167.66
	Quanzhou Zhengyifang Ceramic Technology Co., Ltd.	178.20	167.66
	Foshan Nanhai Meitian Glass Technology Co., Ltd.	178.20	167.66
	Yunfu Jiapeng Stone Co., Ltd	178.20	167.66
	Foshan Debang Building Material Co., Ltd	178.20	167.66
	Foshan Longjing Decoration Materials Co., Ltd	178.20	167.66
Yekalon Industry Inc	Fujian Minqing Tenglong Ceramics Co., Ltd	178.20	167.66
	Romantic Ceramics Co., Ltd	178.20	167.66
	Foshan Shiwan Eagle Brand Ceraminc Ltd	178.20	167.66
	Fujian Hongxing Ceramic Development Co., Ltd	178.20	167.66
	Fujian Zhangzhou Ruicheng Ceramics Co., Ltd	178.20	167.66
	Foshan Nanhai District Traven Development Decorative Tiles Co., Ltd.	178.20	167.66
	Foshan Czun Ceramics Co., Ltd	178.20	167.66
	Foshan Qiangguan Building Materials Co., Ltd	178.20	167.66
	Foshan Jiana Ceramics Co., Ltd	178.20	167.66
	Foshan GIANIA Ceramics	178.20	167.66
	Guangdong Shenghui Ceramics Co., Ltd	178.20	167.66
	Foshan Tai-Decor Decoration Materials Co., Ltd.	178.20	167.66
	Fujian Minqing Jintao Ceramic Co., Ltd	178.20	167.66
	Foshan Lihua Ceramics Co., Ltd	178.20	167.66
	Xingning Toscana Ceramics Co., Ltd	178.20	167.66
	Foshan Nanhai Shengguan Building Materials Co., Ltd.	178.20	167.66
	Jinjiang Zhongrong Ceramic Building Material Co., Ltd.	178.20	167.66
	Foshan Yangguang Ceramics Co., Ltd	178.20	167.66
	Xindonglong Ceramices Co., Ltd	178.20	167.66
	Jinshajiang Ceramics Co., Ltd	178.20	167.66
	Enping Yijian Ceramics Co., Ltd	178.20	167.66
	Jiangmen Huatao Ceramic Co., Ltd	178.20	167.66
	Guangdong Jialian Enterprise Ceramics Co., Ltd.	178.20	167.66
	Guangdong Xinruncheng Ceramics Co., Ltd	178.20	167.66
	Fujian Huatai Group Co., Ltd	178.20	167.66
	Fujian Honghua Group Co., Ltd	178.20	167.66
	Guangdong Yonghang New Materials Industry Co., Ltd.	178.20	167.66
	Jiangxi Jingcheng Ceramics Co., Ltd	178.20	167.66
	Zhaoqing Langfeng Ceramics Co., Ltd	178.20	167.66
	Foshan Top-Black Ceramic Co., Ltd	178.20	167.66
	Zhaoqing Xinhe Ceramics Co., Ltd	178.20	167.66
Yingfei International Limited	Foshan Shuangou Ceramics Co., Ltd	178.20	167.66
Foshan Yinghui Industrial Co., Ltd	Heshan Heqiang Art China & Dinnerware Co., Ltd.	178.20	167.66
Zhuhai Xuri Star Trading Co., Ltd	Zhuhai City Doumen District Xuri Pottery And Porcelain Company Limited.	178.20	167.66
Zi Bo Teng Chen International Trade Co., Ltd	Zibo Jinhao Ceramics Co., Ltd	178.20	167.66
	Shandong Yuan Feng Ceramics Co., Ltd	178.20	167.66
Zibo Belin Trading Co., Ltd	Shandong Lion King Ceramic Technology & Science Co., Ltd.	178.20	167.66
	Shandong Yuanfeng Ceramic Co., Ltd	178.20	167.66
	Shandong Shunwei Ceramic Co., Ltd	178.20	167.66
Zibo Jiaxi Group Co., Ltd	Shandong Lionking Ceramics Co., Ltd	178.20	167.66
	Shandong Gengci Group Co., Ltd	178.20	167.66
	Shandong Lianzhong Ceramics Co., Ltd	178.20	167.66
	Shandong Greenkey Ceramics Co., Ltd	178.20	167.66
	Shandong Yuxi Ceramics Co., Ltd	178.20	167.66
	Zibo Jinhao Ceramics Co., Ltd	178.20	167.66
	Shandong Shunyuan Ceramics Co., Ltd	178.20	167.66
	Shandong Yuma Ceramics Co., Ltd	178.20	167.66
	Shandong Shunwei Ceramics Co., Ltd	178.20	167.66
	Zibo New Jinyi Ceramic And Technoogy Co., Ltd.	178.20	167.66
	Zibo Ginca Ceramics Co., Ltd	178.20	167.66
	Linyi Aoda Ceramics Co., Ltd	178.20	167.66

Exporter	Producer	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets) (percent)
Zibo Lipin Ceramic Co., Ltd	Shandong Shunwei Ceramics Co., Ltd	178.20	167.66
	Shandong Yuanfeng Ceramics Co., Ltd	178.20	167.66
	Shandong Shiziwang Ceramics Technology Co., Ltd.	178.20	167.66
	Shandong Zibo Luzhong Construction Materials Plant.	178.20	167.66
	Shandong Mingyu Ceramics Technology Co., Ltd.	178.20	167.66
	Zibo Xinjinyi Ceramics Technology Co., Ltd	178.20	167.66
	Shandong Guorun Ceramics Co., Ltd	178.20	167.66
	Zibo Jinyi Ceramics Co., Ltd	178.20	167.66
	Anyang Fuerjia Ceramics Technology Co., Ltd	178.20	167.66
	Shandong Gengci Group Co., Ltd	178.20	167.66
	Zhangzhou Aoli Ceramics Development Co., Ltd.	178.20	167.66
	Nan'an Kuoda Construction Materials Co., Ltd	178.20	167.66
	Foshan Modern Mingshi Ceramics Co., Ltd	178.20	167.66
China-Wide Entity [11]		356.02	

Suspension of Liquidation

In accordance with section 703(d)(1)(B) and (d)(2) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to suspend liquidation of entries of subject merchandise as described in the scope of the investigation section entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. Further, pursuant to 19 CFR 351.205(d), Commerce will instruct CBP to require a cash deposit equal to the rates indicated above.

Disclosure

Commerce intends to disclose to interested parties the calculations performed in connection with this preliminary determination within five days of its public announcement or, if there is no public announcement, within five days of the date of publication of this notice in the **Federal Register**, in accordance with 19 CFR 351.224(b).

Verification

As provided in section 782(i)(1) of the Act, Commerce intends to verify information relied upon in making its final determination.

Public Comment

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance no later than seven days after the date on which the last final verification report is issued in this investigation. Rebuttal briefs, limited to issues raised in case briefs, may be submitted no later than five days after the deadline date for case briefs.[12] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this investigation are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, U.S. Department of Commerce, within 30 days after the date of publication of this notice. Requests should contain the party's name, address, and telephone number, the number of participants, whether any participant is a foreign national, and a list of the issues to be discussed. If a request for a hearing is made, Commerce intends to hold the hearing at the U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC, 20230, at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Postponement of Final Determination and Extension of Provisional Measures

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioners. Pursuant to 19 CFR 351.210(e)(2), Commerce requires that requests by respondents for postponement of a final antidumping determination be accompanied by a request for extension of provisional measures from a four-month period to a period not more than six months in duration.

Between October 28, 2019, and October 30, 2019, pursuant to 19 CFR 351.210(e), Belite, Foshan Sanfi, and the petitioner requested that Commerce postpone the final determination and that provisional measures be extended to a period not to exceed six months.[13]

---

[11] Commerce preliminarily determined that Jiaxing Xingcheng Electronics Co., Ltd., Ningbo Panxiang Imp & Exp Co., Ltd., Ningbo Zhonglian Fastener Co., Ltd., and Ningbo Zhong Xin Angora Spinning Mill failed to establish their eligibility for a separate rate and, therefore, preliminarily determined that these companies are part of the China-wide entity. *See* Preliminary Decision Memorandum.

[12] *See* 19 CFR 351.309; *see also* 19 CFR 351.303 (for general filing requirements).

[13] *See* Belite's Letter, "Belite Anyang's Request for Postponement of Final Determination and Extension of Provisional Measures Period in the Antidumping Duty Investigation on *Ceramic Tile from the People's Republic of China,* A–570–108," dated October 28, 2019; Foshan Sanfi's Letter, "Ceramic Tile From the People's Republic of China—Request Postponement of Final Determination and Extension of Provisional Measures Period," dated October 30, 2019; and

In accordance with section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii), because (1) the preliminary determination is affirmative; (2) the requesting exporters account for a significant proportion of exports of the subject merchandise; and (3) no compelling reasons for denial exist, Commerce is postponing the final determination and extending the provisional measures from a four-month period to a period not greater than six months. Accordingly, Commerce's final determination will be issued no later than 135 days after the date of publication of this preliminary determination.

International Trade Commission Notification

In accordance with section 733(f) of the Act, Commerce will notify the International Trade Commission (ITC) of its preliminary determination of sales at LTFV. If the final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after the final determination whether these imports of the subject merchandise are materially injuring, or threaten material injury to, the U.S. industry.

Notification to Interested Parties

This determination is issued and published in accordance with sections 733(f) and 777(i)(1) of the Act and 19 CFR 351.205(c).

Dated: November 6, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix I

Scope of the Investigation

The merchandise covered by this investigation is ceramic flooring tile, wall tile, paving tile, hearth tile, porcelain tile, mosaic tile, flags, finishing tile, and the like (hereinafter ceramic tile). Ceramic tiles are articles containing a mixture of minerals including clay (generally hydrous silicates of alumina or magnesium) that are fired so the raw materials are fused to produce a finished good that is less than 3.2 cm in actual thickness. All ceramic tile is subject to the scope regardless of end use, surface area, and weight, regardless of whether the tile is glazed or unglazed, regardless of the water absorption coefficient by weight, regardless of the extent of vitrification, and regardless of whether or not the tile is on a backing. Subject merchandise includes ceramic tile with decorative features that may in spots exceed 3.2 cm in thickness and includes ceramic tile ''slabs'' or ''panels'' (tiles that are larger than 1 meter^2 (11 ft.^{2})).

Subject merchandise includes ceramic tile that undergoes minor processing in a third country prior to importation into the United States. Similarly, subject merchandise includes ceramic tile produced that undergoes minor processing after importation into the United States. Such minor processing includes, but is not limited to, one or more of the following: Beveling, cutting, trimming, staining, painting, polishing, finishing, additional firing, or any other processing that would otherwise not remove the merchandise from the scope of the investigation if performed in the country of manufacture of the in-scope product.

Subject merchandise is currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under the following subheadings of heading 6907: 6907.21.1005, 6907.21.1011, 6907.21.1051, 6907.21.2000, 6907.21.3000, 6907.21.4000, 6907.21.9011, 6907.21.9051, 6907.22.1005, 6907.22.1011, 6907.22.1051, 6907.22.2000, 6907.22.3000, 6907.22.4000, 6907.22.9011, 6907.22.9051, 6907.23.1005, 6907.23.1011, 6907.23.1051, 6907.23.2000, 6907.23.3000, 6907.23.4000, 6907.23.9011, 6907.23.9051, 6907.30.1005, 6907.30.1011, 6907.30.1051, 6907.30.2000, 6907.30.3000, 6907.30.4000, 6907.30.9011, 6907.30.9051, 6907.40.1005, 6907.40.1011, 6907.40.1051, 6907.40.2000, 6907.40.3000, 6907.40.4000, 6907.40.9011, and 6907.40.9051. Subject merchandise may also enter under subheadings of headings 6914 and 6905: 6914.10.8000, 6914.90.8000, 6905.10.0000, and 6905.90.0050. The HTSUS subheadings are provided for convenience and customs purposes only. The written description of the scope of this investigation is dispositive.

Petitioner's Letter, ''Antidumping Duty Investigation of Ceramic Tile from the People's Republic of China: Petitioner's Request for Postponement of Final Determination and Extension of Provisional Measures Period,'' dated October 30, 2019.

Appendix II

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Period of Investigation
IV. Scope Comments
V. Scope of the Investigation
VI. Product Characteristics
VII. Respondent Selection
VIII. Postponement of Final Determination and Extension of Provisional Measures
IX. Preliminary Negative Determination of Critical Circumstances
X. Collapsing and Affiliation
XI. Discussion of the Methodology
XII. Adjustment Under Section 777(A)(f) of the Act
XIII. Adjustment to Cash Deposit Rate for Export Subsidies
XIV. Recommendation

[FR Doc. 2019–24734 Filed 11–13–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–843]

Certain Lined Paper Products From India: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Determination of No Shipments; 2017–2018

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) is conducting an administrative review of the antidumping duty order on certain lined paper products from India, covering the period September 1, 2017 through August 31, 2018. We preliminarily find that Navneet Education Ltd. (Navneet) made sales of subject merchandise at less than normal value during the period of review (POR) and that SAB International (SAB) did not. We invite interested parties to comment on these preliminary results.

DATES: Applicable November 14, 2019.

FOR FURTHER INFORMATION CONTACT: Cindy Robinson or Samuel Brummitt, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3797 or (202) 482–7851, respectively.

SUPPLEMENTARY INFORMATION:

Background

On September 28, 2006, Commerce published the *CLPP from India AD Order* in the **Federal Register**.[1] On November 15, 2018, pursuant to section 751(a)(1) of the Tariff Act of 1930, as amended (the Act), Commerce initiated an administrative review of the antidumping duty order on certain lined paper products from India.[2] Commerce exercised its discretion to toll all deadlines affected by the partial federal government closure from December 22, 2018 through the resumption of operations on January 28, 2019.[3] On

[1] *See Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Lined Paper Products from the People's Republic of China; Notice of Antidumping Duty Orders: Certain Lined Paper Products from India, Indonesia and the People's Republic of China; and Notice of Countervailing Duty Orders: Certain Lined Paper Products from India and Indonesia,* 71 FR 56949 (September 28, 2006) (*CLPP from India AD Order*).

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 83 FR 57411 (November 15, 2018) (*Initiation Notice*).

[3] *See* Memorandum to the Record from Gary Taverman, Deputy Assistant Secretary for

Continued

June 19, 2019, we extended the deadline for the preliminary results to November 8, 2019.[4]

Commerce initiated this administrative review covering the following thirteen companies: Cellpage Ventures Private Limited (Cellpage), Goldenpalm Manufacturers PVT Limited (Goldenpalm), Kokuyo Riddhi Paper Products Private Limited (Kokuyo), Lodha Offset Limited (Lodha), Lotus Global Private Limited (Lotus Global), Magic International Pvt. Ltd. (Magic), Marisa International (Marisa), Navneet, Pioneer Stationery Private Limited (Pioneer), PP Bafna Ventures Private Limited (PP Bafna),[5] SAB, SGM Paper Products, and Super Impex.[6] This review covers two mandatory respondents, Navneet and SAB. The other eleven companies were not selected for individual examination and remain subject to this administrative review.

Scope of the Order

The merchandise covered by the *CLPP from India AD Order* is certain lined paper products. The merchandise subject to this order is currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 4811.90.9035, 4811.90.9080, 4820.30.0040, 4810.22.5044, 4811.90.9050, 4811.90.9090, 4820.10.2010, 4820.10.2020, 4820.10.2030, 4820.10.2040, 4820.10.2050, 4820.10.2060, and 4820.10.4000. Although the HTSUS numbers are provided for convenience and customs purposes, the written product description remains dispositive. A full description of the scope of the *CLPP from India AD Order* is contained in the Preliminary Decision Memorandum.[7]

Preliminary Determination of No Shipments

On November 22 and December 6, 2018, in their respective responses to Commerce's quantity and value questionnaire, Lodha and Pioneer reported that they had no exports or sales of subject merchandise into the United States during the POR. On December 10, 2018, Marisa submitted a certification of no shipments. To confirm Lodha's, Marisa's, and Pioneer's no-shipment claims, Commerce issued a no-shipment inquiry to U.S. Customs and Border Protection (CBP) requesting that it review Lodha's, Marisa's, and Pioneer's no-shipment claims. CBP reported that it had no information to contradict these claims of no shipments during the POR.

Given that Lodha, Marisa, and Pioneer reported that they made no shipments of subject merchandise to the United States during the POR, and there is no information calling their claims into question, we preliminarily determine that Lodha, Pioneer, and Marisa did not have any reviewable transactions during the POR. Consistent with Commerce's practice, we will not rescind the review with respect to Lodha, Marisa, and Pioneer but, rather, will complete the review and issue instructions to CBP based on the final results.[8]

Methodology

Commerce is conducting this review in accordance with section 751(a)(2) of the Act. Export price is calculated in accordance with section 772 of the Act. Normal value is calculated in accordance with section 773 of the Act. For a full description of the methodology underlying our preliminary results, *see* the Preliminary Decision Memorandum. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov* and is available to all parties in the Central Records Unit, Room B–8094 of the main Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/*. The signed Preliminary Decision Memorandum and the electronic version of the Preliminary Decision Memorandum are identical in content. A list of the topics discussed in the Preliminary Decision Memorandum is attached as an Appendix to this notice.

Rate for Non-Selected Respondents

For the rate for non-selected respondents in an administrative review, generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in a market economy investigation. Under section 735(c)(5)(A) of the Act, the all-others rate is normally ''an amount equal to the weighted-average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely {on the basis of facts available}.'' In this segment of the proceeding, we calculated a margin for Navneet that was not zero, *de minimis,* or based on facts available. Accordingly, we have preliminarily applied the margin calculated for Navneet to the non-individually examined respondents.

Preliminary Results of the Review

We preliminarily determine that, for the period September 1, 2017 through August 31, 2018, the following weighted-average dumping margins exist:

Producer/exporter	Weighted-average dumping margin (percent)
Cellpage Ventures Private Limited	2.30
Goldenpalm Manufacturers PVT Limited	2.30
Kokuyo Riddhi Paper Products Pvt. Ltd	2.30
Lotus Global Private Limited	2.30
Magic International Pvt. Ltd	2.30
Navneet Education Ltd	2.30
PP Bafna Ventures Private Limited	2.30
SAB International	0.00
SGM Paper Products	2.30
Super Impex	2.30

Assessment Rates

Upon issuance of the final results, Commerce shall determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review. If the weighted-average dumping margin for Navneet or SAB is not zero or *de minimis* (*i.e.,* less than 0.5

Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, ''Deadlines Affected by the Partial Shutdown of the Federal Government,'' dated January 28, 2019. All deadlines in this segment of the proceeding have been extended by 40 days. If the new deadline falls on a non-business day, in accordance with Commerce's practice, the deadline will become the next business day.

[4] *See* Memorandum, ''Certain Lined Paper Products from India: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review; 2017–2018,'' dated June 19, 2019.

[5] The name of PP Bafna was inadvertently misspelled in the initiation notice.

[6] *Initiation Notice,* 83 FR at 57412.

[7] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review: Certain Lined Paper Products from India; 2017–2018,'' dated concurrently and hereby adopted by this notice (Preliminary Decision Memorandum).

[8] *See, e.g., Certain Frozen Warmwater Shrimp from Thailand; Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Review, Preliminary Determination of No Shipments; 2012–2013,* 79 FR 15951, 15952 (March 24, 2014), unchanged in *Certain Frozen Warmwater Shrimp from Thailand: Final Results of Antidumping Duty Administrative Review, Final Determination of No Shipments, and Partial Rescission of Review; 2012–2013,* 79 FR 51306, 51307 (August 28, 2014).

percent), we will calculate importer-specific *ad valorem* antidumping duty assessment rates based on the ratio of the total amount of dumping calculated for each importer's examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1).[9] If the weighted-average dumping margin for the respondents listed above is zero or *de minimis* in the final results, or an importer-specific assessment rate is zero or *de minimis* in the final results, we will instruct CBP not to assess antidumping duties on any of their entries in accordance with the *Final Modification for Reviews.*[10]

In accordance with Commerce's assessment practice, for entries of subject merchandise during the POR produced by Navneet or SAB for which it did not know that its merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate of 3.91 percent, as established in the less-than-fair-value investigation, if there is no rate for the intermediate company(ies) involved in the transaction.[11] For a full discussion of this matter, *see Assessment Policy Notice.*[12]

We intend to issue liquidation instructions to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the notice of final results of administrative review for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for respondents noted above will be the rates established in the final results of this administrative review; (2) for merchandise exported by producers or exporters not covered in this administrative review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation, but the producer is, then the cash deposit rate will be the rate established for the most recently completed segment of this proceeding for the producer of the subject merchandise; and (4) the cash deposit rate for all other producers or exporters will continue to be 3.91 percent, the all-others rate established in the investigation. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Disclosure and Public Comment

We will disclose to parties to the proceeding any calculations performed in connection with these preliminary results of review within five days after the date of publication of this notice.[13] Interested parties may submit case briefs not later than 30 days after the date of publication of this notice in the **Federal Register**.[14] Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than five days after the date for filing case briefs.[15] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[16] All briefs must be filed electronically using ACCESS. An electronically filed document must be received successfully in its entirety by the established deadline.

Interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, within 30 days after the date of publication of this notice.[17] Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs. If a request for a hearing is made, Commerce intends to hold the hearing at the U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, at a time and date to be determined.[18] Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

We intend to issue the final results of this administrative review, including the results of our analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties and/or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Commerce's presumption that reimbursement of antidumping duties occurred and increase the subsequent assessment of the antidumping duties.

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(h)(1).

Dated: November 7, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Preliminary Determination of No Shipments
V. Companies Not Selected for Individual Examination
VI. Discussion of the Methodology
VII. Currency Conversion
VIII. Recommendation

[FR Doc. 2019–24733 Filed 11–13–19; 8:45 am]

BILLING CODE 3510–DS–P

[9] In these preliminary results, Commerce applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101 (February 14, 2012). (*Final Modification for Reviews*).

[10] *Id.,* 77 FR at 8102.

[11] *See CLPP from India AD Order,* 71 FR at 56952.

[12] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003) (*Assessment Policy Notice*).

[13] *See* 19 CFR 351.224(b).

[14] *See* 19 CFR 351.309(c)(1)(ii).

[15] *See* 19 CFR 351.309(d)(1).

[16] *See* 19 CFR 351.309(c)(2) and (d)(2) and 19 CFR 351.303 (for general filing requirements).

[17] *See* 19 CFR 351.310(c).

[18] *See* 19 CFR 351.310(d).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–351–849]

Emulsion Styrene-Butadiene Rubber From Brazil: Preliminary Results of Antidumping Duty Administrative Review; 2017–2018

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) preliminarily determines that certain emulsion styrene-butadiene rubber (ESB rubber) from Brazil is being, or is likely to be, sold in the United States at less than fair value. Interested

parties are invited to comment on these preliminary results.

DATES: Applicable November 14, 2019.

FOR FURTHER INFORMATION CONTACT: Drew Jackson, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4406.

SUPPLEMENTARY INFORMATION:

Background

On November 15, 2018, Commerce published in the **Federal Register** the notice of initiation of an antidumping duty administrative review on ESB rubber from Brazil.[1] The review covers one producer/exporter of the subject merchandise, ARLANXEO Brasil S.A. (ARLANXEO Brasil).[2] The period of review (POR) is February 24, 2017 through August 31, 2018.[3] Commerce exercised its discretion to toll all deadlines affected by the partial federal government closure from December 22, 2018 through the resumption of operations on January 29, 2019.[4] As a result, the revised deadline for the preliminary results of this administrative review became July 12, 2019. On June 7, 2019, we extended the preliminary results until November 7, 2019.[5] Interested parties are invited to comment on these preliminary results.

Scope of the Order

The product covered by this review is certain emulsion styrene-butadiene rubber from Brazil. For a full description of the scope *see* the Preliminary Decision Memorandum.[6]

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (the Act). For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. A list of the topics included in the Preliminary Decision Memorandum is included as an appendix to this notice. The Preliminary Decision Memorandum is a public document and is made available to the public via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov,* and it is available to all parties in the Central Records Unit, Room B8024 of the main Commerce building. In addition, a complete version of the Preliminary Decision Memorandum is available at *http://enforcement.trade.gov/frn/.* The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results of the Administrative Review

We preliminarily determine that the following weighted-average dumping margin exists for the period February 24, 2017 through August 31, 2018:

Exporter/producer	Weighted-average margin (percent)
ARLANXEO Brasil S.A	24.97

Disclosure

We intend to disclose the calculations performed for these preliminary results to the interested parties within five days after public announcement of the preliminary results in accordance with 19 CFR 351.224(b).

Public Comment

Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs to the Assistant Secretary for Enforcement and Compliance not later than 30 days after the date of publication of this notice, unless the Secretary alters the time limit. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[7] Parties who submit case briefs or rebuttal briefs in this administrative review are encouraged to submit with each argument: (1) A statement of the issue, (2) a brief summary of the argument, and (3) a table of authorities.[8]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. An electronically filed document must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5:00 p.m. Eastern Time within 30 days after the date of publication of this notice.[9] Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. Commerce intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of these preliminary results in the **Federal Register**, pursuant to section 751(a)(3)(A) of the Act, unless extended.

Assessment Rate

Upon issuance of the final results, Commerce will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review.[10] If a respondent's weighted-average dumping margin is above *de minimis* in the final results of this review, we will calculate an importer-specific assessment rate based on the ratio of the total amount of dumping calculated for each importer's examined sales and the total entered value of the sales in accordance with 19 CFR 351.212(b)(1).[11] If a respondent's weighted-average dumping margin or an importer-specific assessment rate is zero or *de minimis* in the final results of review, we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties in accordance with the *Final Modification for Reviews*.[12] The final results of this administrative review shall be the basis for the assessment of antidumping duties on entries of merchandise under review and for future deposits of estimated duties, where applicable. We intend to issue liquidation instructions

[1] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 83 FR 57411 (November 15, 2018).

[2] *Id.*

[3] *Id.*

[4] *See* Memorandum to the Record from Gary Taverman, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, ''Deadlines Affected by the Partial Shutdown of the Federal Government,'' dated January 28, 2019. All deadlines in this segment of the proceeding have been extended by 40 days.

[5] *See* Memorandum, ''2017–2018 Antidumping Duty Administrative Review of Emulsion Styrene Butadiene Rubber: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review,'' dated June 7, 2019.

[6] *See* Memorandum, ''Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review: Emulsion Styrene-Butadiene Rubber from Brazil; 2017–2018,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[7] *See* 19 CFR 351.309(d); *see also* 19 CFR 351.303 (for general filing requirements).

[8] *See* 19 CFR 351.309(c)(2) and (d)(2).

[9] *See* 19 CFR 351.310(c).

[10] *See* 19 CFR 351.212(b).

[11] In these preliminary results, Commerce applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*).

[12] *See Final Modification for Reviews,* 77 FR at 8103; *see also* 19 CFR 351.106(c)(2).

to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following cash deposit requirements for estimated antidumping duties will be effective upon publication of the notice of final results of this review for all shipments of ESB rubber from Brazil entered, or withdrawn from warehouse, for consumption on or after the date of publication as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for company subject to this review will be equal to the weighted-average dumping margin established in the final results of the review; (2) for merchandise exported by companies not covered in this review but covered in a prior segment of this proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation but the producer is, the cash deposit rate will be the rate established for the most recently completed segment for the producer of the merchandise; (4) the cash deposit rate for all other producers or exporters will continue to be 19.61 percent, the all-others rate established in the less-than-fair-value investigation.[13] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this period of review. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification to Interested Parties

Commerce is issuing and publishing these results in accordance with sections 751(a)(1) and 777(i) of the Act and 19 CFR 351.221(b)(4).

[13] *See Emulsion Styrene-Butadiene Rubber From Brazil: Final Affirmative Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances,* 82 FR 33048 (July 19, 2019).

Dated: November 7, 2019.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Discussion of the Methodology
V. Recommendation

[FR Doc. 2019–24730 Filed 11–13–19; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Public Comment for the Four Draft NOAA Science and Technology Strategies: NOAA Unmanned Systems, Artificial Intelligence, 'Omics, and Cloud Strategies

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice of public comment.

SUMMARY: This notice announces the availability for public comment of the NOAA *Unmanned Systems, Artificial Intelligence, 'Omics, and Cloud draft strategies.* These strategies are intended to dramatically expand our application of these four emerging science and technology focus areas by improving the efficiency, effectiveness and coordination of their development and usage across the agency.

DATES: Comments must be received by December 16, 2019.

ADDRESSES: Copies of the draft strategies may be downloaded or viewed on the internet at *https://nrc.noaa.gov/NOAA-Science-Technology-Focus-Areas.* The documents are also available by sending a written request to the point of contact identified below (see **FOR FURTHER INFORMATION**). You may submit public comments via email to *oar.rc.execsec@noaa.gov.* Please include ''Public Comment on NOAA Draft Science and Technology Strategies'' in the subject line of the message. You may also submit public comments via mail to Emma Kelley, Office of Labs and Cooperative Institutes, NOAA Research, 1315 East-West Highway, Silver Spring, MD 20910. All comments received are part of the public record. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender is publicly accessible. NOAA will accept anonymous comments.

FOR FURTHER INFORMATION CONTACT: Emma Kelley, Research Council Executive Secretariat, Office of Labs and Cooperative Institutes, NOAA Research, Rm. 11319, 1315 East-West Highway, Silver Spring, Maryland 20910. (Phone: 301–734–1179, email: *emma.kelley@noaa.gov*).

SUPPLEMENTARY INFORMATION: In recent years, individual NOAA programs and its multisector partners have worked to advance successful *unmanned systems, artificial intelligence, 'omics, and cloud solutions* that improve the delivery of their respective missions.

The draft strategies NOAA developed for each of these science and technology focus areas directly follow guidance from the Administration and Congress, including the Office of Science and Technology Policy FY21 Research and Development Priorities letter, the National Science and Technology Council report ''Science and Technology for America's Oceans: a Decadal Vision'', the Executive Order on Maintaining American Leadership in Artificial Intelligence, the Weather Research and Forecasting Innovation Act, and the Commercial Engagement Through Ocean Technology (CENOTE) Act.

The draft strategies will ensure robust agency-wide coordination and strong institutional support from NOAA senior leadership for these emerging science and technology focus areas to guide transformational advances in the quality and efficiency of NOAA's science, products, and services.

Summary of the Four Draft Strategies

Unmanned Systems Strategy: In recognition of the opportunities unmanned systems presents for addressing NOAA's mission priorities, the *NOAA Unmanned Systems Strategy* provides a framework to: (1) Efficiently provide requirements-driven, safe, cost-effective, and compliant Unmanned Systems services across the agency; (2) prioritize strategic investments in Unmanned Systems applications and technologies that fuel innovation and strengthen operations, and (3) accelerate and enhance capabilities through partnerships.

Artificial Intelligence Strategy: The overarching goal of the *NOAA Artificial Intelligence (AI) Strategy* is to utilize AI to advance NOAA's requirements-driven mission priorities. Through this strategy, NOAA seeks to reduce the cost of data processing, and provide higher quality and more timely scientific products and services for societal benefits.

'Omics Strategy: In recognition of the opportunities and challenges presented

by the advent of 'omics tools (a suite of advanced methods used to analyze material such as DNA, RNA, or proteins), the NOAA *'Omics Strategy* provides a framework to advance the application of 'omics to address mission priorities. The strategy leverages NOAA's current organizational structure to more effectively implement 'omics through improvements in computational and analytical capacities, targeted research, technology transition, workforce proficiency, and partnerships across NOAA's lines, federal agencies, and extramural research and commercial communities.

Cloud Strategy: NOAA's robust experience with cloud applications are already beginning to demonstrate significant improvements in performance and skill in areas such as satellite data products and services, numerical weather prediction, ocean models, and big data analysis, storage and dissemination. Cloud services will be further leveraged to expand benefits, such as: (1) Accelerated timeline to acquire new computing resources, (2) increased security posture, (3) more accessible and monetizable NOAA data to customers, such as academia and industry, (4) reduced transition time from research to operations, (5) scalable infrastructure that supports scientific and high performance computing requirements, and (6) a more agile and innovative culture.

After completion of these strategies, NOAA will develop corresponding Strategic Implementation Plans (or ''Roadmaps'') that define detailed action items, deadlines, and responsibilities. In the meantime, these NOAA S&T focus areas are already improving performance in our economically impactful missions and setting the course to strengthen our renowned environmental science and technology leadership for the coming decades. Through the four strategies, NOAA will be better positioned to achieve our top agency priorities to regain global leadership in numerical weather prediction and sustainably expand the American Blue Economy.

Dated: November 8, 2019.

David Holst,

Chief Financial Officer/Administrative Officer, Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration.

[FR Doc. 2019–24753 Filed 11–13–19; 8:45 am]

BILLING CODE 3510–KD–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XR055

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Seabird Research Activities in Central California

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

ACTION: Notice; incidental harassment authorization; request for comments on proposed Renewal.

SUMMARY: NMFS received a request from Point Blue Conservation Science (Point Blue) for the Renewal of their currently active incidental harassment authorization (IHA) to take marine mammals incidental to seabird and pinniped research activities in central California. These activities are identical to those covered in the current authorization. Pursuant to the Marine Mammal Protection Act, prior to issuing the currently active IHA, NMFS requested comments on both the proposed IHA and the potential for renewing the initial authorization if certain requirements were satisfied. The Renewal requirements have been satisfied, and NMFS is now providing an additional 15-day comment period to allow for any additional comments on the proposed Renewal not previously provided during the initial 30-day comment period.

DATES: Comments and information must be received no later than November 29, 2019.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to *ITP.Fowler@noaa.gov.*

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments received electronically, including all attachments, must not exceed a 25-megabyte file size. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection*-act without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Amy Fowler, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the original application, Renewal request, and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The Marine Mammal Protection Act (MMPA) prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to here as ''mitigation measures''). Monitoring and reporting of such takings are also required. The meaning of key terms such as ''take,'' ''harassment,'' and ''negligible impact'' can be found in section 3 of the MMPA (16 U.S.C. 1362) and the agency's regulations at 50 CFR 216.103.

NMFS' regulations implementing the MMPA at 50 CFR 216.107(e) indicate that IHAs may be renewed for additional periods of time not to exceed one year for each reauthorization. In the notice of proposed IHA for the initial authorization, NMFS described the circumstances under which we would consider issuing a Renewal for this activity, and requested public comment on a potential Renewal under those circumstances. Specifically, on a case-by-case basis, NMFS may issue a one-year IHA Renewal when (1) another year of identical or nearly identical activities as described in the Specified Activities section is planned or (2) the activities would not be completed by the time the IHA expires and a second IHA would allow for completion of the activities beyond that described in the Dates and Duration section of the initial IHA. All of the following conditions must be met in order to issue a Renewal:

- A request for Renewal is received no later than 60 days prior to expiration of the current IHA.
- The request for Renewal must include the following:

(1) An explanation that the activities to be conducted beyond the initial dates either are identical to the previously analyzed activities or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, take estimates, or mitigation and monitoring requirements; and

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

- Upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures remain the same and appropriate, and the initial findings remain valid.

Although their request was not received 60 days in advance, issuance of the Renewal is still justified, given the effective dates do not extend beyond one year from the expiration of the initial IHA and all of the other qualifications were met.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is provided to allow for any additional comments on the proposed Renewal. A description of the Renewal process may be found on our website at: *www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals.* Any comments received on the potential Renewal, along with relevant comments on the initial IHA, have been considered in the development of this proposed IHA Renewal, and a summary of agency responses to applicable comments is included in this notice. NMFS will consider any additional public comments prior to making any final decision on the issuance of the requested Renewal, and agency responses will be summarized in the final notice of our decision.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an incidental harassment authorization) with respect to potential impacts on the human environment. This action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental harassment authorizations with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the renewal IHA qualifies to be categorically excluded from further NEPA review. We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

History of Request

On June 28, 2018, NMFS issued an IHA to Point Blue to take marine mammals incidental to seabird research activities in central California (83 FR 31372; July 5, 2018), effective from July 7, 2018 through July 6, 2019. On August 20, 2019, NMFS received an application for the Renewal of that initial IHA. As described in the application for Renewal, the activities for which incidental take is requested are identical to those covered in the initial authorization. As required, the applicant also provided a preliminary monitoring report (available at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-research-and-other-activities*) which confirms that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted.

Description of the Specified Activities and Anticipated Impacts

Point Blue plans to monitor and census seabird populations, observe seabird nesting habitat, restore nesting burrows, and resupply a field station annually in central California. The planned activities occur on Southeast Farallon Island (SEFI), Año Nuevo Island (ANO), and Point Reyes National Seashore (PRNS). Point Blue, along with partners Oikonos Ecosystem Knowledge and PRNS, have been conducting seabird research activities at these locations for over 30 years. This research is conducted under cooperative agreements with the U.S. Fish and Wildlife Service (USFWS) in consultation with the Gulf of the Farallones National Marine Sanctuary. The seabird research and monitoring activities planned by Point Blue are identical to those analyzed in the initial IHA issued by NMFS, described in detail in the **Federal Register** notice of proposed IHA (83 FR 20045; May 7, 2018).

Presence of researchers has the potential to disturb pinnipeds hauled out at SEFI, ANO, and PRNS. As in the initial authorization, NMFS anticipates that take, by Level B harassment only, of California sea lions (*Zalophus californianus*), harbor seals (*Phoca vitulina*), northern elephant seals (*Mirounga angustirostris*), and Steller sea lions (*Eumetopias jubatus*) could result from the specified activity (83 FR 31372; July 5, 2018).

Detailed Description of the Activity

A detailed description of the seabird research and monitoring activities for which take is proposed here may be found in the Notices of the Proposed and Final IHAs for the initial authorization (83 FR 20045, May 7, 2018; 83 FR 31372, July 5, 2018). The locations (as described in the *Specific Geographic Region* section of the initial IHA), timing, and nature of the activities, including the types of equipment planned for use, are identical to those described in the previous notices. The proposed Renewal would be effective from the date of issuance through July 6, 2020.

Description of Marine Mammals

A description of the marine mammals in the area of the activities for which authorization of take is proposed here, including information on abundance, status, distribution, and hearing, may be found in the **Federal Register** Notice of the Proposed IHA for the initial authorization (83 FR 20045; May 7, 2018). NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature. The 2018 Stock Assessment Report notes that the estimated abundance of California sea lions has decreased slightly, however, neither this nor any other new information affects which species or stocks have the potential to be affected or the pertinent information in the section Description of Marine Mammals in the Area of Specified Activities contained in the supporting documents for the initial IHA.

Potential Effects on Marine Mammals and Their Habitat

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which take is proposed here may be found in the **Federal Register** Notice of the Proposed IHA for the initial authorization (83 FR 20045; May 7, 2018). NMFS has reviewed the monitoring data from the initial IHA, recent Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects our initial analysis of impacts on marine mammals and their habitat.

Estimated Take

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the **Federal Register** Notices of the Proposed and Final IHAs for the initial authorization (83 FR 20045, May 7, 2018; 83 FR 31372, July 5, 2018). Specifically, the expected number of survey days, and marine mammal occurrence data applicable to this authorization remain unchanged from the previously issued IHA. Similarly, the stocks taken, methods of take, and types of take remain unchanged from the previously issued IHA, as do the number of takes, which are indicated below in Table 1. As in the initial IHA, the take estimates are based on historical data from the previous five monitoring reports (2013–2014, 2014–2015, 2015–2016, 2016–2017, and 2017–2018) to generate 95 percent confidence interval maximums (assuming normal distribution) using STATA, a genera-purpose statistical computer package. Takes recorded in all previous monitoring reports were based on occurrences that are consistent with Levels 2 and 3 of the three-point harassment scale (see Table 2).

TABLE 1—POPULATION ABUNDANCE ESTIMATES, TOTAL PROPOSED LEVEL B TAKE, AND PERCENTAGE OF POPULATION THAT MAY BE TAKEN

Species	Stock	Stock abundance	Total proposed level B take	Percentage of stock or population
California sea lion	U.S	257,606	32,623	12.7
Northern elephant seal	California breeding stock	179,000	239	0.13
Harbor seal	California	30,968	304	0.98
Steller sea lion	Eastern U.S	41,638	43	0.10

Description of Proposed Mitigation, Monitoring and Reporting Measures

The proposed mitigation, monitoring, and reporting measures included as requirements in this authorization are identical to those included in the **Federal Register** Notice announcing the issuance of the initial IHA (83 FR 31372; July 5, 2018), and the discussion of the least practicable adverse impact included in that document remains accurate. The following measures are proposed for this renewal:

To reduce the potential for disturbance from acoustic and visual stimuli associated with survey activities Point Blue will implement the following mitigation measures for marine mammals:

(1) Slow approach to beaches for boat landings to avoid stampede, provide animals opportunity to enter water, and avoid vessel strikes;

(2) Observe a site from a distance, using binoculars if necessary, to detect any marine mammals prior to approach to determine if mitigation is required (*i.e.,* site surveys will not be conducted if fur seals are present; if other pinnipeds are present, researchers will approach with caution, walking slowly, quietly, and close to the ground to avoid surprising any hauled-out individuals and to reduce flushing/stampeding of individuals);

(3) Avoid pinnipeds along access ways to sites by locating and taking a different access way. Researchers will keep a safe distance from and not approach any marine mammal while conducting research, unless it is absolutely necessary to flush a marine mammal in order to continue conducting research (*i.e.,* if a site cannot be accessed or sampled due to the presence of pinnipeds);

(4) Cease or delay visits if the number of takes that have been granted are met, if a species for which takes were not granted is observed (*e.g.,* northern fur seals and Guadalupe fur seals), or if pups are present;

(5) Monitor for offshore predators and do not approach hauled out pinnipeds if great white sharks (*Carcharodon carcharias*) or killer whales (*Orcinus orca*) are present. If Point Blue and/or its designees see pinniped predators in the area, they must not disturb the pinnipeds until the area is free of predators;

(6) Keep voices hushed and bodies low to the ground in the visual presence of pinnipeds;

(7) Conduct seabird observations at North Landing on SEFI in an observation blind, shielded from the view of hauled out pinnipeds;

(8) Crawl slowly to access seabird nest boxes on ANI if pinnipeds are within view;

(9) Coordinate research visits to intertidal areas of SEFI (to reduce potential take) and coordinate research goals for ANI to minimize the number of trips to the island; and

(10) Require beach landings on ANI only occur after any pinnipeds that might be present on the landing beach have entered the water.

Point Blue will contribute to the knowledge of pinnipeds in California by noting observations of: (1) Unusual behaviors, numbers, or distributions of pinnipeds, such that any potential follow-up research can be conducted by the appropriate personnel; (2) tag-bearing pinnipeds or carcasses, allowing transmittal of the information to appropriate agencies and personnel; and (3) rare or unusual species of marine mammals for agency follow-up.

Proposed monitoring protocols for Point Blue will include the following:

(1) Record of date, time, and location (or closest point of ingress) of each visit to the research site;

(2) Composition of the marine mammals sighted, such as species, gender and life history stage (*e.g.,* adult, sub-adult, pup);

(3) Information on the numbers (by species) of marine mammals observed during the activities;

(4) Estimated number of marine mammals (by species) that may have been harassed during the activities;

(5) Behavioral responses or modifications of behaviors that may be attributed to the specific activities and a description of the specific activities occurring during that time (*e.g.,* pedestrian approach, vessel approach); and

(6) Information on the weather, including the tidal state and horizontal visibility.

The lead biologist will serve as an observer to record incidental take. For consistency, any reactions by pinnipeds to researchers will be recorded according to a three-point scale shown in Table 2. Note that only observations of disturbance noted in Levels 2 and 3 should be recorded as takes.

TABLE 2—LEVELS OF PINNIPED BEHAVIORAL DISTURBANCE

Level	Type of response	Definition
1	Alert	Seal head orientation or brief movement in response to disturbance, which may include turning head towards the disturbance, craning head and neck while holding the body rigid in a u-shaped position, changing from a lying to a sitting position, or brief movement of less than twice the animal's body length.
2 *	Movement	Movements in response to the source of disturbance, ranging from short withdrawals at least twice the animal's body length to longer retreats over the beach, or if already moving a change of direction of greater than 90 degrees.
3 *	Flush	All retreats (flushes) to the water.

* Only observations of disturbance Levels 2 and 3 are recorded as takes.

This information will be incorporated into a monitoring report for NMFS. The monitoring report will cover the period from January 1, 2019 through December 31, 2019. NMFS has requested that Point Blue submit annual monitoring report data on a calendar year schedule, regardless of the current IHA's initiation or expiration dates. This will ensure that data from all consecutive months will be collected and, therefore, can be analyzed to estimate authorized take for future IHA's regardless of the existing IHA's issuance date. Point Blue will submit a draft monitoring report to NMFS Office of Protected Resources by April 1, 2020. A final report will be prepared and submitted within 30 days following resolution of any comments on the draft report from NMFS. If no comments are received from NMFS, the draft final report will be considered to be the final report. This report must contain the informational elements described above, at minimum.

Point Blue must also report observations of unusual pinniped behaviors, numbers, or distributions and tag-bearing carcasses to the NMFS West Coast Regional Office.

If at any time the specified activity clearly causes the take of a marine mammal in a manner prohibited by this IHA, such as an injury (Level A harassment), serious injury, or mortality, Point Blue will immediately cease the specified activities and report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS. The report must include the following information:

(1) Time and date of the incident;

(2) Description of the incident;

(3) Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, and visibility);

(4) Description of all marine mammal observations in the 24 hours preceding the incident;

(5) Species identification or description of the animal(s) involved;

(6) Fate of the animal(s); and

(7) Photographs or video footage of the animal(s).

Activities will not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with Point Blue to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. Point Blue may not resume the activities until notified by NMFS.

In the event that an injured or dead marine mammal is discovered and it is determined that the cause of the injury or death is unknown and the death is relatively recent (*e.g.,* in less than a moderate state of decomposition), Point Blue will immediately report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS. The report must include the same information identified in the paragraph above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with Point Blue to determine whether additional mitigation measures or modifications to the activities are appropriate.

In the event that an injured or dead marine mammal is discovered and it is determined that the injury or death is not associated with or related to the activities authorized in the IHA (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), Point Blue will report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS, within 24 hours of the discovery. Point Blue will provide photographs or video footage or other documentation of the stranded animal sighting to NMFS. Activities may continue while NMFS reviews the circumstances of the incident.

Public Comments

As noted previously, NMFS published a notice of a proposed IHA (83 FR 20045; May 7, 2018) and solicited public comments on both our proposal to issue the initial IHA for seabird research and on the potential for a Renewal, should certain requirements be met.

All public comments were addressed in the notice announcing the issuance of the initial IHA (83 FR 31372; July 5, 2018). Below, we describe how we have addressed, with updated information where appropriate, any comments received that specifically pertain to the Renewal of the 2018 IHA.

Comment: The Marine Mammal Commission (Commission) requested clarification of certain issues associated with NMFS's notice that one-year Renewals can be issued in certain limited circumstances and expressed concern that the process would bypass the public notice and comment requirements. The Commission also suggested that NMFS should discuss the possibility of Renewals through a more general route, such as a rulemaking, instead of notice in a specific authorization. The Commission further recommended that if NMFS did not pursue a more general route, that the agency provide the Commission and the public with a legal analysis supporting our conclusion that this process is consistent with the requirements of section 101(a)(5)(D) of the MMPA.

Response: The notice of the proposed initial IHA expressly notified and invited comment from the public on the possibility that under certain, limited conditions the applicant could seek a Renewal IHA for an additional year. The notice described the conditions under which such a Renewal request could be considered and expressly sought public comment in the event such a Renewal were sought. Further, since issuance of the initial IHA NMFS has modified the Renewal process to provide notice through the **Federal Register** and an additional 15-day public comment period at the time the Renewal IHA is requested. NMFS also will provide direct notice of the proposed Renewal to those who commented on the initial IHA, to provide an opportunity to submit any additional comments.

We appreciate the Commission's suggestion that NMFS discuss the potential for IHA Renewals through a more general route, such as a rulemaking. However, utilizing the public comment process associated with IHAs is more efficient for the agency, while still providing for appropriate public input into NMFS' decision-making. Further, NMFS's recent modification to the Renewal process (*i.e.,* soliciting additional public comment at the time of a Renewal request) should alleviate the Commission's concern about the lack of additional public comment and need for a more general rulemaking.

For more information, NMFS has published a description of the Renewal process on our website (available at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals*).

Preliminary Determinations

The seabird research and monitoring activities proposed by Point Blue are identical to those analyzed in the initial IHA, as are the planned number of days of activity, the method of taking, and the effects of the action. The potential effects of Point Blue's activities are limited to Level B harassment in the form of behavioral disturbance. In analyzing the effects of the activity in the initial IHA, NMFS determined that Point Blue's activities would have a negligible impact on the affected species or stocks and that the authorized take numbers of each species or stock were small relative to the relevant stocks (*e.g.,* less than 13 percent of all stocks). The numbers of marine mammals proposed to be taken in this authorization are identical to those authorized in the initial IHA. The mitigation measures and monitoring and reporting requirements as described above are identical to the initial IHA.

NMFS has preliminarily concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA. This includes consideration of the estimated abundance of the California sea lion stock decreasing slightly. Based on the information and analysis contained here and in the referenced documents, NMFS has determined the following: (1) The required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) Point Blue's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action; and (5) appropriate monitoring and reporting requirements are included.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally, in this case with the West Coast Region Protected Resources Division Office, whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is proposed or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Proposed Renewal and Request for Public Comment

As a result of these preliminary determinations, NMFS proposes to issue an IHA Renewal to Point Blue for conducting seabird research activities in Central California, provided the previously described mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* We request comment on our analyses, the proposed Renewal, and any other aspect of this Notice. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

Dated: November 7, 2019.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2019–24668 Filed 11–13–19; 8:45 am]

BILLING CODE 3510–22–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 10:00 a.m., Thursday, November 21, 2019.

PLACE: Three Lafayette Centre, 1155 21st Street NW, Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Enforcement matters. In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at *https://www.cftc.gov/.*

CONTACT PERSON FOR MORE INFORMATION: Christopher Kirkpatrick, 202–418–5964.

Authority: 5 U.S.C. 552b.

Dated: November 12, 2019.

Christopher Kirkpatrick,

Secretary of the Commission.

[FR Doc. 2019–24808 Filed 11–12–19; 4:15 pm]

BILLING CODE 6351–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting

TIME AND DATE: Wednesday, November 13, 2019; 1:30 p.m.

PLACE: Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, MD 20814.

STATUS: Commission Meeting—Closed to the Public.

MATTER TO BE CONSIDERED: Compliance Matter: Staff will brief the Commission on a potential compliance action regarding a home appliance**

CONTACT PERSON FOR MORE INFORMATION: Alberta E. Mills, Secretary, Division of the Secretariat, Office of the General Counsel, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504–7479.

* The Commission unanimously determined by recorded vote that Agency business requires calling the meeting without seven calendar days advance public notice.

Dated: November 12, 2019.

Alberta E. Mills,

Secretary.

[FR Doc. 2019–24837 Filed 11–12–19; 4:15 pm]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Office of the Department of the Air Force

Notice of Intent To Grant an Exclusive Patent License

AGENCY: Department of the Air Force, DoD.

ACTION: Notice of Intent.

SUMMARY: Pursuant to the Bayh-Dole Act and implementing regulations, the Department of the Air Force hereby gives notice of its intent to grant an exclusive patent license agreement to the Defense Science Technology Laboratory, an executive agency of the Ministry of Defense of the United Kingdom of Great Britain and Northern Ireland.

DATES: Written objections must be filed no later than fifteen (15) calendar days after the date of publication of this Notice.

ADDRESSES: Submit written objections to the Air Force Materiel Command Law Office, AFMCLO/JAZ, 2240 B Street, Room 260, Wright-Patterson AFB, OH 45433–7109; Facsimile: (937) 255–3733; or Email: *afmclo.jaz.tech@us.af.mil.* Include Docket No. AFD 1796 in the subject line of the message.

FOR FURTHER INFORMATION CONTACT: Air Force Materiel Command Law Office, AFMCLO/JAZ, 2240 B Street, Rm 260, Wright-Patterson AFB, OH 45433–7109; Facsimile: (937) 255–3733; Email: *afmclo.jaz.tech@us.af.mil.*

SUPPLEMENTARY INFORMATION: The Department of the Air Force intends to grant the exclusive patent license agreement to consolidate rights with co-owner The Secretary of State for Defense of the United Kingdom of Great Britain and Northern Ireland as represented by the Defense Science Technology Laboratory for the invention described in:

A Radio or Sonic Wave Detector, Transmitter, Receiver and Method Thereof
- —United Kingdom Application Serial No. GB1803239.1, filed February 28, 2018
- —Patent Cooperation Treaty Serial No. PCT/GB2019/000041, filed February 25, 2019
- —U.S. Patent Application Serial No. 16/288,791, filed February 28, 2019

The consolidation of rights is in the best interest of both owners in order to promote commercialization of the technology in the United States and abroad. The Department of the Air Force may grant the prospective license unless a timely objection is received that sufficiently shows the grant of the license would be inconsistent with the Bayh-Dole Act or implementing regulations. A competing application for a patent license agreement, completed in compliance with 37 CFR 404.8 and received by the Air Force within the period for timely objections, will be treated as an objection and may be considered as an alternative to the proposed license.

Adriane Paris,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2019–24705 Filed 11–13–19; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Office of the Secretary

U.S. Strategic Command Strategic Advisory Group; Notice of Advisory Committee Closed Meeting; Cancellation

AGENCY: Office of the Chairman Joint Chiefs of Staff, Department of Defense (DoD).

ACTION: Notice of Federal Advisory Committee; cancellation.

SUMMARY: On Monday, October 28, 2019 the DoD published a notice announcing a meeting of the U.S. Strategic Command Strategic Advisory Group that was to take place on Tuesday, November 19, 2019 to Wednesday, November 20, 2019. Due to schedule conflicts, the DoD is cancelling the November 19–20 meeting.

ADDRESSES: Mailing address is 901 SAC Boulevard, Suite 1F7, Offutt AFB, NE 68113–6030.

FOR FURTHER INFORMATION CONTACT: Mr. John L. Trefz, Jr., Designated Federal Officer, (402) 294–4102 (Voice), (402) 294–3128 (Facsimile), *john.l.trefz.civ@mail.mil* (Email).

SUPPLEMENTARY INFORMATION: Due to circumstances beyond the control of the Department of Defense and the Designated Federal Officer, the U.S. Strategic Command Strategic Advisory Group was unable to provide sufficient public notification required by 41 CFR 102–3.150(a) concerning the cancellation of its previously noticed November 19–20, 2019 meeting. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Dated: November 7, 2019.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2019–24690 Filed 11–13–19; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2019–ICCD–0141]

Agency Information Collection Activities; Comment Request; William D. Ford Federal Direct Loan Program Repayment Plan Selection Form

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension of an existing information collection.

DATES: Interested persons are invited to submit comments on or before January 13, 2020.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2019–ICCD–0141. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the

Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, ED will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W208 D, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, 202–377–4018.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: William D. Ford Federal Direct Loan Program Repayment Plan Selection Form.

OMB Control Number: 1845–0014.

Type of Review: An extension of an existing information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 660,000.

Total Estimated Number of Annual Burden Hours: 110,220.

Abstract: The Repayment Plan Request form serves as the means by which Direct Loan borrowers notify the Department of their choice of an initial repayment plan under the Standard, Extended or Graduated options before their loans enter repayment. The form may also be used by borrowers to request a change in the Standard, Extended or Graduated repayment plans options after their loans have entered repayment. If a borrower does not select an initial repayment plan, the borrower is placed on the Standard Repayment Plan in accordance with 34 CFR 685.210(a)(2).

Dated: November 8, 2019.

Kate Mullan,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer.

[FR Doc. 2019–24746 Filed 11–13–19; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–10001–95–OMS]

Good Neighbor Environmental Board

AGENCY: Environmental Protection Agency (EPA).

ACTION: Request for nominations to the Good Neighbor Environmental Board.

SUMMARY: The U.S. Environmental Protection Agency (EPA) invites nominations from a diverse range of qualified candidates to be considered for appointment to its Good Neighbor Environmental Board (GNEB). Vacancies are expected to be filled by March 31, 2020. Sources in addition to this **Federal Register** Notice may also be utilized in the solicitation of nominees.

ADDRESSES: Submit nominations to Eugene Green, Designated Federal Officer, Office of Resources and Business Operations, Federal Advisory Committee Management Division (1601M), 1200 Pennsylvania Avenue NW, Washington, DC 20460. You may also email nominations with the subject line COMMITTEE APPLICATION PACKAGE 2020 for (Name of Nominee) to *green.eugene@epa.gov.*

FOR FURTHER INFORMATION CONTACT: Eugene Green, Designated Federal Officer, U.S. EPA, telephone 202–564–2432, fax: 202–564–8129.

SUPPLEMENTARY INFORMATION:

Background: GNEB is a federal advisory committee chartered under the Federal Advisory Committee Act (FACA), Public Law 92–463. GNEB was created in 1992 by the Enterprise for the Americas Initiative Act, Public Law 102–532, 7 U.S.C. 5404. Implementing authority was delegated to the Administrator of EPA under Executive Order 12916. The GNEB is charged by statute with submitting an annual report to the President on the need for implementation of environmental and infrastructure projects within the states of the United States contiguous to Mexico. The statute calls for the GNEB to have representatives from U.S. Government agencies; the governments of the states of Arizona, California, New Mexico and Texas; and tribal and private organizations with experience in environmental and infrastructure issues along the US/Mexico Border. Members are appointed by the EPA Administrator for two-year terms with the possibility of reappointment. The GNEB meets approximately three times annually either in person or via video/teleconference. The average workload for committee members is approximately 10 to 15 hours per month. Members serve on the committees in a voluntary capacity. Although we are unable to offer compensation or an honorarium, members may receive travel and per diem allowances, according to applicable federal travel regulations. The EPA is seeking nominations from a variety of nongovernmental interests along the U.S.-Mexico border from the private sector, including representatives from business, academia, environmental groups, health groups, ranching and grazing, energy, financial, and other relevant sectors. EPA values and welcomes diversity. To obtain nominations of diverse candidates, EPA encourages nominations of women and men of all racial and ethnic groups.

The following criteria will be used to evaluate nominees:

- Background and experiences that would help members contribute to the diversity of perspectives on the committee (*e.g.,* geographic, economic, social, cultural, educational, and other considerations).
- Representative of a sector or group that helps to shape border-region environmental policy or representatives of a group that is affected by border region environmental policy.
- Has extensive professional knowledge and experience with the issues that the GNEB examines (*i.e.,* environmental and infrastructure issues along the U.S.-Mexico border),

including the bi-national dimension of these issues.

• Bring senior level experience that will fill a need of the GNEB in bringing a new and relevant dimension to its deliberations.

• Possesses a demonstrated ability to work in a consensus building process with a wide range of representatives from diverse constituencies.

• Ability to contribute approximately 10 to 15 hours per month to the GNEB's activities, including face-to-face meetings, conference calls and participation in the development of the GNEB's annual report to the President and comment letters.

• Nominees may self-nominate by submitting a resume describing their professional and educational qualifications, including current business address, email and daytime telephone number.

• All nominees must demonstrate the potential for active and constructive involvement in the GNEB's work.

If you are interested in serving on GNEB, we will need the following items to process your nomination package:

• Nominations must include a brief statement of interest, resume, curriculum vitae, or a short biography (no more than two paragraphs) describing your professional and educational qualifications, including a list of relevant activities and any current or previous service on advisory committees. The statement of interest, resume, curriculum vitae, or short biography should include the candidate's name, name and address of current organization, position title, email address, and daytime telephone number(s). In preparing your statement of interest, please describe how your background, knowledge, and experience will bring value to the work of the committee, and how these qualifications would contribute to the overall diversity of the GNEB. Also, be sure to describe any previous involvement with the Agency through employment, grant funding and/or contracting sources.

• Candidates from the academic sector must also provide a letter of recommendation authorizing the nominee to represent their institution.

• Please be advised that federal registered lobbyists are not permitted to serve on federal advisory boards.

Federal Advisory Committee Term and Condition: As indicated in the EPA memorandum, Strengthening and Improving Membership on EPA Federal Advisory Committees, issued on October 31, 2017, no member of an EPA Federal Advisory Committee may receive compensation from EPA grants, either as a principal investigator or co-investigator, or be in a position that otherwise would reap substantial direct benefit from the grant, while serving on an EPA Federal Advisory Committee.

Accordingly, an individual's ability to begin or continue serving on an EPA Federal Advisory committee may be impacted if during the individual's expected or ongoing service:

• (a) The grant recipient lists the individual as a principal investigator or co-investigator on the grant; or

• (b) The individual is not listed on the grant but is in a position for the entity such that the individual would otherwise reap substantial direct benefit from the grant.

This term and condition does not apply to state, local, or tribal government recipients.

Dated: October 25, 2019.

Eugene Green,

Program Analyst.

[FR Doc. 2019–24745 Filed 11–13–19; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

Sunshine Act Meetings

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 84 FR 59619.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: Friday, November 22, 2019 at 9:00 a.m.

CHANGES IN THE MEETING: The open portion of the November 22, 2019 meeting of the Board of Directors of the Export-Import Bank of the United States, held at Ex-Im Bank in Room 1126, 811 Vermont Avenue NW, Washington, DC 20571, has been cancelled.

CONTACT PERSON FOR MORE INFORMATION: Members of the public who wish to attend the meeting should call Joyce Stone, Office of the General Counsel, 811 Vermont Avenue NW, Washington, DC 20571 (202) 565–3336 by close of business Tuesday, November 19, 2019.

Joyce Brotemarkle Stone,

Assistant Corporate Secretary.

[FR Doc. 2019–24731 Filed 11–12–19; 11:15 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1211]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before January 13, 2020. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams, (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1211.

Title: Sections 96.17; 96.21; 96.23; 96.25; 96.33; 96.35; 96.39; 96.41; 96.43; 96.45; 96.51; 96.57; 96.59; 96.61; 96.63; 96.67, Commercial Operations in the 3550–3650 MHz Band.

Form Number: N/A.

Type of Review: Extension of a currently approved information collection.

Respondents: Business or other for-profit entities, state, local, or tribal government and not for profit institutions.

Number of Respondents: 110,782 respondents; 226,099 responses.

Estimated Time per Response: .25 to 1 hour.

Frequency of Response: One-time and on occasion reporting requirements; other reporting requirements—as-needed basis for equipment safety certification that is no longer in use, and consistently (likely daily) responses automated via the device.

Obligation To Respond: Required to obtain or retain benefits. Statutory authority for, these collections are contained in 47 U.S.C. 151, 152, 154(i), 154(j), 155(c), 302(a), 303, 304, 307(e), and 316 of the Communications Act of 1934.

Total Annual Burden: 64,561 hours.

Total Annual Cost: $13,213,975.

Privacy Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: The FCC adopted an Order on Reconsideration and Second Report and Order, FCC 16–55, that amends rules established in the First Report and Order, FCC 15–47, for commercial use of 150 megahertz in the 3550–3700 MHz (3.5 GHz) band and a new Citizens Broadband Radio Service, on April 28, 2016, published at 81 FR 49023 (July 26, 2016). The rule changes and information requirements contained in the First Report and Order are also approved under this Office of Management and Budget (OMB) control number and have not changed since they were last approved by OMB.

The Commission also received approval from OMB for the information collection requirements contained in FCC 16–55. The amendments contained in the Second Report and Order create additional capacity for wireless broadband by adopting a new approach to spectrum management to facilitate more intensive spectrum sharing between commercial and federal users and among multiple tiers of commercial users. The Spectrum Access System (SAS) will use the information to authorize and coordinate spectrum use for Citizen Broadband Radio Service Devices (CBSDs). The Commission will use the information to coordinate among the spectrum tiers and determine Protection Areas for Priority Access Licensees (PALs).

The following is a description of the information collection requirements for is approved under this collection:

Section 96.25(c)(1)(i) requires PALs to inform the SAS if a CBSD is no longer in use.

Section 96.25(c)(2)(i) creates a default protection contour for any CBSD at the outer limit of the PAL Protection Area, but allows a PAL to self-report a contour smaller than that established by the SAS.

These rules which contain information collection requirements are designed to provide for flexible use of this spectrum, while managing three tiers of users in the band, and create a low-cost entry point for a wide array of users. The rules will encourage innovation and investment in mobile broadband use in this spectrum while protecting incumbent users. Without this information, the Commission would not be able to carry out its statutory responsibilities.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2019–24667 Filed 11–13–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0325]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments should be submitted on or before January 13, 2020. If you anticipate that you will be submitting comments but find it difficult to do so within the time period allowed by this notice, you should advise the contacts below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0325.

Title: Section 80.605, U.S. Coast Guard Coordination.

Form No.: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 10 respondents and 10 responses.

Estimated Time per Response: 1.1 hours.

Frequency of Response: On occasion reporting requirement and Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection of information is contained in Sections 4, 303, 307(e), 309, and 332, 48 Stat. 1066, as amended; 47 U.S.C. 154, 303, 307(e), 309, and 332, unless otherwise noted.

Total Annual Burden: 11 hours.

Annual Cost Burden: None.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: The information collection requirements contained in Section 80.605 are necessary because applicants are required to obtain written permission from the Coast Guard in the area where radio-navigation/radio-location devices are located. This rule insures that no hazard to marine navigation will result from the grant of applications for non-selectable transponders and shore based radio-navigation aids. The Coast Guard is responsible for making this determination under 14 U.S.C. 18. Section 308(b) of the Communications Act of 1934, as amended, 47 U.S.C. 308(b) mandates that the Commission have such facts before it to determine whether an application should be granted or denied. The potential hazard to navigation is a critical factor in determining whether this type of radio device should be authorized.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2019–24663 Filed 11–13–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1126]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before January 13, 2020. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *Nicole.ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele, (202) 418–2991.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1126.

Title: Testing and Logging Requirements for Wireless Emergency Alerts (WEA).

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for–profit entities.

Number of Respondents and Responses: 76 Participating CMS Providers; 429,020 Responses.

Estimated Time per Response: 0.000694 hours (2.5 seconds) to generate each alert log; 2 hours to respond to each request for alert log data or information about geo-targeting

Frequency of Response: Monthly and on occasion reporting requirements and recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 151, 152, 154(i) and (o), 301, 301(r), 303(v), 307, 309, 335, 403, 544(g), 606 and 615 of the Communications Act of 1934, as amended, as well as by sections 602(a), (b), (c), (f), 603, 604 and 606 of the WARN Act.

Total Annual Burden: 119,021 hours.

Total Annual Cost: No cost.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: Participating CMS Providers shall make available upon request to the Commission and FEMA, and to emergency management agencies that offer confidentiality protection at least equal to that provided in the federal Freedom of Information Act (FOIA) their alert logs and information about their approach to geo-targeting insofar as the information pertains to alerts initiated by that emergency management agency.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2019–24666 Filed 11–13–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0262, 3060–0360, 3060–0653, 3060–3060–0754]

Information Collections Being Submitted for Review and Approval to Office of Management and Budget

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Pursuant to the Small Business Paperwork Relief Act of 2002, the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.'' The Commission may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments should be submitted on or before December 16, 2019. If you anticipate that you will be submitting comments but find it difficult to do so with the period of time allowed by this notice, you should advise the contacts listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, OMB, via email *Nicholas_A._Fraser@OMB.eop.gov;* and to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.* Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Cathy Williams at (202) 418–2918. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION: As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the FCC invited the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

OMB Control No.: 3060–0262.

Title: Section 90.179, Shared Use of Radio Stations.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit, non-for-profit institutions, and state, local and tribal government.

Number of Respondents and Responses: 43,000 respondents, 43,000 responses.

Estimated Time per Response: .25 up to .75 hours.

Frequency of Response: Recordkeeping requirement and On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in 47 U.S.C. 154(i), 161, 303(g), 303(r) and 332(c)(7).

Total Annual Burden: 43,000 hours.

Annual Cost Burden: None.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: The Commission was directed by the United States Congress, in the Balanced Budget Act of 1997, to dedicate 2.4 MHz of electromagnetic spectrum in the 746–806 MHz band for public safety services. Section 90.179 requires that Part 90 licensees that share use of their private land mobile radio facility on non-profit, cost-sharing basis to prepare and keep a written sharing agreement as part of the station records. Regardless of the method of sharing, an up-to-date list of persons who are sharing the station and the basis of their eligibility under Part 90 must be maintained. The requirement is necessary to identify users of the system should interference problems develop. This information is used by the Commission to investigate interference complaints and resolve interference and operational complaints that may arise among the users.

OMB Control No.: 3060–0360.

Title: Section 80.409, Station Logs (Maritime Services).

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities, not-for-profit institutions, and state, local and tribal government.

Number of Respondents: 19,214 respondents; 19,214 responses.

Estimated Time per Response: 27.3–95 hours.

Frequency of Response: Recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in 47 U.S.C. 151–155, 301–609.

Total Annual Burden: 538,082 hours.

Annual Cost Burden: None.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: The Commission will submit this extension (no change in the recordkeeping requirement) to the OMB to obtain the full three-year clearance from them. The information collection requirements are as follows:

Section 80.409(c), Public Coast Station Logs: This requirement is necessary to document the operation and public correspondence of public coast radio telegraph, public coast radiotelephone stations, and Alaska public-fixed stations, including the logging of distress and safety calls where applicable. Entries must be made giving details of all work performed which may affect the proper operation of the station. Logs must be retained by the licensee for a period of two years from the date of entry, and, where applicable, for such additional periods such as logs relating to a distress situation or disaster must be retained for three years from the date of entry in the log. If the Commission has notified the licensee of an investigation, the related logs must be retained until the licensee is specifically authorized in writing to destroy them. Logs relating to any claim or complaint of which the station licensee has notice must be retained until the claim or complaint has been satisfied or barred by statute limiting the time for filing suits upon such claims.

Section 80.409(d), Ship Radiotelegraph Logs: Logs of ship stations which are compulsorily equipped for radiotelegraphy and operating in the band 90 to 535 kHz must contain specific information in log entries according to this subsection.

Section 80.409(e), Ship Radiotelephone Logs: Logs of ship stations which are compulsorily equipped for radiotelephony must contain specific information in applicable log entries and the time of their occurrence.

The recordkeeping requirements contained in section 80.409 is necessary to document the operation and public correspondence service of public coast radiotelegraph, public coast radiotelephone stations and Alaska-public fixed stations, ship radiotelegraph, ship radiotelephone and applicable radiotelephone including the logging of distress and safety calls where applicable.

OMB Control Number: 3060–0653.

Title: Sections 64.703(b) and (c), Consumer Information—Posting by Aggregators.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 56,075 respondents; 5,339,038 responses.

Estimated Time per Response: .017 hours (1 minute) to 3 hours.

Frequency of Response: On occasion reporting requirements; Third party disclosure.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is found at section 226 [47 U.S.C. 226] Telephone Operator Services codified at 47 CFR 64.703(b) Consumer Information.

Total Annual Burden: 174,401 hours.

Total Annual Cost: $1,446,340.

Privacy Act Impact Assessment: An assurance of confidentiality is not offered because this information collection does not require the collection of personally identifiable information (PII) from individuals.

Nature and Extent of Confidentiality: No impact(s).

Needs and Uses: The information collection requirements included under this OMB Control Number 3060–0653, requires aggregators (providers of telephones to the public or to transient users of their premises) under 47 U.S.C. 226(c)(1)(A), 47 CFR 64.703(b) of the Commission's rules, to post in writing, on or near such phones, information about the pre-subscribed operator services, rates, carrier access, and the FCC address to which consumers may direct complaints.

Section 64.703(c) of the Commission's rules requires the posted consumer information to be added when an aggregator has changed the pre-subscribed operator service provider (OSP) no later than 30 days following such change. Consumers will use this information to determine whether they wish to use the services of the identified OSP.

OMB Control Number: 3060–0754.

Title: FCC Form 2100, Application for Media Bureau Audio and Video Service Authorization, Schedule H.

Form Number: FCC Form 2100, Schedule H.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for profit entities.

Number of Respondents: 1,758 respondents; 1,758 responses.

Estimated Time per Response: 10 hours.

Frequency of Response: Recordkeeping requirement: Annual reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection of information is contained in Sections 154(i) and 303 of the Communications Act of 1934, as amended.

Total Annual Burden: 17,580 hours.

Total Annual Cost: $1,054,800.

Privacy Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with respect to this collection of information.

Needs and Uses: Commercial full-power and Class A television broadcast stations are required to file FCC Form 2100, Schedule H (formerly FCC Form 398) (Children's Television Programming Report) within 30 days after the end of each calendar year. FCC Form 2100, Schedule H is a standardized form that: (a) Provides a consistent format for reporting the children's educational television programming aired by licensees to meet their obligation under the Children's Television Act of 1990 (CTA), and (b) facilitates efforts by the public and the FCC to monitor compliance with the CTA.

Commercial full-power and Class A television stations are required to complete FCC Form 2100, Schedule H within 30 days after the end of each calendar year and file the form with the Commission. The Commission places the form in the station's online public inspection file maintained on the Commission's database (*www.fcc.gov*). Stations use FCC Form 2100, Schedule H to report, among other things, the Core Programming (*i.e.,* children's educational and informational programming) the station aired the previous calendar year. FCC Form 2100, Schedule H also includes a ''Preemption Report'' that must be completed for each Core Program that was preempted during the year. This ''Preemption Report'' requests information on the reason for the preemption, the date of each preemption, the reason for the preemption and, if the program was rescheduled, the date and time the program was re-aired.

On July 10, 2019, the Commission adopted a Report and Order in MB Docket Nos. 18–202 and 17–105, FCC 19–67, In the Matter of Children's Television Programming Rules; Modernization of Media Regulation Initiative, which modernizes the children's television programming rules in light of changes to the media landscape that have occurred since the rules were first adopted. Among other revisions, the Report and Order revises the children's television programming rules to expand the Core Programming hours to 6:00 a.m. to 10:00 p.m.; modify the safe harbor processing guidelines for determining compliance with the children's programming rules; require that broadcast stations air the substantial majority of their Core Programming on their primary program streams, but permit broadcast stations to air up to 13 hours per quarter of regularly scheduled weekly programming on a multicast stream; eliminate the additional processing guideline applicable to stations that multicast; and modify the rules governing preemption of Core Programming. In addition, the Report and Order revises the children's television programming reporting requirements by requiring that Children's Television Programming Reports (FCC Form 2100, Schedule H) be filed on an annual rather than quarterly basis, within 30 days after the end of the calendar year; eliminating the requirements that the reports include information describing the educational and informational purpose of each Core Program aired during the current reporting period and each Core Program that the licensee expects to air during the next reporting period; eliminating the requirement to identify the program guide publishers who were sent information regarding the licensee's Core Programs; and streamlining the form by eliminating certain fields. The Report and Order also eliminates the requirement to publicize the Children's Television Programming Reports. The Report and Order directs the Media Bureau to make modifications to FCC Form 2100, Schedule H as needed to conform the form with the revisions to the children's programming rules, including the changes to the processing guidelines and preemption policies.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2019–24662 Filed 11–13–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1013]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents,

including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written PRA comments should be submitted on or before January 13, 2020. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *Nicole.ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele, (202) 418–2991.

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–1013.

Title: Mitigation of Orbital Debris.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 10 respondents; 10 responses.

Estimated Time per Response: 3 hours.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in 47 U.S.C. 151, 154(i), 301, 303, 308, 309 and 310.

Total Annual Burden: 30 hours.

Annual Cost Burden: $19,250.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: In general, there is no need for confidentiality with this collection of information.

Needs and Uses: This collection will be submitted to the Office of Management and Budget (OMB) as an extension after this 60-day comment period has ended in order to obtain the full three-year clearance from OMB.

Orbital debris consists of artificial objects orbiting the Earth that are not functional spacecraft. It consists of a wide range of non-functioning man-made objects that have been placed in the Earth's orbit, both accidentally and on purpose. Orbital debris consists of small objects such as paint flakes, discarded lens caps, ejected bolts and pieces of debris from exploded spacecraft and rocket bodies. Since human activity in space began, there has been a steady growth in the number and total mass of orbital debris. Once created, debris remains in orbit indefinitely, absent other forces. Growth in the orbital debris population may limit the usefulness of space for communications and other uses in the future by raising the costs and lowering the reliability of space based systems. Furthermore, the effects of collisions involving orbital debris can be catastrophic and may cause significant damage to functional spacecraft or to persons or property on the surface of the Earth, if the debris re-enters the Earth's atmosphere in an uncontrolled manner.

The information collection requirements accounted for in this collection are necessary to mitigate the potential harmful effects of orbital debris accumulation. Without such information collection requirements, the growth in the orbital debris population may limit the usefulness of space for communications and other uses in the future by raising the costs and lowering the reliability of experimental and amateur systems. Furthermore, the effects of collisions involving orbital debris can be catastrophic and may cause significant damage to functional spacecraft or to persons or property on the surface of the Earth, if the debris re-enters the Earth's atmosphere in an uncontrolled manner.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2019–24665 Filed 11–13–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–1108]

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments should be submitted on or before January 13, 2020. If you anticipate that you will be submitting comments but find it difficult to do so within the time period allowed by this notice, you should advise the contacts below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–1108.

Title: Consummation of Assignments and Transfers of Control of Authorization.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 163 respondents; 163 responses.

Estimated Time per Response: 1 hour.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. The Commission has authority for this information collection pursuant to 47 U.S.C. 154(i) of the Communications Act of 1934, as amended.

Total Annual Burden: 163 hours.

Annual Cost Burden: $48,900.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: In general, there is no need for confidentiality.

Needs and Uses: This collection will be submitted to the Office of Management and Budget (OMB) as an extension after this 60 day comment period has ended in order to obtain the full three-year clearance from OMB.

Without this collection of information, the Commission would not have critical information such as a change in a controlling interest in the ownership of the licensee. The Commission would not be able to carry out its duties under the Communications Act and to determine the qualifications of applicants to provide international telecommunications service, including applicants that are affiliated with foreign entities, and to determine whether and under what conditions the authorizations are in the public interest, convenience, and necessity. Furthermore, without this collection of information, the Commission would not be able to maintain effective oversight of U.S. providers of international telecommunications services that are affiliated with, or involved in certain co-marketing or similar arrangements with, foreign entities that have market power.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2019–24661 Filed 11–13–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0816]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments should be submitted on or before January 13, 2020. If you anticipate that you will be submitting comments but find it difficult to do so within the time period allowed by this notice, you should advise the contacts below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0816.

Title: Local Telephone Competition and Broadband Reporting, Report and Order, FCC Form 477, (WC Docket No. 19–195, WC Docket No, 11–10, FCC 19–79).

Form Number: FCC Form 477.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; not-for-profit institutions; and state, local, or tribal governments.

Number of Respondents and Responses: 2,515 respondents; 5,030 responses.

Estimated Time per Response: 387 hours (average).

Frequency of Response: Semi-annual reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 4(i), 201, 218–220, 251–252, 271, 303(r), 332, and 403 of the Communications Act of 1934, as amended, and in section 706 of the Telecommunications Act of 1996, as amended, codified in section 1302 of the Broadband Data Improvement Act, 47 U.S.C. 1302.

Total Annual Burden: 1,946,610 hours.

Total Annual Cost: No cost.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: The Commission will no longer treat as confidential service providers' minimum advertised or expected speed data for mobile broadband services. Thus, provider-specific coverage data will be publicly released for all subsequent Form 477 filings. This action is necessary to ensure that consumers can easily use the information that is disclosed to the public, including minimum advertised or expected speed data, because such information is only beneficial if consumers know where service coverage is available.

Needs and Uses: After the 60-day comment period expires, the Commission will submit the revised information collection to the Office of Management and Budget (OMB) to obtain a full three-year clearance.

The revisions to the information collection are necessitated by a Report and Order in WC Docket Nos. 19–195 and 11–10, FCC 19–79, adopted on August 1, 2019. In this Order, the Commission makes targeted changes to the existing Form 477 data collection to reduce reporting burdens for all filers and incorporate new technologies.

The Order adopts the 5G–NR (New Radio) technology standards developed by the 3rd Generation Partnership Project (3GPP) with Release 15 and requires providers to submit 5G deployment data that meet the specifications of Release 15 (or any successor release that may be adopted by the Commission's Bureaus). The *Order* also requires mobile providers to submit broadband and voice subscriber data at the census-tract level based on the subscriber's place of primary use for postpaid subscribers and based on the subscriber's telephone number for prepaid and resold subscribers. These changes are necessary because the deployment data collected on Form 477 are no longer sufficient for targeting universal service funds. The actions to improve the Form 477 data collection are designed to increase the usefulness of the information to the Commission, Congress, the industry, and the public.

The Order reduces the burden on broadband providers by removing the requirement that facilities-based providers submit separate coverage maps depicting their broadband network coverage areas for each transmission technology and each frequency band. It also modifies the requirement that mobile broadband providers report coverage information for each technology deployed in their networks by reducing the number of categories from nine to four. The Order eliminates the requirement that facilities-based providers submit a list of census tracts in which the provider advertises its mobile wireless broadband service and in which the service is available to actual and potential subscribers. Finally, the Order removes the requirement that fixed providers offering business/enterprise/government services to report the maximum downstream and upstream contractual or guaranteed data throughput rate (committed information rate) available in each reported census block.

As part of these revisions to the Form 477 data collection, the Commission is requesting approval of certain changes to the form and the related instructions. These changes are necessary to streamline the filing process, implement revisions to the data collection, eliminate burdensome filings requirements, and increase the usefulness of the information to the Commission, Congress, the industry, and the public.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2019–24660 Filed 11–13–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0250]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

DATES: Written comments should be submitted on or before January 13, 2020. If you anticipate that you will be submitting comments but find it difficult to do so within the time period allowed by this notice, you should advise the contacts below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0250.

Title: Sections 73.1207, 74.784 and 74.1284, Rebroadcasts.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions; State, local or tribal government.

Number of Respondents and Responses: 6,462 respondents; 11,012 responses.

Estimated Time per Response: 0.50 hours.

Frequency of Response: Recordkeeping requirement; on occasion reporting requirement; semi-annual reporting requirement; third party disclosure requirement.

Total Annual Burden: 5,506 hours.

Total Annual Costs: None.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Sections 154(i) and 325(a) of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality with this information collection.

Privacy Act Impact Assessment: No impact(s).

Needs and Uses: The information collection requirements contained in 47 CFR 73.1207 require that licensees of broadcast stations obtain written permission from an originating station prior to retransmitting any program or any part thereof. A copy of the written consent must be kept in the station's files and made available to the FCC upon request. Section 73.1207 also specifies procedures that broadcast stations must follow when rebroadcasting time signals, weather bulletins, or other material from non-broadcast services.

The information collection requirements contained in 47 CFR 74.784(b) require that a licensee of a low power television or TV translator station shall not rebroadcast the programs of any other TV broadcast station without obtaining prior consent of the station whose signals or programs are proposed to be retransmitted. Section 74.784(b) requires licensees of low power television and TV translator stations to notify the Commission when rebroadcasting programs or signals of another station. This notification shall include the call letters of each station rebroadcast. The licensee of the low power television or TV translator station shall certify that written consent has been obtained from the licensee of the station whose programs are retransmitted.

* 10771 Lastly, the information collection requirements contained in 47 CFR 74.1284 require that the licensee of a FM translator station obtain prior consent to rebroadcast programs of any broadcast station or other FM translator. The licensee of the FM translator station must notify the Commission of the call letters of each station rebroadcast and must certify that written consent has been received from the licensee of that station. Also, AM stations are allowed to use FM translator stations to rebroadcast the AM signal.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2019–24664 Filed 11–13–19; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors will meet in open session at 10:00 a.m. on Tuesday, November 19, 2019, to consider the following matters:

Summary Agenda

No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Disposition of Minutes of a Board of Directors' Meeting Previously Distributed.

Memorandum and resolution re: Regulatory Capital Rule: Revisions to the Supplementary Leverage Ratio to Exclude Certain Central Bank Deposits of Banking Organizations Predominantly Engaged in Custody, Safekeeping and Asset Servicing Activities.

Memorandum and resolution re: Regulatory Capital Treatment for High Volatility Commercial Real Estate (''HVCRE'') Exposures.

Memorandum and resolution re: Final Rule Removing Transferred OTS Regulation, Part 390 Subpart M—Deposits.

Memorandum and resolution re: Notice of Final Rulemaking Re: The Use and Remittance of Certain Assessment Credits.

Memorandum and resolution re: Establishment of the FDIC Advisory Committee of State Regulators.

Reports of actions taken pursuant to authority delegated by the Board of Directors and reports of the Office of Inspector General.

Discussion Agenda

Memorandum and resolution re: Regulatory Capital Rule: Standardized Approach for Calculating the Exposure Amount of Derivative Contracts.

Memorandum and resolution re: Notice of Proposed Rulemaking on Conversion of the Statement of Policy for Section 19 of the Federal Deposit Insurance Act to a Regulation.

Memorandum and resolution re: Notice of Proposed Rulemaking on Federal Interest Rate Authority.

The meeting will be held in the Board Room located on the sixth floor of the FDIC Building located at 550 17th Street NW, Washington, DC.

This Board meeting will be Webcast live via the internet and subsequently made available on-demand approximately one week after the event. Visit *http://fdic.windrosemedia.com* to view the live event. Visit *http://fdic.windrosemedia.com/index.php?category=FDIC+Board+Meetings* after the meeting. If you need any technical assistance, please visit our Video Help page at: *https://www.fdic.gov/video.html.*

The FDIC will provide attendees with auxiliary aids (*e.g.,* sign language interpretation) required for this meeting. Those attendees needing such assistance should call 703–562–2404 (Voice) or 703–649–4354 (Video Phone) to make necessary arrangements.

Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Executive Secretary of the Corporation, at 202–898–7043.

Dated at Washington, DC, on November 12, 2019.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2019–24851 Filed 11–12–19; 4:15 pm]

BILLING CODE 6714–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

TIME AND DATE: Tuesday, November 19, 2019 at 10:00 a.m.

PLACE: 1050 First Street NE, Washington, DC.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED:

Compliance matters pursuant to 52 U.S.C. 30109.

Matters relating to internal personnel decisions, or internal rules and practices.

Investigatory records compiled for law enforcement purposes and production would disclose investigative techniques.

Information the premature disclosure of which would be likely to have a considerable adverse effect on the implementation of a proposed Commission action.

Matters concerning participation in civil actions or proceedings or arbitration.

* * * * *

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Vicktoria J. Allen,

Acting Deputy Secretary of the Commission.

[FR Doc. 2019–24853 Filed 11–12–19; 4:15 pm]

BILLING CODE 6715–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary by email at *Secretary@fmc.gov,* or by mail, Federal Maritime Commission, Washington, DC 20573, within twelve days of the date this notice appears in the **Federal Register**. Copies of agreements are available through the Commission's website (*www.fmc.gov*) or by contacting the Office of Agreements at (202)–523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 201323.

Agreement Name: Hoegh/Hyundai Glovis Global Space Charter Agreement.

Parties: Hoegh Autoliners AS and Hyundai Glovis Co., Ltd.

Filing Party: Wayne Rohde; Cozen O'Connor.

Synopsis: The Agreement authorizes the parties to charter space to/from one another on an ''as needed/as available'' basis in the trade between all ports in the United States and all ports and points worldwide.

Proposed Effective Date: 12/21/2019.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/24444.

Agreement No.: 201234–003.

Agreement Name: Agreement by Ocean Common Carriers to Participate on the Exchange Board.

Parties: CMA CGM S.A.; COSCO Shipping Co., Ltd.; COSCO Shipping Lines Co., Ltd.; Hapag Lloyd AG; Hyundai Merchant Marine Co., Ltd.; Maersk Line A/S; Ocean Network Express Pte. Ltd.; and Pacific International Lines (PTE) Ltd.

Filing Party: Ashley Craig and Elizabeth Lowe; Venable LLP.

Synopsis: The amendment adds ONE and PIL as parties to the Agreement.

Proposed Effective Date: 12/19/2019.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/2064.

Agreement No.: 201235–003.

Agreement Name: Agreement by Ocean Common Carriers to Use Standard Service Contract Terms.

Parties: CMA CGM S.A.; COSCO Shipping Co., Ltd.; COSCO Shipping Lines Co., Ltd.; Hapag Lloyd AG; Hyundai Merchant Marine Co., Ltd.; Maersk Line A/S; Ocean Network Express Pte. Ltd.; Orient Overseas Container Line Limited; OOCL (Europe) Limited; and Pacific International Lines (PTE) Ltd.

Filing Party: Ashley Craig and Elizabeth Lowe; Venable LLP.

Synopsis: The amendment adds ONE and PIL as parties to the Agreement.

Proposed Effective Date: 12/19/2019.

Location: https://www2.fmc.gov/FMC.Agreements.Web/Public/AgreementHistory/2065.

Dated: November 8, 2019.

Rachel E. Dickon,

Secretary.

[FR Doc. 2019–24757 Filed 11–13–19; 8:45 am]

BILLING CODE 6731–AA–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Federal Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than November 27, 2019.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *BF Bank Partners LP and Main Street Banking Partners LP, both of Oklahoma City, Oklahoma;* as members acting in concert with the Rainbolt Family Control Group, to acquire voting shares of BancFirst Corporation and thereby indirectly acquire voting shares of BancFirst, both of Oklahoma City, Oklahoma, and Pegasus Bank, Dallas, Texas. The individuals who serve as the general partners of BF Bank Partners LP and Main Street Banking Partners LP, David E. Rainbolt and Leslie J. Rainbolt, respectively, both of Oklahoma City, Oklahoma, were previously approved under the Act and Regulation Y to acquire the voting shares that are the subject of this notice.

2. *The Commerce Bank and Trust Holding Company Employee Stock Ownership Plan, David S. Frick as Plan Administrator, both of Topeka, Kansas;* to acquire voting shares of Commerce Bank and Trust Holding Company and thereby indirectly acquire voting shares of CoreFirst Bank & Trust, both of Topeka, Kansas.

B. Federal Reserve Bank of St. Louis (David L. Hubbard, Senior Manager) P.O. Box 442, St. Louis, Missouri 63166–2034. Comments can also be sent electronically to *Comments.applications@stls.frb.org:*

1. *Charles S. Penick, individually, and together with the Charles S. Penick Mary Michele Penick Revocable Trust, Charles S. Penick and Mary Michele Penick as co-trustees; the M. Michele Penick Irrevocable Trust, Mary Michele Penick, trustee; Mary Michele Penick; Mary Reese Fisher; and Ella Bleu Fisher, all of Morrilton, Arkansas; Edward M. Penick; George Penick; and Diane L. Tait, all of Little Rock, Arkansas; Megan Penick Voss; Beau Steven Voss; and Finlee Dru Voss, all of Solgohachia, Arkansas; and Mollie Penick Tanner, Rison, Arkansas;* as members of a group acting in concert to retain voting shares of Petit Jean Bancshares, Inc., and thereby indirectly retain voting shares of Petit Jean State Bank, both of Morrilton, Arkansas.

C. Federal Reserve Bank of San Francisco (Gerald C. Tsai, Director, Applications and Enforcement) 101 Market Street, San Francisco, California 94105–1579:

1. *Berkshire Hathaway, Inc., Wellfleet New York Insurance Company, Berkshire Hathaway Assurance Corporation, Berkshire Hathaway Homestate Insurance Company, Berkshire Hathaway International Insurance Ltd, Berkshire Hathaway Life Insurance Company of Nebraska, Berkshire Hathaway Specialty Insurance Company, BH Finance LLC, BHG Life Insurance Company, California Insurance Company, Central States Indemnity Company of Omaha, Columbia Insurance Company, Continental Indemnity Company, Cypress Insurance Company, Finial Reinsurance Company, First Berkshire Hathaway Life Insurance Company, National Fire & Marine Insurance Company, National Indemnity Company, National Liability & Fire Insurance Company, National Indemnity Company of Mid America, National Indemnity Company of the South, NRG America Holding Company, and Oak River Insurance Company, all of Omaha, Nebraska; Am GUARD Insurance Company and NorGUARD Insurance Company, both of Wilkes-Barre, Pennsylvania; Government Employees Insurance Company, GEICO Indemnity Company, and GEICO Marine Insurance Company, all of Chevy Chase, Maryland; General Re Life Corporation, General Reinsurance Corporation, General Star Indemnity Company, General Star National Insurance Company, and Genesis Insurance Company, all of Stamford, Connecticut; Medical Protective Company and Princeton Insurance Company, both of Ft. Wayne, Indiana; Mt. Vernon Fire Insurance Company and United States Liability Insurance Company, both of Wayne, Pennsylvania; and Old United Casualty Company, Merriam, Kansas;* to retain over 10 percent, and to acquire up to 24.99 percent, of the voting shares of Bank of America Corporation, Charlotte, North Carolina, and thereby indirectly retain and acquire voting shares of Bank of America, National Association, Charlotte, North Carolina and Bank of America California, National Association, San Francisco, California.

Board of Governors of the Federal Reserve System, November 8, 2019.

Michele Taylor Fennell,

Assistant Secretary of the Board.

[FR Doc. 2019–24735 Filed 11–13–19; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–20–19ACI]

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 Sealant Efficiency Assessment for Locals and States (SEALS) 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 April 8, 2019 to obtain comments from the public and affected agencies. CDC did not receive 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.* 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

Sealant Efficiency Assessment for Locals and States (SEALS)—Existing Collection in use without an OMB Control Number—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

By age 19, 67% of U.S. adolescents living in poverty have experienced tooth decay and 27% have at least one decayed tooth needing treatment. School sealant programs (SSP) provide dental sealants, which protect against 80% of cavities for two years, and continue to protect against 50% of cavities for up to four years.

Little is known about school sealant program delivery logistics, resource costs, or the quantity of resources used per unit of service or per averted cavity. The previously mentioned economic model on the cost-effectiveness of SSPs could find no recent studies on SSP cost in the U.S. and relied on the findings from four studies, all published before 2001. A systematic review of economic evaluations of SSPs conducted further found wide variation in reported cost per child, ranging from $33 to $163. Information on the cost and efficiency of SSPs could help these programs become more efficient and provide more services per dollar in their budget.

CDC requests information from states regarding children's cavity risk, one-year sealant retention rate, sealant program services delivered, and school sealant program cost and quantity of resources used at each school event. This data will allow CDC and states to monitor the performance and efficiency of their SSPs, which will improve and extend program delivery to more children.

At the beginning of each school year, SSPs electronically enter a list of schools they plan to serve (Add Schools), information about their program delivery logistics (Program Options), and per unit resource costs (Cost Options). Data from the previous funding period suggest that one SSP typically serves 20 schools. At each school event, SSPs enter information about resource use, children's risk for tooth decay, and delivered services (Add Event). Information collected at each school can be entered electronically onsite, or collected on paper form and entered electronically at a later date. At the end of the school year, SSPs enter administrative costs (*e.g.,* office supplies, rent, computers) electronically, and within nine to 15 months after first visiting the school, they enter information about sealant retention. Effectiveness of resin-based sealants is directly tied to retention, in that a retained sealant is 100% effective at preventing cavities. Because of this, many SSPs sample a few children for retention when they visit the school the next year to deliver services to new students.

CDC proposes to conduct a benchmarking analysis to identify the set of efficient SSPs and factors/practices associated with efficiency. Findings from the CDC benchmarking analyses will be submitted for publication in peer-reviewed journals and presented at the National Oral Health Conference. Findings will also be shared with the Association of State and Territorial Dental Directors (ASTDD), the oral health divisions in HRSA and CMS, and the National Institutes of Dental and Craniofacial Research. This information will inform entities considering implementing SSPs; assist local SSPs and state oral health departments to monitor efficiency and impact; identify best practices; and document if and how SSPs are a good investment of public health dollars.

CDC requests OMB clearance for three years. The total estimated annualized burden hours is 1,388. There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
State Sealant Administrator	Add Program and Add User	18	1	45/60
SSP Local Administrator	Add User and Add School	162	1	43/60
	Program Options and Cost Options	162	1	46/60
	Add Event	162	20	21/60

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2019–24727 Filed 11–13–19; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–367a–d and CMS–10400]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by *December 16, 2019.*

ADDRESSES: When commenting on the proposed information collections, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be received by the OMB desk officer via one of the following transmissions: OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–5806 *OR* Email: *OIRA_submission@omb.eop.gov.*

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html.*

1. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

2. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Medicaid Drug Program; *Use:* Labelers transmit drug product and pricing data to CMS within 30 days after the end of each calendar month and quarter. CMS calculates the unit rebate amount (URA) and the unit rebate offset amount (UROA) for each new drug application (NDC) and distributes to all State Medicaid agencies. States use the URA to invoice the labeler for rebates and the UROA to report onto CMS–64. The monthly data is used to calculate Federal Upper Limit (FUL) prices for applicable drugs and for states that opt to use this data to establish their pharmacy reimbursement methodology. *Form Number:* CMS–367a, b, c, and d (OMB control number: 0938–0578); *Frequency:* Monthly, quarterly, and on occasion; *Affected Public:* Private sector (Business or other for-profits); *Number of Respondents:* 743; *Total Annual Responses:* 14,117; *Total Annual Hours:* 219,185. (For policy questions regarding this collection contact Andrea Wellington at 410–786–3490.)

2. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Establishment of Exchanges and Qualified Health Plans; *Use:* The Patient Protection and Affordable Care Act (Pub. L. 111–148) and the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152) (collectively, the Patient Protection and Affordable Care Act (PPACA)) were signed into law in 2010. The PPACA established competitive private health insurance markets, called Marketplaces or Exchanges, which give millions of Americans and small businesses access to qualified health plans (QHPs), including stand-alone dental plans (SADPs)—private health and dental insurance plans that are certified as meeting certain standards.

As directed by the rule Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers (77 FR 18310) (Exchange rule), each Exchange assumed responsibilities related to the certification and offering of QHPs. Under 45 CFR 156.280(e)(5)(ii), each QHP issuer that offers non-excepted abortion services must submit to the State Insurance Commissioner a segregation plan describing how the QHP issuer establishes and maintains separate payment accounts for any QHP covering non-excepted abortion services, and pursuant to § 156.280(e)(5)(iii), each QHP issuer must annually attest to compliance with PPACA section 1303 and applicable regulations. This segregation plan is used to verify that the QHP issuer's financial and other systems fully conform to the segregation requirements required by the PPACA. *Form Number:* CMS–10400 (OMB control number 0938–1156); *Frequency:* Annually; *Affected Public:* Private Sector (business or other for-profits, not-for-profit institutions); *Number of Respondents:* 210; *Number of Responses:* 210; *Total Annual Hours:* 580. For questions regarding this collection contact Michele Oshman at 410–786–4396.

Dated: November 8, 2019.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2019–24756 Filed 11–13–19; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10466 and 10714]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by January 13, 2020.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number _____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html.*

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10466 Patient Protection and Affordable Care Act; Exchange Functions: Eligibility for Exemptions

CMS–10714 Electronic Medical Documentation Interoperability (EMDI) Pre and Post Pilot Measures Survey

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Patient Protection and Affordable Care Act; Exchange Functions: Eligibility for Exemptions; *Use:* The data collection and reporting requirements in ''Patient Protection and Affordable Care Act; Exchange Functions: Eligibility for Exemptions; Miscellaneous Minimum Essential Coverage Provisions'' (78 FR 39494—July 1, 2013)), address federal requirements that states must meet with regard to the Exchange minimum function of performing eligibility determinations and issuing certificates of exemption from the shared responsibility payment. In the final regulation, CMS addresses standards related to eligibility, including the verification and eligibility determination process, eligibility redeterminations, options for states to rely on HHS to make eligibility determinations for certificates of exemption, and reporting. *Form Number:* CMS–10466 (OMB control number: 0938–1190); *Frequency:* Occasionally; *Affected Public:* Private Sector (Businesses or other for-profits); *Number of Respondents:* 45,060; *Total Annual Responses:* 45,060; *Total Annual Hours:* 12,150. For policy questions regarding this collection contact Katherine Bentley at 301–492–5209.

2. *Type of Information Collection Request:* New Collection; *Title of Information Collection:* Electronic Medical Documentation Interoperability (EMDI) Pre and Post Pilot Measures Survey; *Use:* The EMDI program assists the Centers for Medicare & Medicaid Services (CMS) Health Information Technology (health IT) standards and interoperability (S&I) initiative, which is to: (1) Facilitate and expand the secure transport of interoperable electronic documentation, (2) utilize and fill in the gaps in the current standards to achieve increased level of interoperability among systems and organizations, and (3) demonstrate the utility of these standards by establishing pilot programs with existing Health Information Handlers, Health Information Service Providers (HISP), and health care providers.

The EMDI Initiative, associated documentation, and pilots are for the purposes of evaluating the performance of CMS policies that involve interoperability and the collection of data/information only. The collected data/information will help CMS, and the EMDI team in determining the overall effectiveness of piloting the EMDI program, as well as assessing each provider's current ability to send, and receive electronic data. *Form Number:* CMS–10714 (OMB control number: 0938-New); *Frequency:* Yearly; *Affected Public:* Private Sector (Business or other for-profit, not-for-profit institutions); *Number of Respondents:* 240; *Total Annual Responses:* 240; *Total Annual*

Hours: 120. For policy questions regarding this collection contact Christopher Lofts at 410–786–4076.

Dated: November 8, 2019.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2019–24755 Filed 11–13–19; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2019–N–4900]

Patient-Focused Drug Development Guidance: Incorporating Clinical Outcome Assessments Into Endpoints for Regulatory Decision Making; Public Workshop; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop; request for comments.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is announcing a public workshop to convene a discussion on incorporating clinical outcome assessments (COAs) into endpoints for regulatory decision making. This workshop will inform development of patient-focused drug development guidance as required by the 21st Century Cures Act (Cures Act) and as part of commitments made by FDA under the sixth authorization of the Prescription Drug User Fee Amendments (PDUFA VI). The Agency will publish a discussion document approximately 1 month before the workshop date. FDA is interested in seeking information and comments on the approaches proposed in the discussion document, as well as input on examples that could be illustrated in the forthcoming draft guidance, where approaches proposed in the discussion document have been successfully applied.

DATES: The public workshop will be held on December 6, 2019, from 9 a.m. to 5 p.m. Submit either electronic or written comments on this public workshop by February 4, 2020. See the **SUPPLEMENTARY INFORMATION** section for registration date and information.

ADDRESSES: The public workshop will be held at FDA's White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993. Entrance for the public workshop participants (non-FDA employees) is through Building 1 where routine security check procedures will be performed. For parking and security information, please refer to *https://www.fda.gov/AboutFDA/WorkingatFDA/BuildingsandFacilities/WhiteOakCampusInformation/ucm241740.htm.*

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 February 4, 2020. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of February 4, 2020. 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–2019–N–4900 for ''Patient-Focused Drug Development Guidance: Incorporating Clinical Outcome Assessments into Endpoints for Regulatory Decision Making; Public Workshop; Request for Comments.'' 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 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: Meghana Chalasani, Center for Drug Evaluation and Research, Food and

Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6304, Silver Spring, MD 20993–0002, 240–402–6525, Fax: 301–847–8443, *meghana.chalasani@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

This public workshop is intended to support FDA implementation of requirements for guidance development under section 3002 of the Cures Act (Pub. L. 114–255) and to meet a performance goal included in PDUFA VI. Section 3002 of Title III, Subtitle A of the Cures Act directs FDA to develop patient-focused drug development guidance to address a number of areas, including methodologies, standards, and technologies to collect and analyze COA data for purposes of regulatory decision-making.

In addition, FDA committed to meet certain performance goals under PDUFA VI. This reauthorization, part of the FDA Reauthorization Act of 2017 (Pub. L. 115–52), signed by President Trump on August 18, 2017, includes a number of performance goals and procedures that are documented in the PDUFA VI Commitment Letter, which is available at *https://www.fda.gov/downloads/ForIndustry/UserFees/PrescriptionDrugUserFee/UCM511438.pdf.*

These goal commitments were developed in consultation with patient and consumer advocates, healthcare professionals, and other public stakeholders, as part of negotiations with regulated industry. Section J.1 of the commitment letter, ''Enhancing the Incorporation of the Patient's Voice in Drug Development and Decision-Making,'' (*https://www.fda.gov/downloads/ForIndustry/UserFees/PrescriptionDrugUserFee/UCM511438.pdf*) outlines work, including the development of a series of guidance documents and associated public workshops to facilitate the advancement and use of systematic approaches to collect and utilize robust and meaningful patient and caregiver input that can more consistently inform drug development, and, as appropriate, regulatory decision making.

Prior to the issuance of each guidance, as part of the development, FDA will conduct a public workshop to gather input from the wider community of patients, patient advocates, academic researchers, expert practitioners, drug developers, and other stakeholders.

II. Topics for Discussion at the Public Workshop

During the public workshop, speakers and participants will address a range of issues and considerations related to incorporating COAs into endpoints for regulatory decision-making. The range of issues and considerations includes: (1) Endpoint development; (2) estimands and analysis models; (3) addressing heterogeneity in disease symptoms and functional status between patients and within the same patient over time; and (4) data collection, storage, transmission, and analysis.

III. Participating in the Public Workshop

Registration: Interested parties are encouraged to register early. To register electronically, please visit *https://patientfocuseddrugdevelopment.eventbrite.com.* Registration for in-person attendance will close on December 3, 2019. Registration for the webcast will remain open until the day of the workshop. Persons without access to the internet can call 301–796–0621 to register. If you are unable to attend the workshop in person, you can register to view a live webcast of the workshop. You will be asked to indicate in your registration if you plan to attend in person or via the webcast. Seating will be limited, so early registration is recommended.

Registration is free. FDA may limit the number of participants from each organization based on space limitations. Registrants will receive confirmation once they have been accepted. Onsite registration on the day of the workshop will be based on space availability.

If you need special accommodations due to a disability, please contact Meghana Chalasani (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days before the workshop.

Requests for Oral Presentations: There will be time allotted during the workshop for open public comment. Sign-up for this session will be on a first-come, first-served basis on the day of the workshop. Individuals and organizations with common interests are urged to consolidate or coordinate, and request time for a joint presentation. No commercial or promotional material will be permitted to be presented or distributed at the public workshop.

Streaming Webcast of the Public Workshop: This public workshop will also be webcast at *https://collaboration.fda.gov/pfddg123119/.* If you have never attended a Connect Pro event before, test your connection at *https://collaboration.fda.gov/common/help/en/support/meeting_test.htm.* To get a quick overview of the Connect Pro program, visit *https://www.adobe.com/go/connectpro_overview.* FDA has verified the website addresses in this document, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

Transcripts: Please be advised that as soon as a transcript of the public workshop is available, it will be accessible at *https://www.regulations.gov.* It may be viewed at the Dockets Management Staff (see **ADDRESSES**). A link to the transcript will also be available on the internet at *https://www.fda.gov/drugs/news-events-human-drugs/patient-focused-drug-development-guidance-collection-and-analysis-clinical-outcome-assessment-data.*

Dated: November 8, 2019.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2019–24726 Filed 11–13–19; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–D–2310]

Process To Request a Review of Food and Drug Administration's Decision Not To Issue Certain Export Certificates for Devices; 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 a final guidance entitled ''Process to Request a Review of FDA's Decision Not to Issue Certain Export Certificates for Devices.'' FDA is issuing this guidance to comply with changes to the Federal Food, Drug, and Cosmetic Act (FD&C Act), as amended by the FDA Reauthorization Act of 2017 (FDARA), which specifies the process afforded to persons denied a Certificate to Foreign Government (CFG) for a device. This guidance describes the information that the Center for Devices and Radiological Health (CDRH) and the Center for Biologics Evaluation and Research (CBER), in collaboration with the Office of Regulatory Affairs (ORA), will provide to a person whose request for a CFG for a device is denied, and the process for seeking review of such a denial.

DATES: The announcement of the guidance is published in the **Federal Register** on November 14, 2019.

ADDRESSES: You may submit either electronic or written comments on

Agency guidances 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–2018–D–2310 for ''Process to Request a Review of FDA's Decision Not to Issue Certain Export Certificates for 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 guidance document entitled ''Process to Request a Review of FDA's Decision Not to Issue Certain Export Certificates for Devices'' to the Office of Policy, 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, or to the Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Joann Belt, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1463, Silver Spring, MD 20993–0002, *exportcert@cdrh.fda.gov,* 301–796–7400, option 3; or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993, 240–402–7911.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is issuing this guidance to comply with section 704 of FDARA (Pub. L. 115–52), which amended section 801(e)(4) of the FD&C Act (21 U.S.C. 381(e)(4)), to specify the process afforded to persons denied a CFG for a device. This guidance describes the information that CDRH and CBER, in collaboration with ORA, will provide to a person whose request for a CFG for a device is denied, and the process for seeking review of such a denial. This guidance applies to the process for persons denied CFGs requested pursuant to section 801(e)(4)(A) of the FD&C Act for devices manufactured in an establishment registered under section 510 of the FD&C Act (21 U.S.C. 360) (*i.e.,* FDA-approved, cleared, or exempted devices) that are exported from the United States. This guidance supplements the FDA's guidance ''FDA Export Certificates,'' which is available at: *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/fda-export-certificates.* FDA considered comments received on the draft guidance that appeared in the **Federal Register** of August 17, 2018 (83 FR 41078). FDA revised the guidance as appropriate in response to the comments.

II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on ''Process to Request a Review of FDA's Decision Not to Issue Certain Export Certificates for 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.

III. Electronic Access

Persons interested in obtaining a copy of the 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.* This guidance document is also available at *https://www.regulations.gov* or *https://www.fda.gov/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics/biologics-guidances.* Persons unable to download an electronic copy of ''Process to Request a Review of FDA's Decision Not to Issue Certain Export Certificates for Devices'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number 17044 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). The collections of information in the following FDA regulations and guidance have been approved by OMB as listed in the following table:

FD&C Act section; 21 CFR part; or guidance	Topic	OMB control No.
FD&C Act sections 801(e) and 802 (21 U.S.C. 382)	Export certificates for FDA regulated products	0910–0498
21 CFR part 820	Current Good Manufacturing Practice (CGMP); Quality System (QS) Regulation.	0910–0073
21 CFR part 807, subparts A through E	Electronic Submission of Medical Device Registration and Listing.	0910–0625
''Center for Devices and Radiological Health Appeals Processes''.	Appeals process	0910–0738

Dated: November 5, 2019.

Lowell J. Schiller,

Principal Associate Commissioner for Policy.

[FR Doc. 2019–24717 Filed 11–13–19; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request; Standardized Work Plan (SWP) Form for Use With Applications to the Bureau of Health Workforce (BHW) Research and Training Grants and Cooperative Agreements, OMB No. 0906–xxxx–New

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, HRSA has submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR have been provided to OMB. OMB will accept further comments from the public during the review and approval period. OMB may act on HRSA's ICR only after the 30-day comment period for this Notice has closed.

DATES: Comments on this ICR should be received no later than December 16, 2019.

ADDRESSES: Submit your comments, including the ICR Title, to the desk officer for HRSA, either by email to *OIRA_submission@omb.eop.gov* or by fax to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: To request a copy of the clearance requests submitted to OMB for review, email Lisa Wright-Solomon, the HRSA Information Collection Clearance Officer at *paperwork@hrsa.gov* or call (301) 443–1984.

SUPPLEMENTARY INFORMATION:

Information Collection Request Title: SWP Form for Use with Applications to BHW Research and Training Grants and Cooperative Agreements, OMB No. 0906–xxxx–NEW

Abstract: BHW requires applicants for training and research grants and cooperative agreements to submit a work plan that describes the timeframes and deliverables required during the grant period of performance to address each of the needs detailed in the Purpose and Need section of the application, as required in the Notice of Funding Opportunity announcement. Applicants are currently able to submit work plans in a non-standardized format.

In order to standardize the data provided by applicants to make informed decisions about funding and assist with monitoring awardee progress, BHW plans to require applicants to complete a SWP form in lieu of submitting a work plan in the applicant's own format. Applicants will use the SWP form when they submit their proposals, and grantees and Project Officers will use the SWP information to assist in monitoring progress once HRSA makes the awards.

A 60-day notice was published in the **Federal Register** on June 19, 2019, Vol. 84, No. 118, pp.28560–28561. There was one public comment and it was thoroughly addressed.

Need and Proposed Use of the Information: The information collected by the SWP form is necessary to standardize and streamline the data used by HRSA in reviewing applications and monitoring awardees. The form will ask applicants to provide a description of the activities or steps the recipient will take to achieve each of the objectives proposed during the entire period of performance. The current variation in formats and data submitted by applicants reduces efficiency in reviewing, awarding, and monitoring each project, so this change will remedy that inefficiency. In addition, seeking OMB approval comports with the regulatory requirement imposed by 45 CFR 75.206(a), Paperwork clearances.

The proposed SWP form will be used to provide information to assess applications for awards including ranking applications as part of the grant review process. BHW will also use the information to assess whether current recipients of grant funding have met statutory and programmatic requirements.

Likely Respondents: Respondents will be applicants to HRSA's research and training programs in BHW.

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
Standardized Work Plan	1,000	1	1,000	1	1,000
	1,000	....	1,000	....	1,000

Maria G. Button,

Director, Executive Secretariat.

[FR Doc. 2019–24715 Filed 11–13–19; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Research Misconduct

AGENCY: Office of the Secretary, HHS

ACTION: Notice.

SUMMARY: Findings of research misconduct have been made against Deepti Malhotra, Ph.D. (Respondent), former Doctoral Student and Postdoctoral Fellow, Department of Environmental Health Sciences, Johns Hopkins Bloomberg School of Public Health (JHSPH). Dr. Malhotra engaged in research misconduct in research supported by U.S. Public Health Service (PHS) funds, specifically National Heart, Lung, and Blood Institute (NHLBI), National Institutes of Health (NIH), grants R01 HL081205, P50 HL084945, P50 HL084948–01, U01 HL105569–03, P50 HL107169–01, R01 HL066554–09, and R03 HL096931–02; National Institute of Environmental Health Sciences (NIEHS), NIH, grants P50 ES015903, P01 ES018176–01, and P30 ES003891–25; National Cancer Institute (NCI), NIH, grant P50 CA058184–18; and National Institute for Research Resources (NCRR), NIH, grant UL1 RR025005–02. The administrative actions, including debarment for a period of four (4) years, were implemented beginning on October 1, 2019, and are detailed below.

FOR FURTHER INFORMATION CONTACT: Elisabeth A. Handley, Interim Director, Office of Research Integrity, 1101 Wootton Parkway, Suite 240, Rockville, MD 20852, (240) 453–8200.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Office of Research Integrity (ORI) has taken final action in the following case:

Deepti Malhotra, Ph.D., Johns Hopkins Bloomberg School of Public Health: Based on the report of an investigation conducted by JHSPH and analysis conducted by ORI in its oversight review, ORI found that Dr. Deepti Malhotra, former Doctoral Student and Postdoctoral Fellow, Department of Environmental Health Sciences, JHSPH, engaged in research misconduct in research supported by PHS funds, specifically NHLBI, NIH, grants R01 HL081205, P50 HL084945, P50 HL084948–01, U01 HL105569–03, P50 HL107169–01, R01 HL066554–09, and R03 HL096931–02; NIEHS, NIH, grants P50 ES015903, P01 ES018176–01, and P30 ES003891–25; NCI, NIH, grant P50 CA058184–18; and NCRR, NIH, grant UL1 RR025005–02.NCI, NIH, grant R01 CA122737–01A2.

ORI found that Respondent engaged in research misconduct by knowingly, intentionally, and/or recklessly falsifying and/or fabricating data included in the following four (4) published papers and her Ph.D. Thesis:

- *Am J Respir Crit Care Med.* 2008;178(6):592–604 (hereafter referred to as ''*AJRCCM* 2008''). Retracted in: *Am J Respir Crit Care Med.* 2016 Feb 1;193(3):344.
- *Am J Respir Crit Care Med.* 2009;180(12):1196–1207 (hereafter referred to as ''*AJRCCM* 2009''). Retracted in: *Am J Respir Crit Care Med.* 2016 Feb 1;193(3):344.
- *J Clin Invest.* 2011;121(11):4289–4302 (hereafter referred to as ''*JCI* 2011''). Retracted in: *J Clin Invest.* 2014 Dec;124(12):5521.
- *PLoS Comput Biol.* 2012;8(7):e1002597 (hereafter referred to as ''*PLoS Comput Biol.* 2012'').
- Malhotra D. ''Transcription Factor Nuclear Factor (Erythroid-Derived 2) Receptor 2 (Nrf2), A Master Regulator of Environmental Stress Response, Is A Modifier Of Chronic Obstructive Pulmonary Disease (COPD).'' A dissertation submitted to the Johns Hopkins University in conformity with the requirements for the degree of Doctor of Philosophy, August 2010 (hereafter referred to as the ''Ph.D. Thesis'').

Respondent knowingly, intentionally, and/or recklessly falsified and/or fabricated Western blot data for protein expression in cultured cell lines and/or alveolar macrophages of patients with chronic obstructive pulmonary disease (COPD) by trimming and manipulating Western blot images to disguise their origin or by reversing negative DNA gel images of the PCR product, reusing and relabeling them to represent Western blot data for unrelated experiments in seventeen (17) figures included in four (4) published papers and twelve (12) figures included in her Ph.D. Thesis. In the absence of original reliable image data, the quantitative data in associated plots, statistical analyses, and related text also are falsified and/or fabricated. Specifically, Respondent falsified and/or fabricated the following figures included in:

- *AJRCCM* **2008**

▪ by reusing sets of repeating blot band images from unknown and/or differently labeled film images to falsely create Western Blot panels of:

➢ GAPDH in Figure 1C, also included as Figure 2–4B in the Ph.D. Thesis
➢ GAPDH, DJ–1 and KEAP1 in Figure 2B, also included as Figure 2–4C in the Ph.D. Thesis
➢ GAPDH in Figure 5D, also included as Figure 2–7A in the Ph.D. Thesis
➢ DJ–1, NRF2, NQO1, and GAPDH in Figure 6B, also included as Figure 2–8B in the Ph.D. Thesis

- *AJRCCM* **2009**

▪ by trimming Western blot panel representing samples from:

➢ Human subjects in Figure 4C and in the Ph.D. Thesis, Figure 3–7C, right column, Figure 3–7G, right column, and Figure 3–8A, right column, GAPDH lanes 1–4, and reusing them to represent samples from mice in Figure 3A and in the Ph.D. Thesis, Figure 3–6A
➢ normal human subjects in Figures 4C and 5A, left column, and in the Ph.D.

Thesis, Figures 3–7C and 3–8A, left column, and reusing them after flipping horizontally and vertically as lanes 12–18 in the same GAPDH panel in the same figures to represent samples from COPD patients

• *JCI* **2011**

▪ by trimming Western blot panels from:

➢ Figure 2D, reusing and relabeling in Figure 4A to represent different samples

➢ Supplemental Figure 1A, reusing and relabeling in Figure 4A to represent different samples

➢ Figure 3F, reusing and relabeling Figure 3B, bottom panel, in *PloS Comp Biol.* 2012

➢ Figure 9B and the Ph.D. Thesis Figure 4–9H, bottom panel, lanes 1–5, and reusing them in Figure 4–8C, lanes 4–8, in the Ph.D. Thesis, to represent different samples

➢ Figure 9B and the Ph.D. Thesis, Figure 4–9H, middle panel, lanes 1–3, and reusing them in Figure 4–8C, middle panel, lanes 2–4, in the Ph.D. Thesis, to represent different samples

➢ Figure 9D and the Ph.D. Thesis, Figure 4–9I, top panel, lanes 1–4, and reusing them after flipping horizontally in Figure 4–8C, top panel, lanes 1–4, in the Ph.D. Thesis, to represent different samples

▪ by trimming negative DNA gel images from:

➢ Figure 2A, reversing and reusing the positive image as Western blot images in:

• Figure 3B

• Supplemental Figure 3A

➢ Figure 3G, reversing and reusing the positive image as Western blots in different panels in Figure 3B in *PloS Comp Biol.* 2012

Dr. Malhotra entered into a Voluntary Exclusion Agreement (Agreement) and agreed for a period of four (4) years, beginning on October 1, 2019:

(1) To exclude herself voluntarily from any contracting or subcontracting with any agency of the United States Government and from eligibility for or involvement in nonprocurement programs of the United States Government referred to as ''covered transactions'' pursuant to HHS' Implementation (2 CFR part 376) of OMB Guidelines to Agencies on Governmentwide Debarment and Suspension, 2 CFR part 180 (collectively the ''Debarment Regulations''); and

(2) to exclude herself voluntarily from serving in any advisory capacity to PHS including, but not limited to, service on any PHS advisory committee, board, and/or peer review committee, or as a consultant.

Elisabeth A. Handley,

Interim Director, Office of Research Integrity.

[FR Doc. 2019–24691 Filed 11–13–19; 8:45 am]

BILLING CODE 4150–31–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Research Misconduct

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Findings of research misconduct have been made against Dr. Sudhakar Yakkanti (Respondent) (formerly named Sudhakar Akulapalli),[1] former staff scientist and Director of the Cell Signaling, Retinal & Tumor Angiogenesis Laboratory, Boys Town National Research Hospital (BTNRH). Respondent engaged in research misconduct in research supported by U.S. Public Health Service (PHS) funds, specifically, National Cancer Institute (NCI), National Institutes of Health (NIH), grant R01 CA143128, National Eye Institute (NEI), NIH, grants R01 EY018179 and R01 EY16695, and National Institute of Diabetes and Digestive and Kidney Diseases (NIDDK), NIH, grants R01 DK055000, R01 DK055001, R01 DK062987, and R01 DK051711. The administrative actions, including debarment for a period of five (5) years, were implemented beginning on August 24, 2019, and are detailed below.

FOR FURTHER INFORMATION CONTACT: Elisabeth A. Handley, Interim Director, Office of Research Integrity, 1101 Wootton Parkway, Suite 240, Rockville, MD 20852, (240) 453–8200.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Office of Research Integrity (ORI) has taken final action in the following case:

Dr. Sudhakar Yakkanti, Boys Town National Research Hospital: Based upon the evidence and findings of an investigation report by BTNRH and additional information obtained by ORI during its oversight review of the BTNRH investigation, ORI found that Dr. Sudhakar Yakkanti, former staff scientist and Director of the Cell Signaling, Retinal & Tumor Angiogenesis Laboratory, BTNRH, engaged in research misconduct in research supported by PHS funds, specifically, NCI, NIH, grant R01 CA143128, NEI, NIH, grants R01 EY018179 and R01 EY16695, and NIDDK, NIH, grants R01 DK055000, R01 DK055001, R01 DK062987, and R01 DK051711.

ORI found by a preponderance of the evidence that Respondent intentionally, knowingly, or recklessly falsified and/or fabricated figures in the following eight (8) unfunded NIH grant applications, one (1) funded NIH grant application, seven (7) publications, and two (2) unpublished manuscripts:

• R01 CA115763–01A2 submitted to NCI, NIH (unfunded)
• R21 CA155796–01 submitted to NCI, NIH (unfunded)
• R01 CA166195–01 submitted to NCI, NIH (unfunded)
• R01 CA143128–01 submitted to NCI, NIH (unfunded)
• R01 CA143128–04 submitted to NCI, NIH (unfunded)
• R01 EY020539–01 submitted to NEI, NIH (unfunded)
• R01 EY020539–01A1 submitted to NEI, NIH (unfunded)
• R01 EY024967–01 submitted to NEI, NIH (unfunded)
• R01 CA143128–01A1 submitted to NCI, NIH (funded)
• *Biochemistry* 2000;39(42):12929–12938 (hereafter referred to as ''*Biochem* 2000'')
• *Proc. Natl. Acad. Sci. U.S.A.* 2003;100(8):4766–4771 (hereafter referred to as ''*PNAS* 2003'')
• *The Journal of Clinical Investigation* 2005;115(10):2801–2810 (hereafter referred to as ''*JCI* 2005'')
• *Invest. Ophthalmol. Vis. Sci.* 2009;50(10):4567–4575 (hereafter referred to as ''*IOVS* 2009'')
• *Pharmaceutical Research* 2008;25(12):2731–2739 (hereafter referred to as ''*Pharm Research* 2008'')
• *Scientific Reports* 2014;4(4136):1–9 (hereafter referred to as ''*Sci Reports* 2014'')
• *Current Eye Res.* 2010 Jan;35(1):44–55 (hereafter referred to as ''*CER* 2010'')
• Tumstatin inhibits Choroidal Neovascularization by Inhibiting MMP–2 activation *in-vitro* and *in vivo.* Submitted to *Molecular Vision* on February 7, 2011 (hereafter referred to as ''*Mol Vis* Sub 2011'') (unpublished)
• Inhibitory Effect of Tumstatin on Corneal Neovascularization Both *In-vitro* and *In-vivo.* Submitted to *Journal of Clinical & Experimental Ophthalmology* on January 16, 2011 (hereafter referred to as ''*JCEO* Sub 2011'') (unpublished)

Specifically, ORI found by a preponderance of the evidence that

[1] The Respondent changed his name from Sudhakar Akulapalli to Sudhakar Yakkanti during the BTNRH inquiry.

Respondent engaged in research misconduct by intentionally, knowingly, or recklessly:

- Falsifying an image from an *in vivo* choroidal neovascularization (CNV) experiment by falsely relabeling an image representing results from an experiment with the anti-angiogenic molecule arresten (α1NC1) to represent results from a different CNV experiment with a different anti-angiogenic molecule, hexastatin (α6NC1) in Figure 9A (right panel) of grant application R01 CA166195–01
- falsifying an image from an *in vivo* CNV experiment by falsely relabeling an image representing results from an experiment with the anti-angiogenic molecule hexastatin (α6NC1) to represent results from different CNV experiments with different anti-angiogenic molecules:
  —Arresten (α1NC1) in Figure 10A (right panel) of grant application R01 EY020539–01A1
  —tumstatin (α3NC1) in Figure 6A (right panel) of *Mol Vis* Sub 2011
- falsifying and/or fabricating bar graphs in Figure 9B of grant application R01 CA166195–01, which was based on the falsified image in Figure 9A (right panel) of grant application R01 CA166195–01
- falsifying and/or fabricating bar graphs in Figure 6B of *Mol Vis* Sub 2011, which was based on the falsified image in Figure 6A (right panel) of *Mol Vis* Sub 2011
- falsifying and/or fabricating bar graphs in Figure 10B of grant application R01 EY020539–01A1, which was based on the falsified image in Figure 10A of grant application R01 EY020539–01A1
- falsifying microscope images of endothelial tube formation assays by labeling one image as two different experiments:
  —A control in an experiment performed in Human umbilical vein endothelial cells (HUVECs) in Figure 1D (first panel) of grant application R21 CA155796–01
  —a control in an experiment performed in mouse choroidal endothelial cells (MCECs) in Figure 2B (first panel) of grant application R01 EY020539–01A1
- falsifying microscope images of endothelial tube formation assays by reusing and falsely labeling one image as three different experiments:
  —HUVECs treated with 0.5 µM hexastatin (α6(IV)NC1) in Figure 1D (third panel) of grant application R21 CA155796–01
  —MCECs treated with 0.5 µM arresten (α1(IV)NC1) in Figure 2B (second panel) of grant application R01 EY020539–01A1
  —MCECs treated with 1.0 µM tumstatin (α3(IV)NC1) in Figure 2C (bottom right panel) of *Mol Vis* Sub 2011
- falsifying Western blot images by reusing and falsely labeling one image as four different experiments:
  —The protein band FAK from HUVECs treated with hexastatin (α6(IV)NC1) in Figure 3A (bottom panel) of grant application R21 CA155796–01 and Figure 4A (bottom panel) of grant application R01 CA166195–01
  —the protein band FAK from MCECs treated with arresten (α1(IV)NC1) in Figure 5A (bottom panel) of grant application R01 EY020539–01A1
  —the protein band Raf from HUVECs treated with rh-Endo in Figure 5A (bottom panel) of *PNAS* 2003
  —the protein band FAK from mouse retinal pigmented epithelial cell (MRPECs) treated with arresten (α1(IV)NC1) in Figure 5B (bottom panel) of grant application R01 EY020539–01 and in Figure 7B (bottom panel) of *IOVS* 2009
- falsifying Western blot images by reusing and falsely labeling one image as two different experiments:
  —HUVECs treated with rh-Endo in Figure 5D (middle panel) of *PNAS* 2003
  —mouse retinal endothelial cells (MRECs) treated with arresten (α1(IV)NC1) in Figure 7C (top panel) of *IOVS* 2009
- falsifying Western blot images by reusing and falsely labeling one image as two different experiments:
  —HUVECs treated with hexastatin (α6(IV)NC1) in Figure 3C (top panel) of grant application R21 CA155796–01
  —MCECs treated with arresten (α1(IV)NC1) in Figure 5B (top panel) of grant application R01 EY020539–01A1
- falsifying Western blot images by reusing and falsely labeling one image as two different experiments:
  —HUVECs treated with hexastatin (α6(IV)NC1) in Figure 3C (bottom panel) of grant application R21 CA155796–01
  —MCECs treated with arresten (α1(IV)NC1) in Figure 5B (bottom panel) of grant application R01 EY020539–01A1
- falsifying Western blot images by reusing and falsely labeling one image as two different experiments:
  —HUVECs treated with hexastatin (α6(IV)NC1) in Figure 3D (top panel) of grant application R21 CA155796–01
  —MCECs treated with arresten (α1(IV)NC1) in Figure 5C (top panel) of grant application R01 EY020539–01A1
- falsifying Western blot images by reusing and falsely labeling one image as two different experiments:
  —HUVECs treated with hexastatin (α6(IV)NC1) in Figure 3D (bottom panel) of grant application R21 CA155796–01,
  —MCECs treated with arresten (α1(IV)NC1) in Figure 5C (bottom panel) of grant application R01 EY020539–01A1
- falsifying Western blot images by reusing and falsely labeling one image as three different experiments:
  —The protein band FAK(P) from HUVECs treated with rh-Endo in Figure 4A (top panel) of *PNAS* 2003
  —the protein band Cox-2 from HUVECs treated with arresten (α1(IV)NC1) in Figure 2B (top panel) of grant application R01 CA115763–01A2, Figure 2B (top panel) of grant application R01 CA143128–01, and Figure 2B (top panel) of grant application R01 CA143128–01A1
  —the protein band Cox-2 from MCECs treated with arresten (α1(IV)NC1) in Figure 5C (top panel) of grant application R01 CA143128–04 and Figure 8B (top panel) of R01 EY024967–01
- falsifying Western blot images by reusing and falsely labeling one image as two different experiments:
  —The protein band eIF2α 51A in Figure 1A (lanes 3–5) of *Biochem* 2000
  —the protein band tumstatin (α3(IV)NC1) in Figure 2 (lanes 2–4) of *Pharm Research* 2008
- falsifying Western blot images by reusing and falsely labeling one image as two different experiments:
  —The protein band active MMP–2 in Figure 10D (top panel, lanes 1–4) of grant application R01 CA115763–01A2, Figure 10B of grant application R01 CA143128–01, Figure 10B (third panel, lanes 1–4) of grant application R01 CA143128–01A1, and Figure 7D (third panel, lanes 1–4) of grant application R01 EY020539–01A1
  —the protein band arresten (α1(IV)NC1) in Figure 3C (lanes 3–6) of *Sci Reports* 2014, Figure 6D (lanes 3–6) of grant application R01 CA143128–04, and Figure 9D (lanes 3–6) of grant application R01 EY024967–01
- falsifying Western blot images by reusing and falsely labeling one image as three different experiments:

—The protein band Raf from mouse lung endothelial cells (MLECs) at the time points 0, 5, 10, 20, and 30 minutes in Figure 5A (bottom panel, lanes 1–5) of *JCI* 2005
—the protein band FAK(P) from MRECs at the time points 20 and 40 minutes in Figure 7A (top panel, lanes 2 and 4) of *IOVS* 2009 and Figure 5A (top panel, lanes 2 and 4) of grant application R01 EY020539–01
—the protein band FAK from MRECs at the time points 0, 20, 20, 40, and 40 minutes in Figure 7A (bottom panel, lanes 1–5) of *IOVS* 2009 and Figure 5A (bottom panel, lanes 1–5) of grant application R01 EY020539–01

• falsifying images of corneas by reusing and falsely labeling one image as two different experiments:
—CNV cornea treated with arresten (α1(IV)NC1) in Figure 13 (right panel) of grant application R01 EY020539–01
—CNV cornea treated with tumstatin (α3(IV)NC1) in Figure 3A (right panel) of *JCEO* Sub 2011

• falsifying images of corneal sections by reusing and falsely labeling one image as two different experiments:
—CNV cornea treated with arresten (α1(IV)NC1) in Figure 14 (right panel) of grant application R01 EY020539–01
—CNV cornea treated with tumstatin (α3(IV)NC1) in Figure 4 (right panel) of *JCEO* Sub 2011

• falsifying endothelial cell migration assays by reusing and falsely labeling one image as two different experiments:
—MRECs treated with vascular endothelial growth factor (VEGF) and arresten (α1(IV)NC1) in Figure 2A (top right panel) of *IOVS* 2009 and Figure 2 (top right panel) of grant application R01 EY020539–01
—HUVECs treated with only VEGF in Figure 1C (middle panel) of grant application R21 CA155796–01 and Figure 2C (second panel) of grant application R01 CA166195–01

• falsifying endothelial cell migration assays by reusing and falsely labeling one image as two different experiments:
—MRECs treated with VEGF in Figure 2A (top middle panel) of *IOVS* 2009 and Figure 2 (top middle panel) of grant application R01 EY020539–01
—MRECs treated with basic fibroblast growth factor (bFGF) in Figure 3A (second panel) of *CER* 2010

• falsifying endothelial cell migration assays by reusing and falsely labeling one image as two different experiments:
—MRECs treated with bFGF and arresten (α1NC1) in Figure 3A (fourth panel) of *CER* 2010
—MRECs treated with VEGF and arresten (α1NC1) in Figure 2A (bottom middle panel) of *IOVS* 2009 and Figure 2 (bottom middle panel) of grant application R01 EY020539–01

• falsifying endothelial cell migration assays by reusing and falsely labeling one image as three different experiments:
—MRECs treated with bFGF and 10 μg/ml arresten (α1NC1) in Figure 3A (fifth panel) of *CER* 2010
—HUVECs treated with VEGF and 0.5 μM hexastatin (α6NC1) in Figure 1C (last panel) of grant application R21 CA155796–01
—HUVECs treated with VEGF and 0.25 μM hexastatin (α6NC1) in Figure 2C (third panel) of grant application R01 CA166195–01

The following administrative actions have been implemented, beginning on August 24, 2019:

(1) Respondent is debarred for a period of five (5) years from eligibility for any contracting or subcontracting with any agency of the United States Government and from eligibility for, or involvement in, nonprocurement programs of the United States Government referred to as ''covered transactions'' pursuant to HHS' Implementation (2 CFR part 376 *et seq.*) of Office of Management and Budget (OMB) Guidelines to Agencies on Governmentwide Debarment and Suspension, 2 CFR part 180 (collectively the ''Debarment Regulations'');

(2) Respondent is prohibited from serving in any advisory capacity to PHS including, but not limited to, service on any PHS advisory committee, board, and/or peer review committee, or as a consultant for a period of five (5) years; and

(3) in accordance with 42 CFR 93 §§ 93.407(a)(1) and 93.411(b), HHS will send a notice of the findings and of the need for correction or retraction to the pertinent journals for each of the following:

• *Biochemistry* 2000;39(42):12929–12938
• *Proc. Natl. Acad. Sci. U.S.A.* 2003;100(8):4766–4771
• *The Journal of Clinical Investigation* 2005;115(10):2801–2810
• *Invest. Ophthalmol. Vis. Sci.* 2009;50(10):4567–4575
• *Pharmaceutical Research* 2008;25(12):2731–2739
• *Scientific Reports* 2014;4(4136):1–9
• *Current Eye Res.* 2010 Jan;35(1):44–55

Elisabeth A. Handley,

Interim Director, Office of Research Integrity.

[FR Doc. 2019–24689 Filed 11–13–19; 8:45 am]

BILLING CODE 4150–31–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center For Advancing Translational Sciences; 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 Center for Advancing Translational Sciences Special Emphasis Panel; CTSA.

Date: January 24, 2020.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: Victor Henriquez, Ph.D., Scientific Review Officer, Office of Scientific Director, National Center for Advancing Translational Sciences (NCATS), National Institutes of Health, 6701 Democracy Blvd., Democracy 1, Room 1080, Bethesda, MD 20892–4878, 301–435–0813, *henriquv@mail.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 7, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–24677 Filed 11–13–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Institute of Environmental Health Sciences Special Emphasis Panel, which was published in the **Federal Register** on October 30, 2019, 84 FR 58164.

The National Institute of Environmental Health Sciences Special Emphasis Panel Meeting: E-Learning for Hazmat and Emergency Response, is being amended due to a change in the meeting time. This one day meeting will be held on November 12th, 2019 at 1:00 p.m. and will end at 4:00 p.m. This meeting is closed to the public.

Dated: November 7, 2019.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–24672 Filed 11–13–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed 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 Institute of Mental Health Special Emphasis Panel; NIMH HIV/AIDS Review (P30).

Date: November 25, 2019.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center Building (NSC), 6001 Executive Boulevard, Rockville, MD 20852.

Contact Person: David W. Miller, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6140, MSC 9608, Bethesda, MD 20892–9608, 301–443–9734, *millerda@mail.nih.gov.*

Name of Committee: National Institute of Mental Health Special Emphasis Panel; BRAIN Initiative: Non-Invasive Neuromodulation—New Tools and Techniques (R01).

Date: December 4, 2019.

Time: 12:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center Building (NSC), 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Rebecca Steiner Garcia, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6149, MSC 9608, Bethesda, MD 20892–9608, 301–443–4525, *steinerr@mail.nih.gov.*

Name of Committee: National Institute of Mental Health Special Emphasis Panel; NIMH HIV/AIDS Training Review (R25, T32, K99).

Date: December 4, 2019.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center Building (NSC), 6001 Executive Boulevard, Rockville, MD 20852.

Contact Person: David W. Miller, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6140, MSC 9608, Bethesda, MD 20892–9608, 301–443–9734, *millerda@mail.nih.gov.*

Name of Committee: National Institute of Mental Health Special Emphasis Panel; RFA Review: Computational Methods for Integrating Tissue and Single Cell Genomic Data from the Brain.

Date: December 18, 2019.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center Building (NSC), 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Nicholas Gaiano, Ph.D., Review Branch Chief, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center/Room 6150/MSC 9606, 6001 Executive Boulevard, Bethesda, MD 20892–9606, 301–443–2742, *nick.gaiano@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: November 7, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–24678 Filed 11–13–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Cancer Advisory Board and NCI Board of Scientific Advisors, December 2, 2019, 8:30 a.m. to December 3, 2019, 12:00 p.m., National Cancer Institute Shady Grove Campus, Rockville, MD, 20850 which was published in the **Federal Register** on February 11, 2019, 84 FR 3205.

This meeting notice is amended to add two subcommittee meetings. The National Cancer Advisory Board (NCAB) Ad Hoc Subcommittee on Population Science, Epidemiology and Disparities will meet on December 2, 2019 from 5:30 p.m. to 7:00 p.m. and the NCAB Subcommittee on Clinical Investigations will meet on December 2, 2019 from 7:30 p.m. to 9:00 p.m. Both meetings will be held at the Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Boulevard, Rooms—To Be Determined, Gaithersburg, MD 20878.

This meeting notice is also amended to change the meeting from a two-day to a one-day meeting and change the open and closed session meeting times. The joint meeting of the NCAB and NCI Board of Scientific Advisors will now be held on December 3, 2019 with the open session from 8:00 a.m. to 4:30 p.m. and the closed session from 4:45 p.m. to 5:45 p.m.

Dated: November 7, 2019.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–24676 Filed 11–13–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Myalgic Encephalomyelitis/Chronic Fatigue Syndrome.

Date: December 4, 2019.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: M Catherine Bennett, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5182, MSC 7846, Bethesda, MD 20892, 301–435–1766, *bennettc3@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel PAR Panel; Cancer Health Disparities.

Date: December 5, 2019.

Time: 8:00 a.m. to 10:00 a.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW, Washington, DC 20015.

Contact Person: Rolf Jakobi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6187, MSC 7806, Bethesda, MD 20892, 301–495–1718, *jakobir@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: AIDS and Related Research.

Date: December 6, 2019.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Barna Dey, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3184, Bethesda, MD 20892, 301–451–2796, *bdey@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Program Projects: Combination Therapy for HIV Eradication.

Date: December 6, 2019.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Shiv A Prasad, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5220, MSC 7852, Bethesda, MD 20892, 301–443–5779, *prasads@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel PAR Panel; Adverse Drug Reaction.

Date: December 6, 2019.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Alexander D Politis, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3210, MSC 7808, Bethesda, MD 20892, (301) 435–1150, *politisa@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Cancer therapeutics and biomarkers.

Date: December 6, 2019.

Time: 11:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Mehrdad Mohseni, MD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5211, MSC 7854, Bethesda, MD 20892, 301–435–0484, *mohsenim@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Language, Communication, Cognition and Perception.

Date: December 6, 2019.

Time: 11:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Katherine Colona Morasch, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3170, Bethesda, MD 20892, *moraschkc@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 7, 2019.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–24674 Filed 11–13–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Population Sciences Subcommittee, which was published in the **Federal Register** on February 28, 2019, 84 FR 6808.

The meeting date has changed from a two-day meeting on November 14th and November 15th, 2019 to a one-day meeting on November 14th, 2019. The meeting is closed to the public.

Dated: November 7, 2019.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–24675 Filed 11–13–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of The Director, National Institutes of Health; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Novel and Exceptional Technology and Research Advisory Committee.

The meeting will be open to the public, 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 also be videocast and can be accessed from the NIH Videocasting and Podcasting website (*http://videocast.nih.gov/*).

Name of Committee: Novel and Exceptional Technology and Research Advisory Committee.

Date: December 5, 2019.

Time: 11:00 a.m. to 5:15 p.m.

Agenda: The Novel and Exceptional Technology and Research Advisory Committee (NExTRAC) will discuss (1) pathways for responsible innovation in emerging biotechnologies; (2) characteristics of emerging biotechnologies, including presentations on horizon scanning, gene editing in the clinic, gene drives, neurotechnology, artificial intelligence, and synthetic biology; and (3) proactively addressing scientific and societal implications of emerging biotechnologies. In addition, charge(s) to the committee will be presented.

Place: National Institutes of Health, Building 35A, Room 620/630, 9000 Rockville Pike, Bethesda, MD 20892.

Name of Committee: Novel and Exceptional Technology and Research Advisory Committee.

Date: December 6, 2019.

Time: 9:00 a.m. to 2:45 p.m.

Agenda: The Novel and Exceptional Technology and Research Advisory Committee (NExTRAC) will discuss (1) pathways for responsible innovation in emerging biotechnologies; (2) characteristics of emerging biotechnologies, including presentations on horizon scanning, gene editing in the clinic, gene drives, neurotechnology, artificial intelligence, and synthetic biology; and (3) proactively addressing scientific and societal implications of emerging biotechnologies. In addition, charge(s) to the committee will be presented.

Place: National Institutes of Health, Building 35A, Room 620/630, 9000 Rockville Pike, Bethesda, MD 20892.

Contact Person: Shayla Beckham, Management Program Analyst, Office of Science Policy, National Institutes of Health, 6705 Rockledge Drive, Room 750, Bethesda, MD 20892–9606, 301–496–9838, *shayla.beckham@nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the NExTRAC web page: *https://osp.od.nih.gov/biotechnology/novel-exceptional-technology-research-advisory-committee/,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: November 7, 2019.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019–24673 Filed 11–13–19; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2019–0025; OMB No. 1660–0017]

Agency Information Collection Activities: Proposed Collection; Comment Request; Public Assistance Program

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public to take this opportunity to comment on a revision of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning information collected for the Public Assistance (PA) program eligibility determinations, grants management, and compliance with Federal laws and regulations.

DATES: Comments must be submitted on or before January 13, 2020.

ADDRESSES: To avoid duplicate submissions to the docket, please use only one of the following means to submit comments:

(1) *Online.* Submit comments at *www.regulations.gov* under Docket ID FEMA–2019–0025. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Docket Manager, Office of Chief Counsel, DHS/FEMA, 500 C Street SW, 8NE, Washington, DC 20472–3100.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available via the link in the footer of *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Rachel Hildebrand, Process Improvement Section Chief, Public Assistance Program Delivery Branch, 202–646–3484. You may contact the Information Management Division for copies of the proposed collection of information at email address: *FEMA-Information-Collections-Management@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5207 (the Stafford Act), authorizes grants to assist State, Tribal, and local governments and certain Private Non-Profit entities with the response to and recovery from disasters following Presidentially declared major disasters and emergencies. 44 CFR part 206 specifies the information collections necessary to facilitate the provision of assistance under the Public Assistance (PA) Program. 44 CFR 206.202 describes the general application procedures for the PA Program.

FEMA is seeking a revision to the already existing collection of information, OMB Control Number 1660–0017, because FEMA proposes changing the title from ''Request for Appeals and Recommendation/No Forms'' to ''Request for Appeals or Arbitrations and Recommendations/No Forms.'' Section 1219 of the Disaster Recovery Reform Act of 2018, which amended Section 423(d) of the Stafford Act (42 U.S.C. 5189a), provides a right of arbitration to certain applicants of the PA Program that have a dispute concerning the eligibility for assistance or repayment of assistance. Plus, the annual cost to the Federal Government is increasing from $805,311.96 to $1,891,473. Finally, there has been a change in the annual burden hours due to a correction of errors in burden estimates. For example, in the past, FEMA incorrectly used 1.3 hours to represent 1.5 hours for FEMA Form 009–0–91.

Collection of Information

Title: Public Assistance Program.

Type of Information Collection: Revision of a currently approved collection.

OMB Number: 1660–0017.

FEMA Forms: FEMA Form–009–0–49 Request for Public Assistance; FEMA Form 009–0–91 Project Worksheet (PW); FEMA Form 009–0–91A Project Worksheet (PW)—Damage Description and Scope of Work Continuation Sheet; FEMA Form 009–0–91B Project Worksheet (PW)—Cost Estimate Continuation Sheet; FEMA Form 009–0–91C Project Worksheet (PW)—Maps and Sketches Sheet; FEMA Form 009–0–91D Project Worksheet (PW)—Photo Sheet; FEMA Form 009–0–120 Special Considerations Questions; FEMA Form 009–0–121 PNP Facility Questionnaire; FEMA Form 009–0–123 Force Account Labor Summary Record; FEMA Form 009–0–124 Materials Summary Record;

FEMA Form 009–0–125 Rented Equipment Summary Record; FEMA Form 009–0–126 Contract Work Summary Record; FEMA Form 009–0–127 Force Account Equipment Summary Record; FEMA Form 009–0–128 Applicant's Benefits Calculation Worksheet; FEMA Form 009–0–111, Quarterly Progress Report; FEMA Form 009–0–141, FAC–TRAX System.

Abstract: The information collected is utilized by FEMA to make determinations for Public Assistance grants based on the information supplied by the respondents.

Affected Public: State, local or Tribal government.

Estimated Number of Respondents: 1,012.

Estimated Number of Responses: 398,068.

Estimated Total Annual Burden Hours: 466,025.

Estimated Total Annual Respondent Cost: $29,601,921.

Estimated Respondents' Operation and Maintenance Costs: N/A.

Estimated Respondents' Capital and Start-Up Costs: N/A.

Estimated Total Annual Cost to the Federal Government: $1,891,473.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed 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; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Maile Arthur,

Deputy Director, Information Management Division, Office of the Chief Administrative Officer, Mission Support, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2019–24719 Filed 11–13–19; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Agency Information Collection Activities: Vulnerability Assessments

AGENCY: Infrastructure Security Division (ISD), Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

ACTION: 30-Day notice and request for comments; revision, 1670–0035.

SUMMARY: DHS CISA ISD will submit the following information collection request (ICR) to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. CISA previously published this ICR for a 60-day public comment period. No comments were received by CISA. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are due by December 16, 2019.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, OMB. Comments should be addressed to the OMB Desk Officer, Department of Homeland Security and sent via electronic mail to *dhsdeskofficer@omb.eop.gov.* All submissions must include the words ''Department of Homeland Security'' and the OMB Control Number 1670–0035.

Comments submitted in response to this notice may be made available to the public through relevant websites. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. If you send an email comment, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. Please note that responses to this public comment request containing any routine notice about the confidentiality of the communication will be treated as public comments that may be made available to the public notwithstanding the inclusion of the routine notice.

FOR FURTHER INFORMATION CONTACT: Ricky Morgan, 866–844–8163, *IPGatewayHelpDesk@hq.dhs.gov.*

SUPPLEMENTARY INFORMATION: The Presidential Policy Directive-21 and the National Infrastructure Protection Plan highlight the need for a centrally managed repository of infrastructure attributes capable of assessing risks and facilitating data sharing. To support this mission need, the DHS CISA ISD has developed a data collection system that contains several capabilities which support the homeland security mission in the area of critical infrastructure (CI) protection.

Protective Security Advisors (PSAs) and Cyber Security Advisors (CSAs) conduct voluntary assessments on CI facilities. These assessments are web-based and are used to collect an organization's basic, high-level information, and its dependencies. This data is then used to determine a Protective Measures Index (PMI) and a Resilience Measures Index (RMI) for the assessed organization. This information allows an organization to see how it compares to other organizations within the same sector as well as allows them to see how adjusting certain aspects would change their score. This allows the organization to then determine where best to allocate funding and perform other high-level decision-making processes pertaining to the security and resiliency of the organization.

The information will be gathered by site visits, arranged between the organization owners and DHS PSAs or CSAs. The PSA or CSA will then visit the site and perform the assessment, as requested. They then return to complete the vulnerability assessment and input the data into the system where the data is then accessible to system users. Once available, the organization and other relevant system users can then review the data and use it for planning, risk identification, mitigation and decision making. All data is captured electronically by the PSA, CSA or by the organization as a self-assessment. Participation in the vulnerability assessments is voluntary, but full completion of the assessment data collection is required if the organization desires to receive a complete evaluation of their security posture.

After assessments are input into the system, the user is prompted to participate in a feedback questionnaire. Every user is prompted to participate in the Post Assessment questionnaire after entering an assessment. Participation in the Post Assessment questionnaire is voluntary. The Post Assessment Questionnaires are designed to capture feedback about a vulnerability assessment and the system. There are three different questionnaires correlated and prompted after entering a particular assessment into the database. The results are used internally within DHS to make programmatic improvements.

The collection of information uses automated electronic vulnerability assessments and questionnaires. The vulnerability assessments and questionnaires are electronic in nature and include questions that measure the security, resiliency and dependencies of an organization. The vulnerability assessments are arranged at the request of an organization and are then scheduled and performed by a PSA or CSA.

The changes to the collection since the previous OMB approval include: Updating the title of the collection, adding three customer feedback questionnaires, increase in burden estimates and costs. The three questionnaires were added to the collection to provide user feedback on the content and functionality of the system. The addition of the questionnaires have increased the burden estimates by $3,861.

The annual burden cost for the collection has increased by $121,591, from $1,786,166 to $1,907,757, due to the addition of the Post Assessment Questionnaires and updated wage rates.

The annual government cost for the collection has increased by $509,195, from $1,710,959 to $2,220,152, due to the addition of the Post Assessment Questionnaires and updated wage rates.

This is a revision and renewal of an information collection.

OMB is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Title of Collection: Cybersecurity and Infrastructure Security Agency Vulnerability Assessments.

OMB Control Number: 1670–0035.

Frequency: Annually.

Affected Public: State, Local, Tribal, and Territorial Governments and Private Sector Individuals.

Number of Annualized Respondents: 3,181.

Estimated Time per Respondent: 7.5 hours, 0.17 hours.

Total Annualized Burden Hours: 21,907 hours.

Total Annualized Respondent Opportunity Cost: $1,907,757.

Total Annualized Respondent Out-of-Pocket Cost: $0.

Total Annualized Government Cost: $2,220,152.

Scott Libby,

Deputy Chief Information Officer.

[FR Doc. 2019–24743 Filed 11–13–19; 8:45 am]

BILLING CODE 9110–9P–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLAK940000.L14100000.BX0000.20X. LXSS001L0100]

Filing of Plats of Survey: Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of official filing.

SUMMARY: The plats of survey of lands described in this notice are scheduled to be officially filed in the Bureau of Land Management (BLM), Alaska State Office, Anchorage, Alaska. These surveys were executed at the request of the U.S. Coast Guard, the Bureau of Indian Affairs and BLM, are necessary for the management of these lands.

DATES: The BLM must receive protests by December 16, 2019.

ADDRESSES: You may buy a copy of the plats from the BLM Alaska Public Information Center, 222 W 7th Avenue, Mailstop 13, Anchorage, AK 99513. Please use this address when filing written protests. You may also view the plats at the BLM Alaska Public Information Center, Fitzgerald Federal Building, 222 W 8th Avenue, Anchorage, Alaska, at no cost.

FOR FURTHER INFORMATION CONTACT: Douglas N. Haywood, Chief, Branch of Cadastral Survey, Alaska State Office, Bureau of Land Management, 222 W. 7th Avenue, Anchorage, AK 99513; 907–271–5481; *dhaywood@blm.gov.* People who use a telecommunications device for the deaf may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the BLM during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The lands surveyed are:

U.S. Survey No. 4486, accepted October 31, 2019, situated within:

Kateel River Meridian, Alaska

T. 25 N, R. 19 W

U.S. Survey No. 5877, accepted October 31, 2019, situated within:

Seward Meridian, Alaska

T. 8 S, R. 14 W

U.S. Survey No. 8610, accepted October 31, 2019, situated within:

Fairbanks Meridian, Alaska

T. 8 N, R. 5 W

U.S. Survey No. 9480, accepted October 31, 2019, situated within:

Fairbanks Meridian, Alaska

Tps. 11 N, Rs. 17 and 18 E

U.S. Survey No. 14383, accepted August 21, 2019, situated within:

Seward Meridian, Alaska

T. 2 N, R. 6 E

U.S. Survey No. 14471, accepted August 21, 2019, situated within:

Copper River Meridian, Alaska

T. 16 S, R. 6 W

U.S. Survey No. 14488, accepted October 31, 2019, situated within:

Fairbanks Meridian, Alaska

T. 8 N, R. 14 W

U.S. Survey No. 14490, accepted October 31, 2019, situated within:

Kateel River Meridian, Alaska

T. 5 S, R. 6 E

U.S. Survey No. 14491, accepted August 21, 2019, situated within:

Seward Meridian, Alaska

T. 9 N, R. 10 E

U.S. Survey No. 14492, accepted August 21, 2019, situated within:

Seward Meridian, Alaska

T. 2 N, R. 9 E

U.S. Survey No. 14493, accepted August 21, 2019, situated within:

Seward Meridian, Alaska

T. 5 N, R. 10 E

U.S. Survey No. 14494, accepted August 21, 2019, situated within:

Seward Meridian, Alaska

T. 11 N, R. 9 E

Copper River Meridian, Alaska

T. 28 N, R. 14 E, accepted October 31, 2019
T. 9 S, R. 3 E, accepted August 21, 2019
T. 68 S, R. 78 E, accepted June 21, 2019
T. 68 S, R. 79 E, accepted June 21, 2019
T. 73 S, R. 91 E, accepted June 21, 2019
T. 73 S, R. 92 E, accepted June 21, 2019
T. 74 S, R. 92 E, accepted June 21, 2019

Fairbanks Meridian, Alaska

T. 4 S, R. 8 W, accepted October 31, 2019

Kateel River Meridian, Alaska

T. 18 N, R. 18 E, accepted August 21, 2019
T. 33 N, R. 19 W, accepted August 6, 2019
T. 6 S, R. 20 E, accepted October 31, 2019
T. 3 S, R. 10 W, accepted August 6, 2019

T. 3 S, R. 40 W, accepted November 4, 2019

Seward Meridian, Alaska

T. 7 N, R. 9 E, accepted August 6, 2019
T. 21 N, R. 11 E, accepted August 21, 2019
T. 15 N, R. 43 W, accepted July 24, 2019
T. 7 S, R. 12 W, accepted October 31, 2019

Umiat Meridian, Alaska

T. 8 N, R. 18 E, accepted August 21, 2019

A person or party who wishes to protest one or more plats of survey identified above must file a written notice of protest with the State Director for the BLM in Alaska. The notice of protest must identify the plat(s) of survey that the person or party wishes to protest. You must file the notice of protest before the scheduled date of official filing for the plat(s) of survey being protested. The BLM will not consider any notice of protest filed after the scheduled date of official filing. A notice of protest is considered filed on the date it is received by the State Director for the BLM in Alaska during regular business hours; if received after regular business hours, a notice of protest will be considered filed the next business day. A written statement of reasons in support of a protest, if not filed with the notice of protest, must be filed with the State Director for the BLM in Alaska within 30 calendar days after the notice of protest is filed.

If a notice of protest against a plat of survey is received prior to the scheduled date of official filing, the official filing of the plat of survey identified in the notice of protest will be stayed pending consideration of the protest. A plat of survey will not be officially filed until the dismissal or resolution of all protests of the plat.

Before including your address, phone number, email address, or other personally identifiable information in a notice of protest or statement of reasons, you should be aware that the documents you submit, including your personally identifiable information, may be made publicly available in their entirety at any time. While you can ask the BLM to withhold your personally identifiable information from public review, we cannot guarantee that we will be able to do so.

Authority: 43 U.S.C. Chap. 3.

Douglas N. Haywood,
Chief Cadastral Surveyor, Alaska.

[FR Doc. 2019–24754 Filed 11–13–19; 8:45 am]
BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–DTS#–29211; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting comments on the significance of properties nominated before October 26, 2019, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted by November 29, 2019.

ADDRESSES: Comments may be sent via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C St. NW, MS 7228, Washington, DC 20240.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before October 26, 2019. Pursuant to Section 60.13 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Nominations submitted by State Historic Preservation Officers:

COLORADO

Denver County

White Spot Restaurant, (Commercial Resources of the East Colfax Avenue Corridor), 601 East Colfax Ave., Denver, 09000776

GEORGIA

Bibb County

Georgia Industrial Home, 4690 North Mumford Rd., Macon, SG100004743

Glynn County

Dixville Historic District, Bounded by rear property lines along Walnut Ave., Palmetto Ave. to Prince St., Martin Luther King Jr. Blvd. & Stonewall St., Brunswick, SG100004744

Washington County

Sandersville High School, 514 North Harris St., Sandersville, SG100004745

INDIANA

Carroll County

Burlington Township No. 9 School, (Indiana's Public Common and High Schools MPS), 6013 Cty. Rd. East 600 South, Burlington, MP100004727

Dearborn County

Greendale Historic District, Roughly bounded by Gages Ln., Ridge Ave., Tanners Creek, Probasco St. & Nowlin Ave., Greendale, SG100004720

Lake County

Hansen Branch-Hammond Public Library, 2823 Martha St., 6736 Alabama Ave., Hammond, SG100004719

St. John's Lutheran Church and School, 2271 West 10th Ave., Gary, SG100004723

Marion County

Kahn Tailoring Company, 800 North Capitol Ave., Indianapolis, SG100004717

South Side Turnverein Hall, 306 Prospect St., Indianapolis, SG100004724

Massachusetts Avenue Commercial District (Boundary Increase and Decrease), Roughly bounded by one blk. to either side of Massachusetts Ave. from Delaware St. to I65, Indianapolis, BC100004725

Ladywood Estates, (Residential Planning and Development in Indiana, 1940–1973 MPS), Roughly bounded by the 5200 blk. of Emerson Way, Ladywood Dr. & the hill west of Nob Ln., Indianapolis, MP100004728

Spencer County

Hardy-Baumgaertner House, 105 Walnut St., Rockport, SG100004718

Switzerland County

Vevay Historic District, Roughly bounded by Seminary St., Market St., Arch St., Pearl St. & Main St., Vevay, SG100004722

IOWA

Johnson County

Iowa Federation Home for Colored

Girls, 942 Iowa Ave., Iowa City, SG100004731

Tate Arms, 914 South Dubuque St., Iowa City, SG100004732

LOUISIANA

Orleans Parish

All Saints Church and School, 1441 Teche St., New Orleans, SG100004729

St. Charles Parish

Odd Fellows Hall, 224 Shaw St., Hahnville, SG100004730

MASSACHUSETTS

Plymouth County

Reed, H.R., House, 46 Water St., Marion, SG100004738

NEW YORK

Broome County

First Presbyterian Church of Deposit, 129 Second St., Deposit, SG100004734

Erie County

St. Matthias Episcopal Church Complex, 374 Main St., 24 Maple Rd., East Aurora, SG100004735

Schaefer and Brother Malt House, 520 Seventh St., Buffalo, SG100004737

Niagara County

Sacred Heart Roman Catholic Church Complex, 1112 South Ave., Niagara Falls, SG100004736

Otsego County

Rutherford House, 26 East St., Edmeston, SG100004733

NORTH DAKOTA

Pembina County

Icelandic Evangelical Lutheran Church, 415 Beaupre St. (AKA Adelaide St.), Pembina, SG100004714

Walsh County

Forest River State Bank, 110 Front St., Forest River, SG100004715

OKLAHOMA

Oklahoma County

Oklahoma National Guard Armory, 200 NE 23rd St., Oklahoma City, SG100004739

State Highway Department Testing Laboratory, 2311 North Central Ave., Oklahoma City, SG100004740

Iroquois Apartments, (Midtown Brick Box Apartments 1910–1935, Oklahoma City MPS), 900 NW 13th St., Oklahoma City, MP100004741

Harmony School, 1537 NE 24th St., Oklahoma City, SG100004742

VIRGINIA

Loudoun County

Willisville Historic District, 33000 & 34000 blks. of Welbourne Rd., Middleburg vicinity, SG100004746

New Kent County

New Kent Ordinary, 12000 New Kent Hwy., New Kent Courthouse, SG100004747

A request to move has been received for the following resource:

INDIANA

Allen County

Craigville Depot, Ryan Rd. & Edgerton Rd., (3 addresses presented), New Haven vicinity, MV84000181

Additional documentation has been received for the following resources:

INDIANA

Marion County

Massachusetts Avenue Commercial District, Roughly bounded by one blk. to either side of Massachusetts Ave. from Delaware St. to I 65, Indianapolis, AD82000064

Monroe County

Vinegar Hill Historic District, East First St. from Woodlawn to Jordan & South Sheridan to East Maxwell, Bloomington, AD05000195

Authority: Section 60.13 of 36 CFR part 60.

Dated: October 28, 2019.

Julie H. Ernstein,

Supervisory Archeologist, National Register of Historic Places/National Historic Landmarks Program.

[FR Doc. 2019–24683 Filed 11–13–19; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–19–043]

Sunshine Act Meetings

Agency Holding the Meeting: United States International Trade Commission.

TIME AND DATE: November 22, 2019 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 on Inv. Nos. 701–TA–610 and 731–TA–1425–1426 (Final) (Refillable Stainless Steel Kegs from China and Germany). The Commission is currently scheduled to complete and file its determinations and views of the Commission by December 9, 2019.
5. Vote on Inv. No. 731–TA–747 (Final) (Fresh Tomatoes from Mexico). The Commission is currently scheduled to complete and file its determination and views of the Commission by December 9, 2019.
6. *Outstanding action jackets:* None.

The Commission is holding the meeting under the Government in the Sunshine Act, 5 U.S.C. 552(b). 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 8, 2019.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2019–24783 Filed 11–12–19; 11:15 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–19–041]

Sunshine Act Meetings

Agency Holding the Meeting: United States International Trade Commission.

TIME AND DATE: November 19, 2019 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 on Inv. No. 731–TA–1424 (Final) (Mattresses from China). The Commission is currently scheduled to complete and file its determination and views of the Commission by December 9, 2019.
5. *Outstanding action jackets:* None.

The Commission is holding the meeting under the Government in the Sunshine Act, 5 U.S.C. 552(b). 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 8, 2019.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2019–24782 Filed 11–12–19; 11:15 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[USITC SE–19–042]

Sunshine Act Meetings

Agency Holding the Meeting: United States International Trade Commission.

TIME AND DATE: November 20, 2019 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 on Inv. Nos. 701–TA–611 and 731–TA–1428 (Final) (Aluminum Wire and Cable from China). The Commission is currently scheduled to complete and file its determinations and views of the Commission by December 16, 2019.
5. *Outstanding action jackets:* None.

The Commission is holding the meeting under the Government in the Sunshine Act, 5 U.S.C. 552(b). 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 8, 2019.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2019–24781 Filed 11–12–19; 11:15 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act, and Notice of Availability and Request for Comments on Draft Restoration Plan/Environmental Assessment

On November 8, 2019, the Department of Justice filed a Complaint and lodged a proposed Consent Decree with the United States District Court for the Eastern District of Michigan in a lawsuit entitled *United States of America, State of Michigan, and the Saginaw Chippewa Indian Tribe of Michigan* v. *The Dow Chemical Company,* Civil Action No. 1:19–cv–13292. On the same date, the United States Fish and Wildlife Service published a Draft Restoration Plan/Environmental Assessment (''RP/EA'') that relates to various natural resource restoration activities that would be undertaken pursuant to the Consent Decree.

The proposed Consent Decree would resolve natural resource damage claims asserted against The Dow Chemical Company (''Dow'') for injuries to natural resources resulting from releases of hazardous substances, including dibenzo-*p*-dioxins and dibenzofurans, into the environment from a facility that Dow owns and operates in Midland, Michigan. The filed Complaint in this action alleges that injured natural resources include, but are not limited to, fish, mammals, and birds within an Assessment Area that includes portions of the Tittabawassee River and adjacent riverbank and floodplain areas, the Saginaw River and adjacent riverbank and floodplain areas, portions of Saginaw Bay, and an area within Midland affected by aerial deposition of hazardous substances from Dow's Midland facility. The Complaint also alleges that hazardous substances released from Dow's Midland facility resulted in the loss of recreational fishing and tribal use services provided by natural resources.

The Complaint asserts claims on behalf of designated federal, state, and tribal natural resource trustees to recover natural resource damages under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9607. The Complaint also asserts claims on behalf of state natural resource trustees to recover natural resource damages under Sections 3115(2) and 20126a of the Michigan Natural Resources and Environmental Protection Act, MCL 324.3115(2) and 324.20126a. The natural resource trustees here include the U.S. Department of the Interior, acting through the U.S. Fish and Wildlife Service and the Bureau of Indian Affairs; the Saginaw Chippewa Indian Tribe of Michigan; and the State of Michigan, represented by the Michigan Department of Environment, Great Lakes, and Energy (formerly known as the Michigan Department of Environmental Quality), the Michigan Department of Natural Resources, and the Michigan Attorney General (collectively, the ''Trustees'').

Under the proposed Consent Decree, Dow would: (1) Implement eight natural resource restoration projects in accordance with requirements set forth in Statements of Work attached to the Consent Decree and subject to oversight and approval of the Trustees; (2) pay $6.75 million to a restoration account that will be used by the Trustees to fund five additional natural resource restoration projects described in the Consent Decree; (3) pay an additional $15 million to a restoration account—of which at least $5 million will be used to fund additional natural resource restoration projects that will be selected by the Trustees in the future, with public input; (4) reimburse the Trustees for past assessment costs not already reimbursed under a memorandum of agreement; and (5) implement two other projects as part of the resolution of a separate State claim for reimbursement of certain State response costs. In addition, under the proposed Consent Decree, the United States, on behalf of Settling Federal Agencies, would pay $21 million to Dow in exchange for a comprehensive resolution of potential liability of Settling Federal Agencies for both natural resource damages and for past and future response costs relating to releases or discharges from Dow's Midland, Michigan facility.

Subject to specific reservations of rights set forth in the proposed Consent Decree, the proposed settlement would resolve (1) Dow's potential liability for natural resource damages resulting from releases of hazardous substances or discharges of oil from Dow's Midland facility, (2) Dow's potential liability for reimbursement of a limited set of State response costs identified in the proposed Consent Decree, and (3) specified claims of Dow against the other Settling Parties, including claims against Settling Federal Agencies that Dow contends are also liable for releases or discharges of hazardous substances or discharges of oil from the Midland facility. The proposed Consent Decree does not resolve potential liability of Dow to perform response actions to clean up hazardous substances or discharges of oil released from the Midland facility or to reimburse any response costs incurred by the Settling Parties in connection with releases from the Midland facility.

Consistent with the Department of the Interior's Natural Resource Damage Assessment and Restoration regulations, 43 CFR part 11, and the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321–4347, and its implementing regulations at 40 CFR parts 1500–1508, the Trustees evaluated a suite of three alternatives for conducting the type, quality, and quantity of restoration sufficient to compensate the public for natural resource injuries and service losses resulting from releases of hazardous substances from Dow's Midland facility. Based on selection factors including location, technical feasibility, cost effectiveness, and types and timing of benefits, the Trustees identified a preferred alternative. The Draft RP/EA describes the Trustees' natural resource damage assessment, identifies and evaluates various alternatives considered by the Trustees to restore, replace or acquire the equivalent of injured natural resources, and identifies the Trustees' preferred alternative.

Under the preferred alternative described in the Draft RP/EA, Dow would implement a set of projects to protect, enhance, and restore habitat for natural resources as well as provide recreational fishing, hunting, park-use, and tribal-use services relevant to the impacted area; provide funding for a set of projects for the Trustees to implement either directly or through partnerships; and provide funding for future projects to be selected by the Trustees with public input, as well as funding to support long-term stewardship of the projects beyond Dow's obligations.

The publication of this notice opens a period for public comment on both the proposed Consent Decree and the Draft RP/EA.

Comments on the proposed Consent Decree should be addressed to the Deputy Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States of America, State of Michigan, and the Saginaw Chippewa Indian Tribe of Michigan* v. *The Dow Chemical Company,* D.J. Ref. No. 90–11–3–08593. All comments on the Consent Decree must be submitted no later than forty five (45) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Deputy Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.*

The Justice Department will provide a paper copy of the Consent Decree and/or the Draft RP/EA upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

If requesting a paper copy of both the Consent Decree and the Draft RP/EA, please enclose a check or money order for $107.50 (25 cents per page reproduction cost) payable to the United States Treasury. For a paper copy of the Consent Decree without the Draft RP/EA, the cost is $64.00. For a paper copy of only the Draft RP/EA, the cost is $43.50.

Comments on the Draft RP/EA should be addressed to Lisa L. Williams, U.S. Fish and Wildlife Service, and reference "TR RP/EA comment" in the subject line. All comments on the Draft RP/EA must be submitted no later than forty-five (45) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*t.river.nrda@fws.gov.*
By mail	Lisa L. Williams, U.S. Fish and Wildlife Service, 2651 Coolidge Road, East Lansing, MI 48823.

During the public comment period, the Draft RP/EA may be examined and downloaded at this U.S. Fish and Wildlife Service Midwest Region Natural Resource Damage Assessment website: *https://www.fws.gov/Midwest/es/ec/nrda/TittabawasseeRiverNRDA/.* As described above, a paper copy of the Draft RP/EA may be obtained from the Department of Justice upon written request and payment of reproduction costs.

Randall M. Stone,

Acting Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2019–24718 Filed 11–13–19; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Prohibited Transaction Exemption 2019–07; Exemption Application No. D–11962]

Notice of Exemption Involving Credit Suisse Group AG (CSG) and Its Current and Future Affiliates, Including Credit Suisse AG (CSAG) (Collectively, Credit Suisse or the Applicant), Located in Zurich, Switzerland

AGENCY: Employee Benefits Security Administration, U.S. Department of Labor.

ACTION: Notice of individual exemption.

SUMMARY: This document contains an exemption issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice is for the following granted exemption: 2019–07, Credit Suisse AG, D–11962.

DATES: This five-year exemption will be in effect for five years beginning on the expiration of PTE 2015–14.

FOR FURTHER INFORMATION CONTACT: Mrs. Blessed Chuksorji-Keefe of the Department, telephone (202) 693–8567. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant this exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition, the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. One request for a hearing was received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Discussion

On July 16, 2019, the Department of Labor (the Department) published a notice of proposed exemption in the **Federal Register** at 84 FR 33966, for certain entities with specified relationships to CSAG (CS Affiliated QPAMs) to continue to rely upon the relief provided by PTE 84–14 for a period of five years,[1] notwithstanding CSAG's criminal conviction, as described herein. The Department is granting this exemption in order to ensure that Covered Plans[2] whose

[1] 49 FR 9494 (March 13, 1984), as corrected at 50 FR 41430 (October 10, 1985), as amended at 70 FR 49305 (August 23, 2005) and as amended at 75 FR 38837 (July 6, 2010), hereinafter referred to as PTE 84–14 or the QPAM exemption.

[2] The term "Covered Plan" is a plan subject to Part 4 of Title 1 of ERISA ("ERISA-covered plan")

assets are managed by a CS Affiliated QPAM may continue to benefit from the relief provided by PTE 84–14. The exemption is effective from November 21, 2019 through November 20, 2024 (the Exemption Period).

No relief from a violation of any other law is provided by this exemption, including any criminal conviction described in the proposed exemption, as clarified herein. Furthermore, the Department cautions that the relief in this exemption will terminate immediately if, among other things, an entity within the Credit Suisse corporate structure is convicted of a crime described in Section I(g) of PTE 84–14 (other than the Conviction) during the Exemption Period. The terms of this exemption have been specifically designed to promote conduct that adheres to basic fiduciary standards under ERISA and the Code. The exemption also aims to ensure that plans and IRAs can terminate relationships in an orderly and cost effective fashion in the event a plan or IRA fiduciary determines it is prudent for the plan or IRA to sever its relationship with an entity covered by the exemption.

Written Comments

The Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption. All comments and requests for a hearing were due by August 30, 2019. The Department received three comment letters in response to the proposed exemption.[3] One letter did not identify substantive issues. Credit Suisse commented, and requested numerous revisions to the proposed exemption. Three individuals (Dr. Paul Morjanoff, James S. Henry and Andreas Frank) joined together in one letter (the Morjanoff Letter).[4] In the Morjanoff Letter, the individuals: Requested a hearing; commented on Credit Suisse's letter; and requested revisions to the proposed exemption.[5]

After considering these submissions, the Department has determined to grant the proposed exemption, with revisions, as described below.

I. The Credit Suisse Comment Letter

Credit Suisse Comment 1. Credit Suisse requested that the Department reconsider its decision to impose the exemption's annual audit requirement. Credit Suisse contends: (1) The conviction occurred outside of the CS Affiliated QPAMs, in an entity that is separate from the asset management business; (2) the audit proposed for the second five-year term of relief is more burdensome than the audit imposed under the existing exemption for the first five-year term; and (3) the exemption's Compliance Officer requirement is a reasonable substitute for a full audit. Credit Suisse represents that it has demonstrated a strong culture of compliance and commitment to addressing the Department's articulated concerns.

Department's Response: The Department is not eliminating the exemption's audit requirement. CSAG, which is the corporate parent of the CS Affiliated QPAMs, knowingly and willfully engaged in serious, substantial, pervasive and decades-long criminal misconduct. The audits required by this exemption are structured to ensure that CS Affiliated QPAMs remain insulated from CSAG and the criminal misconduct that gave rise to the Conviction. Each future annual audit is essential to the Department's determination that, prospectively, this exemption will be in the interest of, and protective of, Covered Plans, and will be administratively feasible, as required by Section 408(a) of ERISA.

Credit Suisse Comment 2. Credit Suisse requests that, if the audit requirement is not eliminated, the Department revise the certification process for an Audit Report's addendum. In this regard, Section I(i)(5) of the exemption provides, in pertinent part, that the CS Affiliated QPAM must promptly address or prepare a written plan of action to address any determination as to the adequacy of the Policies and Training and the auditor's recommendations (if any) with respect to strengthening the Policies and Training of the respective CS Affiliated QPAM. Any action taken or the plan of action to be taken by the respective CS Affiliated QPAM must be included in an addendum to the Audit Report (such addendum must be completed prior to the certification described in Section I(i)(7) below).

Section I(i)(7) of the exemption requires, in relevant part, that a senior executive officer of the CS Affiliated QPAM certify in writing, under penalty of perjury, that the CS Affiliated QPAM addressed, corrected, or remedied any noncompliance and inadequacy, or has an appropriate written plan to address any inadequacy regarding the Policies and Training identified in the Audit Report.

Credit Suisse states that ''it would be preferable'' to require that the addendum be completed as part of the senior executive officer certification process, rather than prior to it. According to Credit Suisse, requiring completion of addenda as part of the certification process would allow for meaningful, comprehensive input by the certifying officer.

Department's Response: The Department is not making the requested modification. The certification of a completed addendum by a CS executive officer ensures that a senior, knowledgeable corporate officer with relevant experience has reviewed the actual actions taken, or the actual plans of action that will be taken, by the CS Affiliated QPAM, to address any instances of the CS Affiliated QPAM's noncompliance or inadequacy. The Department is not persuaded that certification of actions, or plans of action, that are not finalized provides meaningful protection to Covered Plans. Further, nothing in the exemption precludes a certifying officer from providing meaningful, comprehensive input prior to the finalization of the addendum.

Credit Suisse Comment 3. Section I(i)(8) provides, in part: ''The Risk Committee, the Audit Committee, and CSAG's Board of Directors are provided a copy of each Audit Report. . . and the head of Compliance and the General Counsel must review the Audit Report for each CS Affiliated QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report . . . .''

First, Credit Suisse states that the requirement that the Audit Report be provided to the Risk Committee, Audit Committee, and Board of Directors is an escalation compared to not only the

---

or a plan subject to Section 4975 of the Code (''IRA'') with respect to which a CS Affiliated QPAM relies on PTE 84–14, or with respect to which a CS Affiliated QPAM (or any CS affiliate) has expressly represented that the manager qualifies as a QPAM or relies on the QPAM class exemption (PTE 84–14). A Covered Plan does not include an ERISA-covered Plan or IRA to the extent the CS Affiliated QPAM has expressly disclaimed reliance on QPAM status or PTE 84–14 in entering into its contract, arrangement, or agreement with the ERISA-covered plan or IRA.

[3] The letters are summarized below. The commenters' letters are available in their entirety by contacting the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, and referencing Application No. D–11962.

[4] The letter included a statement that, ''Mr. Bartlett Naylor, Senior Financial Policy Advocate, Public Citizen's Congress Watch, also formally requests a hearing.'' However, Mr. Naylor did not submit any information that validates or supports this request.

[5] The Department requested that Credit Suisse respond, on the record, to the Morjanoff Letter. Credit Suisse's response may be requested through the Public Disclosure Office in the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, by referencing Application No. D–11962.

existing exemption but to prior exemptions for similarly situated applicants. PTE 2015–14 contains no requirement to provide the audit report to a committee of the Board of Directors. Credit Suisse notes that the Department granted exemptions arising from criminal convictions of entities that conspired to manipulate the price of U.S. dollars and euros exchanged in the foreign currency exchange (FX) spot market (the FX exemptions),[6] and the Audit Reports in those exemptions were required to be provided to either the Risk Committee or the Audit Committee of the entity's Board of Directors (depending on their structure), not both, and not to the full Board.

Second, Credit Suisse requests that the condition be revised to require that an executive officer of Credit Suisse AG must review the Audit Report for each CS Affiliated QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report.

Department's Response: The Department is not persuaded that the conditions in this exemption must mirror the conditions in the FX exemptions. First, the Department's individual exemptions and the conditions therein are not precedential. Further, the Department does not view all criminal convictions as analogous when determining whether to grant an individual exemption and how best to protect affected plans and IRAs. Each applicant for an exemption must demonstrate, and the Department must affirmatively find, on the record, that the requested relief is in the interest of, and protective of, affected plans and IRAs, and administratively feasible. Finally, the Department will not fail to impose a condition it believes will enhance the protection of affected plans and IRAs, merely because an earlier exemption does not contain that condition.

It is the Department's understanding that the primary function of Credit Suisse's Risk Committee is to assist the Credit Suisse Group AG Board of Directors in fulfilling its risk management responsibilities as defined by applicable law and regulations as well as Credit Suisse Group AG's articles of association and internal regulations. Additionally, it is the Department's understanding that the primary function of Credit Suisse's Audit Committee is to assist the Board of Directors in its oversight role by monitoring and assessing the financial statements of Credit Suisse. Given those roles, the Department believes that receipt of the Audit Report by either the Risk Committee or the Audit Committee will provide a meaningful protection to Covered Plans. Consistent with this requirement, the exemption mandates that a senior executive officer of the Risk or Audit Committee that received the Audit Report must review the Audit Report, and must certify in writing, under penalty of perjury, that the officer has reviewed the Audit Report.

Credit Suisse Comment 4. Section I(i)(9) requires, in part, that each CS Affiliated QPAM must provide its certified Audit Report to the Department no more than 30 days following the completion of the Audit Report. Credit Suisse requests that the time for delivering the audit report to the Department be extended from 30 days to 45 days.

Department's Response: The Department has revised Section I(i)(9) as requested.

Credit Suisse Comment 5. Credit Suisse requests that relief to the CS Affiliated QPAMs and to Covered Plans not be conditioned upon the independent auditor's cooperation with the Department or disclosure of work papers. In this regard, Section I(i)(11) provides, in part: ''The auditor must provide the Department, upon request, for inspection and review, access to all of the work papers created and used in connection with the audit, provided the access and inspection are otherwise permitted by law. . . .'' And Section I(q) provides, in part: ''A CS Affiliated QPAM will not fail to meet the terms of this five-year exemption solely because a different CS Affiliated QPAM fails to satisfy a condition for relief described in Sections I(c), (d), (h), (i), (j), (k), (l), (n), and (p); or, if the independent auditor described in Section I(i) fails a provision of the exemption other than the requirement described in Section I(i)(11), provided that such failure did not result from any actions or inactions of CSAG or its affiliates.''

Department's Response: The Department is not making the requested revision. The Department expects the CS Affiliated QPAMs and the Independent Auditor will make every effort to ensure that their respective responsibilities under the exemption are fulfilled, and to contact the Office of Exemption Determinations in a timely manner any time guidance is needed. The Department is not aware of any instance where an independent auditor has failed to meet its responsibilities under a QPAM Section I(g) individual exemption.

Credit Suisse Comment 6. Section I(a) of the proposed exemption provides, in part: ''For purposes of this exemption, including paragraph (c) below, ''participate in'' refers not only to active participation in the criminal conduct of CSAG that is the subject of the Conviction, but also to knowing approval of the criminal conduct, or knowledge of such conduct without taking active steps to prohibit such conduct, including reporting the conduct to such individual's supervisors, and to the Board of Directors. In this regard, unless the individual reasonably believed that his or her initial report was given an appropriate response within a reasonable time, the individual must further report the criminal conduct to the person or persons the individual reasonably expected would carry out the appropriate response.''

Credit Suisse requests that this condition be replaced with the language in the FX exemptions. No prior exemption has contained a requirement that an individual determine whether his or her initial report of criminal conduct was appropriately addressed, and Credit Suisse submits that this requirement is not necessary to protect Covered Plans, and the requirement is inherently problematic. According to Credit Suisse, instead of reflecting a state of affairs that existed at the time of the criminal conduct, the condition appears to be prospective in that it requires further action by any individual with knowledge of the criminal conduct. Credit Suisse states that even the parallel conditions in the exemptions granted to BNP Paribas in May 2018 and to UBS in February 2019, both for third convictions, applied only to the criminal conduct at issue and did not contain a prospective component. Credit Suisse performed the diligence required by the Department under the existing exemption. Credit Suisse states that the requirement is unjust and, with the significant passage of time, potentially impossible, to now require the investigation and diligence required by this provision.

Credit Suisse additionally argues that the condition as written involves a subjective assessment of the state of mind of the reporting individual at the time of the criminal conduct. According to Credit Suisse, this analysis requires the Applicant to speculate about what an individual may have been thinking, which is nearly impossible to comply

[6] Citicorp, JPMorgan Chase & Co. and Barclays PLC were criminally convicted for conspiring to manipulate the price of U.S. dollars and euros exchanged in the foreign currency exchange (FX) spot market (the FX convictions). QPAMs related to those entities received five year exemptions (the FX exemptions) allowing them to continue to rely on the relief provided by PTE 84–14, notwithstanding the FX convictions. See PTE 2017–05 (Citicorp), PTE 2017–03 (JPMorgan Chase & Co.) and PTE 2017–06 (Barclays).

with or confirm, especially five years removed from the criminal conduct.

The applicant also complains that the term ''reasonably'' is used three times and is not defined, resulting in a further lack of clarity as to whether and how this condition could be satisfied. Credit Suisse submits that this condition is not practically enforceable and that there is no need to deviate from the objective conditions used in the FX exemptions.

Department's Response: The Department is revising the exemption in part in response to the Credit Suisse request. The condition, as written, is consistent with an essential premise of the QPAM class exemption: That the QPAM, and those persons and entities that control the QPAM, act with integrity. The condition, as written, is also consistent with representations by Credit Suisse: That the criminal misconduct did not occur within any CS Affiliated QPAM. The Department carefully considered those representations when structuring the protective conditions of PTE 2015–14 and this exemption. The Department expects that each CS Affiliated QPAM will use every effort to ensure that this condition is met throughout the duration of the exemption. The Department is revising the condition by removing the last sentence of Section I(a) beginning with ''In this regard . . .'' as requested by Credit Suisse.

Credit Suisse Comment 7. Section I(d) of the proposed exemption provides, in part: At all times during the Exemption Period, a CS Affiliated QPAM will not use its authority or influence to direct an ''investment fund'' (as defined in Section VI(b) of PTE 84–14) that is subject to ERISA or the Code and managed by such CS Affiliated QPAM with respect to one or more Covered Plans, to enter into any transaction with CSAG or to engage CSAG to provide any service to such investment fund, for a direct or indirect fee borne by such investment fund, regardless of whether such transaction or service may otherwise be within the scope of relief provided by an administrative or statutory exemption. A Credit Suisse Affiliated QPAM will not fail this condition solely because:

(1) A CSAG affiliate serves as a local sub-custodian that is selected by an unaffiliated global custodian that, in turn, is selected by someone other than a CS Affiliated QPAM or CS Related QPAM;

(2) CSAG provides only necessary, non-investment, nonfiduciary services that support the operations of CS Affiliated QPAMs, at the CS Affiliated QPAM's own expense, and the Covered Plan is not required to pay any additional fee beyond its agreed-to asset management fee. This exception does not permit CSAG or its branches to provide any service to an investment fund managed by a CS Affiliated QPAM or CS Related QPAM; or

(3) CSAG employees are double-hatted, seconded, supervised, or subject to the control of a CS Affiliated QPAM.

First, regarding Section I(d)(1), Credit Suisse states: ''the formulation here is not practically workable and must be revised. Although Section I(d)(1) allows a CSAG affiliate to serve as a local sub-custodian, this condition does not benefit the Covered Plan clients of Credit Suisse because only the Bank and its branches—not an affiliate—currently serve as local sub-custodians for the four largest plan global custodians. While in some markets, it might be possible for a global custodian to select an affiliate or subsidiary of a bank, that situation is very rare.''

Department's Response: The Department is not revising Section I(d)(1). The criminal wrong-doing that is the subject of the Conviction was committed by CSAG, and the charging documents cite participation by CSAG subsidiaries. In this regard, as noted in the proposed exemption, on May 19, 2014, in the U.S. District Court for the Eastern District of Virginia (the District Court),[7] the U.S. Department of Justice charged CSAG with, and CSAG pled guilty to, one criminal count of conspiracy to violate Code section 7206(2).[8] The charging documents cited Credit Suisse and its subsidiaries, Credit Suisse Fides and Clariden Leu Ltd., for willfully aiding, assisting in, procuring, counseling, and advising the preparation and presentation of false income tax returns and other documents to the Internal Revenue Service of the Treasury Department (IRS), for decades, prior to and through approximately 2009. On May 19, 2014, pursuant to a plea agreement, CSAG entered a guilty plea for assisting U.S. citizens in federal income tax evasion. On November 21, 2014, the District Court entered a judgment of conviction against CSAG.

Credit Suisse has not adequately demonstrated that permitting CSAG and its subsidiaries and branches to participate in the sub-custody transactions described in Section I(d)(1) of the exemption would be in the interest of, and protective of, affected Covered Plans.

Second, regarding Section I(d)(2), Credit Suisse states: The condition should be clarified to permit CSAG to provide support services to the CS Affiliated QPAMs regardless of whether such support also benefits an investment fund managed by a QPAM, as long as the Covered Plan pays no additional fee. According to Credit Suisse, the condition, as written, creates confusion in any situation where CSAG may provide services to the CS Affiliated QPAMs because of the prohibition on services to investment funds managed by the QPAMs.

Department's Response: The Department is not revising the condition. Credit Suisse has not demonstrated that the condition creates confusion. In the Department's view, the condition is clear and unambiguous: CSAG may only provide necessary, non-investment, non-fiduciary services that support the operations of CS Affiliated QPAMs, at the CS Affiliated QPAM's own expense. Further, the Department notes that if it is unclear whether a particular arrangement or situation satisfies a term in the exemption, the CS Affiliated QPAM should resolve the ambiguity in light of the exemption's protective purposes. To the extent additional clarification is necessary, persons or entities should contact EBSA's Office of Exemption Determinations, at 202–693–8540.

Credit Suisse Comment 8. Section I(l) of the proposed exemption provides, in part: ''The CS Affiliated QPAM must comply with each condition of PTE 84–14, as amended, with the sole exception of the violation of Section I(g) of PTE 84–14 that is attributable to the Conviction. If, during the Exemption Period, an entity within the Credit Suisse corporate structure is convicted of a crime described in Section I(g) of PTE 84–14, (other than the Conviction), including a conviction in a foreign jurisdiction for a crime described in Section I(g) of PTE 84–14, relief in this exemption would terminate immediately.''

Credit Suisse requests that the Department ''reconsider its additional condition that a conviction in a foreign jurisdiction automatically would disqualify Credit Suisse from relief under Section I(g) of PTE 84–14 and under this individual exemption, as stated in Section I(l).'' Credit Suisse submits that, should the Department include the condition in Section I(l) for Credit Suisse and later reconsider its view, the CS Affiliated QPAMs would be treated differently from similarly

[7] *United States of America* v. *Credit Suisse AG,* Case Number 1:14–cr–188–RBS.

[8] Section 7206(2) of the Code prohibits willfully aiding, assisting, procuring, counseling, or advising the preparation or presentation of false income tax returns. Section 371 of Title 18 of the United States Code generally prohibits two or more persons from conspiring either to commit any offense against the United States or to defraud the United States.

situated applicants and the regulated community as a whole.

Department's Response: The Department has removed the condition's reference to foreign convictions. This revision should not be interpreted, however, as the Department's affirmation that a violation of Section I(g) of PTE 84–14 does not occur when a person or entity is convicted in a foreign jurisdiction for a crime described in Section I(g) of PTE 84–14.

Credit Suisse Comment 9. Credit Suisse requests three revisions to Sections I(a) and I(b) of the proposed exemption. Section I(a) provides, in relevant part: ''The CS Affiliated QPAMs (including their officers, directors, agents other than CSAG, employees of such QPAMs, and CSAG employees described in subparagraph (d) above) did not know of, have reason to know of, or participate in the criminal conduct of CSAG that is the subject of the Conviction . . . ''

Section I(b) of the proposed exemption provides: ''The CS Affiliated QPAMs and the CS Related QPAMs (including their officers, directors, agents other than CSAG, employees of such QPAMs, and CSAG employees described in subparagraph (d) above) did not receive direct compensation, or knowingly receive indirect compensation, in connection with the criminal conduct of CSAG that is the subject of the Conviction.''

First, Credit Suisse requests that the Department qualify that the conditions apply only to employees of the CS Affiliated and Related QPAMs who had responsibility for or exercised authority in connection with the management of plan assets. Credit Suisse states that comparable sections in the FX exemptions covered only QPAM employees ''who had responsibility for, or exercised authority in connection with the management of plan assets.''

Second, Credit Suisse states that the phrase ''or knowingly receive indirect compensation'' implicates the same problems as the definition of ''participated in,'' described above. Credit Suisse states that it performed the diligence required by the Department under the existing exemption, and it is potentially impossible, given the passage of time, to perform the investigation and diligence required by this provision.

Third, Credit Suisse requests that the Department clarify that references to CSAG employees described in subparagraph (d) of the proposed exemption, is intended to refer only to subparagraph (d)(3).

Department's Response: The Department is not making the first two requested revisions. The FX convictions involve criminal misconduct that occurred within non-asset management divisions of certain entities that acted as QPAMs. Consistent with those facts, Section I(a) of each FX exemption precludes relief if a QPAM's asset management division employs an individual who knew of the misconduct, had reason to know of the misconduct, or who participated in the relevant FX criminal misconduct. Also consistent with those facts, Section I(b) of each FX exemption precludes relief if an employee in a QPAM's asset management division received direct compensation or knowingly received indirect compensation from participating in the criminal conduct that gave rise to the relevant FX conviction.

It is the Department's understanding, consistent with Credit Suisse's representations, that the CSAG Conviction arose from criminal misconduct that occurred outside any CS Affiliated QPAM. No CS Affiliated QPAM employee (asset management or otherwise) knew of, had reason to know of, or participated in, the criminal misconduct that gave rise to the CSAG Conviction. Section I(a) and Section I(b) of the exemption are structured consistent with both the record and with Credit Suisse's representations. Credit Suisse has not demonstrated that it would be in the interest of Covered Plans if individuals who participated in, or were compensated from, the CSAG criminal misconduct were permitted to work in a non-asset management division of a CS Affiliated QPAM.

Regarding Credit Suisse's comment regarding the difficulty a CS Affiliated QPAM may have in complying with these conditions, the Department expects that each CS Affiliated QPAM will use every effort to ensure that the conditions are complied with throughout the duration of the exemption.

Credit Suisse's third requested revision is consistent with the Department's intent, and the Department has made the requested revision.

Credit Suisse Comment 10. Section I(f) provides: ''A CS Affiliated QPAM or a CS Related QPAM did not exercise authority over the assets of any plan subject to Part 4 of Title I of ERISA (an ERISA-covered plan) or section 4975 of the Code (an IRA) in a manner that it knew or should have known would: further criminal conduct that is the subject of the Conviction; or cause the CS Affiliated QPAM or CS Related QPAM, its affiliates, or related parties to directly or indirectly profit from the criminal conduct that is the subject of the Conviction.''

Credit Suisse requests that the term ''related parties'' be removed from this condition. Credit Suisse states that the term is undefined and should be removed.

For clarity, the Department is removing the term ''related parties.''

Credit Suisse Comment 11. Section I(h)(1) provides, in pertinent part: ''Each CS Affiliated QPAM must continue to maintain, adjust (to the extent necessary) or immediately implement and follow written policies and procedures (the Policies). The Policies must require and be reasonably designed to ensure that:

(i) The asset management decisions of the CS Affiliated QPAMs are conducted independently of CSAG's corporate management and business activities, and without considering any fee a CS-related local sub-custodian may receive from those decisions. This condition does not preclude a CS Affiliated QPAM from receiving publicly available research and other widely available information from a CSAG affiliate;

* * * * *

(vi) The CS Affiliated QPAM complies with the terms of this five-year exemption, and CSAG complies with the terms of Section I(d)(2).''

First, Credit Suisse states that the phrase ''or immediately implement'' should be deleted. ''Immediately'' is not defined, and in Credit Suisse's view, it is unrealistic for the CS Affiliated QPAMs to ''immediately implement'' the policies required under the exemption. Credit Suisse requests that the Department revise the condition, such that each CS Affiliated QPAM must continue to maintain and follow or, within six (6) months of the effective date of this exemption, adjust (to the extent necessary) and implement written policies.

Department's Response: Credit Suisse has not demonstrated or supported its contention that it would be ''unrealistic'' for the CS Affiliated QPAMs to ''immediately implement'' the policies required by the exemption. However, the Department believes that Covered Plans would be adequately protected if the CS Affiliated QPAMs continue to follow and maintain policies the Policies required by PTE 2015–14 for six months following the effective date of this exemption (*i.e.,* until May 20, 2020). Notwithstanding this, the Department notes that the policies required by PTE 2015–14 do not cover transactions or arrangements described in Section I(d) of this exemption. Therefore, the Department is revising Section I(h)(1), which now begins as follows: Prior to May 21, 2020, a CS Affiliated QPAM may continue to maintain, follow and implement the policies described in Section I(h)(1) of PTE 2015–14. Otherwise, each CS Affiliated QPAM must maintain, adjust (to the extent necessary), implement, and follow the written policies and procedures described below (the Policies). Notwithstanding the preceding sentence, a CS Affiliated QPAM may not engage in any transaction or arrangement described in Section I(d)(1) through (3) of this exemption prior to the date the Policies have been developed, implemented and followed.

Second, Credit Suisse notes that Section I(h)(1)(i) includes the additional prohibition that asset management decisions are made ''without considering any fee a CS-related local sub-custodian may receive from those decisions.'' Credit Suisse states that the scope of this condition is unclear by virtue of the ambiguous word ''considering. . .'' Credit Suisse requests that the Department substitute the following language: ''without putting the fact of any fee a CS-related local sub-custodian may receive before the interest of the plan client.''

Department's Response: The Department is not revising the condition. Credit Suisse has not demonstrated why the term ''considering'' is ambiguous. As written, the condition makes it clear that the Policies must require and be reasonably designed to ensure that the CS Affiliated QPAM's asset management decisions do not take into account the fee a CS-related local sub-custodian may receive from those decisions.

Third, Credit Suisse states that the second clause of Section I(h)(1)(vi) ''is impracticable for the reasons [Credit Suisse raised] in connection with Section I(d)(2).''

Department's Response: The Department is not revising the second clause of Section I(h)(1)(vi) for the same reasons the Department expressed in response to Credit Suisse's request to revise Section I(d)(2).

Credit Suisse Comment 12. Section I(h)(2) provides: ''Any violation of, or failure to comply with, an item in subparagraphs (h)(1)(ii) through (vi) of this section, is corrected as soon as reasonably possible upon discovery, or as soon after the QPAM reasonably should have known of the noncompliance (whichever is earlier), and any such violation or compliance failure not so corrected is reported, upon discovery of such failure to so correct, in writing, to appropriate corporate officers, the head of Compliance and the General Counsel (or their functional equivalent) of the relevant CS Affiliated QPAM, and the independent auditor responsible for reviewing compliance with the Policies. A CS Affiliated QPAM will not be treated as having failed to develop, implement, maintain, or follow the Policies, provided that it corrects any instance of noncompliance as soon as reasonably possible upon discovery, or as soon as reasonably possible after the QPAM reasonably should have known of the noncompliance (whichever is earlier), and provided that it adheres to the reporting requirements set forth in this paragraph (2).''

Credit Suisse states that the notification requirements of this condition are unclear by virtue of the phrase ''appropriate corporate officers.'' Credit Suisse suggests instead that subsection (h)(2) read as follows: ''Any violation of, or failure to comply with, an item in subparagraphs (h)(1)(ii) through (vi) of this section, is corrected as soon as reasonably possible upon discovery, or as soon after the QPAM reasonably should have known of the noncompliance (whichever is earlier), and any such violation or compliance failure not so corrected is reported, upon discovery of such failure to so correct, in writing, to the head of Compliance and the General Counsel (or their functional equivalent) of the relevant CS Affiliated QPAM, and the independent auditor responsible for reviewing compliance with the Policies. A CS Affiliated QPAM will not be treated as having failed to develop, implement, maintain, or follow the Policies, provided that it corrects any instance of noncompliance as soon as reasonably possible upon discovery, or as soon as reasonably possible after the QPAM reasonably should have known of the noncompliance (whichever is earlier), or provided that it adheres to the reporting requirements set forth in this paragraph (2), if applicable.''

Department's Response: The Department is removing the condition's reference to ''appropriate corporate officers.'' However, the Department is not making Credit Suisse's remaining requested revisions. Credit Suisse has not demonstrated why a CS Affiliated QPAM should not be treated as having failed to develop, implement, maintain or follow the Policies merely because it adheres to the condition's reporting requirements.

Credit Suisse Comment 13. Section I(h)(3) provides, in part: ''Each CS Affiliated QPAM must maintain, adjust (to the extent necessary), and implement a program of training (the Training), conducted at least annually, for all relevant CS Affiliated QPAM asset/portfolio management, trading, legal, compliance, and internal audit personnel. The Training must:

* * * * *

(ii) Be conducted by a professional who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code.''

Credit Suisse requests confirmation that the training may be conducted electronically or via a website. In addition, Credit Suisse requests a period of six (6) months from the effective date of the exemption to adjust and implement training as necessary.

Department's Response: The Department declines to incorporate the Applicant's requested language regarding the use of electronic or web-based methods in conducting the Training. Further, the training required by this exemption is substantially similar to the training required by PTE 2015–14, and Credit Suisse has not demonstrated the need to delay the training required by this exemption for six months. Given the importance of this condition, the Department is not revising the condition to allow the six month adjustment/implementation period sought by Credit Suisse.

Credit Suisse Comment 14. Section I(k)(1) provides: ''Each CS Affiliated QPAM provides a notice of the five-year exemption, along with a separate summary describing the facts that led to the Conviction (the Summary), which have been submitted to the Department, and a prominently displayed statement (the Statement) that the Conviction results in a failure to meet a condition in PTE 84–14, to each sponsor and beneficial owner of a Covered Plan that entered into a written asset or investment management agreement with a CS Affiliated QPAM, or the sponsor of an investment fund in any case where a CS Affiliated QPAM acts as a sub-adviser to the investment fund in which such ERISA-covered plan and IRA invests. The notice, Summary and Statement must be provided prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the CS Affiliated QPAM. If this five-year exemption is granted, the clients must receive a **Federal Register** copy of the notice of final five-year exemption within sixty (60) days of its publication in the **Federal Register**. The notice may be delivered electronically (including by an email that has a link to the five-year exemption).''

Credit Suisse requests that the sixty-day period to provide notice of the final exemption run from the effective date, rather than the date of publication in the **Federal Register**.

Department's Response. The Department has revised the condition as requested.

Credit Suisse Comment 15. Section I(m)(1) provides:

''By May 20, 2020, CSAG designates a senior compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements described herein. The Compliance Officer must conduct an annual review for each twelve month period, beginning on November 21, 2019, (the Annual Review) to determine the adequacy and effectiveness of the implementation of the Policies and Training. With respect to the Compliance Officer, the following conditions must be met:

* * * * *

(ii) The Compliance Officer must have a direct reporting line to the highest ranking corporate officer in charge of compliance for asset management.''

Credit Suisse requests that the condition be changed to require a CS Affiliated QPAM, rather than the parent company, to designate the senior compliance officer. In addition, Credit Suisse requests that the Department clarify that each relevant line of business may designate its own compliance officer. Finally, Credit Suisse requests clarification that the designated compliance officer report to (or be) the highest ranking corporate officer in charge of compliance for the CS Affiliated QPAM.

Department's Response: The Department is making the requested revisions.

Credit Suisse Technical Corrections Request

In addition to the substantive comments above, Credit Suisse requested that certain technical clarifications be made to the proposed exemption. The Department's responses are described below.

Technical Correction Request 1. Section I(h)(1)(iv) provides: ''Any filings or statements made by the CS Affiliated QPAM to regulators, including but not limited to, the Department of Labor, the Department of the Treasury, the Department of Justice, and the Pension Benefit Guaranty Corporation, on behalf of, or in relation to Covered Plans are materially accurate and complete, to the best of such QPAM's knowledge at that time . . . .''

Credit Suisse requests that the Department strike the phrase ''in relation to Covered Plans'' in Section (I)(h)(1)(iv). Section (I)(h)(1)(v) includes ''communications with such regulators with respect to Covered Plans,'' which encompasses all communications that would potentially be covered by Section I(h)(1)(iv). Because a similar requirement is included in both subsections, the assumption is that a different meaning is intended.

Department's Response: The Department is not making the requested revision. The phrase ''in relation to Covered Plans'' is sufficiently clear such that the requested revision is not warranted.

Technical Correction Request 2. Section I(i)(5)(i) provides, in part, that ''the Audit Report must include the auditor's specific determinations regarding the adequacy of the CS Affiliated QPAM's Policies and Training; the CS Affiliated QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective CS Affiliated QPAM's noncompliance with the written Policies and Training described in Section I(h) above. The CS Affiliated QPAMs must promptly address any noncompliance. The CS Affiliated QPAM must promptly address or prepare a written plan of action to address any determination as to the adequacy of the Policies and Training and the auditor's recommendations (if any) with respect to strengthening the Policies and Training of the respective CS Affiliated QPAM.''

Credit Suisse requests that the requirement in Section I(i)(5)(i) to ''promptly'' address any noncompliance be revised to be ''as soon as reasonably possible.'' This would align the procedure with the provisions for addressing noncompliance relating to the policies, set forth in Section I(h)(2), which require action ''as soon as reasonably possible.''

Department's Response: The Department is not making the requested revision. The term ''promptly'' is consistent with the Department's view that addressing any noncompliance must be an important and high priority for a CS Affiliated QPAM.

Technical Correction Request 3. Section I(i)(7) provides, in part: ''With respect to each Audit Report, the General Counsel, or one of the three most senior executive officers of the CS Affiliated QPAMs to which the Audit Report applies, must certify in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this five-year exemption; and that to the best of such officer's knowledge at the time the CS Affiliated QPAM addressed, corrected, or remedied any noncompliance and inadequacy or has an appropriate written plan to address any inadequacy regarding the Policies and Training identified in the Audit Report.''

Credit Suisse requests that the Department replace ''General Counsel'' in Section I(i)(7) with ''general counsel,'' and clarify that the certification of the Audit Report may come from the respective CS Affiliated QPAM's general counsel or one of its three most senior officers.

Department's Response: Given that the criminal misconduct that gave rise to the CSAG Conviction did not occur at any CS Affiliated QPAM, the Department has replaced ''General Counsel'' with ''general counsel.'' The condition is otherwise clear and reflects the Department's intent as to who must certify the Audit Report.

Technical Correction Request 4. Section I(i)(12) provides: ''CSG must notify the Department of a change in the independent auditor no later than two (2) months after the engagement of a substitute or subsequent auditor and must provide an explanation for the substitution or change including a description of any material disputes between the terminated auditor and CSAG.''

Credit Suisse requests that the reference to ''CSG'' in Section I(i)(12) be revised to read, ''CSAG and/or the CS Affiliated QPAMs.''

Department's Response: The Department has revised the exemption consistent with this request.

II. The Morjanoff Letter

a. *The Individuals' Hearing Request:* The three individuals that submitted the Morjanoff Letter stated that ''it is impractical to present all the necessary evidence as comments, but it can be presented at a hearing. Briefly, the reasons are:

1. Recent investigations and court decisions show that CS provided false information for the first exemption.

2. It has declined to correct this false information since then.

3. CS lodged their comment on the last day and was not publicly visible until after public comments had closed.

4. That CS comment requested a relaxation of waiver conditions based on highly dubious assumptions.

5. In essence, this would tend to recreate conditions which could facilitate illegal activity based on the same general scheme as facilitated the criminal activity for which it was convicted.

6. That scheme was based on having a set of 'ineffective rules & policies' for appearances while 'inciting' staff to

break those 'rules & policies' for the bank's illegal profit.

7. Quasi 'third parties' were created which pretended to be 'external' to the bank, but in fact operated as if they were a part of the bank.

8. Because thousands of bank employees became accustomed to such extreme double standards, special remediation is required.

9. The public have a right and an urgent need to respond to CS's proposals.

10. Since comments have closed, that would have to be at a public hearing.

11. The sophistication of the bank's deceptions go beyond what can be reasonably expected of the DOL or pension funds to adequately discern.

12. As further proof of the bank's absence of seriousness in correcting its illegal activities, we note that it continues to refuse to respond to formal notifications of crime in the bank sent to top management.

13. A complete analysis of the flaws in CS's submissions is beyond the scope of a comment.''

The individuals stated further, ''A public hearing is essential: CS's submission contains false statements, omissions & half-truths while the DOL can't be expected to have the expertise to see through CS's schemes.''

The individuals attached numerous links to recent court cases and other sources. The individuals added, ''The matters raised are not merely matters of law and the factual issues identified are too complex to be adequately explored through the submission of evidence in written (including electronic) form.'' The individuals concluded, ''[s]ince the 'CS Public Hearing' was held on January 15, 2015, a mass of new evidence has become publicly available which dramatically changes the context of the application. Had this knowledge been available previously, it is likely that the previous application would have either been rejected or the waiver substantially modified. Broadly speaking, CS would have known these facts and their non-disclosure represents a serious lack of candour and likely a sufficient breach of requirements to summarily reject the current application.''

Department's Response to the Individuals' Hearing Request: The Department declines to hold a hearing. The individuals articulated and supported their views in a twelve page comment letter. The individuals had adequate time (a 45 day comment period, plus one additional week) to supplement their letter with all relevant information that was available to them. The individuals did not demonstrate that the issues they raised in the Morjanoff Letter would be more fully or expeditiously explored at a hearing.

Regarding the three individuals' contention that, ''[s]ince the 'CS Public Hearing' was held on January 15, 2015, a mass of new evidence has become publicly available which dramatically changes the context of the application[,]'' the Department believes the Independent Auditor is best suited to determine whether any newly uncovered evidence affects Credit Suisse's compliance with requirements of the exemption. An essential premise in the Department's determination to grant PTE 2015–14 (and this exemption) is that a qualified independent auditor will annually determine whether each condition of the exemption had been met over the prior year. This includes an in-depth analysis of a wide range of transactions, arrangements, policies, agreements, and procedures relating to the operation of, and services provided by, the Credit Suisse QPAMs. Further, in the Department's view, the factual issues described by the individuals in the Morjanoff Letter could be fully explored through the submission of evidence in written (including electronic) form, which the individuals failed to submit.

b. *The Individuals' Response to the Credit Suisse Comment Letter:* In the Morjanoff Letter, the three individuals took issue with many of the revisions that Credit Suisse requested in their response letter. With respect to the Credit Suisse-requested revisions which the Department accepted, the three individuals stated the following:

(a) Regarding Credit Suisse's request to remove the term ''related parties'' from Section I(f), the three individuals state that Credit Suisse structured their crime so that undefined ''quasi-third parties'' benefited from and concealed criminal activity. ''It is futile to attempt to define related parties while CS uses its creativity in manufacturing them. Details can be provided at a public hearing.''

(b) The three individuals state that the exemption should specify the actual affiliates who will receive relief under the exemption. The individuals recommend that relief should be limited to CSAM LLC and CSAM Ltd, ''who are the only affiliates that currently manage the assets of ERISA-covered plans on a discretionary basis.'' The individuals state that Credit Suisse Securities (USA) LLC ''has participated in all manner of illegal, criminal and disreputable activities (as described in previous submissions and subsequently)'' and should not be permitted to be QPAM. The individuals state that if relief is available to potentially other affiliates, ''they should be named now, and their suitability examined at a public hearing.''

Department's Response: The Department does not agree the suitability of future CS Affiliated QPAMs must be examined at a public hearing. This exemption contains a suite of protective conditions, including an in-depth annual audit of, among other things, each CS Affiliated QPAM's transactions, training and policies, as well as each QPAM's compliance with the terms of this exemption. The Department has reviewed prior audits of CS Affiliated QPAMs under PTE 2015–14, and the Department believes the conditions of this exemption are sufficiently protective of Covered Plans with assets managed by current and future QPAMs.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of ERISA or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of ERISA, which, among other things, require a fiduciary to discharge its duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of ERISA; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) In accordance with section 408(a) of ERISA and section 4975(c)(2) of the Code, the Department makes the following determinations: The exemption is administratively feasible, the exemption is in the interests of affected plans and of their participants and beneficiaries, and the exemption is protective of the rights of participants and beneficiaries of such plans;

(3) The exemption is supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describe all material terms of the transaction which is the subject of the exemption.

Five-Year Exemption

The Department is granting a five-year exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011).[9]

Section I. Covered Transactions

The CS Affiliated QPAMs, as further defined in Section II(d), will not be precluded from relying on the exemptive relief provided by Prohibited Transaction Exemption 84–14 (PTE 84–14),[10] notwithstanding the ''Conviction'' against CSAG (as further defined in Section II(a)),[11] during the Exemption Period, provided that the following conditions are satisfied:

(a) The CS Affiliated QPAMs and the CS Related QPAMs (including their officers, directors, agents other than CSAG, employees of such QPAMs, and CSAG employees described in subparagraph (d) below) did not know of, have reason to know of, or participate in the criminal conduct of CSAG that is the subject of the Conviction. For purposes of this exemption, including paragraph (c) below, ''participate in'' refers not only to active participation in the criminal conduct of CSAG that is the subject of the Conviction, but also to knowing approval of the criminal conduct, or knowledge of such conduct without taking active steps to prohibit such conduct, including reporting the conduct to such individual's supervisors, and to the Board of Directors.

(b) The CS Affiliated QPAMs and the CS Related QPAMs (including their officers, directors, agents other than CSAG, employees of such QPAMs, and CSAG employees described in subparagraph (d)(3) below) did not receive direct compensation, or knowingly receive indirect compensation, in connection with the criminal conduct of CSAG that is the subject of the Conviction;

(c) The CS Affiliated QPAMs will not employ or knowingly engage any of the individuals that ''participated in'' the criminal conduct of CSAG that is the subject of the Conviction;

(d) At all times during the Exemption Period, a CS Affiliated QPAM will not use its authority or influence to direct an ''investment fund'' (as defined in Section VI(b) of PTE 84–14) that is subject to ERISA or the Code and managed by such CS Affiliated QPAM with respect to one or more Covered Plans, to enter into any transaction with CSAG or to engage CSAG to provide any service to such investment fund, for a direct or indirect fee borne by such investment fund, regardless of whether such transaction or service may otherwise be within the scope of relief provided by an administrative or statutory exemption. A CS Affiliated QPAM will not fail this condition solely because:

(1) A CSAG affiliate serves as a local sub-custodian that is selected by an unaffiliated global custodian that, in turn, is selected by someone other than a CS Affiliated QPAM or CS Related QPAM;

(2) CSAG provides only necessary, non-investment, non-fiduciary services that support the operations of CS Affiliated QPAMs, at the CS Affiliated QPAM's own expense, and the Covered Plan is not required to pay any additional fee beyond its agreed-to asset management fee. This exception does not permit CSAG or its branches to provide any service to an investment fund managed by a CS Affiliated QPAM or CS Related QPAM; or

(3) CSAG employees are double-hatted, seconded, supervised, or subject to the control of a CS Affiliated QPAM;

(e) Any failure of a CS Affiliated QPAM to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction;

(f) A CS Affiliated QPAM or a CS Related QPAM did not exercise authority over the assets of any plan subject to Part 4 of Title I of ERISA (an ERISA-covered plan) or section 4975 of the Code (an IRA) in a manner that it knew or should have known would: Further criminal conduct that is the subject of the Conviction; or cause the CS Affiliated QPAM or CS Related QPAM or its affiliates to directly or indirectly profit from the criminal conduct that is the subject of the Conviction;

(g) CSAG will not act as a fiduciary within the meaning of section 3(21)(A)(i) or (iii) of ERISA, or section 4975(e)(3)(A) and (C) of the Code, with respect to ERISA-covered Plan and IRA assets, except it may act as such a fiduciary (1) with respect to employee benefit plans sponsored for its own employees or employees of an affiliate; or (2) in connection with securities lending services of the New York Branch of CSAG. CSAG will not be treated as violating the conditions of the exemption solely because it acted as an investment advice fiduciary within the meaning of section 3(21)(A)(ii) of ERISA or section 4975(e)(3)(B) of the Code;

(h)(1) Prior to May 21, 2020, a CS Affiliated QPAM may continue to maintain, follow and implement the policies described in Section I(h)(1) of PTE 2015–14. Otherwise, each CS Affiliated QPAM must maintain, adjust (to the extent necessary), implement, and follow the written policies and procedures described below (the Policies). Notwithstanding the preceding sentence, a CS Affiliated QPAM may not engage in any transaction or arrangement described in Section I(d)(1) through (3) of this exemption prior to the date the Policies below have been developed, implemented and followed.

The Policies must require and be reasonably designed to ensure that:

(i) The asset management decisions of the CS Affiliated QPAMs are conducted independently of CSAG's corporate management and business activities, and without considering any fee a CS-related local sub-custodian may receive from those decisions. This condition does not preclude a CS Affiliated QPAM from receiving publicly available research and other widely available information from a CSAG affiliate;

(ii) The CS Affiliated QPAM fully complies with ERISA's fiduciary duties, and with ERISA and the Code's prohibited transaction provisions, in each case, as applicable, with respect to each Covered Plan, and does not knowingly participate in any violation of these duties and provisions with respect to Covered Plans;

(iii) The CS Affiliated QPAM does not knowingly participate in any other person's violation of ERISA or the Code with respect to Covered Plans;

(iv) Any filings or statements made by the CS Affiliated QPAM to regulators, including but not limited to, the Department of Labor, the Department of the Treasury, the Department of Justice,

[9] For purposes of this five-year exemption, references to section 406 of Title I of ERISA, unless otherwise specified, should be read to refer as well to the corresponding provisions of section 4975 of the Code.

[10] 49 FR 9494 (March 13, 1984), as corrected at 50 FR 41430 (October 10, 1985), as amended at 70 FR 49305 (August 23, 2005), and as amended at 75 FR 38837 (July 6, 2010).

[11] Section I(g) of PTE 84–14 generally provides that ''[n]either the QPAM nor any affiliate thereof . . . nor any owner . . . of a 5 percent or more interest in the QPAM is a person who within the 10 years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of'' certain criminal activity therein described.

and the Pension Benefit Guaranty Corporation, on behalf of, or in relation to Covered Plans are materially accurate and complete, to the best of such QPAM's knowledge at that time;

(v) To the best of its knowledge at the time, the CS Affiliated QPAM does not make material misrepresentations or omit material information in its communications with such regulators with respect to Covered Plans, or make material misrepresentations or omit material information in its communications with Covered Plans; and

(vi) The CS Affiliated QPAM complies with the terms of this five-year exemption, and CSAG complies with the terms of Section I(d)(2);

(2) Any violation of, or failure to comply with, an item in subparagraphs (h)(1)(ii) through (vi) of this section, is corrected as soon as reasonably possible upon discovery, or as soon after the QPAM reasonably should have known of the noncompliance (whichever is earlier), and any such violation or compliance failure not so corrected is reported, upon discovery of such failure to so correct, in writing, to the head of Compliance and the general counsel (or their functional equivalent) of the relevant CS Affiliated QPAM, and the independent auditor responsible for reviewing compliance with the Policies. A CS Affiliated QPAM will not be treated as having failed to develop, implement, maintain, or follow the Policies, provided that it corrects any instance of noncompliance as soon as reasonably possible upon discovery, or as soon as reasonably possible after the QPAM reasonably should have known of the noncompliance (whichever is earlier), and provided that it adheres to the reporting requirements set forth in this paragraph (2);

(3) Each CS Affiliated QPAM must maintain, adjust (to the extent necessary), and implement a program of training (the Training), conducted at least annually, for all relevant CS Affiliated QPAM asset/portfolio management, trading, legal, compliance, and internal audit personnel. The Training must:

(i) At a minimum, cover the Policies, ERISA and Code compliance (including applicable fiduciary duties and the prohibited transaction provisions), ethical conduct, the consequences for not complying with the conditions of this five-year exemption (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing; and

(ii) Be conducted by a professional who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code;

(i)(1) Each CS Affiliated QPAM submits to three audits, conducted by an independent auditor, who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code, to evaluate the adequacy of, and each CS Affiliated QPAM's compliance with, the Policies and Training described herein. The audit requirement must be incorporated in the Policies. The first audit must cover the 24 month period that begins on November 21, 2019. The second audit must cover the 24 month period that begins on November 21, 2021, and the third audit must cover the 12 month period that begins on November 21, 2023. Each audit must be completed no later than six (6) months after the period to which the audit applies;[12]

(2) Within the scope of the audit and to the extent necessary for the auditor, in its sole opinion, to complete its audit and comply with the conditions for relief described herein, and only to the extent such disclosure is not prevented by state or federal statute, or involves communications subject to attorney client privilege, each CS Affiliated QPAM and, if applicable, CSAG, will grant the auditor unconditional access to its business, including, but not limited to: Its computer systems; business records; transactional data; workplace locations; training materials; and personnel. Such access is limited to information relevant to the auditor's objectives, as specified by the terms of this exemption;

(3) The auditor's engagement must specifically require the auditor to determine whether each CS Affiliated QPAM has developed, implemented, maintained, and followed the Policies in accordance with the conditions of this five-year exemption, and has developed and implemented the Training, as required herein;

(4) The auditor's engagement must specifically require the auditor to test each CS Affiliated QPAM's operational compliance with the Policies and Training. In this regard, the auditor must test a sample of: (1) Each CS Affiliated QPAM's transactions involving Covered Plans; (2) each CS Affiliated QPAM's transactions involving CSAG affiliates that serve as a local sub-custodian. The samples must be sufficient in size and nature to afford the auditor a reasonable basis to determine the QPAM's operational compliance with the Policies and Training;

(5) For each audit, on or before the end of the relevant period described in Section I(i)(1) for completing the audit, the auditor must issue a written report (the Audit Report) to CSAG and the CS Affiliated QPAMs to which the audit applies that describes the procedures performed by the auditor during the course of its examination. The auditor, at its discretion, may issue a single consolidated Audit Report that covers all the CS Affiliated QPAMs. The Audit Report must include the auditor's specific determinations regarding:

(i) The adequacy of the CS Affiliated QPAM's Policies and Training; the CS Affiliated QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective CS Affiliated QPAM's noncompliance with the written Policies and Training described in Section I(h) above. The CS Affiliated QPAMs must promptly address any noncompliance. The CS Affiliated QPAM must promptly address or prepare a written plan of action to address any determination as to the adequacy of the Policies and Training and the auditor's recommendations (if any) with respect to strengthening the Policies and Training of the respective CS Affiliated QPAM. Any action taken or the plan of action to be taken by the respective CS Affiliated QPAM must be included in an addendum to the Audit Report (such addendum must be completed prior to the certification described in Section I(i)(7) below). In the event such a plan of action to address the auditor's recommendation regarding the adequacy of the Policies and Training is not completed by the time of submission of the Audit Report, the following period's Audit Report must state whether the plan was satisfactorily completed. Any determination by the auditor that the respective CS Affiliated QPAM has implemented, maintained, and followed sufficient Policies and Training must not be based solely or in substantial part on an absence of evidence indicating noncompliance. In this last regard, any finding that a CS Affiliated QPAM has complied with the requirements under this subparagraph must be based on evidence that the particular CS Affiliated QPAM has actually implemented, maintained, and followed the Policies and Training required by this exemption. Furthermore, the auditor must not solely rely on the Annual Exemption Report created by the compliance officer (the Compliance Officer), as described in Section I(m)

[12] Periods prior to November 21, 2019 must be audited consistent with PTE 2015–14.

below, as the basis for the auditor's conclusions in lieu of independent determinations and testing performed by the auditor as required by Section I(i)(3) and (4) above; and

(ii) The adequacy of the Annual Exemption Review described in Section I(m);

(6) The auditor must notify the respective CS Affiliated QPAMs of any instance of noncompliance identified by the auditor within five (5) business days after such noncompliance is identified by the auditor, regardless of whether the audit has been completed as of that date;

(7) With respect to each Audit Report, the general counsel, or one of the three most senior executive officers of the CS Affiliated QPAMs to which the Audit Report applies, must certify in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this five-year exemption; that, to the best of such officer's knowledge at the time, the CS Affiliated QPAM addressed, corrected, or remedied any noncompliance and inadequacy or has an appropriate written plan to address any inadequacy regarding the Policies and Training identified in the Audit Report. Such certification must also include the signatory's determination that, to the best of the officer's knowledge at the time, the Policies and Training in effect at the time of signing are adequate to ensure compliance with the conditions of this exemption and the applicable provisions of ERISA and the Code;

(8) A copy of the Audit Report must be provided to CSAG's Board of Directors and to either the Risk Committee or the Audit Committee; and a senior executive officer at either the Risk Committee or the Conduct and Financial Crime Control Committee must review the Audit Report for each CS Affiliated QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report;

(9) Each CS Affiliated QPAM must provide its certified Audit Report, by regular mail to: The Department's Office of Exemption Determinations (OED), 200 Constitution Avenue NW, Suite 400, Washington, DC 20210, or by private carrier to: 122 C Street NW, Suite 400, Washington, DC 20001–2109. The delivery must take place no more than 45 days following the completion of the Audit Report. The Audit Report will be part of the public record regarding this five-year exemption. Furthermore, each CS Affiliated QPAM must make its Audit Report unconditionally available, electronically or otherwise, for examination upon request by any duly authorized employee or representative of the Department, other relevant regulators, and any fiduciary of a Covered Plan;

(10) Any engagement agreement with an auditor to perform the audit required by this exemption must be submitted to OED no later than two (2) months after the execution of the engagement agreement;

(11) The auditor must provide the Department, upon request, for inspection and review, access to all of the workpapers created and used in connection with the audit, provided the access and inspection are otherwise permitted by law; and

(12) CSAG and/or the CS Affiliated QPAMs must notify the Department of a change in the independent auditor no later than two (2) months after the engagement of a substitute or subsequent auditor and must provide an explanation for the substitution or change including a description of any material disputes between the terminated auditor and CSAG and/or the CS Affiliated QPAMs;

(j) As of the effective date of this five-year exemption, with respect to any arrangement, agreement, or contract between a CS Affiliated QPAM and a Covered Plan, each CS Affiliated QPAM agrees and warrants to Covered Plans:

(1) To comply with ERISA and the Code, as applicable with respect to the Covered Plan; to refrain from engaging in prohibited transactions that are not otherwise exempt (and to promptly correct any inadvertent prohibited transactions); and to comply with the standards of prudence and loyalty set forth in section 404 of ERISA with respect to each such ERISA-covered plan and IRA to the extent that section 404 is applicable;

(2) To indemnify and hold harmless the Covered Plan for any actual losses resulting directly from a CS Affiliated QPAM's violation of ERISA's fiduciary duties, as applicable, and of the prohibited transaction provisions of ERISA and the Code, as applicable; a breach of contract by a CS Affiliated QPAM; or any claim arising out of the failure of such CS Affiliated QPAMs to qualify for the exemptive relief provided by PTE 84–14 as a result of a violation of Section I(g) of PTE 84–14 other than the Conviction. This condition only applies to actual losses caused by the CS Affiliated QPAM's violations;

(3) Not to require (or otherwise cause) the Covered Plan to waive, limit, or qualify the liability of the CS Affiliated QPAM for violating ERISA or the Code or engaging in prohibited transactions;

(4) Not to restrict the ability of the Covered Plan to terminate or withdraw from its arrangement with the CS Affiliated QPAM, with respect to any investment in a separately-managed account or pooled fund subject to ERISA and managed by such QPAM, with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors. In connection with any such arrangement involving investments in pooled funds subject to ERISA entered into after the effective date of this exemption, the adverse consequences must relate to a lack of liquidity of the underlying assets, valuation issues, or regulatory reasons that prevent the fund from promptly redeeming an ERISA-covered plan's or IRA's investment, and such restrictions must be applicable to all such investors and effective no longer than reasonably necessary to avoid the adverse consequences;

(5) Not to impose any fees, penalties, or charges for such termination or withdrawal with the exception of reasonable fees, appropriately disclosed in advance, that are specifically designed to prevent generally-recognized abusive investment practices or specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors, provided that such fees are applied consistently and in like manner to all such investors;

(6) Not to include exculpatory provisions disclaiming or otherwise limiting liability of the CS Affiliated QPAMs for a violation of the agreement's terms. To the extent consistent with section 410 of ERISA, however, this provision does not prohibit disclaimers for liability caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of CSAG and its affiliates, or damages arising outside the control of the CS Affiliated QPAM; and

(7) Within four (4) months of the effective date of this five-year exemption, each CS Affiliated QPAM must provide a notice of its obligations under this Section I(j) to each Covered Plan. For Covered Plans that enter into a written asset or investment management agreement with a CS Affiliated QPAM on or after November 21, 2019, the CS Affiliated QPAM must agree to its obligations under this Section I(j) in an updated investment management agreement between the CS Affiliated QPAM and such clients or

other written contractual agreement. Notwithstanding the above, a CS Affiliated QPAM will not violate the condition solely because a Covered Plan refuses to sign an updated investment management agreement. This condition will be deemed met for each Covered Plan that received a notice pursuant to PTE 2015–14 that meets the terms of this condition.

(k) *Notice to Covered Plan Clients.* Each CS Affiliated QPAM provides a notice of the five-year exemption, along with a separate summary describing the facts that led to the Conviction (the Summary), which have been submitted to the Department, and a prominently displayed statement (the Statement) that the Conviction results in a failure to meet a condition in PTE 84–14, to each sponsor and beneficial owner of a Covered Plan that entered into a written asset or investment management agreement with a CS Affiliated QPAM, or the sponsor of an investment fund in any case where a CS Affiliated QPAM acts as a sub-adviser to the investment fund in which such ERISA-covered plan and IRA invests. The notice, Summary and Statement must be provided prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the CS Affiliated QPAM. The clients must receive a **Federal Register** copy of the notice of final five-year exemption within sixty (60) days of the effective date of this exemption. The notice may be delivered electronically (including by an email that has a link to the five-year exemption).

(l) The CS Affiliated QPAM must comply with each condition of PTE 84–14, as amended, with the sole exception of the violation of Section I(g) of PTE 84–14 that is attributable to the Conviction. If, during the Exemption Period, an entity within the Credit Suisse corporate structure is convicted of a crime described in Section I(g) of PTE 84–14, relief in this exemption would terminate immediately;

(m)(1) By May 20, 2020, each CS Affiliated QPAM designates a senior compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements described herein. For purposes of this condition (m), each relevant line of business within a CS Affiliated QPAM may designate its own compliance officer. The Compliance Officer must conduct an annual review for each twelve month period, beginning on November 21, 2019, (the Annual Exemption Review) to determine the adequacy and effectiveness of the implementation of the Policies and Training. With respect to the Compliance Officer, the following conditions must be met:

(i) The Compliance Officer must be a professional who has extensive experience with, and knowledge of, the regulation of financial services and products, including under ERISA and the Code; and

(ii) The Compliance Officer must have a direct reporting line to the highest ranking corporate officer in charge of compliance for the applicable CS Affiliated QPAM.

(2) With respect to each Annual Exemption Review, the following conditions must be met:

(i) The Annual Exemption Review includes a review of the CS Affiliated QPAMs compliance with and effectiveness of the Policies and Training and of the following: Any compliance matter related to the Policies or Training that was identified by, or reported to, the Compliance Officer or others within the compliance and risk control function (or its equivalent) during the previous year; the most recent audit report issued pursuant to this exemption or PTE 2015–14; any material change in the relevant business activities of the CS Affiliated QPAMs; and any change to ERISA, the Code, or regulations related to fiduciary duties and the prohibited transaction provisions that may be applicable to the activities of the CS Affiliated QPAMs;

(ii) The Compliance Officer prepares a written report for each Annual Exemption Review (each, an Annual Exemption Report) that (A) summarizes his or her material activities during the preceding year; (B) sets forth any instance of noncompliance discovered during the preceding year, and any related corrective action; (C) details any change to the Policies or Training to guard against any similar instance of noncompliance occurring again; and (D) makes recommendations, as necessary, for additional training, procedures, monitoring, or additional and/or changed processes or systems, and management's actions on such recommendations;

(iii) In each Annual Exemption Report, the Compliance Officer must certify in writing that to the best of his or her knowledge at the time: (A) The report is accurate; (B) the Policies and Training are working in a manner which is reasonably designed to ensure that the Policies and Training requirements described herein are met; (C) any known instance of noncompliance during the preceding year and any related correction taken to date have been identified in the Annual Exemption Report; and (D) the CS Affiliated QPAMs have complied with the Policies and Training, and/or corrected (or are correcting) any known instances of noncompliance in accordance with Section I(h) above;

(iv) Each Annual Exemption Report must be provided to appropriate corporate officers of CSAG and each CS Affiliated QPAM to which such report relates; the head of Compliance and the general counsel (or their functional equivalent) of the relevant CS Affiliated QPAM; and must be made unconditionally available to the independent auditor described in Section I(i) above;

(v) Each Annual Exemption Review, including the Compliance Officer's written Annual Exemption Report, must be completed within three (3) months following the end of the period to which it relates;

(n) Each CS Affiliated QPAM will maintain records necessary to demonstrate that the conditions of this five-year exemption have been met, for six (6) years following the date of any transaction for which the CS Affiliated QPAM relies upon the relief in the five-year exemption;

(o) During the Exemption Period, CSAG: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or Non-Prosecution Agreement (an NPA) that Credit Suisse Group AG or CSAG or any affiliate (as defined in Section VI(d) of PTE 84–14) enters into with the U.S Department of Justice, to the extent such DPA or NPA relates to the conduct described in Section I(g) of PTE 84–14 or section 411 of ERISA; and (2) immediately provides the Department any information requested by the Department, as permitted by law, regarding the agreement and/or the conduct and allegations that led to the agreement;

(p) Within 60 days of the effective date of the five-year exemption, each CS Affiliated QPAM, in its agreements with, or in other written disclosures provided to Covered Plans, will clearly and prominently inform Covered Plan clients of their right to obtain a copy of the Policies or a description (Summary Policies) which accurately summarizes key components of the CS Affiliated QPAM's written Policies developed in connection with this exemption. If the Policies are thereafter changed, each Covered Plan client must receive a new disclosure within six (6) months following the end of the calendar year during which the Policies were changed.[13] With respect to this

[13] In the event the Applicant meets this disclosure requirement through Summary Policies, changes to

Continued

requirement, the description may be continuously maintained on a website, provided that such website link to the Policies or Summary Policies is clearly and prominently disclosed to each Covered Plan; and

(q) A CS Affiliated QPAM will not fail to meet the terms of this five-year exemption, solely because a different CS Affiliated QPAM fails to satisfy a condition for relief under this five-year exemption described in Sections I(c), (d), (h), (i), (j), (k), (l), (n), and (p); or, if the independent auditor described in Section I(i) fails a provision of the exemption other than the requirement described in Section I(i)(11), provided that such failure did not result from any actions or inactions of CSAG or its affiliates.

Section II. Definitions

(a) The term ''Conviction'' means the judgment of conviction against CSAG for one count of conspiracy to violate section 7206(2) of the Internal Revenue Code in violation of Title 18, United States Code, Section 371, that was entered in the District Court for the Eastern District of Virginia in Case Number 1:14–cr–188–RBS, on November 21, 2014.

(b) The term ''Covered Plan'' means a plan subject to Part 4 of Title I of ERISA (an ''ERISA-covered plan'') or a plan subject to section 4975 of the Code (an ''IRA''), in each case, with respect to which a CS Affiliated QPAM relies on PTE 84–14, or with respect to which a CS Affiliated QPAM (or any CSAG affiliate) has expressly represented that the manager qualifies as a QPAM or relies on the QPAM class exemption (PTE 84–14). A Covered Plan does not include an ERISA-covered plan or IRA to the extent the CS Affiliated QPAM has expressly disclaimed reliance on QPAM status or PTE 84–14 in entering into a contract, arrangement, or agreement with the ERISA-covered plan or IRA.

(c) The term ''CSAG'' means Credit Suisse AG.

(d) The term ''CS Affiliated QPAM'' means a ''qualified professional asset manager'' (as defined in Section VI(a) of PTE 84–14) that relies on the relief provided by PTE 84–14 and with respect to which CSAG is a current or future ''affiliate'' (as defined in Section VI(d) of PTE 84–14), but is not a CS Related QPAM. The term ''CS Affiliated QPAM'' excludes the parent entity, CSAG.

the Policies shall not result in the requirement for a new disclosure unless, as a result of changes to the Policies, the Summary Policies are no longer accurate.

(e) The term ''CS Related QPAM'' means any current or future ''qualified professional asset manager'' (as defined in Section VI(a) of PTE 84–14) that relies on the relief provided by PTE 84–14, and with respect to which CSAG owns a direct or indirect five (5) percent or more interest, but with respect to which CSAG is not an ''affiliate'' (as defined in section VI(d)(1) of PTE 84–14).

(f) The term ''Exemption Period'' means the period from November 21, 2019 through November 20, 2024.

Effective Date: This five-year exemption will be in effect for five years beginning on the expiration of PTE 2015–14.

FOR FURTHER INFORMATION CONTACT: Mrs. Blessed Chuksorji-Keefe of the Department, telephone (202) 693–8567. (This is not a toll-free number.)

Signed at Washington, DC, this 8th day of November, 2019.

Lyssa Hall,

Director, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2019–24750 Filed 11–13–19; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2018–0007]

National Advisory Committee on Occupational Safety and Health (NACOSH): Notice of Membership Meeting

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Announcement of a NACOSH meeting.

SUMMARY: NACOSH will meet on December 12, 2019, in Washington, DC.

DATES: NACOSH will meet from 9:30 a.m. to 4:00 p.m., ET, Thursday, December 12, 2019.

ADDRESSES: NACOSH will meet in Room N–5437, Conference Rooms A–D, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210.

Submission of comments and requests to speak: Submit comments and requests to speak at the NACOSH meeting by December 5, 2019, identified by the docket number for this **Federal Register** notice (Docket No. OSHA–2018–0007), using one of the following methods:

Electronically: You may submit comments, including attachments, electronically at: *http://www.regulations.gov,* the Federal eRulemaking Portal. Follow the online instructions for submitting comments.

Facsimile: If your comments, including attachments, do not exceed 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Regular mail, express mail, hand delivery, and messenger or courier service: You may submit comments and attachments to the OSHA Docket Office, Docket No. OSHA–2018–0007, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3653, 200 Constitution Avenue NW, Washington, DC 20210. Deliveries (express mail, hand (courier) delivery, and messenger service) are accepted during the OSHA Docket Office's normal business hours, 10:00 a.m. to 3:00 p.m., ET.

Instructions: All submissions must include the agency name and the OSHA docket number for this **Federal Register** notice (Docket No. OSHA–2018–0007). Because of security-related procedures, submissions by regular mail may result in a significant delay in receipt. Please contact the OSHA Docket Office for information about security procedures for making submissions by express mail, hand (courier) delivery, and messenger service.

OSHA will place comments and requests to speak, including personal information, in the public docket, which may be available online. Therefore, OSHA cautions interested parties about submitting personal information such as Social Security numbers and birthdates.

Docket: To read or download documents in the public docket for this NACOSH meeting, go to *http://www.regulations.gov.* All documents in the public docket are listed in the index; however, some documents (*e.g.,* copyrighted material) are not publicly available to read or download through *http://www.regulations.gov.* All submissions are available for inspection and, when permitted, copying at the OSHA Docket Office at the above address. For information on using *http://www.regulations.gov* to make submissions or to access the docket, click on the ''Help'' tab at the top of the homepage. Contact the OSHA Docket Office for information about materials not available through that website and for assistance in using the internet to locate submissions and other documents in the docket.

Requests for special accommodations: Please submit requests for special accommodations for this NACOSH meeting by December 5, 2019, to Ms. Carla Marcellus, OSHA, Technical Data Center, Room N–3508, U.S. Department of Labor, 200 Constitution Ave NW, Washington, DC 20210; telephone: (202) 693–2235; email: *marcellus.carla@dol.gov.*

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Mr. Francis Meilinger, Director, OSHA Office of Communications; telephone (202) 693–1999 (TTY (877) 889–5627); email *meilinger.francis2@dol.gov.*

For general information about NACOSH: Ms. Michelle Walker, Director, OSHA Technical Data Center, Directorate of Technical Support and Emergency Management; telephone (202) 693–2350 (TTY (877) 889–5627); email *walker.michelle@dol.gov.*

For copies of this ***Federal Register*** *Notice:* Electronic copies of this **Federal Register** notice are available at *http://www.regulations.gov.* This notice, as well as news releases and other relevant information, are also available at OSHA's web page at *www.osha.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651, 656) established NACOSH to advise, consult with, and make recommendations to the Secretary of Labor and the Secretary of Health and Human Services on matters relating to the administration of the OSH Act. NACOSH is a continuing advisory committee of indefinite duration.

NACOSH operates in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App. 2), its implementing regulations (41 CFR part 102–3), and OSHA's regulations on NACOSH (29 CFR part 1912a).

NACOSH is comprised of 12 members, all of whom the Secretary appoints. The Committee must meet at least two times a year (29 U.S.C. 656(a)(1)).

II. Meeting Information

Attending the meeting: NACOSH will meet on December 12, 2019, from 9:30 a.m. until approximately 4:00 p.m., ET. The Committee will meet at the U.S. Department of Labor, Frances Perkins Building, 200 Constitution Avenue NW, Washington, DC 20210 in Room N–5437, Conference Rooms A–D. Meeting attendees must use the visitor's entrance located at 3rd & C Streets NW.

Meeting agenda: The tentative agenda for the meeting includes:

1. An introduction and update from the Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health on key OSHA initiatives, and
2. Remarks from the Director of the National Institute for Occupational Safety and Health.

Requests to speak at the NACOSH meeting: Attendees who want to address NACOSH at the meeting must submit a request to speak, as well as any written or electronic presentation by December 5, 2019, using one of the methods listed in the **ADDRESSES** section. The request must state the amount of time requested to speak; the interest you represent (*e.g.,* business, organization, affiliation), if any; and a brief outline of your presentation. PowerPoint presentations and other electronic materials must be compatible with PowerPoint 2010 and other Microsoft Office 2010 formats.

OSHA will place comments and requests to speak, including personal information, in the public docket, which may be available online. Therefore, OSHA cautions interested parties about submitting personal information such as Social Security Numbers and birthdates.

Docket: To read or download documents in the public docket for this NACOSH meeting, go to *http://www.regulations.gov.* All documents in the public docket are listed in the index; however, some documents (*e.g.,* copyrighted material) are not publicly available to read or download through *http://www.regulations.gov.* All submissions are available for inspection and, when permitted, copying at the OSHA Docket Office at the above address. For information on using *http://www.regulations.gov* to make submissions or to access the docket, click on the ''Help'' tab at the top of the homepage. Contact the OSHA Docket Office for information about materials not available through that website and for assistance in using the internet to locate submissions and other documents in the docket.

Authority and Signature

Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this notice under the authority granted by 5 U.S.C. App. 2; 29 U.S.C. 656; 29 CFR part 1912a; 41 CFR part 102–3; and Secretary of Labor's Order No. 1–2012 (77 FR 3912 (1/25/2012)).

Signed at Washington, DC, on November 6, 2019.

Loren Sweatt,

Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2019–24679 Filed 11–13–19; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL CREDIT UNION ADMINISTRATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice and request for comment.

SUMMARY: The National Credit Union Administration (NCUA), as part of a continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on the following extensions of a currently approved collection, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments should be received on or before January 13, 2020 to be assured consideration.

ADDRESSES: Interested persons are invited to submit written comments on the information collection to Dawn Wolfgang, National Credit Union Administration, 1775 Duke Street, Suite 6032, Alexandria, Virginia 22314; Fax No. 703–519–8579; or Email at *PRAComments@NCUA.gov.*

FOR FURTHER INFORMATION CONTACT: Address requests for additional information to Dawn Wolfgang at the address above or telephone 703–548–2279.

SUPPLEMENTARY INFORMATION:

OMB Number: 3133–0103.

Title: Recordkeeping and Disclosure Requirements Associated with Regulations B, E, M, and CC.

Type of Review: Extension of a currently approved collection.

Abstract: This information collection request provides for the application of three CFPB rules and one FRB rule. NCUA has enforcement responsibility for these rules for federal credit unions. These rules are: Regulation B (''Equal Credit Opportunity Act,'' 12 CFR part 1002); Regulation E (''Electronic Fund Transfers,'' 12 CFR part 1005); Regulation M (''Consumer Leasing,'' 12 CFR part 1013); and Regulation CC (''Availability of Funds and Collection of Checks,'' 12 CFR part 229).

The third party disclosure and recordkeeping requirements in this collection are required by statute and regulation. The regulations prescribe certain aspects of the credit application and notification process, making certain disclosures, uniform methods for computing the costs of credit, disclosing credit terms and cost, resolving errors on certain types of credit accounts, and timing requirements and disclosures relating to the availability of deposited funds.

Affected Public: Private Sector: Not-for-profit institutions; Individuals or households.

Estimated No. of Respondents: Reg. B, 3,330 FCU; Reg. E, 2,661 FCU and 24,700,000 credit union members; Reg. M, 48 FCU, and Reg. CC, 4,396 FICU.

Estimated No. of Responses per Respondent: Annual for most credit unions. Once for credit union members choosing to opt-in.

Estimated Total Annual Responses: 56,105,209.

Estimated Burden Hours per Response: Estimated burden hours per response range from 0.01 to 20 depending upon the information collection activity.

Estimated Total Annual Burden Hours: 3,239,916.

OMB Number: 3133–0163.

Title: Privacy of Consumer Financial Information, Regulation P, 12 CFR part 1016.

Type of Review: Extension of a currently approved collection.

Abstract: Regulation P (12 CFR part 1016) requires credit unions to disclose its privacy policies to customers as well as offer customers a reasonable opportunity to opt out-in whole or in part-of those policies to further restrict the release of their personal financial information to nonaffiliated third parties. Credit unions are required to provide an initial privacy notice to customers that is clear and conspicuous, an annual notice of the privacy policies and practices of the institution, a revised notice to customers if triggered by specific changes to the existing policy, and a notice of the right of the customer to opt out of the institution's information sharing practices. Consumers who choose to exercise their opt-out right document this choice by returning an opt-out form or other permissible method.

Affected Public: Private Sector: Not-for-profit institutions; Individuals or households.

Estimated No. of Respondents: 2,654 FICU; 1,360,000 members who opt-out.

Estimated No. of Responses per Respondent: Annual for most FICUs. Once for credit union members choosing to opt-out.

Estimated Total Annual Responses: 1,365,319.

Estimated Burden Hours per Response: FICUs, 8.11; Consumers, 0.28.

Estimated Total Annual Burden Hours: 426,248.

OMB Number: 3133–0187.

Title: Reverse Mortgage Products—Guidance for Managing Reputation Risks.

Type of Review: Extension of a currently approved collection.

Abstract: The Reverse Mortgage Guidance sets forth standards intended to ensure that financial institutions effectively assess and manage the compliance and reputation risks associated with reverse mortgage products. The information collection will allow NCUA to evaluate the adequacy of a federally-insured credit union's internal policies and procedures as they relate to reverse mortgage products.

Affected Public: Private Sector: Not-for-profit institutions.

Estimated No. of Respondents: 17.

Estimated No. of Responses per Respondent: 1.05.

Estimated Total Annual Responses: 18.

Estimated Burden Hours per Response: 9.78.

Estimated Total Annual Burden Hours: 176.

Request for Comments: Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will become a matter of public record. The public is invited to submit comments concerning: (a) Whether the collection of information is necessary for the proper execution of the function of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of the information on the respondents, including the use of automated collection techniques or other forms of information technology.

By Gerard Poliquin, Secretary of the Board, the National Credit Union Administration, on November 7, 2019.

Dated: November 8, 2019.

Dawn D. Wolfgang,

NCUA PRA Clearance Officer.

[FR Doc. 2019–24723 Filed 11–13–19; 8:45 am]

BILLING CODE 7535–01–P

THE NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Notice of Proposed Information Collection Request: "Museums Empowered: Professional Development Opportunities for Museum Staff"—A Museums for America Special Initiative

AGENCY: Institute of Museum and Library Services.

ACTION: Notice, request for comments, collection of information.

SUMMARY: The Institute of Museum and Library Services (IMLS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act. This pre-clearance consultation program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The purpose of this Notice is to solicit comments concerning Museums Empowered: Professional Development and Capacity Building Opportunities for Museums—A Museums for America Special Initiative.

A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the addressee section below on or before January 12, 2020.

The IMLS is particularly interested in comments which:

- 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;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who

are 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.

ADDRESSES: For a copy of the documents contact: Mark Isaksen, Senior Museum Program Officer, Institute of Museum and Library Services, 955 L'Enfant Plaza North, SW, Suite 4000, Washington, DC 20024. Mr. Isaksen can be reached by telephone: 202–653–4662; fax: 202–653–4667; email: *misaksen@imls.gov* or by or by *teletype* (TTY/TDD) for persons with hearing difficulty at 202–653–4614.

FOR FURTHER INFORMATION CONTACT: Kim Miller, Grants Management Specialist, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Ms. Miller can be reached by Telephone: 202–653–4762, or by email at *kmiller@imls.gov* or by teletype (TTY/TDD) for persons with hearing difficulty at 202–653–4614.

SUPPLEMENTARY INFORMATION:

I. Background

The Institute of Museum and Library Services is the primary source of federal support for the nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. Our vision is a nation where museums and libraries work together to transform the lives of individuals and communities. To learn more, visit *www.imls.gov.*

II. Current Actions

To administer a special initiative in the Museums for America (MFA) grant program titled Museums Empowered: Professional Development Opportunities for Museum Staff—A Museums for America Special Initiative.

Museums for America (MFA) grants support projects that strengthen the ability of an individual museum to serve its public. This is a special MFA initiative with the goal of strengthening the ability of an individual museum to serve its public through professional development activities that cross-cut various departments to generate systemic change within the museum.

As centers of innovation and discovery, as well as catalysts of community revitalization, museums are at the forefront of change in our communities. Like any other institution, museums need to remain dynamic to respond to fast-evolving technological advances and changing demographics. Museums also need to generate and share outcomes-based data and results of their community impact and develop sustainable organizational structures and strategies for continued growth and vitality. Professional Development is critical for museums to deliver on these areas of need.

To support and empower museums of all sizes and disciplines in responding to the evolving needs of the museum profession and changes in their communities, this MFA special initiative has four project categories for professional development: 1. Diversity and Inclusion 2. Digital Technology 3. Evaluation 4. Organizational Management. Potential projects will address one of these four categories and help strengthen the ability of an individual museum to better serve its public. Projects will utilize comprehensive strategies and frameworks to support professional development. Projects should cross-cut various departments and result in systemic change within the museum.

Agency: Institute of Museum and Library Services.

Title: ''Museums Empowered: Professional Development Opportunities for Museum Staff''—A Museums for America Special Initiative.

OMB Number: 3137–0107.

Agency Number: 3137.

Frequency: Annually.

Affected Public: Museums that meet the IMLS Museums for America institutional eligibility criteria.

Number of Respondents: 100.

Estimated Time per Respondent: 40 hours.

Total Burden Hours: 4,000.

Total Annualized cost to respondents: $112,480.00.

Total Annualized capital/startup costs: 0.

Total Annualized Cost to Federal Government: $14,471.88.

Public Comments Invited: Comments submitted in response to this notice will be summarized and/or included in the request for OMB's clearance of this information collection.

Dated: November 8, 2019.

Kim Miller,

Grants Management Specialist, Institute of Museum and Library Services.

[FR Doc. 2019–24725 Filed 11–13–19; 8:45 am]

BILLING CODE 7036–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Humanities

Meeting of Humanities Panel

AGENCY: National Endowment for the Humanities; National Foundation on the Arts and the Humanities.

ACTION: Notice of meeting.

SUMMARY: The National Endowment for the Humanities will hold six meetings of the Humanities Panel, a federal advisory committee, during December 2019. The purpose of the meetings is for panel review, discussion, evaluation, and recommendation of applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965.

DATES: See **SUPPLEMENTARY INFORMATION** for meeting dates.

ADDRESSES: The meetings will be held at Constitution Center, 400 7th Street SW, Washington, DC 20506, unless otherwise indicated.

FOR FURTHER INFORMATION CONTACT: Elizabeth Voyatzis, Committee Management Officer, 400 7th Street SW, Room 4060, Washington, DC 20506; (202) 606–8322; *evoyatzis@neh.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App.), notice is hereby given of the following meetings:

1. Date: December 3, 2019

This meeting will discuss applications on the topic U.S. History (Pre-1900), for the Humanities Collections and Reference Resources grant program, submitted to the Division of Preservation and Access.

2. Date: December 9, 2019

This meeting will discuss applications for the Dialogues on the Experience of War grant program, submitted to the Division of Education Programs.

3. Date: December 10, 2019

This meeting will discuss applications for the Dialogues on the Experience of War grant program, submitted to the Division of Education Programs.

4. Date: December 11, 2019

This meeting will discuss applications for the Dialogues on the Experience of War grant program, submitted to the Division of Education Programs.

5. Date: December 11, 2019

This meeting will discuss applications for Fellowship Programs at Independent Research Institutions, submitted to the Division of Research Programs.

6. Date: December 13, 2019

This meeting will discuss applications for the Dialogues on the Experience of War grant program, submitted to the Division of Education Programs.

Because these meetings will include review of personal and/or proprietary financial and commercial information given in confidence to the agency by grant applicants, the meetings will be closed to the public pursuant to sections 552b(c)(4) and 552b(c)(6) of Title 5, U.S.C., as amended. I have made this determination pursuant to the authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee Meetings dated April 15, 2016.

Dated: November 7, 2019.

Elizabeth Voyatzis,

Committee Management Officer, National Endowment for the Humanities.

[FR Doc. 2019–24714 Filed 11–13–19; 8:45 am]

BILLING CODE 7536–01–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* November 14, 2019.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 7, 2019, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 127 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–24, CP2020–23.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019–24702 Filed 11–13–19; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Priority Mail and First-Class Package Service Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Date of required notice:* November 14, 2019.

FOR FURTHER INFORMATION CONTACT: Sean Robinson, 202–268–8405.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 7, 2019, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail & First-Class Package Service Contract 126 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2020–23, CP2020–22.

Sean Robinson,

Attorney, Corporate and Postal Business Law.

[FR Doc. 2019–24659 Filed 11–13–19; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87491; File No. SR–NASDAQ–2019–088]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 4759

November 7, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 1, 2019, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 4759, as described below. While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on November 4, 2019.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 4759, which lists the proprietary and network processor feeds that the Exchange utilizes for the handling, routing, and execution of orders, as well as for the regulatory compliance processes related to those functions. Presently, the Exchange's trading system utilizes proprietary market data as the Primary Source of quotation data for the following markets that provide a reliable direct feed: NYSE American, Nasdaq BX, CBOE EDGA, CBOE EDGX, CHX, NYSE, NYSE Arca, Nasdaq, Nasdaq PSX, CBOE BYX, and CBOE BZX. For each of these markets, the Exchange uses SIP data as the Secondary Source of quotation data.[3] For other markets,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Pursuant to Rule 4759, the Primary Source of data is used unless it is delayed by a configurable amount compared to the Secondary Source of data.

namely NYSE National, FINRA ADF, and IEX, the Exchange utilizes SIP data as the Primary Source; there is no Secondary Source for those markets. The Exchange proposes to amend Rule 4759 to state that going forward, the Exchange will utilize SIP data, rather than a direct feed, as its Primary Source of data for CHX (now known as NYSE Chicago [4]), with no Secondary Source utilized for that data. The Exchange proposes this amendment to reflect the fact that NYSE Chicago is migrating to a new technology platform and that, after November 1, 2019, it has announced that it will cease offering the NYSE Chicago Book Feed that currently serves as its direct feed to the Exchange.[5] Although the Exchange understands that NYSE Chicago plans to offer new data feeds to replace the NYSE Chicago Book Feed, the Exchange has yet to decide whether it will utilize them.[6]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5) of the Act,[8] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The Exchange believes that it is necessary to amend its Rules to account for the fact that, after November 1, 2019, NYSE Chicago will no longer offer the direct feed to which the Exchange currently subscribes. The Exchange notes that it already utilizes the SIP as its sole source of quote data for NYSE National and IEX—as well as the FINRA ADF, without issue. In the event that the Exchange determines that its proposal to utilize SIP data is inadequate for its purposes, then the Exchange may choose to subscribe to one or more of the replacement proprietary data feeds that NYSE Chicago plans to offer beginning on November 4, 2019.

Lastly, the Exchange believes that it is consistent with the public interest and the protection of investors to update the names of the exchanges listed in Rule 4759 as this change will make it easier for market participants to identify the exchanges for which the Exchange uses the direct feed and/or SIP for the purposes described in the Rule.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issue; instead, it is merely intended to reflect the fact that the Exchange will no longer consume the NYSE Chicago Book Feed, which NYSE Chicago plans to discontinue after November 1, 2019. The Exchange does not expect that its decision to utilize the SIP, going forward, to obtain NYSE Chicago quote data will have any competitive impacts. As noted above, the Exchange presently utilizes the SIP as its sole source of quote data for several other exchanges, including NYSE National and IEX.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [9] and Rule 19b–4(f)(6) thereunder.[10]

A proposed rule change filed under Rule 19b–4(f)(6) [11] normally does not become operative for 30 days from the date of filing. However, Rule 19b–4(f)(6)(iii) [12] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the Exchange can amend Rule 4759 prior to the discontinuation of the NYSE Chicago Book Feed. The Exchange states that waiver of the operative delay would prevent Rule 4759 from being inaccurate and causing confusion among investors and the public. For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change operative upon filing.[13]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2019–088 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–NASDAQ–2019–088. 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

The Exchange reverts to the Primary Source of data once the delay has been resolved.

[4] The Exchange also proposes to update the Rule to reflect the fact that the Chicago Stock Exchange is now known as NYSE Chicago.

[5] *See https://www.nyse.com/market-data/real-time#chicago.*

[6] *See id.* If and when the Exchange decides to subscribe to these replacement NYSE Chicago direct data feed products, the Exchange will file a proposal to amend Rule 4759 accordingly.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has requested that the Commission waive the pre-filing requirement. The Commission hereby waives that requirement.

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b–4(f)(6)(iii).

[13] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

only one method. The Commission will post all comments on the Commission's internet website (*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 website 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–NASDAQ–2019–088 and should be submitted on or before December 5, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–24699 Filed 11–13–19; 8:45 am]

BILLING CODE 8011–01–P

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87489; File No. SR–Phlx–2019–47]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 3304(a)

November 7, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 29, 2019, Nasdaq PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 3304(a), as described below. While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on November 4, 2019.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaqphlx.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 3304(a), which lists the proprietary and network processor feeds that the Exchange utilizes for the handling, routing, and execution of orders, as well as for the regulatory compliance processes related to those functions. Presently, the Exchange's trading system utilizes proprietary market data as the Primary Source of quotation data for the following markets that provide a reliable direct feed: NYSE American, Nasdaq BX, CBOE EDGA, CBOE EDGX, CHX, NYSE, NYSE Arca, Nasdaq, Nasdaq PSX, CBOE BYX, and CBOE BZX. For each of these markets, the Exchange uses SIP data as the Secondary Source of quotation data.[3] For other markets, namely NYSE National, FINRA ADF, and IEX, the Exchange utilizes SIP data as the Primary Source; there is no Secondary Source for those markets. The Exchange proposes to amend Rule 3304(a) to state that going forward, the Exchange will utilize SIP data, rather than a direct feed, as its Primary Source of data for CHX (now known as NYSE Chicago[4]), with no Secondary Source utilized for that data. The Exchange proposes this amendment to reflect the fact that NYSE Chicago is migrating to a new technology platform and that, after November 1, 2019, it has announced that it will cease offering the NYSE Chicago Book Feed that currently serves as its direct feed to the Exchange.[5] Although the Exchange understands that NYSE Chicago plans to offer new data feeds to replace the NYSE Chicago Book Feed, the Exchange has yet to decide whether it will utilize them.[6]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5) of the Act,[8] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The Exchange believes that it is necessary to amend its Rules to account for the fact that, after November 1, 2019, NYSE Chicago will no longer offer the direct feed to which the Exchange currently subscribes. The Exchange notes that it already utilizes the SIP as its sole source of quote data for NYSE National and IEX—as well as the FINRA ADF, without issue. In the event that the Exchange determines that its proposal to utilize SIP data is inadequate for its purposes, then the Exchange may choose to subscribe to one or more of the replacement proprietary data feeds that NYSE Chicago plans to offer beginning on November 4, 2019.

Lastly, the Exchange believes that it is consistent with the public interest and the protection of investors to update the names of the exchanges listed in Rule 3304(a) as this change will make it easier for market participants to identify

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Pursuant to Rule 3304(a), the Primary Source of data is used unless it is delayed by a configurable amount compared to the Secondary Source of data. The Exchange reverts to the Primary Source of data once the delay has been resolved.

[4] The Exchange also proposes to update the Rule to reflect the fact that the Chicago Stock Exchange is now known as NYSE Chicago.

[5] *See https://www.nyse.com/market-data/real-time#chicago.*

[6] *See id.* If and when the Exchange decides to subscribe to these replacement NYSE Chicago direct data feed products, the Exchange will file a proposal to amend Rule 4759 [sic] accordingly.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

the exchanges for which the Exchange uses the direct feed and/or SIP for the purposes described in the Rule.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issue; instead, it is merely intended to reflect the fact that the Exchange will no longer consume the NYSE Chicago Book Feed, which NYSE Chicago plans to discontinue after November 1, 2019. The Exchange does not expect that its decision to utilize the SIP, going forward, to obtain NYSE Chicago quote data will have any competitive impacts. As noted above, the Exchange presently utilizes the SIP as its sole source of quote data for several other exchanges, including NYSE National and IEX.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [9] and Rule 19b–4(f)(6) thereunder.[10]

A proposed rule change filed under Rule 19b–4(f)(6) [11] normally does not become operative for 30 days from the date of filing. However, Rule 19b–4(f)(6)(iii) [12] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the Exchange can amend Rule 3304(a) prior to the discontinuation of the NYSE Chicago Book Feed. The Exchange states that waiver of the operative delay would prevent Rule 3304(a) from being inaccurate and causing confusion among investors and the public. For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change operative upon filing.[13]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2019–47 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–2019–47. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*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 website 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–2019–47 and should be submitted on or before December 5, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–24697 Filed 11–13–19; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87485; File No. SR–LCH SA–2019–005]

Self-Regulatory Organizations; LCH SA; Order Approving Proposed Rule Change Relating to (i) Introduction of Clearing of the New Markit iTraxx Subordinated Financials Index CDS and the Related Single Name CDS Constituents; (ii) Enhancements to Wrong Way Risk Margin; and (iii) Modification to Default Fund Additional Margin

November 7, 2019.

I. Introduction

On August 2, 2019, Banque Centrale de Compensation, which conducts business under the name LCH SA (''LCH SA''), filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has requested that the Commission waive the pre-filing requirement. The Commission hereby waives that requirement.

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b–4(f)(6)(iii).

[13] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 17 CFR 200.30–3(a)(12).

(''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend its rules to (i) introduce clearing of new Markit iTraxx Subordinated Financials Index CDS and the Related Single Name CDS Constituents (together ''Subordinated Financials''); (ii) incorporate changes to the Wrong Way Risk (''WWR'') margin recommended as a result of a risk model validation; and (iii) modify the Default Fund Additional Margin (''DFAM''). The proposed rule change was published for comment in the **Federal Register** on August 9, 2019.[3] On August 30, 2019, the Commission designated a longer period for taking action on the proposed rule change to November 7, 2019.[4] The Commission did not receive comments on the proposed rule change. For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

A. Subordinated Financials

To introduce clearing of Subordinated Financials,[5] the proposed rule change would make changes to (i) the Reference Guide: CDSClear Margin Framework and CDSClear Default Fund Methodology (together the ''CDSClear Risk Methodology''); (ii) the CDS Clearing Supplement (''Supplement''); and (iv) the CDS Clearing Procedures (''Procedures'').[6]

i. Changes to the CDSClear Risk Methodology

LCH SA's existing Total Initial Margin Framework is comprised of the following components: Self Referencing Margin; Spread Margin; WWR Margin; Short Charge Margin; Interest Rate Risk Margin; Recovery Rate Margin; Vega Margin; and certain additional margins, including Liquidity and Concentration Risk Margin. The proposed rule change would apply LCH SA's existing margin methodology to the clearing of Subordinated Financials, and in doing so, would adapt certain components of that margin methodology for the clearing of Subordinated Financials. Specifically, the proposed rule change would adapt the Spread Margin, WWR Margin, Short Charge Margin, and Liquidity and Concentration Risk Margin components to the clearing of Subordinated Financials.

With respect to the Spread Margin, LCH would use the historical data available for Subordinated Financials and would consider Subordinated Financials to be a different instrument than senior debt for purposes of portfolio margining.

With respect to WWR Margin, the proposed rule change would cover Subordinated Financials with specific shocks calibrated from available historical data.

With respect to the Short Charge, the proposed rule change would apply to Subordinated Financials the existing global short charge that covers non-financials, but would consider shocks in the recovery rates to ensure that the short charge covers the different recovery rates for Subordinated Financials. With respect to calculating the short charge for portfolios containing Subordinated Financials, LCH believes that considering shocks in the recovery rates without modifying the number of defaults would lead to overly conservative margins where jump-to-default would outweigh other components of the margin methodology.[7] To avoid this outcome the proposed rule change would decrease the number of expected credit events in the five days following the default of a Clearing Member from two to one, by moving the second credit event to the ''extreme market conditions'' category as opposed to the ''normal market conditions'' category. The proposed rule change would also calculate the exposure the portfolio has to each underlying reference entity and the probability of each combination of defaults, to define the maximum amount that could be lost with a 99.7% confidence due to default events. The proposed rule change would then retain the greater of this calculated amount and the top exposure with a shifted recovery rate as the Short Charge margin.

Finally, the proposed rule change would make similar changes with respect to the stressed short charge and global short charge, and a specific change for CDX.HY names, by taking the stress short charge as the maximum of the sum of the top two exposures and the average across the ten riskiest entities.

With respect to Liquidity and Concentration Risk Margin, the proposed rule change would apply the existing liquidity charge to Subordinated Financials as a new instrument but would consider Subordinated Financials jointly with Senior CDS for purposes of the concentration charge component of the margin charge.

ii. Changes to the Supplement

The proposed rule change would amend the Supplement, which establishes the legal terms for CDS transactions cleared by LCH SA. The proposed rule change would amend the Supplement to include relevant language needed for clearing Subordinated Financials. Specifically, with respect to defining Credit Events, the proposed rule change would change various references to ''Restructuring Credit Event'' to ''M(M)R Restructuring'' or add references ''M(M)R Restructuring'', to make clear that these provisions apply to a restructuring that is a ''M(M)R Restructuring.'' This change is needed because clearing Subordinated Financials would introduce transactions for which Restructuring is a Credit Event but where ''M(M)R Restructuring'' is not applicable, and thus, in specifying provisions that would apply to ''M(M)R Restructuring'' the proposed rule change would clarify that these provisions would not apply to a restructuring of Subordinated Financials. Moreover, a number of provisions of the Supplement, such as the defined terms, apply to all Cleared Transactions that refer to a Reference Entity, which would include Cleared Transactions involving Subordinated Financials. However, the clearing of Subordinated Financials would mean that a portfolio could contain CDS contracts that have the same underlying Reference Entity but which reference different seniorities of debt issued by that Reference Entity. Certain Credit Events or Succession Events with respect to a Reference Entity could apply or not apply to a CDS contract, depending on seniority and/or transaction type. Thus, where appropriate and necessary, the proposed rule change would add wording to the relevant provisions of the Supplement to clarify that that, depending on the Reference Entity, Transaction Type, or Reference Obligation, those provisions may apply or not apply to a specific transaction. In connection with this change, the proposed rule change would also add a definition for, and various references to, the term ''Component Transaction'' to distinguish further cleared transactions by Reference Entity

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 86576 (Aug. 6, 2019), 84 FR 39386 (Aug. 9, 2019) (SR–LCH–SA–2019–005) (''Notice'').

[4] Securities Exchange Act Release No. 86834 (Aug. 30, 2019), 84 FR 46984 (Sep. 6, 2019) (SR–LCH–SA–2019–005).

[5] The following description is substantially excerpted from the Notice. *See* Notice, 84 FR at 39386. For further explanation on the background and creation of Subordinated Financials, *see* Notice, 84 FR at 39386.

[6] Capitalized terms not otherwise defined herein have the meanings assigned to them in the LCH SA rulebook, the CDSClear Risk Methodology, Supplement, or Procedures.

[7] *See* Notice, 84 FR at 39387.

and Transaction Type. The proposed rule change would also make various modifications to use of the Physical Settlement Matrix to accommodate clearing of Subordinated Financials.

Finally, unrelated to the clearing of Subordinated Financials, the proposed rule change would modify inaccurate references to the CCM Client account structure. Earlier this year, LCH SA amended its rules to permit Clearing Members to create multiple account structures for a single client and multiple trade accounts per client within a single omnibus account structure.[8] In line with that change, the proposed rule change would update certain portions of the Supplement to make clear that Clearing Members may create multiple account structures for a single client and multiple trade accounts per client within a single omnibus account structure. LCH SA did not make these changes in the earlier amendment, and the proposed rule change would make these changes now to ensure consistency with the amendment from earlier this year. The proposed rule change would also make various typographical and technical corrections to the CDS Clearing Supplement and update references as needed.

iii. Changes to the Procedures

Consistent with the changes to the Supplement, the proposed rule change would modify Section 4 of the Procedures to treat transactions differently depending upon the Transaction Type and/or seniority of a transaction. Similarly, the proposed rule change would add a reference to seniority and Reference Entity, Transaction Type, and Reference Obligation in Procedure 4.3. As discussed above, the clearing of Subordinated Financials would mean that a portfolio could contain CDS contracts that have the same underlying Reference Entity but which reference different seniorities of debt issued by that Reference Entity. Thus, the proposed rule change would modify Section 4 of the Procedures to distinguish the Reference Obligation by seniority level, if applicable.

B. WWR Margin

To address certain recommendations arising out of a recent model validation, the proposed rule change would make two changes to WWR margin designed to enhance the WWR margin's stability and decrease its volatility. First, the proposed rule change would calculate WWR margin as if it was inside the expected shortfall. Second, the proposed rule change would include the iTraxx Main index in the WWR margin calculation, with a dedicated shock defined separately from the iTraxx Senior Financials and iTraxx Subordinated Financials indices.

C. Modification to DFAM

Independent of and unrelated to LCH SA's proposal to introduce the clearing of Subordinated Financials, the proposed rule change would also modify DFAM. LCH SA's intent in collecting DFAM is to ensure that LCH SA collects from a Clearing Member additional margin to account for the stress risk of that Clearing Member above a certain threshold (defined as a percentage of the size of the Default Fund and dependent on the internal credit score of the Clearing Member). In other words, DFAM gradually demutualizes a Clearing Member's stress risk above and beyond a certain threshold of the Default Fund by collecting additional margin from that Clearing Member (rather than covering such stress risk through the Default Fund). However, according to LCH SA, it does not intend to require Clearing Members to deposit a total amount of resources for a given clearing service higher than that Clearing Member's worst stress loss for that service. To ensure that the sum of all resources called from a Clearing Member, including DFAM, does not exceed the stress tested loss measured for that Clearing Member, consistent with LCH SA's intent in collecting DFAM,[9] the proposed rule change would put in place a cap on the amount of DFAM to ensure that, in collecting DFAM, LCH SA does not unintentionally require a Clearing Member to contribute resources greater than the Clearing Member's worst stress loss. The proposed rule change would do so by amending the CDSClear Default Fund Methodology to ensure that DFAM could not exceed a Clearing Member's Stress Test Loss Over Additional Margin, which would be defined as a Clearing Member's Stress Test Loss, minus that Clearing Member's contribution to the Default Fund.

III. Commission Findings

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the organization.[10] For the reasons given below, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act[11] and Rules 17Ad–22(e)(1) and (e)(6)(i) thereunder.[12]

A. Consistency With Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of LCH SA be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions, to assure the safeguarding of securities and funds which are in the custody or control of LCH SA or for which it is responsible, and, in general, to protect investors and the public interest.[13]

As described above, the proposed rule change would facilitate the clearing of Subordinated Financials by LCH SA, which, as discussed above, consist of the Markit iTraxx Subordinated Financials Index CDS and Related Single Name CDS Constituents. To do so, the proposed rule change would amend the CDSClear Risk Methodology to apply LCH SA's existing margin methodology to Subordinated Financials and, relatedly, amend the Supplement and the Procedures to add new terms and revise existing terms and references as necessary to ensure that Subordinated Financials are clearly and accurately defined and referenced throughout LCH SA's existing rulebook. By making these changes to facilitate LCH SA's clearance and settlement of these additional CDS contracts, the Commission believes the proposed rule change would promote the prompt and accurate clearance and settlement of securities transactions.

Moreover, as described above, the proposed rule change would make a number of changes to LCH SA's margin methodology, which the Commission believes would improve the operation and effectiveness of the margin methodology. First, in adapting LCH SA's margin methodology to the clearance and settlement of Subordinated Financials, the Commission believes that the proposed rule change would help to ensure that LCH SA's margin system effectively deals with, and collects margin to cover, the risks associated with clearing these additional CDS contracts. Second, the Commission believes that, by incorporating the changes to the WWR

[8] Securities Exchange Act Release No. 86376 (July 15, 2019), 84 FR 34955 (July 19, 2019) (SR–LCH–SA–2019–003).

[9] *See* Notice, 84 FR at 39387.

[10] 15 U.S.C. 78s(b)(2)(C).

[11] 15 U.S.C. 78q–1(b)(3)(F).

[12] 17 CFR 240.17Ad–22(e)(1) and (e)(6)(i).

[13] 15 U.S.C. 78q–1(b)(3)(F).

margin described above, the proposed rule change would help to ensure that WWR margin operates effectively and accurately captures and covers the wrong-way-risk associated with clearing certain portfolios. Finally, the Commission believes that in establishing a cap on DFAM the proposed rule change would help to ensure that LCH SA does not require Clearing Members to deposit a total amount of resources for a given clearing service higher than their worst stress loss for that service, consistent with LCH SA's intent in collecting DFAM.

Given that an effective margin system is necessary to manage LCH SA's credit exposures to its Clearing Members and the risks associated with clearing security based swap-related portfolios, the Commission believes that the proposed rule change would help improve LCH SA's ability to avoid potential losses that could result from the mismanagement of credit exposures and the risks associated with clearing security based swap-related portfolios. Because such losses could disrupt LCH SA's ability to promptly and accurately clear security based swap transactions, the Commission believes that the proposed rule change, by improving the operation and effectiveness of LCH SA's margin system, would thereby help promote the prompt and accurate clearance and settlement of securities transactions. Similarly, given that such losses could threaten LCH SA's ability to operate, thereby threatening access to securities and funds in LCH SA's control, the Commission believes that the proposed rule change would help assure the safeguarding of securities and funds which are in the custody or control of the LCH SA or for which it is responsible. For both of these reasons, the Commission believes the proposed rule change would, in general, protect investors and the public interest. Finally, the Commission believes that in helping to ensure that LCH SA does not collect from a Clearing Member DFAM higher than its worst stress loss, the proposed rule change would leave a Clearing Member with additional liquidity to engage in CDS transactions, which would therefore promote the clearance and settlement of CDS transactions.

Finally, as discussed above, the proposed rule change would correct typographical errors, make technical corrections, and update references as needed to the Supplement and Procedures, including modifying inaccurate references to the CCM Client account structure. The Commission believes that these changes would help to ensure that the Supplement and Procedures are clear and operate effectively, consistent with LCH SA's intent. The Commission further believes that clear and effective Supplement and Procedures are necessary for LCH SA to promptly and accurately clear and settle CDS transactions, and therefore that this aspect of the proposed rule change also would promote the prompt and accurate clearance and settlement of securities transactions.

Therefore, the Commission finds that the proposed rule change would promote the prompt and accurate clearance and settlement of securities transactions, assure the safeguarding of securities and funds in LCH SA's custody and control, and in general, protect investors and the public interest, consistent with the Section 17A(b)(3)(F) of the Act.[14]

B. Consistency With Rule 17Ad–22(e)(1)

Rule 17Ad-22(e)(1) requires that LCH SA establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for a well-founded, clear, transparent, and enforceable legal basis for each aspect of its activities in all relevant jurisdictions.[15] The Commission believes that the proposed rule change, in introducing new terms, as well as correcting typographical errors and updating references, would help to ensure that the Supplement and Procedures provide a consistent and enforceable legal basis for clearing Subordinated Financials. Therefore, the Commission finds that the proposed rule change is consistent with Rule 17Ad–22(e)(1).[16]

C. Consistency With Rule 17Ad–22(e)(6)(i)

Rule 17Ad–22(e)(6)(i) requires that LCH SA establish, implement, maintain, and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, considers, and produces margin levels commensurate with, the risks and particular attributes of each relevant product, portfolio, and market.[17]

The Commission believes that the proposed rule change, in adapting LCH SA's margin methodology to the clearance and settlement of Subordinated Financials, would help to ensure that LCH SA's margin system considers, and produces margin levels commensurate with, the risks and particular attributes of these additional CDS contracts. Moreover, the Commission believes that, by incorporating the changes to the WWR margin described above, the proposed rule change would help to ensure that LCH SA's margin system considers, and produces margin levels commensurate with, the wrong-way-risk associated with clearing certain portfolios. Finally, in capping DFAM to ensure that Clearing Members are not required to deposit a total amount of resources for a given clearing service higher than their worst stress loss for that service, consistent with LCH SA's intent, the Commission believes that the proposed rule change would help to ensure that LCH SA's margin requirement does not exceed the stress loss risk associated with a Clearing Member, and thus is set at a level commensurate with the stress risk posed by a particular Clearing Member's portfolio. Because the proposed rule change would not prevent LCH SA from collecting DFAM up to the stress loss risk associated with a Clearing Member, however, the Commission believes the proposed rule change would not interfere with LCH SA's ability to cover its credit exposures to Clearing Members through DFAM.

Therefore, the Commission finds that the proposed rule change is consistent with Rule 17Ad–22(e)(6)(i).[18]

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and in particular, with the requirements of Section 17A(b)(3)(F) of the Act[19] and Rules 17Ad–22(e)(1) and (e)(6)(i) thereunder.[20]

It is therefore ordered pursuant to Section 19(b)(2) of the Act[21] that the proposed rule change (SR–LCH–SA–2019–005), be, and hereby is, approved.[22]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–24693 Filed 11–13–19; 8:45 am]

BILLING CODE 8011–01–P

[14] 15 U.S.C. 78q–1(b)(3)(F).

[15] 17 CFR 240.17Ad–22(e)(1).

[16] *Id.*

[17] 17 CFR 240.17Ad–22(e)(6)(i).

[18] *Id.*

[19] 15 U.S.C. 78q–1(b)(3)(F).

[20] 17 CFR 240.17Ad–22(e)(1) and (e)(6)(i).

[21] 15 U.S.C. 78s(b)(2).

[22] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87488; File No. SR–NYSEArca–2019–79]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 7.37–E To Specify in Exchange Rules the Exchange's Use of Data Feeds From NYSE Chicago, Inc.

November 7, 2019.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on October 31, 2019, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to: (1) Amend Rule 7.37–E to specify in Exchange rules the Exchange's use of data feeds from NYSE Chicago, Inc. (''NYSE Chicago'') for order handling and execution, order routing, and regulatory compliance; and (2) amend Rule 7.45–E to reflect that Archipelago Securities LLC (''Arca Securities'') would function as a routing broker for the Exchange's affiliate, NYSE Chicago. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to update and amend the table in Rule 7.37–E that sets forth on a market-by-market basis the specific network processor and proprietary data feeds that the Exchange utilizes for the handling, execution and routing of orders, and for performing the regulatory compliance checks related to each of those functions. Specifically, the table would be amended to include NYSE Chicago, which intends to migrate to the Pillar trading platform.[4] Rule 7.37–E currently provides that the Chicago Stock Exchange, Inc., the predecessor name of NYSE Chicago, utilizes the securities information processor (''SIP'') data feed as its primary source for the handling, execution and routing of orders, as well as for regulatory compliance, and does not use a secondary source. Once NYSE Chicago transitions trading to Pillar, it would use a direct data feed as its primary source and the SIP data feed as a secondary source. To reflect these changes, the Exchange proposes to amend Rule 7.37–E to specify which data feeds the Exchange would use for NYSE Chicago. Specifically, the Exchange proposes to amend the rule to provide that NYSE Chicago would use the direct data feed as the primary source and would use the SIP data feed as a secondary source.

Additionally, the Exchange proposes to amend Rule 7.45–E to reflect that Arca Securities would function as a routing broker for the Exchange's affiliate, NYSE Chicago. Specifically, the Exchange proposes to amend Rule 7.45–E(c)(1) and (2) to reference NYSE Chicago as an affiliate of the Exchange for the purposes of the inbound routing function performed by Arca Securities. The proposed rule change would provide more clarity and transparency to all the functions that Arca Securities performs on behalf of the Exchange and its affiliates, which now includes NYSE Chicago. The Exchange is not proposing any substantive change to the rule.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[5] in general, and furthers the objectives of Section 6(b)(5),[6] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes its proposal to update the table in Rule 7.37–E to include NYSE Chicago will ensure that Rule 7.37–E correctly identifies and publicly states on a market-by-market basis all of the specific network processor and proprietary data feeds that the Exchange utilizes for the handling, execution and routing of orders, and for performing the regulatory compliance checks to each of those functions. The proposed rule change also removes impediments to and perfects the mechanism of a free and open market and protects investors and the public interest because it provides additional specificity, clarity and transparency. The Exchange believes the proposed rule change to amend Rule 7.45–E also removes impediments to and perfects the mechanism of a free and open market and protects investors and the public interest because the proposed rule change would enhance the clarity and transparency in Exchange Rules surrounding the inbound routing function performed by Arca Securities for the Exchange's affiliate, NYSE Chicago.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is not designed to address any competitive issue but rather would provide the public and investors with information about which data feeds the Exchange uses for execution and routing decisions, and provide clarity in Exchange rules that Arca Securities would perform the inbound routing function on behalf on the Exchange's affiliate, NYSE Chicago.

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] NYSE Chicago has announced that, subject to rule approvals, it will transition to trading on Pillar on November 4, 2019. *See* Trader Update, *available here: https://www.nyse.com/publicdocs/nyse/notifications/trader-update/NYSEChicago_Migration_update_9.4.pdf.*

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act [7] and Rule 19b–4(f)(6) thereunder.[8]

A proposed rule change filed under Rule 19b–4(f)(6) [9] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[10] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange represents that the proposal would correctly identify and publicly state on a market-by-market basis all of the specific network processor and proprietary data feeds that the Exchange utilizes for the handling, execution and routing of orders, and for performing the regulatory compliance checks to each of those functions. Further, the Exchange represents that the proposal would enhance the clarity and transparency in Exchange Rules surrounding the inbound routing function performed by Arca Securities for the Exchange's affiliate, NYSE Chicago. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest, and hereby waives the operative delay and designates the proposed rule change as operative upon filing.[11]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [12] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2019–79 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2019–79. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*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 website 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–NYSEArca–2019–79 and should be submitted on or before December 5, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–24696 Filed 11–13–19; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[9] 17 CFR 240.19b–4(f)(6).

[10] 17 CFR 240.19b–4(f)(6)(iii).

[11] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78s(b)(2)(B).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87486; File No. SR–NASDAQ–2019–061]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Nasdaq Official Closing Price for Nasdaq-Listed Exchange-Traded Products

November 7, 2019.

I. Introduction

On August 8, 2019, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change relating to how the Nasdaq Official Closing Price (''NOCP'') will be determined for a Nasdaq-listed security that is an exchange-traded product (''ETP''). The proposed rule change was published for comment in the **Federal Register** on August 23, 2019.[3] On October 4, 2019, pursuant to Section 19(b)(2) of the Act,[4] the Commission designated a longer period within which

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 86705 (August 19, 2019), 84 FR 44343 (''Notice'').

[4] 15 U.S.C. 78s(b)(2).

to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] The Commission received one comment letter from the Exchange on the proposed rule change.[6] On October 25, 2019, the Exchange filed Amendment No. 1 to the proposed rule change.[7] The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons, and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description of the Proposed Rule Change

Currently, for a Nasdaq-listed ETP that participates in the Nasdaq closing cross, the closing cross price will be the NOCP.[8] For a Nasdaq-listed ETP that does not have a closing cross, the Nasdaq last sale price will be the NOCP.[9] According to the Exchange, thinly-traded ETPs are less likely to have a closing cross, which can result in a closing price that is based on a stale price that is no longer reflective of the value of the security.[10] Specifically, if an ETP is thinly-traded, it is possible that the NOCP would be based on a Nasdaq last sale price that may not necessarily reflect the current value of the security.[11] The Exchange now proposes to amend Nasdaq Rule 4754(b)(4) to amend how it would determine the NOCP for a Nasdaq-listed ETP[12] that does not have a closing cross.[13]

Under proposed Nasdaq Rule 4754(b)(4)(A), the NOCP for a Nasdaq-listed ETP that does not have a closing cross would be the time-weighted average midpoint (''T–WAM'') of the national best bid and national best offer (''NBBO''), with certain parameters. Specifically, the T–WAM price would be a time-weighted average midpoint value calculation that uses eligible quotes during the time period of 3:58:00 p.m. to 3:59:55 p.m., based on quotes observed every second.[14] The T–WAM calculation would only use eligible quotes, and an eligible quote would be defined as a quote whose spread is no greater than a value of 10% of the midpoint price. Quoted spreads within the T–WAM time period that are greater than 10% of the midpoint price would be excluded from the T–WAM calculation. Crossed NBBO markets would also be excluded from the T–WAM calculation.

As proposed, if there are no eligible quotes to use in the T–WAM calculation or if the ETP is halted, the Exchange would use the consolidated last sale price prior to 4:00:00 p.m. as the NOCP. For an ETP that is already listed on Nasdaq, if there are no eligible quotes to use in the T–WAM calculation and no consolidated last sale prices that day, the NOCP would be the previous day's NOCP. For an ETP that transferred its listing to Nasdaq, if there are no eligible quotes to use in the T–WAM calculation and no consolidated last sale prices that day, the NOCP would be the previous day's closing price as disseminated by the primary listing market that previously listed the ETP. For an ETP that is a new Nasdaq listing, if there are no eligible quotes to use in the T–WAM calculation and no consolidated last sale prices that day, the NOCP would not be disseminated.

The Exchange proposes to implement the proposed rule change within 30 calendar days following Commission approval and will announce the implementation date via Nasdaq Equity Trader Alert.[15]

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[16] In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act,[17] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Commission also finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(8) of the Act,[18] which requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

As noted above, the proposal would amend how the Exchange would determine the NOCP for a Nasdaq-listed

[5] *See* Securities Exchange Act Release No. 87230, 84 FR 54714 (October 10, 2019). The Commission designated November 21, 2019, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[6] *See* letter from Phil Mackintosh, Chief Economist, Nasdaq, Inc., dated October 10, 2019, available at *https://www.sec.gov/comments/sr-nasdaq-2019-061/srnasdaq2019061-6293523-193399.pdf* (''Nasdaq Letter'').

[7] In Amendment No. 1, the Exchange provided additional justification for its proposed methodology for determining the NOCP for Nasdaq-listed ETPs and specified that it will implement the proposed rule change within 30 calendar days following Commission approval. Amendment No. 1 is available at *https://www.sec.gov/comments/sr-nasdaq-2019-061/srnasdaq2019061-6353201-195587.pdf.*

[8] *See* Nasdaq Rule 4754(b)(4).

[9] *See* Notice, *supra* note 3, at 44344–45.

[10] *See id.* at 44344.

[11] *See id.*

[12] As used in proposed Nasdaq Rule 4754(b)(4), an ETP would mean a series of Portfolio Depository Receipts, Index Fund Shares, Managed Fund Shares, or Trust Issued Receipts (as defined in Nasdaq Rules 5705(a), 5705(b), 5735, and 5720, respectively); securities linked to the performance of indexes and commodities (including currencies) (as defined in Nasdaq Rule 5710); Index-Linked Exchangeable Notes, Equity Gold Shares, Trust Certificates, Commodity-Based Trust Shares, Currency Trust Shares, Commodity Index Trust Shares, Commodity Futures Trust Shares, Partnership Units, Trust Units, Managed Trust Securities, or Currency Warrants (as defined in Nasdaq Rule 5711(a)–(k)). The proposal would not apply to NextShares (as defined in Nasdaq Rule 5745) and corporate securities. *See* Notice, *supra* note 3, at 44344 n.4.

[13] The Exchange is not proposing to change the process for determining the price level at which the closing cross will occur. *See id.* at 44344 n.9. Nasdaq-listed ETPs that have closing crosses will continue to be priced using the current process for calculating the closing cross price. *See id.* at 44344.

[14] The Exchange states that it has considered using the last sale for an ETP that does not have a closing cross, but determined that even if the last sale occurs during the last two minutes leading into the closing cross, it is not necessarily reflective of the best price to use for the NOCP (*e.g.*, a wide quote and a last sale that is based on either the bid or the offer would not be as accurate as the midpoint of the prevailing quotes at that time). *See* Amendment No. 1, *supra* note 7, at 3. According to the Exchange, using the proposed T–WAM methodology would eliminate a valuation based on a last sale transaction occurring against an excessively wide NBBO, and even when spreads are wide, the midpoint of the spread is usually close to the fair value of the underlying basket of the ETP. *See id.* The Exchange also states that this rationale is based, in part, on conversations with issuers, who are supportive of the proposal. *See id.*

[15] *See* Notice, *supra* note 3, at 44345 and Amendment No. 1, *supra* note 7, at 4.

[16] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[17] 15 U.S.C. 78f(b)(5).

[18] 15 U.S.C. 78f(b)(8).

ETP that does not have a closing cross. The Commission notes that the primary listing market's closing price for a security is relied upon by market participants for a variety of reasons, including, but not limited to, calculation of index values, calculation of the net asset value of mutual funds and exchange-traded products, the price of derivatives that are based on the security, and certain types of trading benchmarks such as volume weighted average price strategies. The Commission believes that the proposed methodology for determining the NOCP for a Nasdaq-listed ETP that does not have a closing cross could provide a NOCP that is more reflective of the current value of the ETP than a potentially stale last sale price, especially for a thinly-traded ETP.[19] In particular, the Nasdaq last sale trade for an ETP that occurred earlier in a trading day or even from a prior trading day may no longer be reflective of the value of the ETP, which should be priced relative to the value of its components.[20] The Commission therefore believes that the Exchange's proposal is reasonably designed to achieve the Act's objectives to protect investors and the public interest. Accordingly, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act.

IV. Solicitation of Comments on Amendment No. 1 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 1 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2019–061 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–NASDAQ–2019–061. 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 website (*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 website 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–NASDAQ–2019–061, and should be submitted on or before December 5, 2019.

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 1 in the **Federal Register.** As discussed above, in Amendment No. 1, the Exchange provided additional justification for its proposed methodology for determining the NOCP for Nasdaq-listed ETPs and specified that it will implement the proposed rule change within 30 calendar days following Commission approval. The Commission notes that Amendment No. 1 does not materially alter the substance of the proposal and provides additional clarity and justification to the proposal. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[21] to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[22] that the proposed rule change (SR–NASDAQ–2019–061), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–24694 Filed 11–13–19; 8:45 am]

BILLING CODE 8011–01–P

[19] *See* Notice, *supra* note 3, at 44344–45. Moreover, according to the Exchange, when there is no closing cross at 4:00:00 p.m., the Exchange's internal research has shown that using the T–WAM of the time period between 3:58:00 p.m. and 3:59:55 p.m. results in a price that reflects a fair current valuation and is reflective of the price that was calculated by the closing cross. *See id.* at 44344 n.12 and 44345. *See also* Nasdaq Letter, *supra* note 6 (providing more details regarding the Exchange's internal research relating to this proposal).

[20] *See* Notice, *supra* note 3, 44345. According to the Exchange, the proposal would not apply to NextShares because its reference trading price is reset to 100 every day for quoting purposes and the actual net asset value does not correspond to this reference price, and therefore the midpoints are not applicable in determining a more accurate fair value of the basket. *See id.* at 44344 n.4. The proposal also would not apply to corporate securities because, unlike ETPs, they do not have a net asset value along with an arbitrage component that keeps the prices in line. *See id.*

[21] 15 U.S.C. 78s(b)(2).

[22] *Id.*

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87490; File No. SR–NYSENAT–2019–25]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 7.37 To Specify in Exchange Rules the Exchange's Use of Data Feeds From NYSE Chicago, Inc.

November 7, 2019.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on October 31, 2019, NYSE National, Inc. (''NYSE National'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to: (1) Amend Rule 7.37 to specify in Exchange rules the Exchange's use of data feeds from NYSE Chicago, Inc. (''NYSE Chicago'') for order handling and execution, order routing, and regulatory compliance; and (2) amend Rule 7.45 to reflect that Archipelago Securities LLC (''Arca Securities'') would function as a routing broker for the Exchange's affiliate, NYSE Chicago. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to update and amend the table in Rule 7.37 that sets forth on a market-by-market basis the specific network processor and proprietary data feeds that the Exchange utilizes for the handling, execution and routing of orders, and for performing the regulatory compliance checks related to each of those functions. Specifically, the table would be amended to include NYSE Chicago, which intends to migrate to the Pillar trading platform.[4] Rule 7.37 currently provides that the Chicago Stock Exchange, Inc., the predecessor name of NYSE Chicago, utilizes the securities information processor (''SIP'') data feed as its primary source for the handling, execution and routing of orders, as well as for regulatory compliance, and does not use a secondary source. Once NYSE Chicago transitions trading to Pillar, it would use a direct data feed as its primary source and the SIP data feed as a secondary source. To reflect these changes, the Exchange proposes to amend Rule 7.37 to specify which data feeds the Exchange would use for NYSE Chicago. Specifically, the Exchange proposes to amend the rule to provide that NYSE Chicago would use the direct data feed as the primary source and would use the SIP data feed as a secondary source.

Additionally, the Exchange proposes to amend Rule 7.45 to reflect that Arca Securities would function as a routing broker for the Exchange's affiliate, NYSE Chicago. Specifically, the Exchange proposes to amend Rule 7.45(c)(1) and (2) to reference NYSE Chicago as an affiliate of the Exchange for the purposes of the inbound routing function performed by Arca Securities. The proposed rule change would provide more clarity and transparency to all the functions that Arca Securities performs on behalf of the Exchange and its affiliates, which now includes NYSE Chicago. The Exchange is not proposing any substantive change to the rule.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[5] in general, and furthers the objectives of Section 6(b)(5),[6] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes its proposal to update the table in Rule 7.37 to include NYSE Chicago will ensure that Rule 7.37 correctly identifies and publicly states on a market-by-market basis all of the specific network processor and proprietary data feeds that the Exchange utilizes for the handling, execution and routing of orders, and for performing the regulatory compliance checks to each of those functions. The proposed rule change also removes impediments to and perfects the mechanism of a free and open market and protects investors and the public interest because it provides additional specificity, clarity and transparency. The Exchange believes the proposed rule change to amend Rule 7.45 also removes impediments to and perfects the mechanism of a free and open market and protects investors and the public interest because the proposed rule change would enhance the clarity and transparency in Exchange Rules surrounding the inbound routing function performed by Arca Securities for the Exchange's affiliate, NYSE Chicago.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is not designed to address any competitive issue but rather would provide the public and investors with information about which data feeds the Exchange uses for execution and routing decisions, and provide clarity in Exchange rules that Arca Securities would perform the inbound routing function on behalf on the Exchange's affiliate, NYSE Chicago.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(6) thereunder.[8]

A proposed rule change filed under Rule 19b–4(f)(6)[9] normally does not become operative prior to 30 days after the date of the filing. However, pursuant

[4] NYSE Chicago has announced that, subject to rule approvals, it will transition to trading on Pillar on November 4, 2019. *See* Trader Update, *available here: https://www.nyse.com/publicdocs/nyse/notifications/trader-update/NYSEChicago_Migration_update_9.4.pdf.*

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[9] 17 CFR 240.19b–4(f)(6).

to Rule 19b–4(f)(6)(iii),[10] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange represents that the proposal would correctly identify and publicly state on a market-by-market basis all of the specific network processor and proprietary data feeds that the Exchange utilizes for the handling, execution and routing of orders, and for performing the regulatory compliance checks to each of those functions. Further, the Exchange represents that the proposal would enhance the clarity and transparency in Exchange Rules surrounding the inbound routing function performed by Arca Securities for the Exchange's affiliate, NYSE Chicago. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest, and hereby waives the operative delay and designates the proposed rule change as operative upon filing.[11]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[12] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSENAT–2019–25 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–NYSENAT–2019–25. 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 website (*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 website 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–NYSENAT–2019–25 and should be submitted on or before December 5, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–24698 Filed 11–13–19; 8:45 am]

BILLING CODE 8011–01–P

[10] 17 CFR 240.19b–4(f)(6)(iii).

[11] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78s(b)(2)(B).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87487; File No. SR–BX–2019–040]

Self-Regulatory Organizations; Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 4759

November 7, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 29, 2019, Nasdaq BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 4759, as described below. While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on November 4, 2019.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaqbx.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 4759, which lists the proprietary

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

and network processor feeds that the Exchange utilizes for the handling, routing, and execution of orders, as well as for the regulatory compliance processes related to those functions. Presently, the Exchange's trading system utilizes proprietary market data as the Primary Source of quotation data for the following markets that provide a reliable direct feed: NYSE American, Nasdaq BX, CBOE EDGA, CBOE EDGX, CHX, NYSE, NYSE Arca, Nasdaq, Nasdaq PSX, CBOE BYX, and CBOE BZX. For each of these markets, the Exchange uses SIP data as the Secondary Source of quotation data.[3] For other markets, namely NYSE National, FINRA ADF, and IEX, the Exchange utilizes SIP data as the Primary Source; there is no Secondary Source for those markets. The Exchange proposes to amend Rule 4759 to state that going forward, the Exchange will utilize SIP data, rather than a direct feed, as its Primary Source of data for CHX (now known as NYSE Chicago [4]), with no Secondary Source utilized for that data. The Exchange proposes this amendment to reflect the fact that NYSE Chicago is migrating to a new technology platform and that, after November 1, 2019, it has announced that it will cease offering the NYSE Chicago Book Feed that currently serves as its direct feed to the Exchange.[5] Although the Exchange understands that NYSE Chicago plans to offer new data feeds to replace the NYSE Chicago Book Feed, the Exchange has yet to decide whether it will utilize them.[6]

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5) of the Act,[8] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The Exchange believes that it is necessary to amend its Rules to account for the fact that, after November 1, 2019, NYSE Chicago will no longer offer the direct feed to which the Exchange currently subscribes. The Exchange notes that it already utilizes the SIP as its sole source of quote data for NYSE National and IEX—as well as the FINRA ADF, without issue. In the event that the Exchange determines that its proposal to utilize SIP data is inadequate for its purposes, then the Exchange may choose to subscribe to one or more of the replacement proprietary data feeds that NYSE Chicago plans to offer beginning on November 4, 2019.

Lastly, the Exchange believes that it is consistent with the public interest and the protection of investors to update the names of the exchanges listed in Rule 4759 as this change will make it easier for market participants to identify the exchanges for which the Exchange uses the direct feed and/or SIP for the purposes described in the Rule.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issue; instead, it is merely intended to reflect the fact that the Exchange will no longer consume the NYSE Chicago Book Feed, which NYSE Chicago plans to discontinue after November 1, 2019. The Exchange does not expect that its decision to utilize the SIP, going forward, to obtain NYSE Chicago quote data will have any competitive impacts. As noted above, the Exchange presently utilizes the SIP as its sole source of quote data for several other exchanges, including NYSE National and IEX.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [9] and Rule 19b–4(f)(6) thereunder.[10]

A proposed rule change filed under Rule 19b–4(f)(6) [11] normally does not become operative for 30 days from the date of filing. However, Rule 19b–4(f)(6)(iii) [12] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the Exchange can amend Rule 4759 prior to the discontinuation of the NYSE Chicago Book Feed. The Exchange states that waiver of the operative delay would prevent Rule 4759 from being inaccurate and causing confusion among investors and the public. For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change operative upon filing.[13]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. 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:

[3] Pursuant to Rule 4759, the Primary Source of data is used unless it is delayed by a configurable amount compared to the Secondary Source of data. The Exchange reverts to the Primary Source of data once the delay has been resolved.

[4] The Exchange also proposes to update the Rule to reflect the fact that the Chicago Stock Exchange is now known as NYSE Chicago.

[5] *See https://www.nyse.com/market-data/real-time#chicago.*

[6] *See id.* If and when the Exchange decides to subscribe to these replacement NYSE Chicago direct data feed products, the Exchange will file a proposal to amend Rule 4759 accordingly.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has requested that the Commission waive the pre-filing requirement. The Commission hereby waives that requirement.

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b–4(f)(6)(iii).

[13] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BX–2019–040 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2019–040. 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 website (*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 website 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–BX–2019–040 and should be submitted on or before December 5, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–24695 Filed 11–13–19; 8:45 am]

BILLING CODE 8011–01–P

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87481; File No. SR–NYSE–2019–57]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend NYSE Rule 7.37 To Specify the Exchange's Use of Data Feeds from NYSE Chicago, Inc.

November 6, 2019.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on October 31, 2019, New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to: (1) Amend Rule 7.37 to specify in Exchange rules the Exchange's use of data feeds from NYSE Chicago, Inc. (''NYSE Chicago'') for order handling and execution, order routing, and regulatory compliance; and (2) amend Rule 17 to reflect that Archipelago Securities LLC (''Arca Securities'') would function as a routing broker for the Exchange's affiliate, NYSE Chicago. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to update and amend the table in Rule 7.37 that sets forth on a market-by-market basis the specific network processor and proprietary data feeds that the Exchange utilizes for the handling, execution and routing of orders, and for performing the regulatory compliance checks related to each of those functions. Specifically, the table would be amended to include NYSE Chicago, which intends to migrate to the Pillar trading platform.[4] Rule 7.37 currenlty [sic] provides that the Chicago Stock Exchange, Inc., the predecessor name of NYSE Chicago, utilizes the securities information processor (''SIP'') data feed as its primary source for the handling, execution and routing of orders, as well as for regulatory compliance, and does not use a secondary source. Once NYSE Chicago transitions trading to Pillar, it would use a direct data feed as its primary source and the SIP data feed as a secondary source. To reflect these changes, the Exchange proposes to amend Rule 7.37 to specify which data feeds the Exchange would use for NYSE Chicago. Specifically, the Exchange proposes to amend the rule to provide that NYSE Chicago would use the direct data feed as the primary source and would use the SIP data feed as a secondary source.

Additionally, the Exchange proposes to amend Rule 17 to reflect that Arca Securities would function as a routing broker for the Exchange's affiliate, NYSE Chicago. Specifically, the Exchange proposes to amend Rule 17(c)(2)(A) and (B) to reference NYSE Chicago as an affiliate of the Exchange for the purposes of the inbound routing function performed by Arca Securities. The proposed rule change would provide more clarity and transparency to all the functions that Arca Securities performs on behalf of the Exchange and its affiliates, which now includes NYSE Chicago. The Exchange is not proposing any substantive change to the rule.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the

[4] NYSE Chicago has announced that, subject to rule approvals, it will transition to trading on Pillar on November 4, 2019. *See* Trader Update, *available here: https://www.nyse.com/publicdocs/nyse/notifications/trader-update/NYSEChicago_Migration_update_9.4.pdf.*

''Act''),[5] in general, and furthers the objectives of Section 6(b)(5),[6] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes its proposal to update the table in Rule 7.37 to include NYSE Chicago will ensure that Rule 7.37 correctly identifies and publicly states on a market-by-market basis all of the specific network processor and proprietary data feeds that the Exchange utilizes for the handling, execution and routing of orders, and for performing the regulatory compliance checks to each of those functions. The proposed rule change also removes impediments to and perfects the mechanism of a free and open market and protects investors and the public interest because it provides additional specificity, clarity and transparency. The Exchange believes the proposed rule change to amend Rule 17 also removes impediments to and perfects the mechanism of a free and open market and protects investors and the public interest because the proposed rule change would enhance the clarity and transparency in Exchange Rules surrounding the inbound routing function performed by Arca Securities for the Exchange's affiliate, NYSE Chicago.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is not designed to address any competitive issue but rather would provide the public and investors with information about which data feeds the Exchange uses for execution and routing decisions, and provide clarity in Exchange rules that Arca Securities would perform the inbound routing function on behalf on the Exchange's affiliate, NYSE Chicago.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [7] and Rule 19b–4(f)(6) thereunder.[8] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.[9]

A proposed rule change filed under Rule 19b–4(f)(6) [10] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[11] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange represents that the proposal would correctly identify and publicly state on a market-by-market basis all of the specific network processor and proprietary data feeds that the Exchange utilizes for the handling, execution and routing of orders, and for performing the regulatory compliance checks to each of those functions. Further, the Exchange represents that the proposal would enhance the clarity and transparency in Exchange Rules surrounding the inbound routing function performed by Arca Securities for the Exchange's affiliate, NYSE Chicago. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest, and hereby waives the operative delay and designates the proposed rule change as operative upon filing.[12]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [13] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2019–57 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2019–57. 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 website (*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

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A)(iii).

[8] 17 CFR 240.19b–4(f)(6).

[9] In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6)(iii).

[12] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 15 U.S.C. 78s(b)(2)(B).

those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website 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–NYSE–2019–57 and should be submitted on or before December 5, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019–24692 Filed 11–13–19; 8:45 am]

BILLING CODE 8011–01–P

[14] 17 CFR 200.30–3(a)(12).

SELECTIVE SERVICE SYSTEM

Forms Submitted to the Office of Management and Budget for Extension of Clearance

AGENCY: Selective Service System.

ACTION: Notice.

The following forms have been submitted to the Office of Management and Budget (OMB) for extension of clearance in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35):

SSS FORM—402

Title: Uncompensated Registrar Appointment Form.

Purpose: Is used to verify the official status of applicants for the position of Uncompensated Registrars and to establish authority for those appointed to perform as Selective Service System Registrars.

Respondents: United States citizens over the age of 18.

Frequency: One time.

Burden: The reporting burden is three minutes or less per respondent.

Copies of the above identified form can be obtained upon written request to the Selective Service System, Reports Clearance Officer, 1515 Wilson Boulevard, Arlington, Virginia 22209–2425.

Written comments and recommendations for the proposed extension of clearance of the form should be sent within 60 days of the publication of this notice to the Selective Service System, Reports Clearance Officer, 1515 Wilson Boulevard, Arlington, Virginia 22209–2425.

A copy of the comments should be sent to the Office of Information and Regulatory Affairs, Attention: Desk Officer, Selective Service System, Office of Management and Budget, New Executive Office Building, Room 3235, Washington, DC 20503.

Dated: November 7, 2019.

Donald M. Benton,

Director.

[FR Doc. 2019–24759 Filed 11–13–19; 8:45 am]

BILLING CODE 8015–01–P

SELECTIVE SERVICE SYSTEM

Forms Submitted to the Office of Management and Budget for Extension of Clearance

AGENCY: Selective Service System.

ACTION: Notice.

The following forms have been submitted to the Office of Management and Budget (OMB) for extension of clearance in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35):

SSS FORM—404

Title: Potential Board Member Information

Purpose: Is used to identify individuals willing to serve as members of local, appeal or review boards in the Selective Service System.

Respondents: Potential Board Members.

Burden: A burden of 15 minutes or less on the individual respondent.

Copies of the above identified form can be obtained upon written request to the Selective Service System, Reports Clearance Officer, 1515 Wilson Boulevard, Arlington, Virginia 22209–2425.

Written comments and recommendations for the proposed extension of clearance of the form should be sent within 60 days of the publication of this notice to the Selective Service System, Reports Clearance Officer, 1515 Wilson Boulevard, Arlington, Virginia 22209–2425.

A copy of the comments should be sent to the Office of Information and Regulatory Affairs, Attention: Desk Officer, Selective Service System, Office of Management and Budget, New Executive Office Building, Room 3235, Washington, DC 20503.

Donald M. Benton,

Director.

[FR Doc. 2019–24758 Filed 11–13–19; 8:45 am]

BILLING CODE 8015–01–P

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA–2019–0016]

Privacy Act of 1974; Matching Program

AGENCY: Social Security Administration (SSA).

ACTION: Notice of a New Matching Program.

SUMMARY: In accordance with the provisions of the Privacy Act, as amended, this notice announces a new matching program with the Center for Medicare & Medicaid Services (CMS). This matching agreement establishes the terms, conditions, and safeguards under which CMS will disclose to SSA Medicare non-utilization information for Social Security Title II beneficiaries aged 90 and above. CMS will identify Medicare enrollees whose records have been inactive for three or more years. SSA will use this data as an indicator to select and prioritize cases for review to determine continued eligibility for benefits under Title II of the Social Security Act (Act). SSA will contact these individuals to verify ongoing eligibility. SSA will use this data for the purposes of fraud discovery and the analysis of fraud program operations; this agreement allows for SSA's Office of Anti-Fraud Programs (OAFP) to evaluate the data for the purposes of fraud detection. SSA will refer individual cases of suspected fraud, waste, or abuse to the Office of the Inspector General (OIG) for investigation.

DATES: The deadline to submit comments on the proposed matching program is 30 days from the date of publication of this notice in the **Federal Register**. The matching program will be applicable on January 1, 2020, or once a minimum of 30 days after publication of this notice has elapsed, whichever is later. The matching program will be in effect for a period of 18 months.

ADDRESSES: Interested parties may comment on this notice by either telefaxing to (410) 966–0869, writing to Matthew Ramsey, Executive Director, Office of Privacy and Disclosure, Office of the General Counsel, Social Security

Administration, G–401 WHR, 6401 Security Boulevard, Baltimore MD 21235–6401, or emailing *Matthew.Ramsey@ssa.gov.* All comments received will be available for public inspection by contacting Mr. Ramsey at this street address.

FOR FURTHER INFORMATION CONTACT: Norma Followell, Supervisory Team Lead, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, G–401 WHR, 6401 Security Boulevard, Baltimore, MD 21235–6401, at telephone: (410) 966–5855, or send an email to *Norma.Followell@ssa.gov.*

SUPPLEMENTARY INFORMATION: None.

Matthew Ramsey,

Executive Director, Office of Privacy and Disclosure, Office of the General Counsel.

PARTICIPATING AGENCIES:

SSA and CMS.

AUTHORITY FOR CONDUCTING THE MATCHING PROGRAM:

The legal authority for this agreement is executed in compliance with the Privacy Act of 1974 (5 U.S.C. 552a), as amended by the Computer Matching and Privacy Protection Act (CMPPA) of 1988 (Public Law (Pub. L.) 100–503), including 5 U.S.C. 552a(b)(3); section 1106 of the Act (42 U.S.C. 1306); and Office of Management and Budget guidelines pertaining to computer matching at 54 FR 25818 (June 19, 1989).

Section 202 of the Act (42 U.S.C. 402) outlines the requirements for eligibility to receive Old-Age, Survivors, and Disability Insurance Benefits under Title II of the Act. Section 205(c) of the Act (42 U.S.C. 405) directs the Commissioner of Social Security to verify the eligibility of a beneficiary.

This matching program employs CMS systems containing Protected Health Information (PHI) as defined by Health and Human Services (HHS) regulation ''Standards for Privacy of Individually Identifiable Health Information'' (45 CFR 160 and 164 (78 FR 5566, Parts A and E, published January 25, 2013)). PHI authorized by the routine uses may only be disclosed by CMS if, and as permitted or required by the ''Standard for Privacy in Individually Identifiable Health Information,'' (45 CFR 164.512d).

PURPOSE(S):

This matching program establishes the terms, conditions, and safeguards under which CMS will disclose to SSA Medicare non-utilization information for Social Security Title II beneficiaries aged 90 and above.

CMS will identify Medicare enrollees whose records have been inactive for three or more years. SSA will use this data as an indicator to select and prioritize cases for review to determine continued eligibility for benefits under Title II of the Act. SSA will contact these individuals to verify ongoing eligibility. In addition, SSA will use this data for the purposes of fraud discovery and the analysis of fraud program operations; this agreement allows for SSA's OAFP to evaluate the data for purposes of fraud detection. SSA will refer individual cases of suspected fraud, waste, or abuse to OIG for investigation.

CATEGORIES OF INDIVIDUALS:

The individuals whose information is involved in this matching program are Social Security Title II beneficiaries aged 90 and above.

CATEGORIES OF RECORDS:

SSA will provide CMS with a finder file containing the following information for each individual: (a) Title II Claim Account Number; (b) Title II Beneficiary Identification Code; (c) First Name; (d) Last Name; and (e) Date of birth.

CMS will provide SSA with a response file containing the following information for each individual: (a) CMS File Number (identified as a Health Insurance Claim Number (HICN) or Medicare Beneficiary Identifier (MBI)); (b) Whether CMS matched beneficiary or individual is a Medicare beneficiary; (c) Whether individual is a Medicaid recipient; (d) Whether Medicare was used in the last 3 years; (e) Whether the beneficiary is a part of an HMO; (f) Whether the beneficiary lives in a nursing home; (g) Whether the beneficiary has private health insurance; (h) Whether the beneficiary has veteran's health insurance; or (i) Whether the beneficiary has Tricare insurance.

SYSTEM(S) OF RECORDS:

SSA will disclose to CMS information from the Master Beneficiary Record (MBR) (60–0090), last fully published January 11, 2006 (71 FR 1826), amended on December 10, 2007 (72 FR 69723), July 5, 2013 (78 FR 40542), July 3, 2018 (83 FR 31250–31251), and November 1, 2018 (83 FR 54969).

SSA will retain any information from the CMS response file in the Anti-Fraud Enterprise Solution System of Records for OAFP fraud-related analytics, or data that leads to OAFP to initiate a fraud investigation (60–0388) published May 3, 2018 (83 FR 19588).

CMS will disclose to SSA information from the following Systems of Record (SORs): (a) National Claims History (NCH) (09–70–0558), published November 20, 2006 (71 FR 67137); (b) Enrollment Data Base (EDB) (09–70–0502), published February 26, 2008 at 73 FR 10249; and (c) The Long Term Care—Minimum Data Set (MDS) (90–70–0528), published March 19, 2007 at 72 FR 12801.

SSA's and CMS's SORs have routine uses permitting the disclosures needed to conduct this match.

[FR Doc. 2019–24724 Filed 11–13–19; 8:45 am]

BILLING CODE P

SURFACE TRANSPORTATION BOARD

[Docket No. AB 55 (Sub-No. 797X)]

CSX Transportation, Inc.—Discontinuance of Service Exemption—in Suffolk County, Va.

CSX Transportation, Inc. (CSXT), has filed a verified notice of exemption under 49 CFR part 1152 subpart F—*Exempt Abandonments and Discontinuances of Service* to discontinue service over an approximately 4.0-mile rail line on its Florence Division, Portsmouth Subdivision, known as the Suffolk Spur from milepost AB 214.0 to milepost AB 218.0, in Suffolk County, Va. (the Line). The Line traverses U.S. Postal Service Zip Code 23434. CSXT states that there is one station on the Line: Suffolk (FSAC10133) at milepost AB 215.0. CSXT states that the station can be closed.

CSXT has certified that: (1) No freight traffic has moved over the Line for two years; (2) any overhead traffic on the Line can be rerouted; (3) no formal complaint filed by a user of rail service on the Line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the Line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the two-year period; and (4) the requirements at 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the discontinuance of service shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) [1] to subsidize continued rail service has been received, this exemption will be effective on December 14, 2019, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues must be filed by November 22, 2019. Formal expressions of intent to file an OFA to subsidize continued rail service under 49 CFR 1152.27(c)(2) [2] must be filed by November 25, 2019.[3] Petitions for reconsideration must be filed by December 4, 2019, with the Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to CSXT's representative, Louis E. Gitomer, Law Offices of Louis E. Gitomer, LLC, 600 Baltimore Avenue, Suite 301, Towson, MD 21204.

If the verified notice contains false or misleading information, the exemption is void ab initio.

Board decisions and notices are available at *www.stb.gov.*

Decided: November 6, 2019.

By the Board, Allison C. Davis, Director, Office of Proceedings.

Kenyatta Clay,

Clearance Clerk.

[FR Doc. 2019–24709 Filed 11–13–19; 8:45 am]

BILLING CODE 4915–01–P

[1] Persons interested in submitting an OFA to subsidize continued rail service must first file a formal expression of intent to file an offer, indicating the intent to file an OFA for subsidy and demonstrating that they are preliminarily financially responsible. *See* 49 CFR 1152.27(c)(2)(i).

[2] The filing fee for OFAs can be found at 49 CFR 1002.2(f)(25).

[3] Because this is a discontinuance proceeding and not an abandonment, trail use/rail banking and public use conditions are not appropriate. Because there will be an environmental review during abandonment, this discontinuance does not require environmental review.

TENNESSEE VALLEY AUTHORITY

Sunshine Act Meetings

TIME AND DATE: 9:30 a.m. on November 14, 2019.

PLACE: The Halloran Centre for Performing Arts & Education, 225 S Main Street, Memphis, Tennessee.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Meeting No. 19–04

The TVA Board of Directors will hold a public meeting on November 14, 2019, at the Halloran Centre for Performing Arts & Education, 225 S Main Street, Memphis, Tennessee. The meeting will be called to order at 9:30 a.m. CT to consider the agenda items listed below. TVA management will answer questions from the news media following the Board meeting.

On November 13, the public may comment on any agenda item or subject at a board-hosted public listening session which begins at 3:30 p.m. CT and will last until 5:30 p.m. Preregistration is required to address the Board.

Agenda

1. Approval of minutes of the August 22, 2019, Board Meeting
2. Report from President and CEO
3. Report of the Finance, Rates, and Portfolio Committee
   A. Contracts Delegation
4. Report of the People and Performance Committee
   A. Fiscal Year 2019 Performance and Compensation
   B. CEO Compensation for Fiscal Year 2020
5. Report of the Audit, Risk, and Regulation Committee
6. Report of the Nuclear Oversight Committee
7. Report of the External Relations Committee
8. Chair Report
   A. Committee Assignments

CONTACT PERSON FOR MORE INFORMATION: For more information: Please call Jim Hopson, TVA Media Relations at (865) 632–6000, Knoxville, Tennessee. People who plan to attend the meeting and have special needs should call (865) 632–6000. Anyone who wishes to comment on any of the agenda in writing may send their comments to: TVA Board of Directors, Board Agenda Comments, 400 West Summit Hill Drive, Knoxville, Tennessee 37902.

Dated: November 7, 2019.

Sherry A. Quirk,

General Counsel.

[FR Doc. 2019–24751 Filed 11–12–19; 11:15 am]

BILLING CODE 8120–08–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2019–0690]

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Flight Operations Quality Assurance (FOQA) Program.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on September 4, 2019. The collection involves the voluntary submission of information gained through the Flight Operations Quality Assurance (FOQA) Program. FOQA is a voluntary safety program designed to improve aviation safety through the proactive use of flight-recorded data. The information collected will allow operators to use this data to identify and correct deficiencies in all areas of flight operations.

DATES: Written comments should be submitted by December 16, 2019.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202) 395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, NW, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Sandra Ray by email at: *Sandra.ray@faa.gov;* phone: 412–329–3088.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

OMB Control Number: 2120–0660.

Title: Flight Operations Quality Assurance (FOQA) Program.

Form Numbers: There are no forms associated with this collection.

Type of Review: Renewal of an Information Collection.

Background: The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on September 4, 2019 (84 FR 46604). Comments were received from the 60 day comment period, and the estimated time burden has been adjusted to reflect those comments. The number of respondents was also updated to reflect the most current number. Flight Operations Quality Assurance (FOQA) is a voluntary safety program designed to improved aviation safety through the proactive use of flight-recorded data. Operators will use this data to identify and correct deficiencies in all areas of flight operations. Properly used, FOQA data can reduce or eliminate safety risks, as well as minimize deviations from regulations. Through access to de-identified aggregate FOQA data, the Federal Aviation Administration (FAA can identify and analyze national trends and target resources to reduce operational risks in the National Airspace System (NAS), air traffic control (ATC), flight operations and airport operations.

The FAA and the air transportation industry have sought additional means for addressing safety problems and identifying potential safety hazards. Based on the experiences of foreign air carriers, the results of several FAA-sponsored studies, and input received from government/industry safety forums, the FAA concluded that wide implementation of FOQA programs could have significant potential to reduce air carrier accident rates below current levels. The value of FOQA programs is the early identification of adverse safety trends, which, if uncorrected, could lead to accidents. A key element in FOQA is the application of corrective action and follow-up to ensure that unsafe conditions are effectively remediated.

Respondents: 64 Air Carriers (55 with existing programs and 9 carriers with new programs).

Frequency: Once for a certificate holders seeking approval of a program, monthly (or less depending on agreement with FAA office) for certificate holders with an approved program.

Estimated Average Burden per Response: 100 Hours for certificate holders seeking approval of a new program, 30.0 hour per year for certificate holders with an approved program.

Estimated Total Annual Burden: 100 hours per new respondent, 30 hours annually per existing respondents.

Issued in Washington, DC on November 8, 2019.

Sandra L. Ray

Aviation Safety Inspector, FAA, Policy Integration Branch, AFS–270.

[FR Doc. 2019–24713 Filed 11–13–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. 2019–68]

Petition for Exemption; Summary of Petition Received; BFD Systems, LLC

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number and must be received on or before December 4, 2019.

ADDRESSES: Send comments identified by docket number FAA–2019–0657 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at (202) 493–2251.

Privacy: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *http://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *http://www.dot.gov/privacy.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jake Troutman, (202) 683–7788, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on November 7, 2019.

Forest Rawls,

Acting Deputy Executive Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2019–0657.

Petitioner: BFD Systems, LLC.

Section(s) of 14 CFR Affected: §§ 61.23(a) & (c); 61.101(e)(4) & (5); 61.113(a); 61.315(a); 91.7(a); 91.119(c); 91.121; 91.151(a)(1); 91.405(a); 91.407(a)(1); 91.409(a)(1) & (2); & 91.417(a) & (b).

Description of Relief Sought: The proposed exemption, if granted, would allow the petitioner to operate the GD–40 BFD Edition unmanned aircraft system, with a maximum takeoff weight of 120 pounds. Operations will be conducted for: Closed set motion picture films, carrying cinematic cameras, in restricted access film locations; not over people, and within visual line of sight of the pilot. The petitioner also requests relief for tethered operations for communication and video equipment cellular network augmentation, and live broadcast conditions. The proposed locations are in guarded restricted-access areas, or within a defined cordoned off area. Cellular network augmentation operations will support FirstNet network subscribers in disaster areas and help restore and improve first responder communications capabilities in the aftermath of natural disasters in the United States.

[FR Doc. 2019–24703 Filed 11–13–19; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[Docket No. FHWA–2019–0034]

Agency Information Collection Activities: Notice of Request for Extension of Currently Approved Information Collection

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of request for extension of currently approved information collection.

SUMMARY: The FHWA invites public comments about our intention to request the Office of Management and Budget's (OMB) approval for renewal of an existing information collection that is summarized below under **SUPPLEMENTARY INFORMATION**. We are required to publish this notice in the **Federal Register** by the Paperwork Reduction Act of 1995.

DATES: Please submit comments by January 13, 2020.

ADDRESSES: You may submit comments identified by DOT Docket ID Number 2020–0034 by any of the following methods:

Website: For access to the docket to read background documents or comments received, go to the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Fax: 1–202–493–2251.

Mail: Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

Hand Delivery or Courier: U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Steven Frankel, (202) 366–9649 or Beatriz Hernandez (202)366–3126, Office of the Chief Financial Officer, Federal Highway Administration, Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Title: Request Form for Fund Transfers to Other Agencies and Among Title 23 Programs.

OMB Control Number: 2125–0620.

Background: The Fixing America's Surface Transportation (FAST) Act, Public Law 114–94, continues the ability of States to transfer highway funds to other States and agencies and among programs/projects. These authorities are codified in sections 104 and 126 of title 23, United States Code, as amended by the FAST Act. Transferability under the FAST Act is generally similar to that allowed under previous authorization acts such as the Moving Ahead for Progress in the 21st Century Act (MAP–21) and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU). This notice establishes requirements for initiating the transfer of apportioned funds (funds distributed among States and programs by statutory formula) to carry out these provisions of law. The types of transfers affected by this notice are:

a. Transfer of funds from a State to the FHWA pursuant to U.S.C. Title 23, § 104(f)(3);

b. Transfer of funds from a State to a Federal Agency other than FHWA;

c. Transfer of funds from a State to another State;

d. Transfer of funds from FHWA to Federal Transit Administration pursuant to U.S.C. Title 23, § 104(f)(1);

e. Transfer of funds between programs pursuant to U.S.C. Title 23, § 126; and,

f. Transfer of funds between projects.

The State initiating the fund transfer must fill out a FHWA Funds Transfer Request form. This transfer form (FHWA–1575C) submitted for approval is similar to the currently approved transfer forms (FHWA–1575 and FHWA–1576) that have been utilized for the past five years. The main improvement is that this transfer form combines what were previously two forms (one for transfers within State or to another State and one for transfers to other agencies) into a single form. The new FHWA–1575C transfer form includes drop-down boxes that will allow States to select the type of transfer and other information. This new form will streamline that transfer request process for States by allowing them to use the single form for all types of transfers of apportioned funds rather than having to select the appropriate form. Information required to fill out a transfer form will include the requester's contact information; a description of the program/project the transfer will come from and go to, the fiscal year, the program code, a demo ID or an urban area when applicable, and the amount to be transferred. The form must be approved by the applicable State Department of Transportation and concurred on by the correlating FHWA Division Office.

Respondents: 50 State Transportation Departments, the District of Columbia, and Puerto Rico.

Frequency: As Needed.

Estimated Average Burden per Response: 15 minutes.

Estimated Total Annual Burden hours: It is estimated that a total of 2,000 responses will be received annually, which would equal a total annual burden of 500 hours.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.

Issued On: November 8, 2019.

Michael Howell,

Information Collection Officer.

[FR Doc. 2019–24721 Filed 11–13–19; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2019–0188]

Hours of Service of Drivers: Palmetto State Armory; Application for Exemption

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of application for exemption; request for comments.

SUMMARY: FMCSA announces that it has received an application from Palmetto State Armory (PSA) requesting an exemption to increase the 100 air-mile radius in ''short-haul operations,'' to 150 air-miles for its drivers. PSA requests the exemption to permit two of its commercial motor vehicle (CMV) drivers to record hours of servie on time records instead of record of duty status (RODS) when operating between 100 and 150 air miles. FMCSA requests public comment on PSA's application for exemption.

DATES: Comments must be received on or before December 16, 2019.

ADDRESSES: You may submit comments identified by Federal Docket Management System Number FMCSA–2019–0188 by any of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* See the *Public Participation and Request for Comments* section below for further information.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building, Ground Floor, Room W12–

140, 1200 New Jersey Avenue SE, between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.

• *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *www.regulations.gov,* including any personal information included in a comment. Please see the *Privacy Act* heading below.

Docket: For access to the docket to read background documents or comments, go to *www.regulations.gov* at any time or visit Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. The on-line FDMS is available 24 hours each day, 365 days each year.

Privacy Act: In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

FOR FURTHER INFORMATION CONTACT: Ms. Pearlie Robinson, FMCSA Driver and Carrier Operations Division; Office of Carrier, Driver and Vehicle Safety Standards; Telephone: (202) 366–4325; Email: *MCPSD@dot.gov.* If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA–2019–0188), indicate the specific section of this document to which the comment applies, and provide a reason for suggestions or recommendations. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comment online, go to *www.regulations.gov* and put the docket number, ''FMCSA–2019–0188'' in the ''Keyword'' box, and click ''Search.'' When the new screen appears, click on ''Comment Now!'' button and type your comment into the text box in the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope. FMCSA will consider all comments and material received during the comment period.

II. Legal Basis

FMCSA has authority under 49 U.S.C. 31136(e) and 31315 to grant exemptions from certain Federal Motor Carrier Safety Regulations. FMCSA must publish a notice of each exemption request in the **Federal Register** (49 CFR 381.315(a)). The Agency must provide the public an opportunity to inspect the information relevant to the application, including any safety analyses that have been conducted. The Agency must also provide an opportunity for public comment on the request.

The Agency reviews safety analyses and public comments submitted, and determines whether granting the exemption would likely achieve a level of safety equivalent to, or greater than, the level that would be achieved by the current regulation (49 CFR 381.305). The decision of the Agency must be published in the **Federal Register** (49 CFR 381.315(b)) with the reasons for denying or granting the application and, if granted, the name of the person or class of persons receiving the exemption, and the regulatory provision from which the exemption is granted. The notice must also specify the effective period (up to 5 years) and explain the terms and conditions of the exemption. The exemption may be renewed (49 CFR 381.300(b)).

III. Request for Exemption

Drivers qualifying for the HOS short-haul exception in 49 CFR 395.1(e)(1) do not have to maintain a record of duty status (RODS), provided that (among other things) they operate within a 100 air-mile radius of their normal work reporting location and return to that location and are relased from work within 12 hours after coming on duty. A driver who exceeds the 100 air-mile radius or the 12-hour limit loses the short-haul exception and must immediately prepare RODS for the entire day, or use an electronic logging device (ELD) if the driver is required to prepare RODS for more than eight days in a thirty day period, per 49 CFR 395.8(a)(1)(i).

PSA is requesting an exemption to increase the 100 air-mile radius in 49 CFR 395.1(e)(1) to 150 air-miles for its drivers. This proposed exemption would enable the drivers not exceeding the 150 air-mile radius to utilize time records instead of a RODS for that day.

PSA reported in its application that drivers pick up and deliver products between manufacturing facilities, many of whom are sister companies. Drivers also drive to PSA retail stores. They drive for short periods of time, usually less than two hours between stops. These stops or deliveries allow the driver to remain alert. All drivers operate property-carrying CMVs within 150 air-miles and return to their work reporting location at the end of each day.

PSA wrote that current operations include trips between 103 and 109 air-miles. PSA contends that the use of ELDs or maintaining driver logs adds substantial costs to its operation and does not increase the level of safety. PSA requests that the exemption cover the maximum allowable duration of 5 years.

IV. Method To Ensure an Equivalent or Greater Level of Safety

To ensure an equivalent level of safety PSA offers monitoring CSA safety management scores, managing hours of service, requiring both pre-trip and post-trip vehicle inspection, as well as training in defensive driving. PSA reports that its CSA safety management scores are zero in all seven categories; with no recordable accidents during the past 24 months. A copy of the application for exemption is available for review in the docket for this notice.

Issued on: November 6, 2019.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2019–24722 Filed 11–13–19; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–1999–6253]

Petition for Waiver of Compliance

Under part 211 of title 49 Code of Federal Regulations (CFR), this document provides the public notice that on October 31, 2019, the Utah Transit Authority (UTA) petitioned the

Federal Railroad Administration (FRA) for a waiver of compliance from certain provisions of the Federal railroad safety regulations contained at 49 CFR parts 210, 217, 218, 219, 220, 221, 222, 223, 225, 228, 229, 231, 234, 238, 239, 240, 242, and 243. FRA assigned the petition Docket Number FRA–1999–6253.

UTA, operator of the rail fixed guideway public transit system TRAX in Salt Lake City, Utah, seeks an extension of the terms and conditions of its current shared use waiver of compliance. TRAX is operated with temporal separation on track owned by UTA and shared partially with Utah Railway Company and Savage Bingham & Garfield Railroad Company freight trains dispatched by UTA. FRA granted the original shared use waiver on August 19, 1999, for the North-South line, modified on March 25, 2011, to include a portion of the Mid-Jordan extension with its additional Siemens S70 rolling stock (77 vehicles). In 2015, FRA renewed the previous waivers, granted relief from additional parts of the CFR, and approved the change of shared use milepost limits on the North-South Line to reflect the cessation of freight service south of 6100 South as part of the transit-exclusive Draper Extension.

Specifically, UTA requests FRA extend the regulatory relief in this docket, noting it has recently retired and disposed of 29 Urban Transportation Development Corporation (UTDC) vehicles acquired from the Santa Clara Valley Transportation Authority. Also, UTA is now requesting relief from part 243 for its light rail operators, supervisors, controller supervisors, and light rail rolling stock maintenance employees because training of these employees is already addressed by the existing Utah Department of Transportation State Safety Oversight Agency program certified by the Federal Transit Administration. UTA Track/Signal and Train Control maintenance-of-way employees will comply with part 243 because these employees also perform work on FRA-compliant Frontrunner commuter service.

UTA states it will adopt specific policies and procedures that will provide a level of safety equivalent to that provided by full compliance with FRA regulations. Also, UTA states that ''unlike some light rail systems operating under a shared use waiver, UTA owns the entirety of the TRAX system and corridor, providing it control of the entry of freight trains on the TRAX system.

A copy of the petition, as well as any written communications concerning the petition, is available for review online at *www.regulations.gov* and in person at the U.S. Department of Transportation's (DOT) Docket Operations Facility, 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590. The Docket Operations Facility is open from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested parties desire an opportunity for oral comment and a public hearing, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number and may be submitted by any of the following methods:

- *Website: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Operations Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, W12–140, Washington, DC 20590.
- *Hand Delivery:* 1200 New Jersey Ave. SE, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Communications received by December 30, 2019 will be considered by FRA before final action is taken. Comments received after that date will be considered if practicable. Anyone can search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See also *https://www.regulations.gov/privacyNotice* for the privacy notice of *regulations.gov.*

Issued in Washington, DC.

John Karl Alexy,

Associate Administrator for Railroad Safety, Chief Safety Officer.

[FR Doc. 2019–24749 Filed 11–13–19; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2019–0120]

Hemphill Brothers Leasing Company; Grant of Petition for Temporary Exemption From Shoulder Belt Requirement for Side-Facing Seats on Motorcoaches

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of grant of a petition for temporary exemption.

SUMMARY: In accordance with the procedures in our regulations, NHTSA is granting a petition from Hemphill Brothers Leasing Company, LLC (Hemphill), for a temporary exemption from a shoulder belt requirement of Federal Motor Vehicle Safety Standard (FMVSS) No. 208, ''Occupant crash protection,'' for side-facing seats on motorcoaches. The grant permits Hemphill to install Type 1 seat belts (lap belt only) at side-facing seating positions, instead of Type 2 seat belts (lap and shoulder belts). After reviewing the petition and the comments received, the agency has determined that the requested exemption is warranted to enable the petitioner to sell a vehicle whose overall level of safety or impact protection is at least equal to that of a nonexempted vehicle.

DATES: This exemption applies to the petitioner's motorcoaches produced from November 14, 2019 until November 15, 2021.

FOR FURTHER INFORMATION CONTACT: Deirdre R. Fujita, Office of the Chief Counsel, NCC–200, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, West Building, Washington, DC 20590. Telephone: (202) 366–2992; Fax: (202) 366–3820.

SUPPLEMENTARY INFORMATION:

I. Background

a. Statutory Authority for Temporary Exemptions

The National Traffic and Motor Vehicle Safety Act (Safety Act), codified as 49 U.S.C. chapter 301, provides the Secretary of Transportation authority to exempt, on a temporary basis, under specified circumstances, and on terms the Secretary deems appropriate, motor vehicles from a motor vehicle safety standard or bumper standard. This authority and circumstances are set forth in 49 U.S.C. 30113. The authority for implementing this section has been delegated to NHTSA by 49 CFR 1.95.

NHTSA established 49 CFR part 555, *Temporary Exemption from Motor Vehicle Safety and Bumper Standards,* to implement the statutory provisions concerning temporary exemptions. Under part 555, subpart A, a vehicle manufacturer seeking an exemption must submit a petition for exemption containing specified information. Among other things, the petition must set forth (a) the reasons why granting the exemption would be in the public interest and consistent with the objectives of the Safety Act, and (b) required information showing that the manufacturer satisfies one of four bases for an exemption.[1] Hemphill has applied on the basis that the applicant is otherwise unable to sell a motor vehicle with an overall safety level at least equal to that of nonexempt vehicles (*see* 49 CFR 555.6(d)). A manufacturer is eligible for an exemption under this basis only if NHTSA determines the exemption is for not more than 2,500 vehicles to be sold in the U.S. in any 12-month period. An exemption under this basis may be granted for not more than 2 years but may be renewed upon reapplication.[2]

b. FMVSS No. 208

On November 25, 2013, NHTSA published a final rule amending FMVSS No. 208 to require seat belts for each passenger seating position in all new over-the-road buses (OTRBs) (regardless of gross vehicle weight rating (GVWR)), and all other buses with GVWRs greater than 11,793 kilograms (kg) (26,000 pounds (lb)) (with certain exclusions).[3]

In the notice of proposed rulemaking (NPRM) preceding the final rule (75 FR 50958, August 18, 2010) NHTSA proposed to permit manufacturers the option of installing either a Type 1 (lap belt) or a Type 2 (lap and shoulder belt) on side-facing seats.[4] The proposed option was consistent with a provision in FMVSS No. 208 that allows lap belts for side-facing seats on buses with a GVWR of 4,536 kg (10,000 lb) or less. NHTSA proposed the option because the agency was unaware of any demonstrable increase in associated risk of lap belts compared to lap and shoulder belts on side-facing seats. NHTSA believed that[5] ‘‘a study commissioned by the European Commission regarding side-facing seats on minibuses and motorcoaches found that due to different seat belt designs, crash modes and a lack of real world data, it cannot be determined whether a lap belt or a lap/shoulder belt would be the most effective.’’[6]

However, after the NPRM was published, the Motorcoach Enhanced Safety Act of 2012 was enacted as part of the Moving Ahead for Progress in the 21st Century Act (MAP–21), Public Law 112–141 (July 6, 2012). Section 32703(a) of MAP–21 directed the Secretary of Transportation (authority delegated to NHTSA) to ‘‘prescribe regulations requiring safety belts to be installed in motorcoaches at each designated seating position.’’[7] As MAP–21 defined ‘‘safety belt’’ to mean an integrated lap and shoulder belt, the final rule amended FMVSS No. 208 to require lap and shoulder belts at all designated seating positions, including side-facing seats, on OTRBs.[8]

Even as it did so, however, the agency reiterated its view that ‘‘the addition of a shoulder belt at [side-facing seats on light vehicles] is of limited value, given the paucity of data related to side facing seats.’’[9] NHTSA also reiterated that there have been concerns expressed in literature in this area about shoulder belts on side-facing seats, noting in the final rule that, although the agency has no direct evidence that shoulder belts may cause serious neck injuries when applied to side-facing seats, there are simulation data indicative of potential carotid artery injury when the neck is loaded by the shoulder belt.[10] The agency also noted that Australian Design Rule ADR 5/04, ‘‘Anchorages for Seatbelts’’ specifically prohibits shoulder belts for side-facing seats.

Given that background, and believing there would be few side-facing seats on OTRBs, NHTSA stated in the November 2013 final rule that the manufacturers at issue may petition NHTSA for a temporary exemption under 49 CFR part 555 to install lap belts instead of lap and shoulder belts at side-facing seats.[11] The basis for the petition would be that the applicant is unable to sell a bus whose overall level of safety is at least equal to that of a non-exempted vehicle. In other words, for side-facing seats, lap belts provide at least an equivalent level of safety as lap and shoulder belts.

c. Overview of Petition

In accordance with 49 U.S.C. 30113 and the procedures in 49 CFR part 555, Hemphill submitted a petition dated April 5, 2018, asking NHTSA for a temporary exemption from the shoulder belt requirement of FMVSS No. 208 for side-facing seats on its OTRBs under 49 CFR 555.6(d). A copy of the petition may be found in the docket (go to *http://www.regulations.gov* and enter Docket No. NHTSA–2019–0019).

Hemphill describes itself as a second-stage manufacturer[12] organized under the laws of Tennessee. The petitioner states that it typically receives a bus shell[13] from an ‘‘original manufacturer’’ and ‘‘customizes the Over-the-Road Bus (‘OTRB’) to meet the needs of entertainers, politicians, musicians, celebrities and other specialized customers who use motorcoaches as a necessity for their businesses.’’ Hemphill states that it ‘‘builds out the complete interior’’ of the bus shell, including—

roof escape hatch; fire suppression systems (interior living space, rear tires, electrical

[1] 49 CFR 555.5(b)(5) and 555.5(b)(7).

[2] 49 CFR 555.8(b) and (e).

[3] 78 FR 70416 (November 25, 2013); response to petitions for reconsideration, 81 FR 19902 (April 6, 2016). The final rule became effective November 28, 2016 for buses manufactured in a single stage, and a year later for buses manufactured in more than one stage.

[4] 75 FR at 50971.

[5] 75 FR at 50971–50972.

[6] *http://ec.europa.eu/enterprise/automotive/projects/safety_consid_long_stg.pdf.*

[7] MAP–21 states at § 32702(6) that ‘‘the term ‘motorcoach’ has the meaning given the term ‘over-the-road bus’ in section 3038(a)(3) of the Transportation Equity Act for the 21st Century (49 U.S.C. 5310 note), but does not include a bus used in public transportation provided by, or on behalf of, a public transportation agency; or a school bus, including a multifunction school activity bus.’’ Section 3038(a)(3) (49 U.S.C. 5310 note) states: ‘‘The term ‘over-the-road bus’ means a bus characterized by an elevated passenger deck located over a baggage compartment.’’

[8] For side-facing seats on buses other than OTRBs, in the final rule NHTSA permitted either lap or lap/shoulder belts at the manufacturer's option.

[9] 78 FR at 70448, quoting from the agency's Anton's Law final rule which required lap/shoulder belts in forward-facing rear seating positions of light vehicles, 59 FR 70907.

[10] Editors: Fildes, B., Digges, K., ‘‘Occupant Protection in Far Side Crashes,’’ Monash University Accident Research Center, Report No. 294, April 2010, pg. 57.

[11] 78 FR at 70448.

[12] While ‘‘second-stage manufacturer’’ is not defined in NHTSA's regulations, Hemphill is referring to a ‘‘final-stage manufacturer,’’ which is defined in NHTSA's certification regulation (49 CFR part 567) as ‘‘a person who performs such manufacturing operations on an incomplete vehicle that it becomes a completed vehicle’’ (49 CFR 567.3). Hemphill states that it also operates the vehicles as a for-hire motor carrier of passengers, ‘‘leas[ing] the vehicle with driver to a customer on an exclusive basis for a designated period of time.’’

[13] The petition states in its petition (p. 2) that the bus shell ‘‘generally contains the following components: Exterior frame; driver's seat; dash cluster, speedometer, emissions light and emissions diagnosis connector; exterior lighting, headlights, marker lights, turn signals lights, and brake lights; exterior glass, windshield and side lights with emergency exits; windshield wiper system; braking system; tires, tire pressure monitoring system and suspension; and engine and transmission.’’

panels, bay storage compartments, and generator); ceiling, side walls and flooring; seating; electrical system, generator, invertor and house batteries; interior lighting; interior entertainment equipment; heating, ventilation and cooling system; galley with potable water, cooking equipment, refrigerators, and storage cabinets; bathroom and showers; and sleeping positions.

The petitioner states that ''fewer than 100 entertainer-type motorcoaches with side-facing seats are manufactured and enter the U.S. market each year.''

In support of its assertion that the exempted vehicles would provide an overall level of safety or impact protection at least equal to that of nonexempt vehicles, Hemphill reiterates NHTSA's statements in the November 2013 final rule. The petitioner states that NHTSA has not conducted testing on the impact or injuries to passengers in side-facing seats in motorcoaches, so ''there is no available credible data that supports requiring a Type 2 belt at the side-facing seating positions.'' Hemphill states that if it complies with the final rule as published, it would be ''forced to offer'' customers—

> a motorcoach with a safety feature that could make the occupants less safe, or certainly at least no more safe, than if the feature was not installed. The current requirement in FMVSS 208 for Type 2 belts at side-facing seating positions in OTRBs makes the applicants unable to sell a motor vehicle whose overall level of safety is equivalent to or exceeds the level of safety of a non-exempted vehicle.

In support of its assertion that the exemption would be consistent with the public interest, Hemphill states ''NHTSA's analysis in developing this rule found that such belts presented no demonstrable increase in associated risk.'' The petitioner also states that the final rule requiring Type 2 belts at side-facing seats ''was not the result of any change in NHTSA policy or analysis, but rather resulted from an overly broad mandate by Congress for 'safety belts to be installed in motorcoaches at each designated seating position.' '' It states that, based on the existing studies noted in the rulemaking, Type 1 belts at side-facing seats may provide equivalent or even superior occupant protection than Type 2 belts.

The petitioner believes that an option for Type 1 belts at side-facing seats is consistent with the objectives of the Safety Act because it allows the manufacturer to determine the best approach to motor vehicle safety depending on the intended use of the vehicle and its overall design. Additionally, Hemphill states the option meets the need for motor vehicle safety because data indicate no demonstrable difference in risk between the two types of belts when installed in side-facing seats. Finally, the petitioner notes that the option would provide an objective standard that is easy for manufacturers to understand and meet.

Notice of Receipt

On March 28, 2019, NHTSA published a notice of receipt of Hemphill's petition for temporary exemption and requested comment on the petition.[14] The agency received 8 comments on the petition, all of which supported the request. NHTSA received no comments opposing the petition.

Several commenters, all similarly-positioned final-stage manufacturers of entertainer-type motorcoaches, submitted identical comments supporting Hemphill's petition.[15] These commenters state that their entertainer motorcoaches are custom built and typically include side-facing, perimeter seating. They state that fewer than 100 entertainer motorcoaches are manufactured each year. They believe that there is no available data supporting requiring a Type 2 belt at side-facing seats and are concerned that serious injury to passengers could result if they installed the shoulder belts at those seats. Another entertainer motorcoach manufacturer[16] stated that there are no statistics or test models showing that a shoulder belt provides a benefit on side-facing seats.

The American Bus Association (ABA), a trade association for operators who transport the public, and the National Interstate Insurance Company, an insurance provider to the commercial passenger transportation industry, strongly supported Hemphill's petition.[17] These commenters also affirm that fewer than 100 entertainer motorcoaches are manufactured each year. They expressed concern that serious injury to passengers could result from operators and manufacturers complying with the FMVSS No. 208 rule to install the shoulder belts and believe there is no data that supports requiring a Type 2 seat belt at side-facing seats.

Agency Analysis and Decision

After reviewing Hemphill's petition for temporary exemption and the comments received on it, the agency is granting the petition. Granting the petition will enable the petitioner to sell a vehicle whose overall level of safety or impact protection is at least equal to that of a nonexempted vehicle.

In the rulemaking implementing MAP–21's mandate for seat belts on motorcoaches, NHTSA's proposal in the NPRM was to allow manufacturers an option of installing Type 1 (lap belt) or Type 2 (lap and shoulder belt) on side-facing seats. The proposed option was consistent with a provision in FMVSS No. 208 that allows lap belts for side-facing seats on buses with a GVWR of 4,536 kg (10,000 lb) or less. NHTSA proposed the option because the agency was unaware of any demonstrable increase in associated risk of lap belts compared to lap and shoulder belts on side-facing seats. That is, the agency believed that lap belts were not less protective than lap and shoulder belts on side-facing seats.

Commenters and the petitioner raise safety concerns about the shoulder belt portion of a lap and shoulder belt on side-facing seats. The commenters and the petitioner do not provide information supporting their beliefs about the potential for ''serious injury'' beyond reciting what NHTSA said on the matter in the November 2013 final rule. Accordingly, NHTSA believes that the potential safety risk at issue is theoretical at this point; as explained in the November 2013 final rule, the agency cannot affirmatively conclude, based on available information, that shoulder belts on side-facing seats are associated with a demonstrated risk of serious neck injuries in frontal crashes. However, at the same time, NHTSA believes a shoulder belt is of limited value on side-facing seats for the reasons explained in the final rule. Given the uncertainties about shoulder belts on side-facing seats, the few side-facing seats there are on buses subject to the November 2013 final rule, and that FMVSS No. 208 does not require shoulder belts on side-facing seats on any other vehicle type, NHTSA is granting Hemphill's petition for temporary exemption. The grant will permit Hemphill to install Type 1 seat belts (lap belt only) at side-facing seating positions, instead of Type 2 seat

[14] 84 FR 11735, Docket No. NHTSA–2019–0019.

[15] D&S Classic Coach, Pioneer Coach, Roberts Brothers Coach Co., Russell Coach, and Nitetrain Coach Co. These commenters were among the ''other petitioners'' listed in the attachment to the Hemphill petition NHTSA discussed in the notice of receipt of Hemphill's petition (84 FR at 11738). Hemphill's petition originally sought to cover 39 ''other petitioners'' listed in an attachment to the petition. NHTSA noted that the Safety Act and NHTSA's procedures did not clearly allow the bundling of petitions for the type of exemption Hemphill sought. Subsequently, the other manufacturers, including these commenters, submitted individual petitions for temporary exemptions. NHTSA will address those petitions separately from this document.

[16] Superior Coach Interiors, which is also among the ''other petitioners'' attached to the Hemphill petition.

[17] National Interstate describes itself as currently insuring a significant share of the enetertainment motorcoach industry marke and states that it has consistently insured motorcoaches for 30 years.

belts (lap and shoulder belts) at those positions, on the OTRBs it manufactures. This exemption does not apply to forward-facing designated seating positions on the petitioner's vehicles. Under FMVSS No. 208, the forward-facing seating positions must have Type 2 lap and shoulder belts.[18]

NHTSA believes that granting Hemphill's petition is consistent with the public interest. The exemption will enable the applicant to sell buses whose overall level of safety is at least equal to that of non-exempted vehicles. Further, we believe that Hemphill is a small entity.[19] Thus, this temporary exemption not only permits the manufacturer to sell vehicles whose overall level of safety is at least equal to that of non-exempted vehicles, but provides relief to a small business by, as the petitioner notes, providing ''an objective standard that is easy for manufacturers to understand and meet.''

A grant is consistent with the Safety Act. The requested exemption will not impact general motor vehicle safety because the exempted buses will provide overall safety at least equal to that of nonexempted buses. Further, Hemphill produces a small number of affected vehicles annually. Hemphill did not specify in its petition how many buses it would manufacture under the exemption but noted that ''fewer than 100 entertainer-type motorcoaches with side-facing seats are manufactured and enter the U.S. market each year.'' As noted earlier, the ABA and the National Interstate Insurance Company, as well as the ''other petitioners'' who have separately filed petitions for temporary exemption, also affirm that fewer than 100 entertainer-type motorcoaches are manufactured each year. Thus, NHTSA concludes that Hemphill will manufacture very few vehicles relative to the 2,500 per manufacturer limit set forth in the Safety Act and 49 CFR 555.6(d)(4). Further, as explained below, in accordance with 49 CFR 555.9 and § 30113(h) of the Safety Act, prospective purchasers will also be notified of the exemption prior to making their purchasing decisions. The vehicles must have a label notifying prospective purchasers that the vehicles are exempted from the shoulder belt requirement of FMVSS No. 208 for the side-facing seats.

Labeling

Under 49 CFR 555.9(b), a manufacturer of an exempted vehicle must securely affix to the windshield or side window of each exempted vehicle a label containing a statement that the vehicle meets all applicable FMVSSs in effect on the date of manufacture ''except for Standard Nos. [Listing the standards by number and title for which an exemption has been granted] exempted pursuant to NHTSA Exemption No. ____.'' This label notifies prospective purchasers about the exemption and its subject. Under § 555.9(c)(2), this information must also be included on the vehicle's certification label.[20]

The text of § 555.9 does not expressly indicate how the required statement on the two labels should read in situations in which an exemption covers part, but not all, of an FMVSS. In this case, NHTSA believes that a blanket statement that the vehicle has been exempted from Standard No. 208, without an indication that the exemption is limited to the shoulder belt on side-facing seats, could be confusing. A purchaser might incorrectly believe that the vehicle has been exempted from all of FMVSS No. 208's requirements. For this reason, NHTSA believes the two labels should read in relevant part, ''except for the shoulder belt requirement for side-facing seats (Standard No. 208, Occupant Crash Protection), exempted pursuant to * * *.''

In accordance with 49 U.S.C. 30113(b)(3)(B)(iv), the applicant is granted NHTSA Temporary Exemption No. EX 19–01, from the shoulder belt requirement of 49 CFR 571.208 for side-facing seats on its motorcoaches. The exemption shall remain effective for the period designated at the beginning of this document in the DATES section.

[18] On October 2, 2019, the National Transportation Safety Board (NTSB) issued Recommendation H–19–14 in connection with the NTSB's investigation of an October 6, 2018 Schoharie, New York limousine crash. H–19–14 recommends that NHTSA ''[r]equire lap/shoulder belts for each passenger seating position on all new vehicles modified to be used as limousines.'' The limousine in the Schoharie crash had between 18 and 22 seating positions and a GVWR of 13,080 lb. Under FMVSS No. 208, vehicles with 11 or more seating positions and a GVWR between 10,000 lb and 26,000 lb are not required to have seat belts in passenger seats. The NTSB recommendation would apply a passenger seat belt requirement to those vehicles.

[19] According to 13 CFR 121.201, the Small Business Administration's size standards regulations used to define small business concerns, manufacturers of these buses fall under North American Industry Classification System (NAICS) No. 336213, Motor Home Manufacturing, which has a size standard of 1,250 employees or fewer.

[20] 49 CFR 555.9(c)(2) refers to § 567.5(c)(7)(iii) as the regulation setting forth the certification statement final-stage manufacturers are to use in their certification labels. That reference to § 567.5(c)(7)(iii) is outdated; it should be to § 567.5(d)(2)(v)(A). The certification label requirements for final-stage manufacturers formerly were in § 567(c)(7)(iii) but the requirements were moved to § 567.5(d)(2)(v)(A) (*see,* 70 FR 7433; February 14, 2005).

Authority: 49 U.S.C. 30113; delegation of authority at 49 CFR 1.95.

Issued on: November 5, 2019.

James Clayton Owens,

Acting Administrator.

[FR Doc. 2019–24490 Filed 11–13–19; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Hazardous Materials: Notice of Applications for Modifications to Special Permits

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications for modification of special permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations, notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein. Each mode of transportation for which a particular special permit is requested is indicated by a number in the ''Nature of Application'' portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

DATES: Comments must be received on or before November 29, 2019.

ADDRESSES: Record Center, Pipeline and Hazardous Materials Safety Administration

U.S. Department of Transportation Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Donald Burger, Chief, Office of Hazardous Materials Approvals and Permits Division, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington, DC 20590–0001, (202) 366–4535.

SUPPLEMENTARY INFORMATION: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington DC or at *http://regulations.gov.*

This notice of receipt of applications for special permit is published in accordance with part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on November 07, 2019.

Donald P. Burger,

Chief, General Approvals and Permits Branch.

SPECIAL PERMITS DATA

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
11827–M	Fujifilm Electronic Materials U.S.A., Inc..	180.605(c)(1), 180.352(b)(3) ...	To modify the special permit to add IMDG language to harmonize international transportation of affected tanks. (modes as authorized by the HMR).
11911–M	Transfer Flow, Inc.	177.834(h), 178.700(c)(1)	To modify the special permit to authorize two new fuel cap designs. (mode 1).
15873–M	Jiangxi Oxygen Plant Co., Ltd.	178.274(b)(2)	To modify the special permit to authorize lower pressure and greater capacity of the cylinders. (modes 1, 2, 3).
16095–M	Clay and Bailey Manufacturing Company.	172.203(a), 178.345–1, 180.413.	To modify the special permit to authorize new gaskets and testing procedures for manway production. (mode 1).
20851–M	CALL2RECYCLE, INC.	172.200, 172.600, 172.700(a)	To modify the special permit to authorize an additional outer packaging and to remove the 800 Wh aggregate energy content for a single package. (mode 1).

[FR Doc. 2019–24710 Filed 11–13–19; 8:45 am]

BILLING CODE 4909–60–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Hazardous Materials: Notice of Applications for New Special Permits

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: List of applications for special permits.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations, notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein. Each mode of transportation for which a particular special permit is requested is indicated by a number in the ''Nature of Application'' portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

DATES: Comments must be received on or before December 16, 2019.

ADDRESSES: Record Center, Pipeline and Hazardous Materials Safety Administration U.S. Department of Transportation Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Donald Burger, Chief, Office of Hazardous Materials Approvals and Permits Division, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington, DC 20590–0001, (202) 366–4535.

SUPPLEMENTARY INFORMATION: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington DC or at *http://regulations.gov.*

This notice of receipt of applications for special permit is published in accordance with part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on November 07, 2019.

Donald P. Burger,

Chief, General Approvals and Permits Branch.

SPECIAL PERMITS DATA

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
20954–N	BNSF RAILWAY COMPANY ..	172.203(a), 174.24, 174.26	To authorize the use of electronic means to maintain and communicate on-board train consist information in lieu of paper documentation when hazardous materials are transported by rail. (mode 2).
20955–N	ZHEJIANG CHUMBOON IRON–PRINTING & TIN–MAKING CO., LTD.	173.304(d)	To authorize the manufacture, marking, sale and use of a non-refillable, non-DOT specification inside metal container. (modes 1, 2, 3, 4).
20956–N	VALTRIS SPECIALTY CHEMICALS.	171.8, 171.4, 172.203(l), 172.322, 176.70.	To authorize the transportation in commerce of two materials as not meeting the § 171.8 definition of a marine pollutant. (modes 1, 2, 3, 4, 5).
20957–N	VERSUM MATERIALS, INC ...	173.338(a)	To authorize the transportation in commerce of tungsten hexafluoride in tubes that are dual marked to a DOT and UN specification. (modes 1, 2, 3).
20958–N	University of Colorado	173.301(g), 173.24(b), 173.24(b)(1), 173.24(f), 173.24(f)(2), 173.24(g)(2).	To authorize the transportation in commerce of compressed air in cylinders which will be purged during transportation in order to protect sensitive equipment from contamination. (modes 1, 4).

SPECIAL PERMITS DATA—Continued

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
20960–N	Johnson Outdoors Gear LLC	173.302a(a)(1)	To authorize the transportation in commerce of Division 2.1 materials in a non-DOT specification receptacle similar to the 2P specification. (modes 1, 2, 3, 4).
20961–N	Portable Electric, Ltd	172.101(j)	To authorize the transportation in commerce of lithium ion batteries contained in equipment that exceeding 35 kg by air. (mode 4).
20962–N	Portable Electric, Ltd	172.101(j), 173.185(b)	To authorize the transportation in commerce by cargo only aircraft of lithium-ion batteries that exceed the maximum weight allowed. (mode 4).
20963–N	Lg Chem Wroclaw Energy Sp Z O O.	172.101(j)	To authorization in commerce of lithium ion batteries exceeding 35 kg by cargo-only aircraft. (mode 4).
20964–N	Stanley Black & Decker, Inc	172.200, 172.600, 172.700(a), 173.185(b).	To authorize the manufacture, mark, sale, and use of lithium ion batteries contained in an enclosure (i.e., generator) providing protection that would otherwise be achieved through packaging. (mode 1).
20965–N	Autoliv Asp, Inc	173.166	To authorize the transportation in commerce of air bag inflators installed in apparel as "safety devices". (modes 1, 2, 3, 4, 5).
20966–N	Autoliv Asp, Inc	173.166(d)	To authorize the transportation in commerce of air bag inflators contained in apparel as not subject to requirements of the HMR. (modes 1, 2, 3, 4, 5).
20969–N	Porsche Logistik Gmbh	172.101(j)	To authorize the transportation in commerce of lithium batteries exceeding 35 kg by cargo-only aircraft. (mode 4).

[FR Doc. 2019–24711 Filed 11–13–19; 8:45 am]

BILLING CODE 4909–60–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

Hazardous Materials: Notice of Actions on Special Permits

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice of actions on special permit applications.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, special permits from the Department of Transportation's Hazardous Material Regulations, notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein.

DATES: Comments must be received on or before December 16, 2019.

ADDRESSES: Record Center, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the special permit number.

FOR FURTHER INFORMATION CONTACT: Donald Burger, Chief, Office of Hazardous Materials Approvals and Permits Division, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington, DC 20590–0001, (202) 366–4535.

SUPPLEMENTARY INFORMATION: Copies of the applications are available for inspection in the Records Center, East Building, PHH–30, 1200 New Jersey Avenue Southeast, Washington, DC or at *http://regulations.gov.*

This notice of receipt of applications for special permit is published in accordance with part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on November 7, 2019.

Donald P. Burger,

Chief, General Approvals and Permits Branch.

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
SPECIAL PERMITS DATA—Granted			
11725–M	Thales Alenia Space Italia Spa	172.101(j), 173.301(f), 173.302a(a)(1), 173.304a(a)(2).	To modify the special permit to add additional 2.3 hazmat.
15335–M	SEASTAR CHEMICALS INC	173.158(f)(3)	To modify the special permit to reference new, improved testing of the package.
20232–M	LEIDOS BIOMEDICAL RESEARCH, INC.		To modify the special permit to authorize additional origination and destination locations.
20255–M	Covanta Environmental Solutions, Llc.		To modify the special permit to authorize air and vessel transportation.
20274–M	BOLLORE LOGISTICS USA INC.	172.101(j), 172.300, 172.400, 173.301, 173.302a(a)(1), 173.304a(a)(2).	To modify the special permit to authorize transportation to/from any destination sites to either of the assembly locations.
20274–M	Bollore Logistics USA Inc	172.101(j), 172.300, 172.400, 173.301, 173.302a(a)(1), 173.304a(a)(2).	To modify the special permit to include reference to a new Competent Authority Approval from the German Competent Authority.

Application No.	Applicant	Regulation(s) affected	Nature of the special permits thereof
20432–M	Procyon-alpha Squared, Inc	172.200, 172.300, 172.400, 173.185(f).	To modify the special permit to authorize the use of QR codes for marking.
20495–M	Tk Services Inc	173.54(a), 173.54(d)	To modify the special permit to authorize carriers other than those contracted to the holder of the permit.
20549–M	CELLBLOCK FCS, LLC	172.400, 172.700(a), 172.102(c)(1), 172.200, 172.300.	To modify the special permit to authorize the transportation in commerce of larger batteries (Wh > 300) without shipping papers, labeling, marking and training.
20567–M	OMNI TANKER PTY. LTD	107.503(b), 107.503(c), 172.102(c)(3), 172.203(a), 173.241, 173.242, 173.243, 178.345–1, 178.347–1, 178.348–1, 180.405, 180.413(d).	To modify the special permit to authorize additional cargo tank designs.
20621–M	Sigma-aldrich Co. Llc	173.56(b), 173.224(c), 173.225(b).	To modify the special permit to authorize the use of a higher density expandable foam and to authorize a smaller package.
20858–N	Cryoconcepts, Lp	173.304a(a)(1), 173.306(a)	To authorize the transportation in commerce of materials as limited quantities that are not otherwise authorized for the exception.
20900–N	Ametek Ameron, Llc	173.56(b), 173.302(a)	To authorize the manufacture, mark, sale, and use of non-DOT specification cylinders similar to DOT 3HT.
20907–N	VERSUM MATERIALS, INC	171.23(a), 171.23(a)(3)	To authorize the transportation in commerce of dichlorosilane in non-DOT specification cylinders.
20910–N	CELLBLOCK FCS, LLC	172.200, 172.300, 172.500, 172.400, 172.700(a).	To authorize the manufacture, mark, sale, and use of UN 4G packaging for the transportation of damaged or defective lithium ion cells and batteries, including cells or batteries contained in equipment, without being subject to certain hazard communication requirements.
20931–N	DEPARTMENT OF DEFENSE US ARMY MILITARY SURFACE DEPLOYMENT & DISTRIBUTION COMMAND.	173.185(e)	To authorize the transportation in commerce of low production and prototype lithium ion batteries in non spec packaging (spacecraft component).
20953–N	Triad National Security, Llc	173.185(a)	To authorize the transportation in commerce of low production lithium ion batteries contained in equipment (spacecraft) in non-specification packaging.

SPECIAL PERMITS DATA—Denied

11900–M	Goldstar Manufacturing L.l.c	173.4(a)(1)(iii), 173.4(a)(9), 173.4(a)(10).	To modify the special permit to authorize an additional 6.1 hazmat.
20917–N	Goldstar Manufacturing L.l.c	173.4(a)(1)(iii), 173.4(a)(9), 173.4(a)(10).	To authorize the transportation in commerce of methyl isothiocyanate under the small quantities exception.
20927–N	MELROSE PYROTECHNICS, INC.	172.504(a)	To authorize the transportation in commerce of Division 1.3G fireworks without requiring the motor vehicle containing the fireworks to be placarded.

SPECIAL PERMITS DATA—Withdrawn

[FR Doc. 2019–24712 Filed 11–13–19; 8:45 am]

BILLING CODE 4909–60–P

FEDERAL REGISTER

Vol. 84 Thursday,

No. 220 November 14, 2019

Part II

Department of Treasury

Office of the Comptroller of the Currency

12 CFR Part 44

Federal Reserve System

12 CFR Part 248

Federal Deposit Insurance Corporation

12 CFR Part 351

Commodity Futures Trading Commission

17 CFR Part 75

Securities and Exchange Commission

17 CFR Part 255

Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds; Final Rule

DEPARTMENT OF TREASURY

Office of the Comptroller of the Currency

12 CFR Part 44

[Docket No. OCC–2018–0010]

RIN 1557–AE27

FEDERAL RESERVE SYSTEM

12 CFR Part 248

[Docket No. R–1608]

RIN 7100–AF 06

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 351

RIN 3064–AE67

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 75

RIN 3038–AE72

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 255

[Release no. BHCA–7; File no. S7–14–18]

RIN 3235–AM10

Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds

AGENCY: Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); Securities and Exchange Commission (SEC); and Commodity Futures Trading Commission (CFTC).

ACTION: Final rule.

SUMMARY: The OCC, Board, FDIC, SEC, and CFTC are adopting amendments to the regulations implementing section 13 of the Bank Holding Company Act. Section 13 contains certain restrictions on the ability of a banking entity and nonbank financial company supervised by the Board to engage in proprietary trading and have certain interests in, or relationships with, a hedge fund or private equity fund. These final amendments are intended to provide banking entities with clarity about what activities are prohibited and to improve supervision and implementation of section 13.

DATES:

Effective date: The effective date for amendatory instructions 1 through 14 (OCC), 16 through 29 (Board), 31 through 44 (FDIC), and 46 through 58 (CFTC) is January 1, 2020; the effective date for amendatory instructions 60 through 73 (SEC) is January 13, 2020; and the effective date for the addition of appendices Z at amendatory instructions 15 (OCC), 30 (Board), and 45 (FDIC) is January 1, 2020, through December 31, 2020, except for amendatory instruction 74 (SEC), which is effective January 13, 2020, through December 31, 2020.

Compliance date: Banking entities must comply with the final amendments by January 1, 2021. Until the compliance date, banking entities must continue to comply with the 2013 rule (as set forth in appendices Z to 12 CFR parts 44, 248, and 351 and 17 CFR parts 75 and 255). Alternatively, a banking entity may voluntarily comply, in whole or in part, with the amendments adopted in this release prior to the compliance date, subject to the agencies' completion of necessary technological changes.

FOR FURTHER INFORMATION CONTACT:

OCC: Roman Goldstein, Risk Specialist, Treasury and Market Risk Policy, (202) 649–6360; Tabitha Edgens, Counsel; Mark O'Horo, Senior Attorney, Chief Counsel's Office, (202) 649–5490; for persons who are deaf or hearing impaired, TTY, (202) 649–5597, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219.

Board: Flora Ahn, Special Counsel, (202) 452–2317, Gregory Frischmann, Senior Counsel, (202) 452–2803, Kirin Walsh, Attorney, (202) 452–3058, or Sarah Podrygula, Attorney, (202) 912–4658, Legal Division, Cecily Boggs, Senior Financial Institution Policy Analyst, (202) 530–6209, David Lynch, Deputy Associate Director, (202) 452–2081, David McArthur, Senior Economist, (202) 452–2985, Division of Supervision and Regulation; Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551.

FDIC: Bobby R. Bean, Associate Director, *bbean@fdic.gov,* Michael E. Spencer, Chief, Capital Markets Strategies, *michspencer@fdic.gov,* Andrew D. Carayiannis, Senior Policy Analyst, *acarayiannis@fdic.gov,* or Brian Cox, Senior Policy Analyst, *brcox@fdic.gov,* Capital Markets Branch, (202) 898–6888; Michael B. Phillips, Counsel, *mphillips@fdic.gov,* Benjamin J. Klein, Counsel, *bklein@fdic.gov,* or Annmarie H. Boyd, Counsel, *aboyd@fdic.gov,* Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SEC: Andrew R. Bernstein, Senior Special Counsel, Sam Litz, Attorney-Adviser, Aaron Washington, Special Counsel, or Carol McGee, Assistant Director, at (202) 551–5870, Office of Derivatives Policy and Trading Practices, Division of Trading and Markets, and Matthew Cook, Senior Counsel, Benjamin Tecmire, Senior Counsel, and Jennifer Songer, Branch Chief at (202) 551–6787 or *IArules@sec.gov,* Division of Investment Management, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

CFTC: Cantrell Dumas, Special Counsel, (202) 418–5043, *cdumas@cftc.gov;* Jeffrey Hasterok, Data and Risk Analyst, (646) 746–9736, *jhasterok@cftc.gov,* Division of Swap Dealer and Intermediary Oversight; Mark Fajfar, Assistant General Counsel, (202) 418–6636, *mfajfar@cftc.gov,* Office of the General Counsel; Stephen Kane, Research Economist, (202) 418–5911, *skane@cftc.gov,* Office of the Chief Economist; Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background
II. Notice of Proposed Rulemaking
III. Overview of the Final Rule and Modifications From the Proposal
  A. The Final Rule
  B. Agency Coordination and Other Comments
IV. Section by Section Summary of the Final Rule
  A. Subpart A—Authority and Definitions
  B. Subpart B—Proprietary Trading Restrictions
  C. Subpart C—Covered Fund Activities and Investments
  D. Subpart D—Compliance Program Requirement; Violations
  E. Subpart E—Metrics
V. Administrative Law Matters
  A. Use of Plain Language
  B. Paperwork Reduction Act
  C. Regulatory Flexibility Act Analysis
  D. Riegle Community Development and Regulatory Improvement Act
  E. OCC Unfunded Mandates Reform Act Determination
  F. SEC Economic Analysis
  G. Congressional Review Act

I. Background

Section 13 of the Bank Holding Company Act of 1956 (BHC Act),[1] also known as the Volcker Rule, generally prohibits any banking entity from engaging in proprietary trading or from

[1] 12 U.S.C. 1851.

acquiring or retaining an ownership interest in, sponsoring, or having certain relationships with a hedge fund or private equity fund (covered fund).[2] The statute expressly exempts from these prohibitions various activities, including among other things:

- Trading in U.S. government, agency, and municipal obligations;
- Underwriting and market making-related activities;
- Risk-mitigating hedging activities;
- Trading on behalf of customers;
- Trading for the general account of insurance companies; and
- Foreign trading by non-U.S. banking entities.[3]

In addition, section 13 of the BHC Act contains several exemptions that permit banking entities to engage in certain activities with respect to covered funds, subject to certain restrictions designed to ensure that banking entities do not rescue investors in those funds from loss, and do not guarantee nor expose themselves to significant losses due to investments in or other relationships with these funds.[4]

Authority under section 13 for developing and adopting regulations to implement the prohibitions and restrictions of section 13 of the BHC Act is shared among the Board, the FDIC, the OCC, the SEC, and the CFTC (individually, an agency, and collectively, the agencies).[5] The agencies issued a final rule implementing section 13 of the BHC Act in December 2013 (the 2013 rule), and those provisions became effective on April 1, 2014.[6]

Since the adoption of the 2013 rule, the agencies have gained several years of experience implementing the 2013 rule, and banking entities have had more than five years of becoming familiar and complying with the 2013 rule. The agencies have received various communications from the public and other sources since adoption of the 2013 rule and over the course of the 2013 rule's implementation. Staffs of the agencies also have held numerous meetings with banking entities and other market participants to discuss the 2013 rule and its implementation. In addition, the data collected in connection with the 2013 rule, compliance efforts by banking entities, and the agencies' experiences in reviewing trading, investment, and other activity under the 2013 rule have provided valuable insights into the effectiveness of the 2013 rule. Together, these experiences have highlighted areas in which the 2013 rule may have resulted in ambiguity, overbroad application, or unduly complex compliance routines or may otherwise not have been as effective or efficient in achieving its purpose as intended or expected.

II. Notice of Proposed Rulemaking

Based on their experience implementing the 2013 rule, the agencies published a notice of proposed rulemaking (the proposed rule or proposal) on July 17, 2018, that proposed amendments to the 2013 rule. These amendments sought to provide greater clarity and certainty about what activities are prohibited under the 2013 rule and to improve the effective allocation of compliance resources where possible.[7]

The agencies sought to address a number of targeted areas for revision in the proposal. First, the agencies proposed further tailoring to make the scale of compliance activity required by the 2013 rule commensurate with a banking entity's size and level of trading activity. In particular, the agencies proposed to establish three categories of banking entities based on the firms' level of trading activity—those with significant trading assets and liabilities, those with moderate trading assets and liabilities, and those with limited trading assets and liabilities.[8] The agencies also invited comments on whether certain definitions, including ''banking entity'' [9] and ''trading desk,'' [10] and ''covered fund'' [11] should be modified.

The agencies also proposed making several changes to subpart B of the 2013 rule, which implements the statutory prohibition on proprietary trading and the various statutory exemptions to this prohibition. The agencies proposed revisions to the trading account definition,[12] including replacing the short-term intent prong of the trading account definition in the 2013 rule with a new prong based on the accounting treatment of a position (the accounting prong) and, with respect to trading activity subject only to the accounting prong, establishing a presumption of compliance with the prohibition on proprietary trading, based on the absolute value of a trading desk's profit and loss.[13] Under the proposed accounting prong, the trading account would have encompassed financial instruments recorded at fair value on a recurring basis under applicable accounting standards.

In addition, the proposal would have modified several of the exemptions and exclusions from the prohibition on proprietary trading in subpart B to clarify how banking entities may qualify for those exemptions and exclusions, as well as to reduce associated compliance burdens. For example, the agencies proposed revising the 2013 rule's exemptions for underwriting and market making-related activities,[14] the exemption for risk-mitigating hedging activities,[15] the exemption for trading by a foreign banking entity that occurs solely outside of the United States,[16] and the liquidity management exclusion.[17] In addition, the agencies proposed establishing an exclusion for transactions to correct trading errors.[18]

The agencies also proposed certain modifications to the prohibitions in subpart C on banking entities directly or indirectly acquiring or retaining an ownership interest in, or having certain relationships with, a covered fund. For example, the proposed rule would have modified provisions related to the underwriting or market making of ownership interests in covered funds [19] and the exemption for certain permitted covered fund activities and investments outside of the United States. The proposal also would have expanded a banking entity's ability to engage in hedging activities involving an ownership interest in a covered fund.[20] In addition, the agencies requested comment regarding tailoring the definition of ''covered fund,'' including potential additional exclusions,[21] and revising the provisions limiting banking entities' relationships with covered funds.[22]

To enhance compliance efficiencies, the agencies proposed tailoring the

[2] *Id.*

[3] 12 U.S.C. 1851(d)(1).

[4] *E.g.,* 12 U.S.C. 1851(d)(1)(G).

[5] 12 U.S.C. 1851(b)(2).

[6] Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds; Final Rule, 79 FR 5535 (Jan. 31, 2014).

[7] Proposed Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds, 83 FR 33432 (July 17, 2018).

[8] *See* 83 FR 33437, 40–42.

[9] *See* 83 FR 33442–46.

[10] *See* 83 FR 33453–54.

[11] *See* 83 FR 33471–82.

[12] The definition of ''trading account'' is a threshold definition that determines whether the purchase or sale of a financial instrument by a banking entity is subject to the restrictions and requirements of section 13 of the BHC Act and the 2013 rule.

[13] *See* 83 FR 33446–51.

[14] *See* 83 FR 33454–62.

[15] *See* 83 FR 33464–67.

[16] *See* 83 FR 33467–70.

[17] *See* 83 FR 33451–52.

[18] *See* 83 FR 33452–53.

[19] *See* 83 FR 33482–83

[20] *See* 83 FR 33483–86.

[21] *See* 83 FR 33471–82.

[22] *See* 83 FR 33486–87.

compliance requirements based on new compliance tiers. The proposed rule would have applied the six-pillar compliance program, and a CEO attestation requirement largely consistent with the 2013 rule, to firms with significant trading assets and liabilities and eliminated the enhanced minimum standards for compliance programs in Appendix B of the 2013 rule.[23] Firms with moderate trading assets and liabilities would have been required to adhere to a simplified compliance program, with a CEO attestation requirement,[24] and firms with limited trading assets and liabilities would have had a presumption of compliance with the rule.[25] The proposal also included a reservation of authority specifying that the agencies could impose additional requirements on banking entities with limited or moderate trading assets and liabilities if warranted.[26] The proposal would have revised the metrics reporting and recordkeeping requirements by, for example, applying those requirements based on a banking entity's size and level of trading activity, eliminating some metrics, and adding a limited set of new metrics to enhance compliance efficiencies.[27] In addition, the agencies requested comment on whether some or all of the reported quantitative measurements should be made publically available.

The agencies invited comment on all aspects of the proposal, including specific proposed revisions and questions posed by the agencies. The agencies received over 75 unique comments from banking entities and industry groups, public interest groups, and other organizations and individuals. In addition, the agencies received approximately 3,700 comments from individuals using a version of a short form letter to express opposition to the proposed rule. For the reasons discussed below, the agencies are now adopting a final rule that incorporates a number of modifications.

III. Overview of the Final Rule and Modifications From the Proposal

A. The Final Rule

Similar to the proposal, the final rule includes a risk-based approach to revising the 2013 rule that relies on a set of clearly articulated standards for both prohibited and permitted activities and investments. The final rule is intended to further tailor and simplify the rule to allow banking entities to more efficiently provide financial services in a manner that is consistent with the requirements of section 13 of the BHC Act.

The comments the agencies received from banking entities and financial services industry trade groups were generally supportive of the proposal, with the exception of the proposed accounting prong, and provided recommendations for further targeted changes. The agencies also received a few comments in opposition to the proposal from various organizations and individuals.[28] As described further below, the agencies have adopted many of the proposed changes to the 2013 rule, with certain targeted adjustments based on comments received. Furthermore, the agencies intend to issue an additional notice of proposed rulemaking that would propose additional, specific changes to the restrictions on covered fund investments and activities and other issues related to the treatment of investment funds under the regulations implementing section 13 of the BHC Act.

The final rule includes the same general three-tiered approach to tailoring the compliance program requirements as the proposal. However, based on comments received, the agencies have modified the threshold for banking entities in the ''significant'' compliance category from $10 billion in gross trading assets and liabilities to $20 billion in gross trading assets and liabilities. The final rule also includes modifications to the calculation of trading assets and liabilities for purposes of determining which compliance tier a banking entity falls into by excluding certain financial instruments that banking entities are permitted to trade without limit under section 13. Additionally, the final rule aligns the methodologies for calculating the ''limited'' and ''significant'' compliance thresholds for foreign banking organizations by basing both thresholds on the trading assets and liabilities of the firm's U.S. operations.[29]

The final rule also includes many of the proposed changes to the proprietary trading restrictions, with certain changes based on comments received. One such change is that the final rule does not include the proposed accounting prong in the trading account definition. Instead, the final rule retains a modified version of the short-term intent prong and replaces the 2013 rule's rebuttable presumption that financial instruments held for fewer than 60 days are within the short-term intent prong of the trading account with a rebuttable presumption that financial instruments held for 60 days or longer are not within the short-term intent prong of the trading account. The final rule also provides that a banking entity that is subject to the market risk capital rule prong of the trading account definition is not also subject to the short-term intent prong, and a banking entity that is not subject to the market risk capital rule prong may elect to apply the market risk capital rule prong (as an alternative to the short-term intent prong). Additionally, the final rule modifies the liquidity management exclusion from the proprietary trading restrictions to permit banking entities to use a broader range of financial instruments to manage liquidity, and it adds new exclusions for error trades, certain customer-driven swaps, hedges of mortgage servicing rights, and purchases or sales of instruments that do not meet the definition of trading assets or liabilities. Furthermore, the final rule revises the trading desk definition to provide more flexibility to banking entities to align the definition with other trading desk definitions in existing or planned compliance programs. This modified definition also will provide for consistent treatment across different regulatory regimes.

The final rule also includes the proposed changes to the exemptions from the prohibitions in section 13 of the BHC Act for underwriting and market making-related activities, risk-mitigating hedging, and trading by foreign banking entities solely outside the United States. The final rule also includes the proposed changes to the covered funds provisions for which specific rule text was proposed, including with respect to permitted underwriting and market making and risk-mitigating hedging with respect to a covered fund, as well as investment in or sponsorship of covered funds by foreign banking entities solely outside the United States and the exemption for prime brokerage transactions. With respect to the exemptions for underwriting and market making-related activities, the final rule adopts the presumption of compliance with the

[23] *See* 83 FR 33487–89; 33490–94.

[24] *See* 83 FR 33489.

[25] *See* 83 FR 33490.

[26] *See* 83 FR 33454.

[27] *See* 83 FR 33494–514.

[28] *See, e.g.,* Senators Merkley et al.; Elise J. Bean (Bean); National Association of Federally-Insured Credit Unions (NAFCU); Better Markets, Inc. (Better Markets); Americans for Financial Reform (AFR); Volcker Alliance; Occupy the SEC; and Volcker 2.0 Form Letter.

[29] Under the proposal, the ''limited'' compliance threshold would have been based on the trading assets and liabilities of a foreign banking organization's worldwide operations whereas the ''significant'' compliance threshold would have been based on the trading assets and liabilities of a foreign banking organization's U.S. operations.

reasonably expected near-term demand requirement for trading within certain internal limits, but instead of requiring banking entities to promptly report limit breaches or increases to the agencies, banking entities are required to maintain and make available upon request records of any such breaches or increases and follow certain internal escalation and approval procedures in order to remain qualified for the presumption of compliance.

With respect to the compliance program requirements, the final rule includes the changes from the proposal to eliminate the enhanced compliance requirements in Appendix B of the 2013 rule and to tailor the compliance program requirements based on the size of the banking entity's trading activity. However, different from the proposal, the final rule only applies the CEO attestation requirement to firms with significant trading assets and liabilities. Also, in response to comments, the final rule includes modifications to the metrics collection requirements to, among other things, eliminate certain metrics and reduce the compliance burden associated with the requirement.

For the OCC, Board, FDIC, and CFTC, the final amendments will be effective on January 1, 2020. For the SEC, the final amendments will be effective on January 13, 2020. In order to give banking entities a sufficient amount of time to comply with the changes adopted, banking entities will not be required to comply with the final amendments until January 1, 2021. During that time, the 2013 rule will remain in effect as codified in appendix Z, which is a temporary appendix that will expire on the compliance date. However, banking entities may voluntarily comply, in whole or in part, with the amendments adopted in this release prior to the compliance date, subject to the agencies' completion of necessary technical changes. In particular, the agencies need to complete certain technological programming in order to accept metrics compliant with the final amendments. The agencies will conduct a test run with banking entities of the revised metrics submission format. A banking entity seeking to switch to the revised metrics prior to January 1, 2021, must first successfully test submission of the revised metrics in the new XML format. Accordingly, banking entities should work with each appropriate agency to determine how and when to voluntarily comply with the metrics requirements under the final rules and to notify such agencies of their intent to comply, prior to the January 1, 2021, compliance date.

B. Interagency Coordination and Other Comments

Section 13(b)(2)(B)(ii) of the BHC Act directs the agencies to ''consult and coordinate'' in developing and issuing the implementing regulations ''for the purpose of assuring, to the extent possible, that such regulations are comparable and provide for consistent application and implementation of the applicable provisions of [section 13 of the BHC Act] to avoid providing advantages or imposing disadvantages to the companies affected . . . .'' [30] The agencies recognize that coordinating with each other to the greatest extent practicable with respect to regulatory interpretations, examinations, supervision, and sharing of information is important to maintaining consistent oversight, promoting compliance with section 13 of the BHC Act and implementing regulations, and to fostering a level playing field for affected market participants. The agencies further recognize that coordinating these activities helps to avoid unnecessary duplication of oversight, reduces costs for banking entities, and provides for more efficient regulation.

In the proposal, the agencies requested comment on interagency coordination regarding the Volcker Rule in general and asked several specific questions relating to transparency, efficiency, and safety and soundness.[31] Numerous commenters, including banking entities and industry groups, suggested that the agencies more effectively coordinate Volcker Rule related supervision, examinations, and enforcement, in order to improve efficiency and predictability in supervision and oversight.[32] For example, several commenters suggested that Volcker Rule related supervision should be conducted solely by a bank's prudential onsite examiner,[33] and that the two market regulators be required to consult and coordinate with the prudential onsite examiner.[34] Several commenters encouraged the agencies to memorialize coordination and information sharing between the agencies by entering into a formal written agreement, such as an interagency Memorandum of Understanding.[35]

Several comment letters from public interest organizations suggested that the agencies have not provided sufficient transparency when implementing and enforcing the Volcker Rule, and urged the agencies to make public certain information related to enforcement actions, metrics, and covered funds activities.[36] In addition, several commenters, including a member of Congress, argued that the agencies have not adequately explained or provided evidence to support the current rulemaking.[37]

The agencies agree with commenters that interagency coordination plays an important role in the effective implementation and enforcement of the Volcker Rule, and acknowledge the benefits of providing transparency in proposing and adopting rules to implement section 13 of the BHC Act. Accordingly, the agencies have endeavored to provide specificity and clarity in the final rule to avoid conflicting interpretations or uncertainty. The final rule also includes notice and response procedures that provide a greater degree of certainty about the process by which the agencies will make certain determinations under the final rule. The agencies continue to recognize the benefits of consistent application of the rules implementing section 13 of the BHC Act and intend to continue to consult with each other when formulating guidance on the final rule that would be shared with the public generally. That said, the agencies also are mindful of the need to strike an appropriate balance between public disclosure and the protection of sensitive, confidential information, and the agencies are generally restricted from disclosing sensitive, confidential business and supervisory information on a firm-specific basis.

Several commenters provided general comments regarding the proposal and the current rulemaking. For example, several public interest commenters suggested that the proposed rule did not provide a sufficient financial disincentive against proprietary trading and encouraged the agencies to adopt certain limitations on compensation arrangements.[38] A commenter also suggested possible penalties for rule violations and encouraged the agencies to elaborate on the consequences of

[30] 12 U.S.C. 1851(b)(2)(B)(ii).

[31] 83 FR 33436.

[32] *See, e.g.,* American Bankers Association (ABA); Institute of International Bankers (IIB); BB&T; Committee on Capital Markets Regulation (CCMR); Japanese Bankers Association (JBA); and the CFA Institute (CFA). Commenters also recommended designating to one agency the task of interpreting the implementing regulations and issuing guidance to smaller banking entities. *See, e.g.,* Credit Suisse and Lori Nuckolls.

[33] *See, e.g.,* ABA; Arvest Bank (Arvest); Credit Suisse; and Financial Services Forum (FSF).

[34] *See* ABA.

[35] *See, e.g.,* ABA; BB&T; CCMR; and FSF.

[36] *See, e.g.,* AFR; Public Citizen; Volcker Alliance; and CFA.

[37] *See, e.g.,* CAP; Merkley; and Public Citizen.

[38] *See, e.g.,* Public Citizen and CAP.

significant violations of the rule.[39] Other commenters recommended that the agencies impose strong penalties on banking entities that break the law.[40] The agencies believe that the appropriate consequences for a violation of the rule will likely depend on the specific facts and circumstances in individual cases, as well as each agency's statutory authority under section 13, and therefore are not amending the rule to provide for specific penalties or financial disincentives for violations. Finally, several commenters suggested that the proposed rule is too complex and may provide too much deference to a banking entity's internal procedures and models (for example, in provisions related to underwriting, market making, and hedging), and that the proposed revisions would make the rule less effective.[41] As discussed further below, the agencies believe that the particular changes adopted in the final rule are meaningfully simpler and streamlined compared to the 2013 rule, and are appropriate for the reasons described in greater detail below.

IV. Section by Section Summary of the Final Rule

A. Subpart A—Authority and Definitions

1. Section ____.2: Definitions

a. Banking Entity

Section 13(a)(1)(A) of the BHC Act prohibits a banking entity from engaging in proprietary trading or acquiring or retaining an ownership interest, or sponsoring, a covered fund, unless the activity is otherwise permissible under section 13.[42] Therefore, the definition of the term ''banking entity'' defines the scope of entities subject to restrictions under the rule. Section 13(h)(1) of the BHC Act defines the term ''banking entity'' to include (i) any insured depository institution (as defined by statute); (ii) any company that controls an insured depository institution; (iii) any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978; and (iv) any affiliate or subsidiary of any such entity.[43] The regulations implementing this provision are consistent with the statute and also exclude covered funds that are not themselves banking entities, certain portfolio companies, and the FDIC acting in its corporate capacity as conservator or receiver.[44]

In addition, the agencies note that, consistent with the statute, for purposes of this definition, the term ''insured depository institution'' does not include certain institutions that function solely in a trust or fiduciary capacity, and certain community banks and their affiliates.[45] Section 203 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA) amended the definition of ''banking entity'' in the Volcker Rule to exclude certain community banks from the definition of insured depository institution, the general result of which was to exclude community banks and their affiliates and subsidiaries from the scope of the Volcker Rule.[46] On July 22, 2019, the agencies adopted a final rule amending the definition of ''insured depository institution,'' in a manner consistent with EGRRCPA.[47]

The proposed rule did not propose specific rule text to amend the definition of ''banking entity,'' but invited comment on a number of specific issues.[48] The agencies received several comments about the ''banking entity'' definition, many of which asked that the agencies revise this definition to exclude specific types of entities.

Several commenters expressed concern about the treatment of certain funds that are excluded from the definition of ''covered fund'' in the 2013 rule, including registered investment companies (RICs), foreign public funds (FPFs), and, with respect to a foreign banking entity, certain foreign funds offered and sold outside of the United States (foreign excluded funds).[49] In particular, these commenters noted that when a banking entity invests in such funds, or has certain corporate governance rights or other control rights with respect to such funds, the funds could meet the definition of ''banking entity'' for purposes of the Volcker Rule.[50] Concerns about certain funds' potential status as banking entities arise, in part, because of the interaction between the statute's and the 2013 rule's definitions of the terms ''banking entity'' and ''covered fund.'' Sponsors of RICs, FPFs, and foreign excluded funds have noted that the treatment of such funds as ''banking entities'' would disrupt bona fide asset management activities (including fund investment strategies that may include proprietary trading or investing in covered funds), which these sponsors argued would be inconsistent with section 13 of the BHC Act.[51] Commenters also noted that treatment of RICs, FPFs, and foreign excluded funds as ''banking entities'' would put such banking entity-affiliated funds at a competitive disadvantage compared to funds not affiliated with a banking entity, and therefore not subject to restrictions under section 13 of the BHC Act.[52] In general, commenters also asserted that the treatment of RICs, FPFs, and foreign excluded funds as banking entities would not further the policy objectives of section 13 of the BHC Act.[53]

Several commenters suggested that the agencies exclude from the definition of ''banking entity'' foreign excluded funds.[54] These commenters generally noted that failing to exclude such funds from the definition of ''banking entity'' in the 2013 rule has the unintended consequence of imposing proprietary trading restrictions and compliance obligations on foreign excluded funds that are in some ways more burdensome than the requirements that would apply under the 2013 rule to covered funds. Another commenter expressed opposition to carving out foreign excluded funds from the definition of banking entity.[55] The staffs of the agencies continue to consider ways in which the regulations may be amended in a manner consistent with the statutory definition of ''banking entity,'' or other appropriate actions that may be taken, to address any unintended consequences of section 13 of the BHC Act and the 2013 rule. The agencies intend to issue a separate proposed

[39] *See* Public Citizen.

[40] *See* Volcker 2.0 Form Letter.

[41] *See, e.g.,* Systemic Risk Council and Oonagh McDonald.

[42] 12 U.S.C. 1851(a)(1)(A). A banking entity may engage in an activity that is permissible under section 13 of the BHC Act only to the extent permitted by any other provision of Federal and State law, and subject to other applicable restrictions. *See* 12 U.S.C. 1851(d)(1).

[43] 12 U.S.C. 1851(h)(1).

[44] *See* 2013 rule § ____.2(c).

[45] *See* final rule § ____.2(r).

[46] Public Law 115–174 (May 24, 2018).

[47] *See* 84 FR 35008.

[48] *See* 83 FR 33442–446.

[49] *See, e.g.,* ABA; American Investment Council (AIC); Bundesverband Investment (BVI); Canadian Bankers Association (CBA); European Banking Federation (EBF); Federated Investors II; Financial Services Agency and Bank of Japan (FSA/Bank of Japan); European Fund and Asset Management Association (EFAMA); and IIB.

[50] *Id.*

[51] *See, e.g.,* IIB and Securities Industry and Financial Markets Association (SIFMA).

[52] *See, e.g.,* Capital One et al.; Credit Suisse; EBF; and Investment Adviser Association (IAA).

[53] *See, e.g.,* ABA; EBF; and Investment Company Institute (ICI).

[54] *Id.* In addition to the requests from commenters for the agencies to exclude foreign excluded funds from the ''banking entity'' definition, commenters also asked the agencies to adopt other amendments to address the treatment of such funds, including by providing a presumption of compliance for such funds (CBA; EBF; and IIB), to permit a banking entity to elect to treat a foreign excluded fund as a covered fund (CBA; EBF; and IIB), and to permanently extend the temporary relief currently provided to foreign excluded funds (IIB).

[55] *See* Data Boiler Technologies, LLC (Data Boiler).

rulemaking that specifically addresses the fund structures under the rule, including the treatment of foreign excluded funds.

To provide additional time to complete this rulemaking, the Federal banking agencies released a policy statement on July 17, 2019, in response to concerns about the treatment of foreign excluded funds. This policy statement provides that the Federal banking agencies would not propose to take action during the two-year period ending on July 21, 2021, against a foreign banking entity based on attribution of the activities and investments of a qualifying foreign excluded fund to the foreign banking entity,[56] or against a qualifying foreign excluded fund as a banking entity, in each case where the foreign banking entity's acquisition or retention of any ownership interest in, or sponsorship of, the qualifying foreign excluded fund would meet the requirements for permitted covered fund activities and investments solely outside the United States, as provided in section 13(d)(1)(I) of the BHC Act and § ____.13(b) of the 2013 rule, as if the qualifying foreign excluded fund were a covered fund.[57]

Several commenters expressed concern with the treatment of RICs and FPFs, which are subject to significant regulatory requirements in the United States and foreign jurisdictions, respectively. These commenters encouraged the agencies to consider excluding such entities from the definition of ''banking entity.''[58] In the past, the staffs of the agencies issued several FAQs to address the treatment of RICs and FPFs.[59] One of these staff FAQs provides guidance about the treatment of RICs and FPFs during the period in which the banking entity is testing the fund's investment strategy, establishing a track record of the fund's performance for marketing purposes, and attempting to distribute the fund's shares (the so-called seeding period).[60] Another FAQ stated that staffs of the agencies would not view the activities and investments of an FPF that meets certain eligibility requirements in the 2013 rule as being attributed to the banking entity for purposes of section 13 of the BHC Act or the 2013 rule, where the banking entity (i) does not own, control, or hold with the power to vote 25 percent or more of any class of voting shares of the FPF (after the seeding period), and (ii) provides investment advisory, commodity trading advisory, administrative, and other services to the fund in compliance with applicable limitations in the relevant foreign jurisdiction. Similarly, this FAQ stated that the staffs of the agencies would not view the FPF to be a banking entity for purposes of section 13 of the BHC Act and the 2013 rule solely by virtue of its relationship with the sponsoring banking entity, where these same conditions are met.[61]

As noted above, the agencies intend to issue a separate proposal addressing and requesting comment on the covered fund provisions and other fund-related issues. The final rule does not modify or revoke any previously issued staff FAQs or guidance related to RICs, FPFs, and foreign excluded funds.[62]

Apart from these topics, the agencies received numerous other comments about the treatment of entities as ''banking entities'' under section 13 of the BHC Act. In general, these commenters requested that the agencies provide additional exclusions from the definition of ''banking entity'' for various types of entities. One commenter suggested that, as an alternative to excluding certain entities from the banking entity definition, the agencies could exempt the activities of these entities from the proprietary trading and covered fund prohibitions.[63]

One commenter recommended that the agencies provide a general exemption from the banking entity definition for investment funds, except in circumstances where the investment fund is determined to have been organized to permit the banking entity sponsor to engage in impermissible proprietary trading.[64] Some commenters encouraged the agencies to exclude employee securities companies from the definition of ''banking entity.''[65] One commenter argued that despite a banking entity's role as a general partner in employee securities companies, treating such entities as ''banking entities'' does not further the policy goals of section 13 of the BHC Act.[66] Several commenters encouraged the agencies to exclude from the definition of ''banking entity'' any non-consolidated subsidiaries not operated or managed by a banking entity, on the basis that such entities were never intended to be subject to section 13 of the BHC Act.[67] Another commenter said the agencies should exclude from the definition of ''banking entity'' all employee compensation plans, regardless of whether such plans are qualified or non-qualified.[68] Other commenters suggested that the agencies should exclude subsidiaries of foreign banking entities that do not engage in trading activities in the United States, or otherwise limit application to foreign subsidiaries of foreign banking groups.[69] Other commenters requested modification of the definition of ''banking entity'' to exclude parent companies and affiliates of industrial loan companies, noting that such companies are generally not subject to other restrictions on their activities under the BHC Act.[70]

One commenter encouraged the agencies to exclude international banks from the definition of ''banking entity'' if they have limited U.S. trading assets and liabilities.[71] This commenter also

[56] Foreign banking entity was defined for purposes of the policy statement to mean a banking entity that is not, and is not controlled directly or indirectly by, a banking entity that is located in or organized under the laws of the United States or any State.

[57] *See* Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Office of the Comptroller of the Currency, ''Statement regarding Treatment of Certain Foreign Funds under the Rules Implementing Section 13 of the Bank Holding Company Act'' (July 17, 2019). This policy statement continued the position of the Federal banking agencies that was released on July 21, 2017, and the position that the agencies expressed in the proposal. *See* 83 FR 33444.

[58] *See, e.g.,* CCMR; IAA; ICI; and Capital One et al. One commenter also expressed support for a narrower exclusion for RICs and FPFs that would apply only during a non-time-limited seeding period. JP Morgan Asset Management.

[59] *See https://www.occ.treas.gov/topics/capitalmarkets/financial-markets/trading-volcker-rule/volcker-rule-implementation-faqs.html* (OCC); *https://www.federalreserve.gov/bankinforeg/volcker-rule/faq.htm* (Board); *https://www.fdic.gov/regulations/reform/volcker/faq.html* (FDIC); *https://www.sec.gov/divisions/marketreg/faq-volcker-rulesection13.htm* (SEC); *https://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_28_VolckerRule/index.htm* (CFTC).

[60] *Id.,* FAQ 16.

[61] *Id.,* FAQ 14.

[62] The FAQs represent the views of staff of the agencies. They are not rules, regulations, or statements of the agencies. Furthermore, the agencies have neither approved nor disapproved their content. The FAQs, like all staff guidance, have no legal force or effect: They do not alter or amend applicable law, and they create no new or additional obligations for any person.

[63] *See* Bank Policy Institute (BPI).

[64] *See* EFAMA.

[65] *See, e.g.,* ABA and FSF.

[66] *See* ABA.

[67] *See, e.g.,* ABA; BPI; SIFMA; JBA.

[68] *See* BB&T.

[69] *See* JBA. This commenter suggested that in the absence of an exclusion for such entities, simplified compliance program requirements should apply to foreign subsidiaries of foreign banking entities that do not engage in trading activities in the United States. The agencies believe that several of the other changes in this final rule will provide relief to foreign banking entities that engage in no trading activities in the United States, including simplifications to the exemption for foreign banking entities engaged in trading outside of the United States, and more tailored compliance program requirements. *See also* FSA/Bank of Japan; IIB.

[70] *See, e.g.,* EnerBank USA (EnerBank); Marketplace Lending Association; National Association of Industrial Bankers.

[71] *See* IIB. This commenter also proposed modifying the manner in which ''banking entity''

Continued

encouraged the agencies to exclude certain non-U.S. commercial companies that are comparable to U.S. merchant banking portfolio companies.[72] This commenter argued that excluding these entities would not pose material risks to the financial stability of the United States.

Some commenters suggested that the agencies should clarify the standards for what constitutes ''control'' in the context of determining whether an entity is an ''affiliate'' or ''subsidiary'' for purposes of the definition of ''banking entity'' in the Volcker Rule.[73] One commenter suggested that the definition of ''banking entity'' should include only a company in which a banking entity owns, controls, or has the power to vote 25 percent or more of a class of voting securities of the company.[74]

The definition of ''banking entity'' in section 13 of the BHC Act uses the definition of control in section 2 of the BHC Act.[75] Under the BHC Act, ''control'' is defined by a three-pronged test. A company has control over another company if the first company (i) directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 percent or more of any class of voting securities of the other company; (ii) controls in any manner the election of a majority of the directors of the other company; or (iii) directly or indirectly exercises a controlling influence over the management or policies of the other company.[76] The Board recently issued a proposed rulemaking that would clarify the standards for evaluating whether one company exercises a controlling influence over another company for purposes of the BHC Act.[77]

The final rule does not amend the definition of banking entity. Commenters raised important considerations with respect to the consequences of the current ''banking entity'' definition under section 13 of the BHC Act and the 2013 rule. The agencies believe that other amendments to the requirements of the regulations implementing the Volcker Rule may address some of the issues raised by commenters. Certain concerns raised by commenters may need to be addressed through amendments to section 13 of the BHC Act.[78] In addition, as noted above, the agencies intend to revisit the fund-related provisions of the Volcker Rule in a separate rulemaking.

b. Limited, Moderate, and Significant Trading Assets and Liabilities

The proposal would have established three categories of banking entities based on their level of trading activity, as measured by the average gross trading assets and liabilities of the banking entity and its subsidiaries and affiliates (excluding obligations of or guaranteed by the United States or any agency of the United States) over the previous four consecutive quarters.[79] These categories would have been used to calibrate compliance requirements for banking entities, with the most stringent compliance requirements applicable to those with the greatest level of trading activities.

The first category would have included firms with ''significant'' trading assets and liabilities, defined as those banking entities that have consolidated trading assets and liabilities equal to or exceeding $10 billion.[80] The second category would have included firms with ''moderate'' trading assets and liabilities, which would have included those banking entities that have consolidated trading assets and liabilities of $1 billion or more, but with less than $10 billion in consolidated trading assets and liabilities.[81] The final category would have included firms with ''limited'' trading assets and liabilities, defined as those banking entities that have less than $1 billion in consolidated trading assets and liabilities.[82] The proposal would have also provided the agencies with a reservation of authority to require a banking entity with limited or moderate trading assets and liabilities to apply the compliance program requirements of a higher compliance tier if an agency determined that the size or complexity of the banking entity's trading or investment activities, or the risk of evasion of the requirements of the rule, warranted such treatment.[83] The proposal also solicited comment as to whether there should be further tailoring of the thresholds for a banking entity that is an affiliate of another banking entity with significant trading assets and liabilities, if that entity generally operates on a basis that is separate and independent from its affiliates and parent companies.[84]

Commenters provided feedback on multiple aspects of the tiered compliance framework, including the level of the proposed thresholds between the categories ($1 billion and $10 billion in trading assets and liabilities), the manner in which ''trading assets and liabilities'' should be measured, and alternative approaches that commenters believed would be preferable to the proposed three-tiered compliance framework. As described further below, after consideration of the comments received, the agencies are adopting a three-tiered compliance framework that is consistent with the proposal, with targeted adjustments to further tailor compliance program requirements based on the level of a firm's trading activities, and in light of concerns raised by commenters.[85] The agencies believe that this approach will increase compliance efficiencies for all banking entities relative to the 2013 rule and the proposal, and will further reduce compliance costs for firms that have little or no activity subject to the prohibitions and restrictions of section 13 of the BHC Act.

Several commenters expressed support for the proposed three-tiered compliance framework in the proposal.[86] One commenter noted that the 2013 rule's compliance regime, which imposes significant compliance obligations on all banking entities with $50 billion or more in total consolidated assets, does not appropriately tailor compliance obligations to the scope of activities covered under the regulation, particularly for firms engaged in limited trading activities.[87] Other commenters expressed general opposition to the proposed three-tiered compliance program.[88] Another commenter expressed concern in particular that banking entities with ''limited'' trading assets and liabilities would have been presumed compliant with the requirements of section 13 of the BHC

status is determined by disaggregating separate, independent corporate groups.

[72] *Id.*

[73] *See, e.g.,* EnerBank and Capital One et al. *See* 12 U.S.C. 1841(a)(2)(C).

[74] *See* Capital One et al.

[75] 12 U.S.C. 1841(a)(2); 12 CFR 225.2(e).

[76] *Id.*

[77] *See* ''Control and Divestiture Proceedings,'' 84 FR 21634–666 (May 14, 2019).

[78] *See, e.g.,* Economic Growth, Regulatory Relief, and Consumer Protection Act § 203 (excluding community banks from the definition of ''banking entity'').

[79] *See* proposed rule § ____.2(t), (v), (ff). Under the proposal, a foreign banking entity's trading assets and liabilities would have been calculated based on worldwide trading assets and liabilities with respect to the $1 billion threshold between limited and moderate trading assets and liabilities, but based on the trading assets and liabilities only of its combined U.S. operations with respect to the $10 billion threshold between moderate and significant trading assets and liabilities. *See* proposed rule § ____.2(t)(1), (ff)(2)–(3).

[80] Proposed rule § ____.2(ff).

[81] Proposed rule § ____.2(v).

[82] Proposed rule § ____.2(t).

[83] Proposed rule § ____.20(h).

[84] *See* 83 FR at 33442 (question 7).

[85] *See* final rule § ____.2(s), (u), (ee).

[86] *See, e.g.,* BB&T Corporation; CFA; CCMR; and State Street Corporation (State Street).

[87] *See* State Street.

[88] *See, e.g.,* Bean; Data Boiler Technologies; and Occupy the SEC.

Act under the proposed rule.[89] Some commenters also suggested that the agencies adopt a two-tiered compliance program, bifurcating banking entities into those with and without significant trading assets and liabilities.[90] One commenter expressed opposition to tailoring compliance requirements for banking entities that operate separately and independently from their affiliates, by calculating trading assets and liabilities for such entities independent of the activities of affiliates.[91] The agencies believe that the three-tiered framework set forth in the proposal, subject to the additional amendments described below, appropriately differentiates among banking entities for the purposes of tailoring compliance requirements. Specifically, the agencies believe that the significant differences in business models and activities among banking entities that would have significant trading assets and liabilities, moderate trading assets and liabilities, and limited trading assets and liabilities, as described below, support having a three-tiered compliance framework.

A few commenters recommended that the agencies raise the proposed $1 billion threshold between banking entities with limited and moderate trading assets and liabilities.[92] These commenters suggested that raising this threshold to $5 billion in trading assets and liabilities would be consistent with the objective of the proposal to have the most streamlined requirements imposed on banking entities with a relatively small amount of trading activities. Other commenters recommended that the threshold between banking entities with limited and moderate trading activities was appropriate or should be set at a lower level.[93] The agencies believe that the compliance obligations applicable to banking entities with limited trading assets and liabilities are most appropriately reserved for banking entities below the $1 billion threshold set forth in the proposal. Such banking entities tend to have simpler business models and do not have large trading operations that would warrant the expanded compliance obligations applicable to banking entities with moderate and significant trading assets and liabilities. As discussed further below, these banking entities also hold a relatively small amount of the trading assets and liabilities in the U.S. banking system. Therefore, the final rule adopts the threshold from the proposed rule for determining whether a banking entity has limited trading assets and liabilities.[94]

Several commenters recommended that the agencies modify the threshold for ''significant'' trading assets and liabilities.[95] Generally, these commenters expressed support for raising the threshold from $10 billion in trading assets and liabilities to $20 billion in trading assets and liabilities.[96] These commenters noted that this change would have minimal impact on the number of banking entities that would remain categorized as having significant trading assets and liabilities.[97] Several commenters also noted that increasing the threshold from $10 billion to $20 billion would provide additional certainty to banking entities that are near or approaching the $10 billion threshold, because market events or unusual customer demands could cause such banking entities to exceed (permanently or on a short-term basis) the $10 billion trading assets and liabilities threshold.[98] The final rule adopts the change recommended by several commenters to raise the threshold from $10 billion to $20 billion for calculating whether a banking entity has significant trading assets and liabilities.[99]

The agencies estimate that, under the final rule with the increased threshold from $10 billion to $20 billion described above, banking entities classified as having significant trading assets and liabilities would hold approximately 93 percent of the trading assets and liabilities in the U.S. banking system. The agencies also estimate that banking entities with significant trading assets and liabilities and those with moderate trading assets and liabilities in combination would hold approximately 99 percent of the trading assets and liabilities in the U.S. banking system. Therefore, both of these thresholds will tailor the compliance obligations under the final rule for all firms by virtue of imposing greater compliance obligations on those banking entities with the most substantial levels of trading activities.

One commenter suggested that the agencies index the compliance tier thresholds to inflation.[100] At present, the agencies do not believe that the additional complexity associated with inflation-indexing the thresholds in the final rule is necessary in light of the other changes to the thresholds and calculation methodologies described below, including the increase in the threshold for firms with significant trading assets and liabilities from $10 billion to $20 billion, and the modifications to the calculation of trading assets and liabilities adopted in the final rule.[101]

Commenters recommended that the regulations incorporate a number of changes to the methodology used in the proposed rule to classify firms into different compliance tiers. Some commenters recommended that the agencies apply a consistent methodology to foreign banking entities to classify such firms as having significant trading assets and liabilities, moderate trading assets and liabilities, or limited trading assets and liabilities.[102] For purposes of classifying the banking entity as having significant trading assets and liabilities, the proposal would have included only the trading assets and liabilities of the combined U.S. operations of a foreign banking entity, but used the banking entity's worldwide trading assets and liabilities for purposes of classifying the firm as having either limited trading assets and liabilities or moderate trading assets and liabilities.[103] Commenters recommended that the agencies apply a consistent standard for classifying a foreign banking entity as having significant trading assets and liabilities, moderate trading assets and liabilities, or limited trading assets and liabilities, and that the most appropriate measure would look only at the combined U.S. operations of such a banking entity.[104] These commenters noted that classifying foreign banking entities based on their global trading activities could have the result of imposing extensive compliance obligations on the non-U.S. trading activities of a banking entity with minimal U.S. trading activities.[105]

The final rule adopts a consistent methodology for calculating the trading assets and liabilities of foreign banking entities across all categories, taking into account only the trading assets and

[89] *See* Occupy the SEC.

[90] *See, e.g.,* ABA; Capital One et al.; and KeyCorp and KeyBank (KeyCorp).

[91] *See* Data Boiler Technologies.

[92] *See, e.g.,* ABA; Capital One et al.; and BPI.

[93] *See, e.g.,* Data Boiler (encouraging the agencies to lower the threshold to $500 million in trading assets and liabilities) and B&F Capital Markets (B&F) (expressing support for the proposed $1 billion threshold).

[94] *See* final rule § ____.2(s)(2)–(3).

[95] *See, e.g.,* ABA; Bank of New York Mellon Corporation, Northern Trust Corporation, and State Street Corporation (Custody Banks); New England Council; Capital One et al.; SIFMA; State Street; and BPI.

[96] *Id.*

[97] *Id.*

[98] *See, e.g.,* ABA; Capital One et al.; and SIFMA.

[99] *See* final rule § ____.2(ee)(1)(i).

[100] *See* Capital One et al.

[101] *See, e.g.,* final rule § ____.2(ee)(1)(i).

[102] *See, e.g.,* IIB and JBA.

[103] *See* proposed rule § ____.2(t)(1), (ff)(2)–(3).

[104] *See, e.g.,* IIB and JBA.

[105] *Id.*

liabilities of such banking entities' combined U.S. operations.[106] The agencies believe this approach is appropriate, particularly for foreign firms with little or no U.S. trading activity but substantial worldwide trading operations. The agencies further believe that the trading activities of foreign banking entities that occur outside of the United States and are booked into such foreign banking entities (or into their foreign affiliates), pose substantially less risk to the U.S. financial system than trading activities booked into a U.S. banking entity, including a U.S. banking entity that is an affiliate of a foreign banking entity. This approach is also appropriate in light of provisions in section 13 of the BHC Act that provide foreign banking entities with significant flexibility to conduct trading and covered fund activities outside of the United States.[107]

One commenter expressed concern that the regulations did not give banking entities sufficient guidance as to how to calculate their trading assets and liabilities, and asked that the regulations expressly permit a banking entity to rely on home jurisdiction accounting standards when calculating trading assets and liabilities.[108] In light of the changes to the methodology for calculating trading assets and liabilities noted above, in particular using combined U.S. trading assets and liabilities for establishing the appropriate compliance tier for foreign banking entities, the agencies believe that further clarifications to the standards for calculating ''trading assets and liabilities'' are not necessary for banking entities to have sufficient information available as to the manner in which to calculate trading assets and liabilities.

A few commenters suggested that the threshold for ''significant trading assets and liabilities'' should be determined based on the relative size of the banking entity's total trading assets and liabilities as compared to other metrics, such as total consolidated assets or capital, thereby establishing a banking entity's compliance requirements based on the significance of trading activities to the banking entity.[109] Some commenters suggested that the use of trading assets and liabilities alone as a metric to classify banking entities for determining compliance obligations was inappropriate.[110] The agencies believe that a banking entity's trading assets and liabilities, as calculated under the methodology described in the final rule, is an appropriate metric to use in establishing compliance requirements for banking entities. Imposing compliance obligations on a banking entity based on the relative significance of trading activities to the firm could have the result of imposing fewer compliance obligations on a larger banking entity with identical trading activities to a smaller counterpart, simply because of that entity's larger size.

Several commenters recommended that the regulations exclude particular types of trading assets and liabilities for purposes of determining whether a banking entity has significant trading assets and liabilities, moderate trading assets and liabilities, or limited trading assets and liabilities. In particular, some commenters encouraged the agencies to exclude all government obligations and other assets and liabilities that are not subject to the prohibition on proprietary trading under section 13 of the BHC Act and the regulations.[111] The final rule modifies the methodology for calculating a firm's trading assets and liabilities to exclude all financial instruments that are obligations of, or guaranteed by, the United States, or that are obligations, participations, or other instruments of or guaranteed by an agency of the United States or a government-sponsored enterprise as described in the regulations.[112] As commenters noted, banking entities are permitted to engage in trading activities in these products under section 13 of the BHC Act and the implementing regulations, and therefore the exclusion of such instruments for the final rule will result in a more appropriately tailored standard than under the proposal. The agencies also believe that the calculation of trading assets and liabilities, subject to these modifications, should continue to be relatively simple for banking entities and the agencies, without requiring the imposition of additional reporting requirements.

A few commenters recommended that certain *de minimis* risk portfolios, such as matched derivatives holdings and loan-related swaps, be excluded from the calculation of trading assets and liabilities.[113] Another commenter recommended the calculation of trading assets and liabilities should exclude insurance assets.[114] Another commenter proposed that the trading assets and liabilities of non-consolidated affiliates be excluded, because tracking the trading assets and liabilities of such subsidiaries on an ongoing basis may present significant practical burdens.[115] As discussed herein, the final rule makes several amendments to the methodology for calculating trading assets and liabilities, for example by excluding securities issued or guaranteed by certain government-sponsored enterprises, and by calculating trading assets and liabilities for foreign banking entities based only on the combined U.S. operations of such banking entities.[116] The agencies believe that the revisions in the final rule should simplify the manner in which a banking entity calculates its trading assets and liabilities. However, the final rule does not adopt the changes recommended by a few commenters to exclude trading assets and liabilities associated with particular business activities or business lines, other than the express modifications noted above, or to exclude the trading assets and liabilities of certain types of subsidiaries. Rather, the final rule adopts an approach that is intended to be straightforward and consistent and allow banking entities greater ability to leverage regulatory reports that banking entities are already required to prepare under existing law, such as the Form Y9–C and the Call Report.[117]

Some commenters noted that the regulations should clarify the manner in which a banking entity should calculate trading assets and liabilities, and make clear whether it would be appropriate to rely on regulatory reporting forms such as the Board's Consolidated Financial Statements for Holding Companies, Form FR Y–9C or call report information, or other regulatory reporting forms.[118] Other commenters recommended that the agencies clarify whether the calculation of ''trading assets and liabilities'' should include only positions that would be within the scope of the ''trading account'' definition, or should otherwise exclude

[106] *See* final rule § ____.2(s)(3), (ee)(3).

[107] *See* Section 13(d)(1)(H), (I) (12 U.S.C. 1851(d)(1)(H), (I)).

[108] *See* JBA.

[109] *See, e.g.,* ABA; Capital One et al.

[110] *See, e.g.,* Data Boiler and John Hoffman.

[111] *See, e.g.,* BMO Financial Group (BMO); Capital One et al.; and KeyCorp.

[112] *See* final rule § ____.2(s)(2), (3); *see also* final rule § ____.6(a)(1), (2).

[113] *See, e.g.,* ABA; Arvest; and BOK Financial (BOK).

[114] *See* Insurance Coalition.

[115] *See* JBA.

[116] *See* final rule § ____.2(s)(2)–(3), (ee)(2)–(3).

[117] Compliance obligations are determined on a consolidated basis under the final rule. For that reason, where a banking entity has an unconsolidated subsidiary, the banking entity would not need to examine additional financial reports to determine its compliance obligations.

[118] *See, e.g.,* Bank of Oklahoma; KeyCorp; BPI; and Capital One et al Banks.

certain types of instruments.[119] The agencies support banking entities relying on current regulatory reporting forms to the extent possible to determine their compliance obligations under the final rule. As discussed above, the calculation of significant trading assets and liabilities, moderate trading assets and liabilities, and limited trading assets and liabilities is based on a four-quarter average, and therefore would not require daily or more frequent monitoring of trading assets and liabilities.[120]

A few commenters encouraged the agencies to include transition periods for a banking entity that moves to a higher compliance tier, to allow the banking entity time to comply with the different expectations under the compliance tier.[121] Some commenters said that the regulations should permit a banking entity to breach a threshold for a higher compliance category without needing to comply with the heightened compliance requirements applicable to banking entities with that level of trading assets and liabilities, provided the banking entity's trading assets and liabilities drop below the relevant threshold within a limited period of time.[122] The final rule does not adopt transition periods or cure periods as recommended by commenters. The calculation of a banking entity's trading assets and liabilities is calculated based on a 4-quarter average, which should provide banking entities with ample notice to come into compliance with the requirements of the final rule when crossing from having limited to moderate trading assets and liabilities, or from moderate to significant trading assets and liabilities.[123]

One commenter recommended that the agencies provide for notice and response procedures prior to exercising the reservation of authority to require a banking entity to apply the requirements of a higher compliance program tier, and, if a banking entity is determined to be required to apply increased compliance program requirements, it should be given a two-year conformance period to come into compliance with such requirements.[124] After considering this comment, the agencies believe that the notice and response procedures provided in the proposal for rebutting the presumption of compliance for banking entities with limited trading assets and liabilities would also be appropriate with respect to an agency exercising this reservation of authority. However, the agencies believe that providing an automatic two-year conformance period would be inappropriate, especially in instances where the agency has concerns regarding evasion of the requirements of the final rule. Therefore, the agencies are adopting the reservation of authority with a modification to require that the agencies exercise such authority in accordance with the notice and response procedures in section ____.20(i) of the final rule.[125] To the extent that an agency exercises this authority to require a banking entity to apply increased compliance program requirements, an appropriate conformance period shall be determined through the notice and response procedures.

B. Subpart B—Proprietary Trading Restrictions

Section 13(a)(1)(A) of the BHC Act prohibits a banking entity from engaging in proprietary trading unless otherwise permitted in section 13. Section 13(h)(4) of the BHC Act defines proprietary trading, in relevant part, as engaging as principal for the trading account of the banking entity in any transaction to purchase or sell, or otherwise acquire or dispose of, a security, derivative, contract of sale of a commodity for future delivery, or other financial instrument that the agencies include by rule. Section 13(h)(6) of the BHC Act defines ''trading account'' to mean any account used for acquiring or taking positions in the securities and instruments described in section 13(h)(4) principally for the purpose of selling in the near term (or otherwise with the intent to resell in order to profit from short-term price movements), and any such other accounts as the agencies, by rule determine.[126] Section 3 of the implementing regulations defines ''proprietary trading,'' ''trading account,'' and several related definitions.

1. Section ____.3: Prohibition on Proprietary Trading and Related Definitions

a. Trading Account

The 2013 rule's definition of trading account includes three prongs and a rebuttable presumption. The short-term intent prong includes within the definition of trading account the purchase or sale of one or more financial instruments principally for the purpose of (A) short-term resale, (B) benefitting from actual or expected short-term price movements, (C) realizing short-term arbitrage profits, or (D) hedging one or more positions resulting from the purchases or sales of financial instruments for the foregoing purposes.[127] Under the 2013 rule's rebuttable presumption, the purchase (or sale) of a financial instrument by a banking entity is presumed to be for the trading account under the short-term intent prong if the banking entity holds the financial instrument for fewer than sixty days or substantially transfers the risk of the financial instrument within sixty days of the purchase (or sale). A banking entity could rebut the presumption by demonstrating, based on all relevant facts and circumstances, that the banking entity did not purchase (or sell) the financial instrument principally for any of the purposes described in the short-term intent prong.[128]

The market risk capital rule prong (market risk capital prong) includes within the definition of trading account the purchase or sale of one or more financial instruments that are both covered positions and trading positions under the market risk capital rule (or hedges of other covered positions under the market risk capital rule), if the banking entity, or any affiliate of the banking entity, is an insured depository institution, bank holding company, or savings and loan holding company, and calculates risk-based capital ratios under the market risk capital rule.[129]

Finally, the dealer prong includes within the definition of trading account any purchase or sale of one or more financial instruments for any purpose if the banking entity (A) is licensed or registered, or is required to be licensed or registered, to engage in the business of a dealer, swap dealer, or security-based swap dealer, to the extent the instrument is purchased or sold in connection with the activities that require the banking entity to be licensed or registered as such; or (B) is engaged in the business of a dealer, swap dealer, or security-based swap dealer outside of the United States, to the extent the instrument is purchased or sold in

---

[119] *See, e.g.,* BMO and Capital One et al.

[120] *See* final rule § ____.2(s)(1)(i), (ee)(1)(i).

[121] *See, e.g.,* ABA; BPI; Custody Banks; Capital One et al.; and State Street.

[122] *See* State Street.

[123] A banking entity approaching a compliance threshold is encouraged to contact its primary financial regulatory agency to discuss the steps the banking entity should take to satisfy its compliance obligations under the new threshold.

[124] *See* BPI.

[125] *See* final rule § ____.20(i).

[126] 12 U.S.C. 1851(h)(6).

[127] *See* 2013 rule § ____.3(b)(1)(i).

[128] *See* 2013 rule § ____.3(b)(2).

[129] *See* 2013 rule § ____.3(b)(1)(ii).

connection with the activities of such business.[130]

The proposal would have replaced the 2013 rule's short-term intent prong with a new third prong based on the accounting treatment of a position (the accounting prong). The proposal also would have added a presumption of compliance with the proposed rule's prohibition on proprietary trading for trading desks whose activities are not covered by the market risk capital prong or the dealer prong if the activities did not exceed a specified quantitative threshold. The proposal would have retained a modified version of the market risk capital prong and would have retained the dealer prong unchanged from the 2013 rule. As described in detail below, the final rule retains the three-pronged definition of trading account from the 2013 rule and does not adopt the proposed accounting prong or presumption of compliance with the proprietary trading prohibition. Rather, the final rule makes targeted changes to the definition of trading account.

Among other changes, the final rule eliminates the 2013 rule's rebuttable presumption and replaces it with a rebuttable presumption that financial instruments held for sixty days or more are not included in the trading account under the short-term intent prong.[131] The agencies believe that the market risk capital prong, which expressly includes certain short-term trading activities, is an appropriate interpretation of the statutory definition of trading account for all firms subject to the market risk capital rule.[132] Therefore, the final rule provides that banking entities that are subject to the market risk capital prong are not subject to the short-term intent prong.[133] However, the final rule provides that banking entities that are subject to the short-term intent prong may elect to apply the market risk capital prong instead of the short-term intent prong.[134] These changes are designed to simplify and tailor the trading account definition in a manner that is consistent with section 13 of the BHC Act and applicable safety and soundness standards.

i. Accounting Prong

The proposed accounting prong would have provided that ''trading account'' meant any account used by a banking entity to purchase or sell one or more financial instruments that is recorded at fair value on a recurring basis under applicable accounting standards.[135] Such instruments generally include, but are not limited to, derivatives, trading securities, and available-for-sale securities. The proposed inclusion of this prong in the definition of ''trading account'' was intended to provide greater certainty and clarity to banking entities than the short-term intent prong in the 2013 rule about which transactions would be included in the trading account, because banking entities could more readily determine which positions are recorded at fair value on their balance sheets.[136]

Many commenters strongly opposed replacing the short-term intent prong with the accounting prong.[137] These commenters asserted that the accounting prong could inappropriately scope in, among other things: Over $400 billion in available-for-sale debt securities;[138] certain long term investments;[139] static hedging of long term investments;[140] traditional asset-liability management activities;[141] derivative transactions entered into for any purpose and duration;[142] long-term holdings of commercial mortgage-backed securities;[143] seed capital investments;[144] investments that are expressly permitted under the covered fund provisions;[145] investments in connection with employee compensation;[146] bank holding company-permissible investments in enterprises engaging in activities that are part of the business of banking or incidental thereto, as well as other investments made pursuant to the BHC Act;[147] and financial holding company merchant banking investments.[148] Some commenters argued that the accounting prong was inconsistent with the statute;[149] would lead to increased regulatory burden and uncertainty;[150] could encourage banking entities not to elect to account for financial instruments at fair value, thereby reducing transparency into banking entities' financial reporting and frustrating risk management practices that are based on the fair value option;[151] could result in disparate treatment of the same activity between two banking entities where one banking entity elects the fair value option and the other does not;[152] would have a disproportionately negative impact on midsize and regional banks;[153] could negatively impact the securitization industry if liquidity for asset-backed securities is impeded;[154] could inappropriately scope in investment advisers' use of seed capital to develop products, services, or strategies for asset management clients;[155] could lead to increased burden for international banks by requiring them to apply both local accounting standards and U.S. generally accepted accounting principles (GAAP) to non-U.S. positions, one for regular accounting purposes and one specifically for assessing compliance with the regulations implementing section 13 of the BHC Act;[156] that the exclusions and exemptions from the prohibition on proprietary trading in the 2013 rule are ill-suited with respect to positions captured by the accounting prong;[157] and that fair valuation of

[130] *See* 2013 rule § ____.3(b)(1)(iii). An insured depository institution may be registered as a swap dealer, but only the swap dealing activities that require it to be so registered are covered by the dealer trading account. If an insured depository institution purchases or sells a financial instrument in connection with activities of the insured depository institution that do not trigger registration as a swap dealer, such as lending, deposit-taking, the hedging of business risks, or other end-user activity, the financial instrument is included in the trading account only if the instrument falls within the definition of trading account under at least one of the other prongs. *See* 79 FR at 5549.

[131] *See* final rule § ____.3(b)(4).

[132] *See* 12 U.S.C. 1851(h)(6); *see also* Instructions for Preparation of Consolidated Financial Statements for Holding Companies, Trading Assets and Liabilities, Schedule HC–D, *available at https://www.federalreserve.gov/reportforms/forms/FR_Y-9C20190731_i.pdf,* and Instructions for Preparation of Consolidated Reports of Condition and Income, Schedule RC–D, *available at https://www.ffiec.gov/pdf/FFIEC_forms/FFIEC031_FFIEC041_201803_i.pdf.*

[133] *See* final rule § ____.3(b)(2)(i).

[134] *See* final rule § ____.3(b)(2)(ii).

[135] *See* proposed rule § ____.3(b)(3); 83 FR at 33447–48.

[136] *See* 83 FR at 33447–48.

[137] *See, e.g.,* BOK; New York Community Bank (NYCB); IAA; ABA; KeyCorp; International Swaps and Derivatives Association (ISDA); Mortgage Bankers Association (MBA); Commercial Real Estate Finance Council (CREFC), Mortgage Bankers Association, and the Real Estate Roundtable (Real Estate Associations); State Street; Chatham Financial et al. (Chatham); Capital One et al.; BPI; FSF; Goldman Sachs; SIFMA; Center for Capital Markets Competitiveness (CCMC); IIB; Credit Suisse; EBF; and Arvest.

[138] *See, e.g.,* BPI and SIFMA.

[139] *See, e.g.,* Capital One et al.; BPI; SIFMA; and CCMR.

[140] *See, e.g.,* BPI and ISDA.

[141] *See, e.g.,* KeyCorp; BPI; Capital One et al.; FSF; and Goldman Sachs.

[142] *See e.g.,* ISDA and BPI.

[143] *See* MBA.

[144] *See, e.g.,* ICI; Capital One et al.; Credit Suisse; FSF; and SIFMA.

[145] *See, e.g.,* Capital One et al. and BPI.

[146] *See, e.g.,* Capital One et al. and BPI.

[147] *See* Capital One et al.

[148] *See* Capital One et al.

[149] *See, e.g.,* Capital One et al.; CCMC; IAA; ABA; ISDA; Credit Suisse; CREFC; BPI; FSF; Goldman Sachs; and SIFMA.

[150] *See, e.g.,* CCMC; JBA; Structured Finance Industry Group (SFIG); IIB; American Action Forum; ABA; BPI; ISDA; and SIFMA.

[151] *See, e.g.,* BPI and IIB.

[152] *See* BPI.

[153] *See, e.g.,* BOK; ABA; and NYCB.

[154] *See* SFIG.

[155] *See* IAA.

[156] *See* IIB.

[157] *See, e.g.,* SIFMA; BPI; CCMR; FSF; and BB&T.

assets and liabilities under applicable accounting standards is not indicative of short-term trading intent.[158]

Some commenters expressed a preference for the 2013 rule's short-term intent prong over the accounting prong.[159] Other commenters suggested revisions to the accounting prong if adopted, such as excluding from the definition of trading account any financial instrument for which financial institutions record the change in value in other comprehensive income; [160] expressly excluding available-for-sale portfolios from the accounting prong; [161] and clarifying that non-U.S. banking entities are permitted to use accounting standards adopted by individual banking entities other than International Financial Reporting Standards and GAAP.[162] One commenter expressed concern that a banking entity could circumvent the prohibition on proprietary trading by recording financial instruments at amortized cost instead of fair value.[163]

Some commenters supported adopting the accounting prong.[164] One commenter urged the agencies to retain the short-term intent prong and to adopt the accounting prong as an additional test without any presumption of compliance.[165] Another commenter argued that the accounting prong should be implemented as a new presumption within the short-term trading prong.[166] This commenter urged the agencies to revise the accounting prong by codifying language from the applicable accounting standards and coupling this with preamble language indicating that the agencies intend to interpret the accounting prong in a manner that is consistent with GAAP and international accounting codifications and guidance, thereby allowing the agencies to definitively interpret the text rather than accounting authorities, who might not consider the regulations implementing section 13 of the BHC Act when making further changes to accounting standards.[167]

After considering all comments received,[168] the agencies are not adopting the accounting prong in the final rule. The agencies agree with commenters' concerns that the accounting prong would have inappropriately scoped in many financial instruments and activities that section 13 of the BHC Act was not intended to capture, including some long-term investments. In addition, the accounting prong would have inappropriately scoped in entire categories of financial instruments, regardless of the banking entity's purpose for buying or selling the instrument, such as all derivatives and equity securities with a readily determinable fair value. Furthermore, the accounting prong would have captured certain seeding activity that would otherwise be permitted under subpart C of the regulations implementing section 13 of the BHC Act. As noted in the preamble to the proposed rule, the impetus behind replacing the short-term intent prong with the accounting prong was to address the uncertain application of the short-term intent prong to certain trades.[169] As discussed in detail below, the agencies have modified the short-term intent prong to provide more clarity. The agencies have also provided further clarity to the trading account definition in the final rule by adding additional exclusions from the ''proprietary trading'' definition. The agencies are adopting these clarifying measures as a more tailored approach to address the difficulties that have arisen under the existing short-term intent prong.

ii. Presumption of Compliance With the Prohibition on Proprietary Trading

Under the accounting prong, the proposal would have added a presumption of compliance with the proprietary trading prohibition based on an objective, quantitative measure of a trading desk's activities.[170] Under this proposed presumption of compliance, the activities of a trading desk of a banking entity that are not covered by the market risk capital prong or the dealer prong—*i.e.,* the activities that would be within the trading account under the proposed accounting prong—would have been presumed to comply with the proposed rule's prohibition on proprietary trading if the activities did not exceed a specified quantitative threshold. The trading desk would have remained subject to the prohibition on proprietary trading and, unless the desk engaged in a material level of trading activity (or the presumption of compliance was rebutted), the desk would not have been required to comply with the more extensive requirements that would otherwise apply under the proposal to demonstrate compliance. The agencies proposed to use the absolute value of the trading desk's profit and loss on a 90-calendar-day rolling basis as the relevant quantitative measure for this threshold.

Two commenters supported adopting the presumption of compliance with the prohibition on proprietary trading.[171] Several commenters opposed adopting this presumption of compliance.[172] Some of these commenters argued that the presumption of compliance could allow banks to evade the restrictions on proprietary trading by splitting trades over multiple trading desks.[173] One of these commenters suggested that the presumption of compliance for trading desk activities that would have been within the trading account under the accounting prong in the proposed rule could invite proprietary trading within the $25 million threshold.[174] Another commenter had several concerns with this proposal, including that not all businesses calculate daily profits and losses, and that even businesses that do not sell a single position within a 90-day period might exceed $25 million in unrealized gains and losses.[175] Two commenters asserted there is no statutory basis to permit a *de minimis* amount of proprietary trading.[176] Other commenters asserted that the presumption could increase regulatory burden.[177] Several commenters argued that, if the presumption is adopted, the threshold should be increased,[178] or the method of calculating profit and loss should be modified.[179] Many commenters stated that the proposed trading desk-level presumption of compliance did not adequately address the overbreadth of the accounting prong.[180]

After considering the comments, the agencies have decided not to adopt a trading desk-level presumption of compliance with the prohibition on

[158] *See, e.g.,* Capital One et al.; ABA; BPI; FSF; SIFMA; and Credit Suisse.

[159] *See, e.g.,* Chatham; BPI; SIFMA; IIB; Credit Suisse; and Arvest.

[160] *See* BOK.

[161] *See* BOK.

[162] *See* JBA.

[163] *See* Volcker Alliance.

[164] *See, e.g.,* Public Citizen; CAP; Better Markets; and AFR.

[165] *See* CAP.

[166] *See* Better Markets.

[167] *See* Better Markets.

[168] *See, e.g.,* BOK; NYCB; IAA; ABA; KeyCorp; ISDA; MBA; Real Estate Associations; State Street; Chatham; Capital One et al.; BPI; FSF; Goldman Sachs; SIFMA; CCMC; IIB; Credit Suisse; EBF; CREFC; and Arvest.

[169] *See* 83 FR at 33448.

[170] *See* proposed rule § ____.3(c); 83 FR at 33449–51.

[171] *See, e.g.,* New England Council and CFA.

[172] *See, e.g.,* Volcker Alliance; Public Citizen; CAP; Bean; Feng; AFR; and Better Markets.

[173] *See, e.g.,* Volcker Alliance; Public Citizen; CAP; and Bean.

[174] *See* Public Citizen.

[175] *See* IIB.

[176] *See, e.g.,* Bean and CAP.

[177] *See, e.g.,* BOK; BPI; IIB; and JBA.

[178] *See, e.g.,* BOK; BPI; IIB; and Capital One et al.

[179] *See, e.g.,* CFA.

[180] *See, e.g.,* Capital One et al.; BPI; FSF; and SIFMA.

proprietary trading. As discussed in the preamble to the proposal, this presumption of compliance would have been available only for a trading desk's activities that would have been within the trading account under the proposed accounting prong, and not for a trading desk that is subject to the market risk capital prong or the dealer prong of the trading account definition. This presumption of compliance was intended to address the potential impact of the accounting prong, which the proposal recognized would have been a significant change from the 2013 rule. In particular, the proposal noted that the proposed trading desk-level presumption of compliance with the prohibition on proprietary trading was intended to allow banking entities to conduct ordinary banking activities without having to assess every individual trade for compliance with subpart B of the implementing regulations and the proposed accounting prong.[181] Since the agencies are not adopting the accounting prong and are adopting additional clarifying revisions to the short-term intent prong, the agencies have determined it is not necessary to adopt the presumption of compliance.

iii. Short-Term Intent Prong

The 2013 rule's short-term intent prong included within the definition of trading account the purchase or sale of one or more financial instruments principally for the purpose of (A) short-term resale, (B) benefitting from actual or expected short-term price movements, (C) realizing short-term arbitrage profits, or (D) hedging one or more positions resulting from the purchases or sales of financial instruments for the foregoing purposes.[182] Under the 2013 rule's rebuttable presumption, the purchase (or sale) of a financial instrument by a banking entity was presumed to be for the trading account under the short-term intent prong if the banking entity held the financial instrument for fewer than sixty days or substantially transferred the risk of the financial instrument within sixty days of the purchase (or sale). A banking entity could rebut the presumption by demonstrating, based on all relevant facts and circumstances, that the banking entity did not purchase (or sell) the financial instrument principally for any of the purposes described in the short-term intent prong.[183]

Several commenters stated that, for banking entities that are subject to the market risk capital prong, the short-term intent prong is redundant.[184] In addition, several commenters stated that the final rule should eliminate the short-term intent prong altogether, as proposed.[185] Other commenters stated that, consistent with the statutory definition of trading account, the agencies should not eliminate the short-term intent prong.[186] One commenter suggested re-adopting the short-term intent prong but defining the term ''short-term'' differently based on asset class.[187] Several commenters supported retaining the short-term intent prong with modifications, such as eliminating or reversing the rebuttable presumption or aligning the short-term intent prong more closely with the market risk capital prong.[188] The agencies agree that there is substantial overlap between the short-term intent prong and the market risk capital prong and have revised the definition of trading account accordingly.

Under the final rule, the definition of trading account includes any account that is used by a banking entity to purchase or sell one or more financial instruments principally for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging one or more of the positions resulting from the purchases or sales of financial instruments for the foregoing purposes.[189] The agencies believe that it is necessary to include a prong other than the market risk capital prong or the dealer prong to define ''trading account'' for banking entities that are subject to the final rule but are not subject to the market risk capital prong. The agencies believe that requiring banking entities that are not subject to the market risk capital rule to apply the market risk capital prong in order to identify the scope of positions subject to the Volcker Rule's proprietary trading provisions could be unduly complex and burdensome for banking entities with smaller and less active trading activities. The final rule allows a banking entity not subject to the market risk capital prong to define its trading account by reference to either the short-term intent prong or the market risk capital prong because both tests are consistent with the statutory definition of trading account; this flexible approach for banking entities with less trading activities is appropriate for various reasons, including because these banking entities are already familiar with the short-term intent prong.[190]

Under the final rule, the regulatory short-term intent prong applies only to a banking entity that is not subject to the market risk capital prong and that has not elected to apply the market risk capital prong to determine the scope of the banking entity's trading account.[191] For purposes of the final rule, a banking entity is subject to the market risk capital prong if it, or any affiliate with which the banking entity is consolidated for regulatory reporting purposes, calculates risk-based capital ratios under the market risk capital rule.[192] Applying the short-term intent prong only to banking entities whose trading account is not covered by the market risk capital prong will simplify application of the rule. No longer applying the short-term intent prong to banking entities that are subject to the market risk capital prong is appropriate because the scope of activities captured by the short-term intent prong is substantially similar to the scope of activities captured by the market risk capital prong. Indeed, the preamble to the 2013 rule noted that the definition of trading position in the market risk capital rule largely parallels the statutory definition of trading account,[193] which in turn mirrors the language in the short-term intent prong. Accordingly, the agencies believe that a banking entity should be subject either to the short-term intent prong or to the market risk capital prong, but not both.[194]

The final rule allows a banking entity that is not subject to the market risk capital prong to elect to apply the market risk capital prong in place of the short-term intent prong.[195] The final rule includes this option to provide parity between smaller banking entities that are not subject to the market risk capital rule and larger banking entities with active trading businesses that are

[181] *See* 83 FR at 33449.

[182] *See* 2013 rule § ____.3(b)(1)(i).

[183] *See* 2013 rule § ____.3(b(2).

[184] *See, e.g.,* Capital One et al.; BPI; FSF; KeyCorp; and SIFMA.

[185] *See, e.g.,* JBA; Credit Suisse; CREFC; and SIFMA.

[186] *See* AFR and Bean.

[187] *See* Occupy the SEC.

[188] *See, e.g.,* SIFMA; BPI; State Street; Chatham; FSF; CCMR; ABA; KeyCorp; Capital One et al.; Arvest; and IIB.

[189] *See* final rule § ____.3(b)(1)(i).

[190] *See* 12 U.S.C. 1851(h)(6).

[191] *See* final rule § ____.3(b)(2)(i), (ii).

[192] *See* 12 CFR part 3, subpart F; part 217, subpart F; part 324, subpart F.

[193] *See* 79 FR at 5548.

[194] A number of commenters suggested that, due to the overlap between the market risk capital prong and the short-term intent prong, banking entities that are subject to the market risk capital prong should not also be subject to the short-term intent prong. *See, e.g.,* Capital One et al.; BPI; FSF; Goldman Sachs; CREFC; and SIFMA.

[195] *See* final rule § ____.3(b)(2)(ii).

subject to the market risk capital prong.[196] Under the final rule, a banking entity that is not subject to the market risk capital rule may choose to define its trading account as if the banking entity were subject to the market risk capital prong. If a banking entity opts into the market risk capital prong, the banking entity's trading account would include all accounts used by the banking entity to purchase or sell one or more financial instruments that would be covered positions and trading positions under the market risk capital rule if the banking entity were subject to the market risk capital rule. Banking entities that do not make this election will continue to apply the short-term intent prong.

Under the final rule, an election to apply the market risk capital prong must be consistent among a banking entity and all of its wholly owned subsidiaries.[197] This consistency requirement is intended to facilitate banking entities' compliance with the proprietary trading prohibition by subjecting wholly owned legal entities within a firm to the same definition. Requiring a consistent definition of ''trading account'' is particularly important to simplify compliance because a trading desk may book trades into different legal entities within an organization, and having a consistent definition of ''trading account'' among these entities should help ensure that each banking entity can identify relevant trading activity and meet its compliance obligations under the final rule. This requirement is also expected to facilitate the agencies' supervision of compliance with the final rule. This consistency requirement would apply only to a banking entity and its wholly owned subsidiaries. In the case of minority-owned subsidiaries or other subsidiaries that the banking entity does not functionally control, it may be impractical for one banking entity within the organization to ensure that all affiliates will make a consistent election. However, the relevant primary financial regulatory agency may subject a banking entity that is not a wholly owned subsidiary to the consistency requirement if the agency determines it is necessary to prevent evasion of the rule's requirements. When exercising this authority, the relevant primary financial regulatory agency will follow the same notice and response procedures used elsewhere in the final rule.

iv. 60-Day Rebuttable Presumption

The proposal would have eliminated the 2013 rule's 60-day rebuttable presumption. Many commenters supported the proposed rule's elimination of this rebuttable presumption.[198] Some commenters urged the agencies to establish a presumption that positions held for more than 60 days are not proprietary trading.[199] Some commenters suggested that the agencies should presume, for banking entities not subject to the market risk capital rule, that financial instruments held for longer than 60 days, or that have an original maturity or remaining maturity upon acquisition of fewer than 60 days to their stated maturities, are not for the banking entity's trading account.[200] One commenter suggested that any third prong to the definition of trading account that applies to banking entities that are not subject to the market risk capital rule should have a rebuttable presumption that any position held by the banking entity as principal for 60 days or more is not for the trading account, as well as a reasonable challenge procedure through which a banking entity would be provided an opportunity to demonstrate to its primary financial regulatory agency that positions held for fewer than 60 days do not constitute proprietary trading.[201] Several commenters asked that the agencies—if they do not eliminate the presumption—provide guidance on the rebuttal process,[202] or make certain revisions to the presumption, such as revising the ''substantial transfer of risk'' language; [203] exempting financial instruments close to maturity; [204] and excluding hedging activity.[205] Some commenters argued, in contrast, that the 60-day rebuttable period was under-inclusive.[206] One commenter argued that any position purchased or sold within 180 days should be automatically included within the definition of trading account, or, in the alternative, that the presumption should be extended from 60 to 180 days, and the agencies should mandate ongoing monitoring and disclosure of all components, excluded or not, of the banking entities' reported trading account assets.[207] This commenter also argued that there should not be a presumption that certain positions are not within the trading account; that documentation requirements for rebutting the presumption should be clearly specified and the criteria more restrictive; that all arbitrage positions should be presumed to be trading positions; and that the definition of ''short-term'' should vary by asset class. Another commenter generally opposed eliminating the 60-day rebuttable presumption.[208]

After considering all comments received, the agencies are eliminating the 60-day rebuttable presumption from the 2013 rule and establishing a new rebuttable presumption that financial instruments held for sixty days or more are not within the short-term intent prong. Since the 2013 rule came into effect, the agencies have found that the rebuttable presumption has captured many activities that should not be included in the definition of proprietary trading,[209] which, under the statute, only covers buying and selling financial instruments principally for the purpose of selling in the near term (or otherwise with the intent to resell in order to profit from short-term price movements).[210] Several commenters supported eliminating the 2013 rule's rebuttable presumption for this reason or due to difficulties in rebutting the presumption.[211] Given the type of activities that have triggered the 2013 rule's rebuttable presumption but that are not undertaken principally for the purpose of selling in the near-term,[212]

[196] Several commenters recommended defining the trading account solely by reference to the dealer prong and market risk capital prong for banking entities subject to the market risk capital rule. *See, e.g.,* Capital One et al.; BPI; FSF; Goldman Sachs; CREFC; and SIFMA. One commenter suggested that banking entities that are not subject to the market risk capital rule and subject to a third prong should be allowed to elect to be treated as a banking entity subject to the market risk capital rule for purposes of the regulations implementing section 13 of the BHC Act. This approach would maintain parity between banking entities that are subject to the market risk capital rule and those that are not. *See* SIFMA.

[197] *See* final rule § ____.3(b)(3).

[198] *See, e.g.,* State Street; Chatham; BPI; FSF; CCMR; and CFA.

[199] *See, e.g.,* ABA; KeyCorp; Capital One et al.; State Street; and Arvest.

[200] *See, e.g.,* ABA; Arvest; BPI; SIFMA; and IIB.

[201] *See* SIFMA.

[202] *See, e.g.,* ABA; Arvest; BPI; SIFMA; State Street; and FSF.

[203] *See, e.g.,* ABA and Arvest.

[204] *Id.*

[205] *See* Capital One et al.

[206] See AFR and Occupy the SEC.

[207] *See* Occupy the SEC.

[208] *See* Bean.

[209] For example, asset-liability, liquidity management activities, transactions to correct error trades and loan-related swaps. *See* Part IV.B.2.b.i–iii.

[210] 12 U.S.C. 1851(h)(4) and (6).

[211] *See, e.g.,* State Street; Chatham; BPI; FSF; CCMR; and CFA.

[212] Such activities include a foreign branch of a U.S. banking entity purchasing a foreign sovereign debt obligation with remaining maturity of fewer than 60 days in order to meet foreign regulatory requirements. Similarly, error correcting trades and matched derivative transactions, discussed *infra* may have triggered the 2013 rule's rebuttable presumption but are not undertaken principally for the purpose of selling in the near term (or otherwise

Continued

the agencies have concluded that it is not appropriate to continue to presume short-term trading intent from holding a financial instrument for fewer than 60 days.

However, the agencies recognize the utility for both the agencies and the subject banking entities of an objective time-based standard.[213] The final rule contains a new rebuttable presumption: The purchase or sale of a financial instrument presumptively lacks short-term trading intent if the banking entity holds the financial instrument for 60 days or longer and does not transfer substantially all of the risk of the financial instrument within 60 days of the purchase (or sale).[214] The agencies agree with commenters that a banking entity subject to the short-term intent prong that holds an instrument for at least 60 days should receive the benefit of a presumption that the trade was not entered into for the purpose of selling in the near term or otherwise with the intent to resell in order to profit from short-term price movements. Replacing the 2013 rule's rebuttable presumption with a rebuttable presumption that financial instruments held for sixty days or longer are not within the short-term intent prong will provide clarity for banking entities with respect to such positions, without imposing the burden associated with the 2013 rule's rebuttable presumption.

In light of the revision to the 60-day rebuttable presumption, the agencies do not believe it is necessary to provide a formal challenge procedure with respect to financial instruments that are purchased or sold within 60 days. Under the final rule, such activity is no longer presumptively within a banking entity's trading account.

As in the 2013 rule, the final rule's presumption only applies to the short-term intent prong and does not apply to the market risk capital or dealer prongs

v. Market Risk Capital Prong Modification

The proposal would have revised the market risk capital prong to apply to the activities of foreign banking organizations (FBOs) to take into account the different market risk frameworks FBOs may have in their home countries.[215] Specifically, the proposal included within the market risk capital prong an alternative definition that permitted a banking entity that is not, and is not controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or any State, to include any account used by the banking entity to purchase or sell one or more financial instruments that are subject to risk-based capital requirements under a market risk framework established by the home-country supervisor that is consistent with the market risk framework published by the Basel Committee on Banking Supervision (Basel Committee), as amended from time to time.

One commenter asserted that, under some foreign regulatory market risk capital frameworks, this expansion would capture positions that are not held for short-term trading.[216] This commenter advocated adopting a flexible approach where foreign banking entities could exclude a position subject to a foreign jurisdiction's market risk capital framework from the trading account by demonstrating that the position was not acquired for short-term purposes or otherwise should not be treated as a trading account position.[217]

After considering the comments on this issue,[218] the agencies have decided not to modify the market risk capital prong to incorporate foreign market risk capital frameworks. The agencies believe that relying on the short-term intent prong, market risk capital prong, and dealer prong will ensure consistent treatment of U.S. and foreign banking entities. Foreign banking entities that are not subject to the market risk capital rule may continue to use the short-term intent prong to define their trading accounts. However, a banking entity, including a foreign banking entity, may elect to apply the market risk capital prong in determining the scope of its trading account. As discussed above, a banking entity that uses the market risk capital prong to determine the scope of its trading account is not also subject to the short-term intent prong. This approach will provide appropriate parity between U.S. and foreign banking entities and will also maintain consistency with the statutory trading account definition.[219]

Accordingly, the final rule retains a market risk capital prong that is substantially similar to that in the 2013 rule. The final rule's market risk capital prong includes within the definition of trading account any account that is used by a banking entity to purchase or sell one or more financial instruments that are both covered positions and trading positions under the market risk capital rule (or hedges of other covered positions under the market risk capital rule), if the banking entity, or any affiliate that is consolidated with the banking entity for regulatory reporting purposes, calculates risk-based capital ratios under the market risk capital rule.[220]

In addition, the final rule includes a transition period for banking entities as they become subject to the market risk capital prong.[221] Under the final rule, if a banking entity is subject to the short-term intent prong and then becomes subject to the market risk capital prong, the banking entity may continue to apply the short-term intent prong instead of the market risk capital prong for one year from the date on which it becomes, or becomes consolidated for regulatory reporting purposes with, a banking entity that calculates risk-based capital ratios under the market risk capital rule. The agencies are adopting this transition period to provide banking entities a reasonable period to update compliance programs.

The market risk capital rule includes a position that is reported as a covered position for regulatory reporting purposes on applicable reporting forms.[222] Certain banking entities that may be subject to, or elect to apply, the

with the intent to resell in order to profit from short-term price movements).

[213] *See* 79 FR at 5550; *see also* ABA; KeyCorp; Capital One et al.; State Street; Arvest; and SIFMA.

[214] *See* final rule § ___.3(b)(4).

[215] *See* proposed rule § ___. 3(b)(1)(ii); 83 FR at 33447.

[216] *See* IIB.

[217] *See id.*

[218] *See* IIB (noting that the scope of some foreign supervisory market risk capital frameworks may capture positions that are not held solely for short-term purposes and thus should be out of scope for purposes of the final rule).

[219] In the course of developing the final rule, the agencies have considered the prudential actions of foreign regulators in this area and the resulting effects on U.S. and non-U.S. financial institutions and the relevant markets in which they participate.

[220] *See* final rule § ___.3(b)(1)(ii). The final rule's market risk capital prong has, however, been modified as compared to the 2013 rule to account for a banking entity that is not consolidated with an affiliate (for regulatory reporting purposes) that calculates risk-based capital ratios under the market risk capital rule. For example, the trading positions of a broker-dealer that is not consolidated with its parent bank holding company will not be included in the holding company's trading positions in the holding company's Form FR Y–9C. In such an instance, even though the broker-dealer is affiliated with an entity that calculates risk-based capital ratios under the market risk capital rule, it would not be subject to the market capital risk prong due to the fact that the broker-dealer is not consolidated with the affiliate for regulatory reporting purposes. As a result, the broker-dealer would be subject to the amended short-term intent prong and the dealer prong (with respect to instruments purchased or sold in connection with the activities that require the broker-dealer to be licensed or registered as such). It may, however, be able to elect to use the market risk capital prong (as an alternative to the short-term intent prong) by following the procedures described above.

[221] Unlike the Volcker Rule compliance program requirements, which are based on average gross trading assets and liabilities over the prior four quarters, the thresholds in the market risk capital rule are based on the most recent quarter.

[222] *See* 12 CFR 3.202; 12 CFR 217.202; 12 CFR 324.202 (defining "covered position").

market risk capital prong may not report positions on applicable regulatory reporting forms as trading assets or trading liabilities. Therefore, the final rule amends the definition of ''market risk capital rule covered position and trading position'' to clarify that this definition includes any position that meets the criteria to be a covered position and a trading position, without regard to whether the financial instrument is reported as a covered position or trading position on any applicable regulatory reporting forms. The final rule also modifies the definition of ''market risk capital rule'' to update a cross-reference to the Board's capital rules and to clarify what the applicable market risk capital rule would be for a firm electing to apply the market risk capital prong.[223]

vi. Dealer Prong

The proposal did not propose revisions to the dealer prong. However, several commenters requested that the agencies clarify that not all purchases and sales of financial instruments by a dealer are captured by the dealer prong.[224] Specifically, these commenters requested that the agencies clarify that the dealer prong does not capture purchases or sales made by a dealer in a non-dealing capacity, including financial instruments purchased for long-term investment purposes.[225] Among other things, those commenters noted that without such modifications, the dealer prong may require a position-by-position analysis to confirm whether a long-term investment is part of the trading account. Another commenter requested that the agencies revise the dealer prong to ensure that derivatives activities remain in the trading account without regard to potential SEC and CFTC actions on the *de minimis* thresholds or other registration requirements, and that such derivatives activities do not benefit from any presumption of compliance.[226] The final rule retains the 2013 rule's dealer prong without any substantive change.[227]

The final rule's dealer prong includes within the definition of trading account any account that the banking entity uses to purchase or sell one or more financial instruments for any purpose if the banking entity (A) is licensed or registered, or is required to be licensed or registered, to engage in the business of a dealer, swap dealer, or security-based swap dealer, to the extent the instrument is purchased or sold in connection with the activities that require the banking entity to be licensed or registered as such; or (B) is engaged in the business of a dealer, swap dealer, or security-based swap dealer outside of the United States, to the extent the instrument is purchased or sold in connection with the activities of such business.[228] In response to commenters and consistent with the 2013 rule, the agencies reaffirm that a banking entity may be licensed or registered as a dealer, but only the types of activities that require it to be so licensed or registered are covered by the dealer prong. Thus, if a banking entity purchases or sells a financial instrument in connection with activities that are not the types of activities that would trigger registration as a dealer, the purchase or sale of the financial instrument is not covered by the dealer prong. However, it may be included in the trading account under the short-term intent prong or the market risk capital prong, as applicable.[229] Moreover, in response to commenters' concerns that the existing rule may require dealers to conduct a position-by-position analysis of their trading activities to determine whether a position is captured by the dealer prong, the agencies believe that the changes being adopted today, particularly the exclusions for financial instruments that are not trading assets or liabilities,[230] should help alleviate those concerns by narrowing the range of transactions covered by the rule.

b. Proprietary Trading Exclusions

Section ____.3 of the 2013 rule generally prohibits a banking entity from engaging in proprietary trading. In addition to defining the scope of trading activity subject to the prohibition on proprietary trading, the 2013 rule also provides several exclusions from the definition of proprietary trading. Based on experience implementing the 2013 rule, the agencies proposed modifying the exclusion for liquidity management and adopting new exclusions for transactions made to correct errors and for certain offsetting swap transactions. In addition, the agencies requested comment regarding whether any additional exclusions should be added, for example, to address certain derivatives entered into in connection with a customer lending transaction. The agencies are adopting the liquidity management exclusion as proposed, with a modification to encompass non-deliverable cross-currency swaps, and additional exclusions for the following activities: (i) Trading activity to correct trades made in error, (ii) loan-related and other customer accommodation swaps, (iii) matched derivative transactions, (iv) hedges of mortgage servicing rights where trading in the underlying mortgage servicing rights is not prohibited by the rule; and (v) financial instruments that do not meet the definition of trading assets or trading liabilities under applicable reporting forms.

i. Liquidity Management Exclusion Amendments

The 2013 rule excludes from the definition of proprietary trading the purchase or sale of securities for the purpose of liquidity management in accordance with a documented liquidity management plan.[231] This exclusion contains several requirements. First, the liquidity management exclusion is limited by its terms to securities and requires that transactions be conducted pursuant to a liquidity management plan that specifically contemplates and authorizes the particular securities to be used for liquidity management purposes; describes the amounts, types, and risks of securities that are consistent with the banking entity's liquidity management plan; and the liquidity circumstances in which the particular securities may or must be used. Second, any purchase or sale of securities contemplated and authorized by the plan must be principally for the purpose of managing the liquidity of the banking entity, and not for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging a position taken for such short-term purposes. Third, the plan must require that any securities purchased or sold for liquidity management purposes be highly liquid and limited to instruments the market, credit, and other risks of which the banking entity does not reasonably expect to give rise to appreciable profits or losses as a result of short-term price movements. Fourth, the plan must limit any

[223] *See* 12 CFR part 217.

[224] *See, e.g.,* BPI; FSF; and SIFMA.

[225] *See e.g.,* BPI; FSF; and SIFMA.

[226] *See* Better Markets.

[227] In response to the commenter, the agencies clarify that banking entities that are licensed or registered (or required to be licensed or registered) as dealers, swap dealers, or security-based swap dealers analyze the types of activities that would be captured by the dealer prong without regard to the *de minimis* thresholds for swap dealer or security-based swap dealer registration. However, regardless of whether a banking entity is so licensed or registered, the banking entity is also required to determine whether a purchase or sale of a financial instrument would be captured by either the short-term intent prong or the market risk capital prong, as applicable.

[228] *See* final rule § ____.3(b)(1)(iii).

[229] *See* final rule § ____.3(b)(1)(i), (ii).

[230] *See infra* section IV.B.1.b.v.

[231] *See* 2013 rule § ____.3(d)(3).

securities purchased or sold for liquidity management purposes to an amount that is consistent with the banking entity's near-term funding needs, including deviations from normal operations of the banking entity or any affiliate thereof, as estimated and documented pursuant to methods specified in the plan. Fifth, the banking entity must incorporate into its compliance program internal controls, analysis, and independent testing designed to ensure that activities undertaken for liquidity management purposes are conducted in accordance with the requirements of the 2013 rule and the banking entity's liquidity management plan. Finally, the plan must be consistent with the supervisory requirements, guidance, and expectations regarding liquidity management of the agency responsible for regulating the banking entity. The 2013 rule established these requirements to provide some safeguards to ensure that the liquidity management exclusion is not misused for the purpose of impermissible proprietary trading.[232] While some safeguards around a banking entity's liquidity management are appropriate, the restrictions under the 2013 rule have limited the ability of banking entities to engage in certain types of bona fide liquidity management activities.

The proposal would have amended the exclusion for liquidity management activities to allow banking entities to use foreign exchange forwards and foreign exchange swaps, each as defined in the Commodity Exchange Act,[233] and physically settled cross-currency swaps (*i.e.,* cross-currency swaps that involve an actual exchange of the underlying currencies) as part of their liquidity management activities.[234] Foreign exchange forwards, foreign exchange swaps, and physically settled cross-currency swaps are often used by trading desks of foreign branches and subsidiaries of a U.S. banking entity to manage liquidity in foreign jurisdictions.[235] The proposal would have provided that a banking entity could use foreign exchange forwards, foreign exchange swaps, and physically settled cross-currency swaps for liquidity management purposes provided that the use of such financial instruments was in accordance with a documented liquidity management plan.[236]

Many commenters supported the proposed expansion of activities covered by the liquidity management exclusion.[237] However, some commenters expressed the view that the expansion did not go far enough and should be expanded to include other types of financial instruments.[238] One commenter asserted that expanding the scope of the liquidity management exclusion would streamline compliance for banking entities without introducing additional safety and soundness concerns or the risk of impermissible proprietary trading.[239] Some commenters said that non-deliverable currency derivatives should also qualify for the exclusion, because there are some currencies for which physically settled cross-currency swaps are not available.[240] Additionally, other commenters argued that given the role of derivatives in liquidity risk management, the agencies should expand the exclusion further to cover all derivatives, including interest rate swaps.[241] Certain commenters suggested that the agencies should further expand the liquidity management exclusion to include all financial instruments that would be convenient and useful for managing liquidity and asset-liability mismatch risks of the organization.[242]

Several commenters claimed that the eligibility criteria of the liquidity management exclusion are opaque and confusing, and suggested modifying, clarifying, or eliminating some or all of the requirements.[243] For example, several commenters argued that the requirement to maintain a documented liquidity management plan with certain enumerated elements is unnecessarily prescriptive.[244] Some commenters stated that banking entities do not rely on the exclusion due to the number and limiting nature of the requirements.[245] Some commenters argued that the agencies should be promoting, rather than restricting, appropriate liquidity management and structural interest rate risk management activities, and that the retention of these requirements is not consistent with the removal of the prescriptive requirements of Appendix B in the 2013 rule.[246] Other commenters argued that the agencies should eliminate the compliance-related requirements and permit banking entities to design and manage their liquidity management function according to their existing internal compliance frameworks.[247] In addition, a commenter recommended clarifying whether treasury functions within banking entities may manage global liquidity through the newly added financial instruments.[248]

In contrast, other commenters did not support the proposed expansion of the liquidity management exclusion.[249] One commenter asserted that the proposed rule fails to demonstrate the need for providing banks greater opportunity to use foreign currency transactions to manage their liquidity needs when those needs are already being met via the securities markets.[250] Another commenter argued that the proposed change would create concern for the currency markets by making it easier for trading desks to trade these instruments for speculative purposes under the guise of legitimate liquidity management.[251] One commenter argued that the proposal would encourage banking entities to exclude impermissible trades as liquidity management and engage in speculative currency trading. As a result, it would increase banks' risk-taking and moral hazard, reducing the effectiveness of regulatory oversight.[252] In addition, some commenters suggested that the agencies did not provide sufficient justification to support the proposed changes to the exclusion.[253]

After reviewing the comments received, the agencies are adopting the liquidity management exclusion substantially as proposed, but with a modification to permit the use of non-deliverable cross-currency swaps. The agencies recognize the various types of financial instruments that can be used by a banking entity for liquidity management as noted by commenters. However, the agencies continue to believe, as stated in the proposal, that the purpose of the expansion is to streamline compliance for banking entities operating in foreign

[232] *See* 79 FR at 5555.

[233] *See* 7 U.S.C. 1a(24) and 1a(25).

[234] *See* proposed rule §____.3(e)(3).

[235] *See* 83 FR at 33451–52

[236] *See id.*

[237] *See, e.g.,* ISDA; Goldman Sachs; ABA; SIFMA; IIB; BPI; GFMCA; CFA; New England Council, CCMC; Capital One et al., FSF; and State Street.

[238] *See, e.g.,* ISDA; ABA; FSF; New England Council; CCMC; Capital One et al.; Goldman Sachs; SIFMA; IIB; Credit Suisse; and State Street.

[239] *See* ISDA.

[240] *See, e.g.,* Global Financial Markets Association (GFMA) (noting that certain non-deliverable financial instruments are also used for liquidity management purposes); SIFMA; State Street; JBA; ABA; BPI; IIB; and Credit Suisse.

[241] *See, e.g.,* FSF; Capital One et al.; IIB; and JBA.

[242] *See, e.g.,* IIB and State Street.

[243] *See, e.g.,* Capital One et al.; BPI; JBA; SIFMA; CCMC; and FSF.

[244] *See, e.g.,* ISDA; KeyCorp; IIB; CCMC; SIFMA; and Goldman Sachs.

[245] *See, e.g.,* FSF and Credit Suisse.

[246] *See, e.g.,* SIFMA and Goldman Sachs.

[247] *See, e.g.,* BPI; IIB; and FSF.

[248] *See* ABA.

[249] *See, e.g.,* Volcker Alliance; Data Boiler; NAFCU; Public Citizen; CAP; Occupy the SEC; and Merkley.

[250] *See* Bean.

[251] *See* Volcker Alliance.

[252] *See* Data Boiler.

[253] *See, e.g.,* Public Citizen and Bean.

jurisdictions.[254] Thus, the final rule expands the liquidity management exclusion to permit the purchase or sale of foreign exchange forwards (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)), foreign exchange swaps (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25)), and cross-currency swaps [255] entered into by a banking entity for the purpose of liquidity management in accordance with a documented liquidity management plan.[256]

In response to commenters' concerns that physically settled cross-currency swaps are not available for some currencies (*e.g.,* due to currency controls), the exclusion also encompasses non-deliverable cross-currency swaps. For currencies where physically settled cross-currency swaps are not available, a banking entity may have had to engage in procedures such as using spot transactions or holding currency at foreign custodians, which could be inefficient. Allowing banking entities to use non-deliverable cross-currency swaps can provide greater flexibility in conducting liquidity management in these situations. Even though physically settled cross-currency swaps are available in many currencies, the agencies believe it is appropriate to allow non-deliverable cross-currency swaps to be used for liquidity management in all currencies. Requiring physical settlement for some cross-currency swaps but not others would make the exclusion more difficult for banking entities to use and for the agencies to monitor, particularly if currency controls change, causing the list of currencies for which physical settlement is permitted to change. These administrative hurdles would negate many of the benefits of allowing the use of non-deliverable cross-currency swaps.

Regarding the assertion that banking entities could meet their liquidity needs in the securities markets, the agencies have found that, to the contrary, foreign exchange forwards, foreign exchange swaps, and cross-currency swaps are often used by trading desks to manage liquidity both in the United States and in foreign jurisdictions. As foreign branches and subsidiaries of U.S. banking entities often have liquidity requirements mandated by foreign jurisdictions, U.S. banking entities often use foreign exchange products to address currency risk arising from holding this liquidity in foreign currencies. Thus, these foreign exchange products are important for liquidity management and should be included in the expansion of the liquidity management exclusion.

The agencies believe that adding foreign exchange forwards, foreign exchange swaps, and cross-currency swaps to the exclusion addresses the primary liquidity management needs for foreign entities, and therefore are declining to expand the exclusion to other products as suggested by some commenters. While some commenters asserted that further expanding the liquidity management exclusion would streamline compliance without introducing additional safety and soundness or proprietary trading concerns, the agencies believe that the range of financial instruments that will qualify for the exclusion under the final rule will be sufficient for managing banking entities' liquidity risks.

The final rule permits a banking entity to purchase or sell foreign exchange forwards, foreign exchange swaps, and cross-currency swaps to the same extent that a banking entity may purchase or sell securities under the liquidity management exclusion in the 2013 rule, and the conditions that apply for securities transactions also apply to transactions in foreign exchange forwards, foreign exchange swaps, and cross-currency swaps.[257]

The agencies acknowledge that, as stated in the proposal, cross-currency swaps generally are more flexible in their terms, may have longer durations, and may be used to achieve a greater variety of potential outcomes, as compared to foreign exchange forwards and foreign exchange swaps.[258] However, the agencies believe that the requirement to conduct liquidity management in accordance with a documented liquidity management plan appropriately limits the use of cross-currency swaps to activities conducted for liquidity management purposes, and therefore banking entities' use of these swaps should not adversely affect currency markets, as one commenter warned. Under the plan, the purpose of the transactions must be liquidity management. The timing of purchases and sales, the types and duration of positions taken and the incentives provided to managers of these purchases and sales must all indicate that managing liquidity, and not taking short-term profits (or limiting short-term losses), is the purpose of these activities. Thus, to be in compliance with the plan, cross-currency swaps must be used principally for the purpose of managing the liquidity of the banking entity, and not for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging a position taken for such short-term purposes.[259]

Regarding the assertion from some commenters that the compliance-related requirements for the liquidity management exclusion are opaque or unnecessarily prescriptive, the agencies believe it is important to retain these requirements in order to provide clarity in administration of the rule and to protect against potential misuse of the liquidity management exclusion for proprietary trading. As noted above, the documented liquidity management plan, required under the 2013 rule and retained in the final rule,[260] is a key element in assuring that liquidity management is the purpose of the relevant transactions. The agencies do not believe that the final rule will stand as an obstacle to or otherwise impair the ability of banking entities to manage their liquidity risks. Although other changes to the 2013 rule in the final rule, such as the elimination of Appendix B, reflect efforts to tailor compliance obligations, the agencies believe it is important to be explicit in maintaining targeted compliance requirements for specific provisions of the final rule, such as the liquidity management exclusion.

The agencies believe that the six required elements of the liquidity management plan help to mitigate commenters' concerns that the proposal would have encouraged banking entities to exclude impermissible trades as liquidity management or increase risk-taking. Under the liquidity management plan required by the final rule, the exclusion does not apply to activities undertaken with the stated purpose or effect of hedging aggregate risks incurred by the banking entity or its affiliates related to asset-liability mismatches or other general market risks to which the entity or affiliates may be exposed. Further, the exclusion does not apply to any trading activities

[254] *See* 83 FR at 33451–52.

[255] As proposed, the final rule defines a cross-currency swap as a swap in which one party exchanges with another party principal and interest rate payments in one currency for principal and interest rate payments in another currency, and the exchange of principal occurs on the date the swap is entered into, with a reversal of the exchange of principal at a later date that is agreed upon for when the swap is entered. This definition is consistent with regulations pertaining to margin and capital requirements for covered swap entities, swap dealers, and major swap participants. *See* 12 CFR 45____.2; 12 CFR 237.2; 12 CFR 349.2; 17 CFR 23.151.

[256] *See* final rule § ____.3(d)(3).

[257] *See* § ____.3(e)(3)(i)–(vi) of the final rule.

[258] *See* 83 FR at 33452.

[259] *See* § ____.3(d)(3)(ii) of the final rule.

[260] *See* § ____.3(d)(3).

that expose banking entities to substantial risk from fluctuations in market values, unrelated to the management of near-term funding needs, regardless of the stated purpose of the activities.[261]

This final rule also includes a change to one of the liquidity management exclusion's requirements. The 2013 rule requires that activity conducted under the liquidity management exclusion be consistent with applicable ''supervisory requirements, guidance, and expectations.'' [262] Consistent with changes elsewhere in the final rule and with the Federal banking agencies' Interagency Statement Clarifying the Role of Supervisory Guidance,[263] the agencies are removing references to guidance and expectations from the regulatory text of the liquidity management exclusion. In addition, the final rule includes conforming changes that reflect the addition of foreign exchange forwards, foreign exchange swaps, and cross-currency swaps as permissible contracts in conjunction with the other criteria under the exclusion.[264]

ii. Transactions To Correct Bona Fide Trade Errors

The proposal included an exclusion from the definition of proprietary trading for trading errors and subsequent correcting transactions.[265] As discussed in the proposal, the exclusion was intended to address situations in which a banking entity erroneously executes a purchase or sale of a financial instrument in the course of conducting a permitted or excluded activity. For example, a trading error may occur when a banking entity is acting solely in its capacity as an agent, broker, or custodian pursuant to § ____.3(d)(7) of the 2013 rule, such as by trading the wrong financial instrument, buying or selling an incorrect amount of a financial instrument, or purchasing rather than selling a financial instrument (or vice versa). To correct such errors, a banking entity may need to engage in a subsequent transaction as principal to fulfill its obligation to deliver the customer's desired financial instrument position and to eliminate any principal exposure that the banking entity acquired in the course of its effort to deliver on the customer's original request. As the proposal noted, banking entities have expressed concern that, however, under the 2013 rule, the initial trading error and any corrective transactions could, depending on the facts and circumstances involved, fall within the proprietary trading definition if the transaction is covered by any of the prongs of the trading account definition and is not otherwise excluded pursuant to a different provision of the rule.

To address this concern, the agencies proposed a new exclusion from the definition of proprietary trading for trading errors and subsequent correcting transactions. The proposal noted that the availability of this exclusion would depend on the facts and circumstances of the transactions, such as whether the banking entity made reasonable efforts to prevent errors from occurring, or identified and corrected trading errors in a timely and appropriate manner. The proposed exclusion required that banking entities, once they identified purchases or sales made in error, transfer the financial instrument to a separately managed trade error account for disposition. The proposal would have required that this separately managed trade error account be monitored and managed by personnel independent from the traders responsible for the error, and that banking entities monitor and manage trade error corrections and trade error accounts.

The majority of commenters generally supported the proposed exclusion for trade errors.[266] Some commenters noted that, consistent with operational risk management practices, bona fide trade error activity is separately managed and classified as an operational loss when there is a loss event or a ''near miss'' when error activity results in a gain.[267] Many commenters urged the agencies not to mandate a separately managed trade error account, but to permit banking entities to resolve trading errors in accordance with internal policies and procedures to avoid duplicative resolution systems and unnecessary regulatory costs.[268] One commenter argued that error trades are clearly outside the scope of activities meant to be prohibited by the statute, so it should not be necessary to include any additional documentation or administrative requirements related to them.[269] One comment letter requested that the agencies clarify that the exclusion covers both pre-settlement trade errors (where the error is identified and corrected prior to being settled in the client's account and is settled in a separately managed trade error account) and post-settlement trade errors (where the trade error is settled in and posted directly to the client's account).[270]

One commenter supported providing an exclusion for bona fide error trades, but suggested certain changes to the proposed exclusion.[271] This commenter expressed concern that the proposed exclusion did not provide sufficient protections to ensure that banking entities correct errors in a timely and comprehensive manner and do not use the exclusion to facilitate directional exposures. To this end, the commenter recommended requiring banking entities to establish reasonably designed controls, including periodic exception reports containing certain specified fields. These reports, the commenter argued, should be provided to independent personnel in the second line-of-defense, including compliance and risk personnel, and escalated internally in accordance with the banking entity's internal policies and procedures. The commenter also recommended requiring periodic error trade testing and audits conducted by the second line-of-defense.

One commenter argued against a blanket exclusion for error trades, and urged the agencies to require any profit from error trades be forfeited to the U.S. Treasury, thereby removing any incentive for a banking entity to erroneously classify intentional financial positions as error trades.[272] Another commenter argued that the proposal did not adequately explain or provide sufficient data to justify the necessity of providing an exclusion for error trades, and that the exclusion could be used to evade the prohibition on proprietary trading.[273]

After weighing the comments received, the agencies are excluding from the definition of ''proprietary trading'' any purchase or sale of one or more financial instruments that was made in error by a banking entity in the course of conducting a permitted or

[261] *See* 79 FR at 5555.

[262] *See* 2013 rule § ____.3(d)(3)(vi).

[263] Interagency Statement Clarifying the Role of Supervisory Guidance (Sept. 11, 2018; *https://www.occ.gov/news-issuances/news-releases/2018/nr-ia-2018-97a.pdf, https://www.fdic.gov/news/news/financial/2018/fil18049.html, https://www.federalreserve.gov/supervisionreg/srletters/sr1805.htm*). The final rule similarly removes references to ''guidance'' from subparts A and C.

[264] The term ''financial instruments'' is substituted for the term ''securities'' when referring to what contracts are permitted under the exclusion.

[265] *See* 83 FR at 33452–53.

[266] *See, e.g.,* ABA; BB&T; Capital One et al.; BPI; FSF; CFA; and JBA.

[267] *See, e.g.,* ABA; BB&T; BPI; Capital One et al.; and FSF.

[268] *See, e.g.,* ABA; Credit Suisse; FSF; JBA; and SIFMA.

[269] *See* SIFMA.

[270] *See* Capital One et al.

[271] *See* Better Markets.

[272] *See* Public Citizen.

[273] *See* CAP.

excluded activity or is a subsequent transaction to correct such an error.[274] The agencies do not believe bona fide trading errors and correcting transactions are proprietary trading. Under the 2013 rule, trading errors and subsequent transactions to correct such errors could trigger the short-term intent prong's 60-day rebuttable presumption and thus could be considered to be presumptively within the trading account. In addition, trading errors and correcting transactions could be within the definition of proprietary trading under the market risk prong or dealer prong. While the final rule eliminates the 2013 rule's 60-day rebuttable presumption,[275] the agencies believe it is useful and appropriate to clarify in the final rule that trading errors and subsequent correcting transactions are not proprietary trading because banking entities do not enter into these transactions principally for the purpose of selling in the near-term (or otherwise with the intent to resell in order to profit from short-term price movements).[276] Rather, the principal purpose of a trading error correction is to remedy a mistake made in the ordinary course of the banking entity's permissible activities.[277] Accordingly, the agencies are adopting this exclusion to provide clarity regarding bona fide trading errors and subsequent correcting transactions.

Consistent with feedback from several commenters,[278] the exclusion in the final rule does not require banking entities to transfer erroneously purchased (or sold) financial instruments to a separately managed trade error account for disposition. The agencies agree that this requirement could have resulted in duplicative resolution systems and imposed undue regulatory costs, which are not appropriate in light of the narrow class of bona fide trading errors that fall within the exclusion. As with all exclusions and permitted trading activities, the agencies intend to monitor use of this exclusion for evasion. For example, the magnitude or frequency of errors could indicate that the trading activity is inconsistent with this exclusion.

The agencies have considered comments suggesting that the agencies should impose on banking entities certain reporting, auditing, and testing requirements specifically related to trade error transactions.[279] As noted above, the agencies believe mandating requirements such as these could lead to undue costs for banking entities, which are not appropriate in light of the narrow class of bona fide trading errors that fall within the exclusion. Such bona fide trade errors and subsequent correcting transactions do not fall within the statutory definition of ''proprietary trading'' because they lack the requisite short-term intent. Accordingly, the agencies do not find it necessary to impose additional requirements with respect to such activities. Further, the agencies do not agree that any profits resulting from trade error transactions should be remitted to the U.S. Treasury.

iii. Matched Derivative Transactions

The proposal requested comment on the treatment of loan-related swaps between a banking entity and customers that have received loans from the banking entity.[280] The proposal explained that, in a loan-related swap transaction, a banking entity enters into a swap with a customer in connection with the customer's loan and contemporaneously offsets the swap with a third party. The swap with the customer is directly related to the terms of the customer's loan.[281] In one typical type of loan-related swap, a banking entity seeks to make a floating-rate loan to a customer that could have the benefit to the banking entity of reducing the banking entity's interest rate risk, but the customer would prefer to have the economics of a fixed-rate loan.[282] To achieve a result that addresses these divergent preferences, the banking entity makes a floating-rate loan to the customer and contemporaneously or nearly contemporaneously enters into a floating rate to fixed rate interest rate swap with the same customer and an offsetting swap with another counterparty.[283] As a result, the customer receives economic treatment similar to a fixed-rate loan.[284] The banking entity has entered into the preferred floating rate loan, provided the customer with the customer's preferred fixed rate economics though the interest rate swap with the customer and offset its market risk exposure from the customer-facing interest rate swap through a swap with another counterparty.[285]

Loan-related swaps have presented a compliance challenge particularly for smaller non-dealer banking entities.[286] These banking entities may enter into loan-related swaps infrequently, and the decision to do so tends to be situational and dependent on changes in market conditions as well as on the interaction of a number of factors specific to the banking entity, such as the nature of the customer relationship.[287]

The proposal sought comment on whether loan-related swaps should be excluded from the definition of proprietary trading, exempted from the prohibition on proprietary trading, or permitted under the exemption for market making-related activities.[288] The proposal also asked whether other types of swaps, such as end-user customer-driven swaps that are used by a customer to hedge commercial risk should be treated the same way as loan-related swaps.[289] The proposal also requested comment as to whether it is appropriate to permit loan-related swaps to be conducted pursuant to the exemption for market making-related activities where the frequency with which a banking entity executes such swaps is minimal but the banking entity remains prepared to execute such swaps when a customer makes an appropriate request.[290]

Most commenters supported allowing loan-related swaps, either by adopting an exclusion from the definition of proprietary trading,[291] creating a new exemption for loan-related swaps,[292] or clarifying that banking entities could enter into loan-related swaps under existing exemptions.[293] The majority of these commenters supported explicitly excluding loan-related swaps from the definition of proprietary trading.[294] These commenters noted that loan-related swap transactions generally do not fall within the statutory definition of trading account and that these

[274] Final rule § ____.3(d)(10).

[275] *See* final rule § ____.3(b)(4).

[276] *See* 12 U.S.C. 1851(h)(6).

[277] *See, e.g.,* BPI and FSF.

[278] *See, e.g.,* ABA; Credit Suisse; FSF; JBA; and SIFMA.

[279] *See* Better Markets.

[280] *See* 83 FR at 33462–64.

[281] *See id.* at 33462.

[282] *Id.*

[283] *Id.*

[284] *Id.*

[285] *Id.* In this example, the banking entity retains the counterparty risk from both swaps. However, depending on the type of swap and the particular transaction, the banking entity may be able to manage the counterparty risk, for example, by clearing the transaction at a clearing agency or derivatives clearing organization acting as a central counterparty, as applicable.

[286] *Id.*

[287] *Id.* at 33463.

[288] *Id.*

[289] *Id.* at 33464.

[290] *Id.* at 33463.

[291] *See, e.g.,* BOK; ABA; Covington & Burling LLP (Covington); JBA; Chatham; Credit Suisse; BPI; SIFMA; IIB, Covington; Arvest; IIB; KeyCorp; and Capital One et al.

[292] *See, e.g.,* Covington and BPI.

[293] *See, e.g.,* Covington; BPI; SIFMA; Credit Suisse; and BB&T.

[294] *See, e.g.,* BOK; ABA; Covington; JBA; Chatham; Credit Suisse; BPI; SIFMA; IIB, Covington; Arvest; IIB; KeyCorp; and Capital One et al.

transactions are important risk-mitigating activities.[295] Commenters stated that providing an exclusion or permitted activity exemption for loan-related swaps would prevent section 13 of the BHC Act from having an unintended chilling effect on an important and prudent lending-related activity.[296] Commenters also stated that these types of swap transactions are important tools that facilitate bank customers' ability to manage their risks.[297] One commenter opposed providing an exclusion for loan-related swaps, arguing that these activities instead should be conducted under the risk-mitigating hedging exemption.[298]

Two commenters requested that the agencies adopt a permitted activity exemption for loan-related swaps or revise the existing exemption for market making-related activities if the agencies do not explicitly exclude loan-related swaps from the definition of proprietary trading.[299] In addition, two commenters suggested that the exemption for riskless principal transactions in § ____.6(c)(2) of the 2013 rule could cover loan-related swaps.[300] These commenters and two others suggested that excluding loan-related swaps from the definition of proprietary trading would be more effective than adopting a new permitted activity exemption or relying on an existing permitted activity exemption.[301]

Two commenters argued that banking entities should be allowed to engage in loan-related swaps using the exemption for market making-related activities.[302] Several other commenters asserted that the market-making exemption is a poor fit for loan-related swaps and that the market-making exemption's requirements were unduly burdensome with respect to this activity, particularly for smaller banking entities.[303]

Several commenters supported excluding additional derivatives activities from the definition of proprietary trading, such as customer-driven matched-book trades that enable customers to hedge commercial risk regardless of whether the swaps are related to a loan.[304] Commenters noted that such customer-driven matched-book trades do not expose banking entities to risk other than counterparty credit risk.[305] Moreover, these trades reduce risks to the bank's customer and thus also reduce the risk of the banking entity's loans to that customer.[306]

Three commenters requested that the exclusion be expanded to cover instances where a banking entity enters into a loan-related swap with a customer but does not offset that swap with a third party.[307]

One commenter urged the agencies to adopt a definition of loan-related swaps that is substantially similar to the definition adopted by the CFTC for swaps executed in connection with originating loans to customers, and to include in the definition, the derivatives transaction entered into with a dealer to offset the risk of the customer-facing swap.[308] Another commenter opposed using the CFTC's definition, noting that the CFTC's definition would not address commodity-based matched-book derivative transactions.[309] One commenter recommended defining ''customer-facing loan-related swap'' to mean any swap with a customer or affiliate thereof in which the rate, asset, liability, or other notional item underlying the swap with the customer or affiliate thereof is, or is directly related to, a financial term of a loan or other credit facility with the customer or affiliate thereof (including, without limitation, the loan or other credit facility's duration, rate of interest, currency or currencies, or principal amount).[310] The same commenter stated that the exclusion should not include a timing requirement with respect to the offsetting swap or, if a timing condition is included, the banking entity should be required to enter into the offsetting swap ''contemporaneously or substantially contemporaneously'' with the customer-facing loan-related swap.[311]

After considering the comments received, the agencies are excluding from the definition of ''proprietary trading'' entering into a customer-driven swap or a customer-driven security-based swap and a matched swap or security-based swap if: (i) The transactions are entered into contemporaneously; (ii) the banking entity retains no more than minimal price risk;[312] and (iii) the banking entity is not a registered dealer, swap dealer, or security-based swap dealer.[313] The agencies are adopting this exclusion to provide greater certainty for non-dealer banking entities that engage in these customer-driven matched-book swap transactions.

Under the 2013 rule, these customer-driven matched swap transactions could trigger the short-term intent prong's rebuttable presumption and thus would be presumptively within the trading account. Although the agencies are eliminating the 2013 rule's rebuttable presumption,[314] the agencies believe that it is nevertheless useful and appropriate to clarify in the final rule that these customer-driven matched swap transactions are not proprietary trading because banking entities do not enter into these transactions principally for the purpose of selling in the near-term (or otherwise with the intent to resell in order to profit from short-term price movements).[315] For this reason, the agencies are providing an exclusion for these activities from the proprietary trading definition rather than requiring them to be conducted pursuant to the risk-mitigating hedging exemption, as one commenter suggested.

The agencies believe that adopting this exclusion will reduce costs for non-dealer banking entities and avoid disrupting a common and traditional banking service provided to small and medium-sized businesses. This exclusion will provide a greater degree of certainty that these customer-driven matched swap transactions are outside the scope of the final rule.

Consistent with feedback received from commenters,[316] the exclusion in the final rule is not limited to loan-related swaps.[317] Thus, the exclusion in the final rule could apply to a swap with a customer in connection with the

[295] *See, e.g.,* BOK; ABA; Covington; JBA; Chatham; Arvest; and IIB.

[296] *See, e.g.,* Covington and Credit Suisse.

[297] *See, e.g.,* Arvest and BOK.

[298] *See* Data Boiler.

[299] *See, e.g.,* Covington and BPI.

[300] *See, e.g.,* SIFMA and Credit Suisse.

[301] *See, e.g.,* Covington; BPI; SIFMA; and Credit Suisse.

[302] *See, e.g.,* BB&T and Credit Suisse (Credit Suisse noted, however, that an exclusion would be preferable to using the market-making exemption).

[303] *See, e.g.,* IIB; Covington; SIFMA; Capital One et al.; BPI; and B&F.

[304] *See, e.g.,* BOK; JBA; ABA; Capital One et al.; and KeyCorp.

[305] *See, e.g.,* BOK and ABA.

[306] *See, e.g.,* BOK.

[307] *See, e.g.,* ABA; Arvest; and IIB.

[308] *See* Chatham.

[309] *See* BOK.

[310] *See* Covington.

[311] *See id.*

[312] Price risk is the risk of loss on a fair-value position that could result from movements in market prices.

[313] Final rule § ____.3(d)(11).

[314] *See* final rule § ____.3(b)(4).

[315] *See* 12 U.S.C. 1851(h)(6).

[316] *See, e.g.,* BOK; JBA; ABA; Capital One et al.; and KeyCorp.

[317] As a result, the agencies are not adopting a definition of ''loan-related swap'' substantially similar to the definition adopted by the CFTC for swaps executed in connection with originating loans to customers, as requested by one customer. *See* Chatham. The agencies also note that this exclusion does not impact the ''insured depository institution swaps in connection with originating loans to customers'' provisions in the CFTC's definition of ''swap dealer.'' *See* 17 CFR 1.3, Swap dealer, paragraphs (4)(i)(C) and (5). Additionally, this exclusion does not affect any other aspects of the ''swap dealer'' definition in CFTC regulations, or how that term is interpreted by the CFTC.

customer's end-user activity (provided that all the terms of the exclusion are met). For example, a corn farmer is a customer of a non-dealer banking entity. To manage its risk with respect to the price of corn, the corn farmer enters into a swap on corn prices with the banking entity. The banking entity contemporaneously enters into a corn-price swap with another counterparty to offset the price risk of the swap with the corn farmer. The swap with the corn farmer and the offsetting swap with the counterparty have matching terms such that the banking entity retains no more than minimal price risk. The agencies have determined that it is appropriate to exclude these types of transactions from the definition of proprietary trading because, like matched loan-related swaps discussed above, banking entities do not enter into these customer-driven transactions principally for the purpose of selling in the near-term (or otherwise with the intent to resell in order to profit from short-term price movements).[318]

Several conditions must be met for the exclusion to apply.[319] The exclusion applies only to banking entities that are not registered dealers, swap dealers, or security-based swap dealers. This approach is consistent with feedback from commenters noting that primarily smaller banking entities have faced compliance challenges with respect to customer-driven swaps activities.[320] Banking entities that are registered dealers, swap dealers, or security-based swap dealers generally engage in these activities on a more regular basis and therefore have been able to conduct their derivatives activities pursuant to the exemption for market making-related activities. Although some commenters argued that the exemption for market making-related activities is too burdensome to apply to this type of activity,[321] the agencies note that the final rule streamlines certain requirements of that exemption.[322]

The exclusion only applies to transactions where one of the two matched swaps or security-based swaps is customer-driven, in that the transaction is entered into for a customer's valid and independent business purposes. In addition, the hedging swap or hedging security-based swap must match the customer-driven swap or customer-driven security-based swap. The banking entity may retain no more than minimal price risk between the two swaps or security-based swaps.[323] Finally, the banking entity must enter into the customer-driven swap or customer driven security-based swap contemporaneously with the matching swap or matching security-based swap.[324] These conditions carve out from the exclusion activities whose principal purpose is resale in the near term.[325] For example, if a banking entity entered into a hedging swap whose economic terms did not match the terms of the customer-driven swap, the banking entity would be exposed to price risk and could be speculating on short-term price movements. Similarly, if a banking entity waited multiple days between entering into a customer-driven swap and entering into the offsetting swap, the banking entity could be speculating on short-term price movements during the unhedged period of the swap transaction. In either case, the banking entity could be engaged in proprietary trading.[326] The requirements in the final rule's exclusion are intended to limit the exclusion to activities that the agencies have determined lack the requisite short-term trading intent.

The agencies have considered the comments requesting an exclusion for unmatched loan-related swaps and determined that such an exclusion is not necessary in the final rule.[327] For example, if a bank provides a loan to a customer and enters into a swap with the customer related directly to the terms of that loan but does not offset that customer-driven swap with a third-party, the exclusion does not apply. Although the exclusion may not apply, the agencies believe that this type of activity is unlikely to be within the trading account under the final rule, particularly because the agencies are not adopting the proposed accounting prong. Entering into such a loan-related swap would be proprietary trading only if the purchase or sale of the swap is principally for short term trading purposes or is otherwise within the definition of trading account.[328]

iv. Hedges of Mortgage Servicing Rights or Assets

The final rule excludes from the definition of proprietary trading any purchase or sale of one or more financial instruments that the banking entity uses to hedge mortgage servicing rights or mortgage servicing assets in accordance with a documented hedging strategy. The agencies are adopting this exclusion to clarify the scope of the prohibition on proprietary trading and to provide parity between banking entities that are subject to the market risk capital prong and banking entities that are subject to the short-term intent prong.

Section 13 of the BHC Act defines "trading account" to mean "any account used for acquiring or taking positions in . . . securities and instruments . . . principally for the purpose of selling in the near term (or otherwise with the intent to resell in order to profit from short-term price movements)," and any such other accounts that the agencies determine by rule. The purchase or sale of a financial instrument as part of a bona fide mortgage servicing rights or mortgage servicing asset hedging program is not within the statutory definition of "trading account" under the short-term intent prong because the principal purpose of such a purchase or sale is hedging rather than short-term resale for profit.

The agencies have determined to explicitly exclude this type of hedging activity from the definition of "proprietary trading" to provide greater clarity to banking entities that are subject to the short-term intent prong in light of changes made elsewhere in the final rule. Under the final rule, banking entities that are subject to the market risk capital prong (or that elect to apply the market risk capital prong) are not subject to the short-term intent prong. The market risk capital rule explicitly excludes intangibles, including servicing assets, from the definition of "covered position." Financial instruments used to hedge mortgage servicing rights or assets generally would not be captured under the market risk capital prong. Therefore, absent an explicit exclusion, banking entities that are subject to the market risk capital prong have more certainty than banking entities that are subject to the short-term intent prong that the purchase or sale of a financial instrument to hedge mortgage servicing rights or mortgage servicing assets is not proprietary

[318] *See* 12 U.S.C. 1851(h)(6).

[319] If a transaction does not satisfy all of the conditions of the exclusion but is not within the definition of trading account, the transaction would not constitute proprietary trading.

[320] *See, e.g.,* Chatham; ABA; and Covington.

[321] *See, e.g.,* IIB; Covington; SIFMA; Capital One et al.; BPI; and B&F.

[322] *See* final rule § ____.4(b).

[323] The banking entity would retain minimal price risk if the economic terms of the two swaps (*e.g.,* index, amount, maturity, and underlying reference asset or index) match.

[324] The exclusion only applies to transactions where the customer-driven swap or customer-driven security-based swap is offset by a matching swap or security-based swap on a one-for-one basis. The exclusion does not apply to portfolio-hedged derivatives transactions.

[325] *See* 12 U.S.C. 1851(h)(6).

[326] Whether the banking entity is actually engaged in impermissible proprietary trading would depend on the facts and circumstances of the particular transaction.

[327] *See* ABA and Arvest.

[328] *See* final rule § ____.3(b).

trading. The agencies are explicitly excluding mortgage servicing rights and mortgage servicing asset hedging activity to provide banking entities that are not subject to the market risk capital prong (or that elect to apply the market risk capital prong) the same degree of certainty. As described in part IV.B.1.a.iii of this **SUPPLEMENTARY INFORMATION**, the final rule seeks to provide parity between smaller banking entities that are not subject to the market risk capital rule and larger banking entities with active trading businesses that are subject to the market risk capital prong. The agencies believe an express exclusion for mortgage servicing rights and mortgage servicing hedging activity is useful in light of the revision to the trading account definition that applies the short-term intent prong only to banking entities that are not subject to the market risk capital prong.

This exclusion applies only to bona fide hedging activities, conducted in accordance with a documented hedging strategy. This requirement will assist the agencies in monitoring for evasion or abuse. In addition, the agencies note that banking entities' mortgage servicing activities and related hedging activities remain subject to applicable law and regulation, including the Federal banking agencies' safety and soundness standards.

v. Financial Instruments That Are Not Trading Assets or Trading Liabilities

The final rule excludes from the trading account any purchase or sale of a financial instrument that does not meet the definition of ''trading asset'' or ''trading liability'' under the banking entity's applicable reporting form. As with the exclusion for hedges of mortgage servicing rights or assets, the agencies are adopting this exclusion to clarify the scope of the prohibition on proprietary trading and to provide parity between banking entities that are subject to the market risk capital prong (or that elect to apply the market risk capital prong) and banking entities that are subject to the short-term intent prong.

The agencies have determined to exclude the purchase or sale of assets that would not meet the definition of trading asset or trading liability from the definition of ''proprietary trading'' to provide greater clarity to banking entities that are subject to the short-term intent prong. As described above, under the final rule, banking entities that are subject to the market risk capital prong (or that elect to apply the market risk capital prong) are not subject to the short-term intent prong.[329] Under the market risk capital prong, a purchase or sale of a financial instrument is within the trading account if it would be both a covered position and trading position under the market risk capital rule. In general, a position is a covered position under the market risk capital prong if it is a trading asset or trading liability (whether on- or off-balance sheet).[330] Thus, the exclusion for financial instruments that are not ''trading assets and liabilities'' extends the same certainty to banking entities subject to the short-term intent prong as is provided by operation of the market risk capital prong.

One commenter recommended that the agencies modify the short-term intent prong to include only financial instruments that meet the definition of trading assets and liabilities and that are held for the purpose of short-term trading.[331] The agencies have determined that including only financial instruments that meet the definition of trading assets and liabilities (by excluding instruments that do not meet this definition) is appropriate because the trading asset and liability definitions used for regulatory reporting purposes incorporate substantially the same short-term trading standard as the short-term intent prong and section 13 of the BHC Act. The Call Report and FR Y–9C provide that trading activities typically include, among other activities, acquiring or taking positions in financial instruments ''principally for the purpose of selling in the near term or otherwise with the intent to resell in order to profit from short-term price movements.'' [332] This language is substantially identical to the statutory definition of trading account, which applies to any account used for acquiring or taking positions in financial instruments ''principally for the purpose of selling in the near term (or otherwise with the intent to resell in order to profit from short-term price movements) . . . .'' [333] Therefore, excluding any purchase or sale of a financial instrument that would not be classified as a trading asset or trading liability on these applicable reporting forms is consistent with the statutory definition of trading account in section 13 of the BHC Act. This exclusion is expected to provide additional clarity to banking entities subject to the short-term intent prong, while also better aligning the compliance program requirements with the scope of activities subject to section 13 of the BHC Act.

This exclusion applies to any purchase or sale of a financial instrument that does not meet the definition of ''trading asset'' or ''trading liability'' under the applicable reporting form as of the effective date of this final rule. The final rule references the reporting forms in effect as of the final rule's effective date to ensure the scope of the exclusion remains consistent with the statutory trading account definition. Because the reporting forms are used for many purposes and are generally based on generally accepted accounting principles, future revisions to the reporting forms could define ''trading asset'' and ''trading liability'' inconsistently with the ''trading account'' definition in section 13 of the BHC Act. Further, tying the exclusion to the reporting forms currently in effect will provide greater certainty to banking entities. If the scope of the exclusion were subject to change based on revisions to the applicable reporting forms, it could require banking entities to make corresponding changes to compliance systems to remain in compliance with the rule, which could result in disruption both for banking entities and the agencies. Accordingly, the final rule excludes any purchase or sale of a financial instrument that does not meet the definition of trading asset or trading liability under the applicable reporting form as of the effective date of the final rule.

c. Trading Desk

The 2013 rule applies certain requirements at the ''trading desk''-level of organization.[334] The 2013 rule defined ''trading desk'' to mean the smallest discrete unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof.[335]

As noted in the proposal, some banking entities had indicated that, in practice, the 2013 rule's definition of trading account had led to uncertainty regarding the meaning of ''smallest discrete unit.'' [336] In addition, banking

[329] *See* final rule § ____.3(b).

[330] *See* 12 CFR 3.202(b); 12 CFR 217.202(b); 12 CFR 324.202(b). In addition, the market risk capital rule's ''covered position'' definition expressly includes and excludes additional classes of instruments.

[331] *See* SIFMA.

[332] *See, e.g.,* Instructions for Preparation of Consolidated Reports of Condition and Income, FFIEC 031 and FFIEC 041, Schedule RC–D; Instructions for Preparation of Consolidated Financial Statements for Holding Companies, Reporting Form FR Y–9C, Schedule HC–D.

[333] 12 U.S.C. 1851(h)(6).

[334] *See* 2013 rule §§ ____.4, ____.5, App. A., App. B; final rule §§ ____.4, ____.5, App. A.

[335] 2013 rule § ____.3(e)(13).

[336] *See* 83 FR at 33453.

entities had communicated that this definition has caused confusion and duplicative compliance and reporting efforts for banking entities that also define trading desks for purposes unrelated to the 2013 rule, including for internal risk management and reporting and calculating regulatory capital requirements.[337] In response to these concerns, the proposal included a detailed request for comment on whether to revise the trading desk definition to align with the trading desk concept used for other purposes.[338] Specifically, the proposal requested comment on using a multi-factor trading desk definition based on the same criteria typically used to establish trading desks for other operational, management, and compliance purposes.[339]

Commenters that addressed the definition of ''trading desk'' generally supported revising the definition along the lines contemplated in the proposal.[340] Commenters asserted that the 2013 rule's ''smallest discrete unit language'' was subjective, ambiguous, and had been interpreted in different ways.[341] Commenters said that adopting a multi-factor definition would be preferable to the 2013 rule's definition because a multi-factor definition would align the definition of trading desk with other operational and managerial structures, whereas the 2013 rule's definition could be interpreted to require banking entities to designate certain units of organization as trading desks purely for purposes of the regulations implementing section 13 of the BHC Act.[342] One commenter supported the multi-factor definition in the proposal but recommended that the agencies should be required to approve the initial trading desk designations and any changes in trading desk designations.[343] One commenter said the agencies should allow the unit of the trading desk to be determined at the discretion of each financial institution [344] and another said it is not necessary to introduce complexity into how banking entities organize their internal operations.[345]

The final rule adopts a multi-factor definition that is substantially similar to the definition included in the request for comment in the proposal, except that the first prong has been revised and the reference to incentive compensation has been removed. This multi-factor definition will align the criteria used to define trading desk for purposes of the regulations implementing section 13 of the BHC Act with the criteria used to establish trading desks for other operational, management, and compliance purposes.

The definition of trading desk includes a new second prong that explicitly aligns the definition with the market risk capital rule.[346] The final rule provides that, for a banking entity that calculates risk-based capital ratios under the market risk capital rule, or a consolidated affiliate of a banking entity that calculates risk-based ratios under market risk capital rule, ''trading desk'' means a unit of organization that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof that is established by the banking entity or its affiliate for purposes of capital requirements under the market risk capital rule.[347] This change specifies that, for a banking entity that is subject to the market risk capital prong, the trading desk established for purposes of the market risk capital rule must be the same unit of organization that is established as a trading desk under the regulations implementing section 13 of the BHC Act. This prong of the trading desk definition is expected to simplify the supervisory activities of the Federal banking agencies that also oversee compliance with the market risk capital rule because the same unit of organization can be assessed for purposes of both the market risk capital rule and section 13 of the BHC Act, which will reduce complexity and cost for banking entities, and improve the effectiveness of the final rule. Together with providing firms with the flexibility to leverage existing or planned compliance programs in order to satisfy the elements of § ____.20 as appropriate, the agencies expect aligning the definition of trading desk will minimize compliance burden on banking entities subject to both rules.

To further align the final rule's trading desk concept with the market risk capital rule, the final rule provides that a trading desk must be ''structured by the banking entity to implement a well-defined business strategy.'' [348] This further aligns the trading desk definition with the definition of ''trading desk'' in the Basel Committee's minimum capital requirements for market risk.[349] This change will ensure that banking entities that are subject to the market risk capital prong and banking entities that are not subject to the market risk capital prong have comparable trading desk definitions. In general, a well-defined business strategy typically includes a written description of a desk's objectives, including the economics behind its trading and hedging strategies, as well as the instruments and activities the desk will use to accomplish its objectives. A desk's well-defined business strategy may also include an annual budget and staffing plan and management reports.

Like the proposal, the final rule states that a trading desk is organized to ensure appropriate setting, monitoring, and management review of the desk's trading and hedging limits, current and potential future loss exposures, and strategies. The final rule also states that a trading desk is characterized by a clearly-defined unit that: (i) Engages in coordinated trading activity with a unified approach to its key elements; (ii) operates subject to a common and calibrated set of risk metrics, risk levels, and joint trading limits; (iii) submits compliance reports and other information as a unit for monitoring by management; and (iv) books its trades together. The agencies consider a unit to be ''clearly-defined'' if it meets these four factors.

The proposal included a multi-factor definition of trading desk that referenced incentive compensation as one defining factor. However, the banking agencies do not incorporate incentive compensation in regulatory capital rules generally, and therefore omitting this criterion would better align the trading desk definition between the market risk capital rule and the Volcker Rule. Thus, the final rule does not incorporate any reference to incentive compensation.[350]

The final rule does not require the agencies to approve banking entities'

[337] *See id.*

[338] *See id.*

[339] *See id.*

[340] *See, e.g.,* ABA; ISDA 1; CCMC; SIFMA 2; Goldman Sachs; FSF; JBA; and AFR.

[341] *See, e.g.,* ABA and CCMC.

[342] *See, e.g.,* ABA; ISDA 1; CCMC; SIFMA 2; Goldman Sachs; FSF; and JBA.

[343] *See* AFR.

[344] *See* JBA.

[345] *See* CCMC.

[346] Currently, the market risk capital rule does not include a definition of ''trading desk.'' However, the federal banking agencies expect to implement the Basel Committee's revised market risk capital standards, which do. *See* Basel Committee on Banking Supervision, ''Minimum Capital Requirements for Market Risk,'' MAR12 (Feb. 2019). The federal banking agencies expect their revised market risk capital rule will include a definition of ''trading desk'' that is consistent with the trading desk concept described in the ''Minimum Capital Requirements for Market Risk,'' and the multifactor approach in this final rule.

[347] *See* final rule § ____.3(e)(13)(ii).

[348] Final rule § ____.3(e)(13)(i)(A).

[349] *See* Basel Committee on Banking Supervision, Minimum Capital Requirements for Market Risk (Feb. 2019).

[350] *Compare* 83 FR at 33453 *with* final rule § ____.3(e)(13)(i)(B).

initial trading desk designations and any changes in trading desk designations, as one commenter had recommended.[351] The agencies believe such an approval process is unnecessary for purposes of the final rule because the agencies intend to continue assessing banking entities' trading desk designations as part of the agencies' ongoing supervision of banking entities' compliance with the final rule as well as other safety and soundness regulations, as applicable. At the same time, the final rule does not allow the trading desk to be set completely at the discretion of the banking entity, as one commenter suggested.[352] The adopted definition will provide flexibility to allow banking entities to define their trading desks based on the same criteria typically used for other operational, management, and compliance purposes but would not be so broad as to hinder the agencies' or banking entities' ability to detect prohibited proprietary trading.

d. Reservation of Authority

The proposal included a reservation of authority that would have permitted an agency to determine, on a case-by-case basis, that any purchase or sale of one or more financial instruments by a banking entity for which it is the primary financial regulatory agency either is or is not for the trading account as defined in section 13(h)(6) of the BHC Act.[353] The preamble requested comment on whether such a reservation of authority would be necessary in connection with the proposed trading account definition, which would have focused on objective factors to define proprietary trading. The agencies explained that this approach may have produced results that were over- or under-inclusive with respect to the statutory trading account definition. The agencies further explained that the reservation of authority could provide appropriate balance by recognizing the subjective elements of the statute in light of the bright-line approach of the proposed accounting prong.

Two commenters supported adopting the reservation of authority.[354] Both of these commenters noted the importance of coordination and consistent application of the reservation of authority, particularly in instances where the primary financial regulatory agency may vary by legal entity within a firm.[355] One of these commenters suggested that the agencies keep such authority in reserve for use solely in those circumstances wherein poor management is putting an institution at risk of failure.[356]

The final rule does not include the proposed reservation of authority.[357] The revised trading account definition in the final rule retains a short-term intent standard that largely tracks the statutory standard.[358] Because the final trading account definition does not include the proposed accounting prong and is aligned with the statutory standard, the agencies do not find it necessary to retain a reservation of authority.

2. Section ____.4: Permitted Underwriting and Market Making Related Activities

a. Current Exemptions for Underwriting and Market Making—Related Activities [359]

Section 13(d)(1)(B) of the BHC Act contains an exemption from the prohibition on proprietary trading for the purchase, sale, acquisition, or disposition of securities, derivatives, contracts of sale of a commodity for future delivery, and options on any of the foregoing in connection with underwriting or market making-related activities, to the extent that such activities are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties (RENTD).[360] As the agencies noted when they adopted the 2013 rule, client-oriented financial services, which include underwriting, market making, and asset management services, are important to the U.S. financial markets and the participants in those markets.[361]

In particular, underwriters play a key role in facilitating issuers' access to funding, and are accordingly important to the capital formation process and to economic growth.[362] For example, underwriters can help reduce issuers' costs of capital by mitigating potential information asymmetries between issuers and their potential investors.[363] Similarly, market makers operate to help ensure that securities, commodities, and derivatives markets in the United States remain well-functioning by, among other things, providing important intermediation and liquidity.[364] At the same time, however, the agencies also recognized that providing appropriate latitude to banking entities to provide such client-oriented services need not and should not conflict with clear, robust, and effective implementation of the statute's prohibitions and restrictions.[365]

Accordingly, the 2013 rule follows a comprehensive, multi-faceted approach to implementing the statutory exemptions for underwriting and market making-related activities. Specifically, section ____.4(a) of the 2013 rule implements the statutory exemption for underwriting and sets forth the requirements that banking entities must meet in order to rely on the exemption. Among other things, the 2013 rule requires that:

- The banking entity act as an ''underwriter'' for a ''distribution'' of securities and the trading desk's underwriting position be related to such distribution;
- The amount and types of securities in the trading desk's underwriting position be designed not to exceed RENTD, and reasonable efforts be made to sell or otherwise reduce the underwriting position within a reasonable period, taking into account the liquidity, maturity, and depth of the market for the relevant type of security;
- The banking entity has established and implements, maintains, and enforces an internal compliance program that is reasonably designed to ensure the banking entity's compliance with the requirements of the underwriting exemption, including reasonably designed written policies and procedures, internal controls, analysis, and independent testing identifying and addressing:
  - The products, instruments, or exposures each trading desk may purchase, sell, or manage as part of its underwriting activities;
  - Limits for each trading desk, based on the nature and amount of the trading

[351] *See* AFR.

[352] *See* JBA.

[353] *See* 83 FR at 33454.

[354] *See, e.g.,* BB&T and CFA.

[355] *Id.*

[356] *See* CFA.

[357] *See* proposed rule § ____.3(g).

[358] Although banking entities that are subject to the market risk capital prong are not subject to the short-term intent prong, the market risk capital prong incorporates a substantially similar short-term intent standard. As described above, the market risk capital rule's definition of trading position largely parallels the statutory definition of trading account, which in turn mirrors the language in the short-term intent prong.

[359] In contrast to the proposal, the discussions of the exemptions for underwriting and market making-related activity have been combined in order to avoid any unnecessary redundancy as well as any confusion that could arise to the extent there are differences in the way that otherwise identical provisions of those exemptions operate. However, the two exemptions remain separate and distinct. Banking entities seeking to rely on one or both exemptions are required to comply with the requirements and legal standards contained in each applicable exemption, and will continue to be required to do so following adoption of the final rule.

[360] 12 U.S.C. 1851(d)(1)(B).

[361] *See* 79 FR at 5615.

[362] *See* 79 FR at 5561 (internal footnotes omitted).

[363] *Id.*

[364] *See* 79 FR at 5576.

[365] *See* 79 FR at 5541.

desk's underwriting activities, including RENTD, on the (1) amount, types, and risk of the trading desk's underwriting position, (2) level of exposures to relevant risk factors arising from the trading desk's underwriting position, and (3) period of time a security may be held;

○ Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits; and

○ Authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval;

• The compensation arrangements of persons performing the banking entity's underwriting activities are designed not to reward or incentivize prohibited proprietary trading; and

• The banking entity is licensed or registered to engage in the activity described in the underwriting exemption in accordance with applicable law.

Similarly, section ____.4(b) of the 2013 rule implements the statutory exemption for market making-related activities and sets forth the requirements that all banking entities must meet in order to rely on the exemption. Among other things, the 2013 rule requires that:

• The trading desk that establishes and manages the financial exposure routinely stands ready to purchase and sell one or more types of financial instruments related to its financial exposure and is willing and available to quote, purchase and sell, or otherwise enter into long and short positions in those types of financial instruments for its own account, in commercially reasonable amounts and throughout market cycles on a basis appropriate for the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

• The amount, types, and risks of the financial instruments in the trading desk's market-maker inventory are designed not to exceed, on an ongoing basis, RENTD, as required by the statute and based on certain factors and analysis specified in the rule;

• The banking entity has established and implements, maintains, and enforces an internal compliance program that is reasonably designed to ensure its compliance with the exemption for market making-related activities, including reasonably designed written policies and procedures, internal controls, analysis, and independent testing identifying and assessing certain specified factors;[366]

• To the extent that any required limit[367] established by the trading desk is exceeded, the trading desk takes action to bring the trading desk into compliance with the limits as promptly as possible after the limit is exceeded;

• The compensation arrangements of persons performing market making-related activities are designed not to reward or incentivize prohibited proprietary trading; and

• The banking entity is licensed or registered to engage in market making-related activities in accordance with applicable law.[368]

In the several years since the adoption of the 2013 rule, public commenters have observed that the significant and costly compliance requirements in the existing exemptions may unnecessarily constrain underwriting and market making without a corresponding reduction in the type of trading activities that the rule was designed to prohibit.[369] As the agencies noted in the proposal, implementation of the 2013 rule has indicated that the existing approach to give effect to the statutory standard of RENTD may be overly broad and complex, and also may inhibit otherwise permissible activity.[370]

Accordingly, the proposal was intended to tailor, streamline, and clarify the requirements that a banking entity must satisfy to avail itself of either exemption for underwriting or market making-related activities. In particular, the proposal intended to provide a clearer way to determine if a trading desk's activities satisfy the statutory requirement that underwriting or market making-related activity, as applicable, be designed not to exceed RENTD. Specifically, the proposal would have established a presumption, available to banking entities both with and without significant trading assets and liabilities, that trading within internally set limits satisfies the requirement that permitted activities must be designed not to exceed RENTD.[371] In addition, the agencies also proposed to tailor the exemption for underwriting and market making-related activities' compliance program requirements to the size, complexity, and type of activity conducted by the banking entity by making those requirements applicable only to banking entities with significant trading assets and liabilities.[372]

b. Proposed Presumption of Compliance With the Statutory RENTD Requirement

As described above, the statutory exemptions for underwriting and market making-related activities in section 13(d)(1)(B) of the BHC Act requires that such activities be designed not to exceed RENTD.[373] Consistent with the statute, for the purposes of the exemption for underwriting activities, section ____.4(a)(2)(ii) of the 2013 rule requires that the amount and type of the securities in the trading desk's underwriting position be designed not to exceed RENTD, and reasonable efforts are made to sell or otherwise reduce the underwriting position within a reasonable period, taking into account the liquidity, maturity, and depth of the market for the relevant type of security.[374]

Similarly, for the purposes of the exemption for market making-related activities, section ____.4(b)(2)(ii) of the 2013 rule requires that the amount, types, and risks of the financial instruments in the trading desk's market-maker inventory are designed not to exceed, on an ongoing basis, RENTD, based on certain factors and analysis.[375] Specifically, these factors are: (i) The liquidity, maturity, and depth of the market for the relevant type of financial instrument(s), and (ii) demonstrable analysis of historical customer demand, current inventory of financial instruments, and market and other factors regarding the amount, types, and risks of or associated with positions in financial instruments in which the trading desk makes a market, including through block trades.[376] Under § ____.4(b)(2)(iii)(C) of the 2013 rule, a banking entity must account for these considerations when establishing limits for each trading desk.[377]

In the proposal, the agencies recognized that the prescriptive standards for meeting the statutory RENTD requirements in the exemptions for underwriting and market making-related activities were complex, costly, and did not provide bright line conditions under which trading activity

366 *See* 2013 rule § ____.4(b)(2)(iii).

367 *See* 79 FR at 5615.

368 2013 rule § ____.4(b)(2). This provision was not intended to expand the scope of licensing or registration requirements under relevant U.S. or foreign law that are applicable to a banking entity engaged in market-making activities, but rather to recognize that compliance with applicable law is an essential indicator that a banking entity is engaged in market-making activities. *See* 79 FR at 5620.

369 83 FR at 33435, 33459.

370 83 FR at 33445–46.

371 Proposed rules § ____.4(a)(8) and § ____.4(b)(6).

372 83 FR at 33438 and 33459.

373 12 U.S.C. 1851(d)(1)(B).

374 2013 rule § ____.4(a)(2)(ii).

375 2013 rule § ____.4(b)(2)(ii).

376 *Id.*

377 2013 rule § ____.4(b)(2)(iii)(C).

could be classified as permissible underwriting or market making-related activity.[378] Accordingly, the agencies sought comment on a proposal to implement this key statutory factor—in connection with both relevant exemptions—in a manner designed to provide banking entities and the agencies with greater certainty and clarity about what activity constitutes permissible underwriting or market making-related activity pursuant to the applicable exemption.[379]

Instead of the approach taken in the 2013 rule, the agencies proposed to establish the articulation and use of internal limits as a key mechanism for conducting trading activity in accordance with the rule's exemptions for underwriting and market making-related activities.[380] Specifically, the proposal would have provided that the purchase or sale of a financial instrument by a banking entity would be presumed to be designed not to exceed RENTD if the banking entity establishes internal limits for each trading desk, subject to certain conditions, and implements, maintains, and enforces those limits, such that the risk of the financial instruments held by the trading desk does not exceed such limits.[381] As stated in the proposal, the agencies believe that this approach would provide banking entities with more flexibility and certainty in conducting permissible underwriting and market making-related activities.[382]

Under the proposal, all banking entities, regardless of their volume of trading assets and liabilities, would have been able to voluntarily avail themselves of the presumption of compliance with the RENTD requirement by establishing and complying with these internal limits. With respect to the underwriting exemption, the proposal would have provided that a banking entity would establish internal limits for each trading desk that are designed not to exceed RENTD, based on the nature and amount of the trading desk's underwriting activities, on the:

(1) Amount, types, and risk of its underwriting position;

(2) Level of exposures to relevant risk factors arising from its underwriting position; and

(3) Period of time a security may be held.[383]

With respect to the exemption for market making-related activities, the proposal would have provided that all banking entities, regardless of their volume of trading assets and liabilities, would be able to voluntarily avail themselves of the presumption of compliance with the RENTD requirement by establishing and complying with internal limits. Specifically, the proposal would have provided that a banking entity would establish internal limits for each trading desk that are designed not to exceed RENTD, based on the nature and amount of the trading desk's market making-related activities, on the:

(1) Amount, types, and risks of its market-maker positions;

(2) Amount, types, and risks of the products, instruments, and exposures the trading desk may use for risk management purposes;

(3) Level of exposures to relevant risk factors arising from its financial exposure; and

(4) Period of time a financial instrument may be held.[384]

In the case of both exemptions, the proposal provided that banking entities utilizing the applicable presumption of compliance with the RENTD requirement would have been required to maintain internal policies and procedures for setting and reviewing desk-level risk limits.[385] The proposed approach would not have required that a banking entity's limits be based on any specific or mandated analysis, as required with respect to RENTD analysis under the 2013 rule. Rather, a banking entity would have established the limits according to its own internal analyses and processes around conducting its underwriting activities and market making-related activities in accordance with section 13(d)(1)(B).[386] In addition, the proposal would have required, for both the exemption for underwriting and market making-related activities, a banking entity to promptly report to the appropriate agency when a trading desk exceeds or increases its internal limits.[387]

The proposal also provided that internal limits established by a banking entity for the presumption of compliance with the statutory RENTD requirement under both the exemption for underwriting and market making-related activities would have been subject to review and oversight by the appropriate agency on an ongoing basis. Any review of such limits would have assessed whether or not those limits are established based on the statutory standard—*i.e.,* the trading desk's RENTD, based on the nature and amount of the trading desk's underwriting or market making-related activities.[388]

Finally, under the proposal, the presumption of compliance with the statutory RENTD requirement for permissible underwriting and market making-related activities could have been rebutted by the appropriate agency if the agency determines, based on all relevant facts and circumstances, that a trading desk is engaging in activity that is not based on the trading desk's RENTD on an ongoing basis. The agency would have provided notice of any such determination to the banking entity in writing.[389]

The agencies requested comment on the proposed addition of a presumption that conducting underwriting or market making-related activities within internally set limits satisfies the requirement that permitted such activities be designed not to exceed RENTD.

---

[378] *See* 83 FR at 33455, 33459.

[379] *Id.*

[380] As stated in the proposal, as a consequence of the changes to focus on limits, many of the requirements of the 2013 rule relating to limits associated with the exemptions for underwriting and market making-related activities would be incorporated into this requirement and modified or removed as appropriate in the proposal.

[381] *See* proposed rule § ____.4(a)(8); proposed rule § ____.4(b)(6).

[382] 83 FR at 33438.

[383] Proposed rule § ____.4(a)(8)(i).

[384] Proposed rule § ____.4(6)(i)(B).

[385] *See* 83 FR at 33456, 33460. Under the proposal, banking entities with significant trading assets and liabilities would have continued to be required to establish internal limits for each trading desk as part of the underwriting compliance program requirement in § ____.4(a)(2)(iii)(B), the elements of which would cross-reference directly to the requirement in proposed § ____.4(a)(8)(i). Similarly, banking entities with significant trading assets and liabilities would have continued to be required to establish internal limits for each trading desk as part of the compliance program requirement for market making-related activity in § ____.4(b)(2)(iii)(C), the elements of which would cross-reference directly to the requirement in proposed § ____.4(b)(6)(i). Banking entities without significant trading assets and liabilities would have no longer been required to establish a compliance program that is specific for the purposes of complying with the either exemption, but would need to establish, implement, maintain and enforce internal limits if they chose to utilize the proposed presumption of compliance with respect to the statutory RENTD requirement in section 13(d)(1)(B) of the BHC Act.

[386] *See* 83 FR at 33456, 34460. In the proposal, the agencies indicated that they expected that the risk and position limits metric that is required for certain banking entities under the 2013 rule (and would continue to be required under the Appendix to the proposal) would help banking entities and the agencies to manage and monitor the underwriting and market making-related activities of banking entities subject to the metrics reporting and recordkeeping requirements of the Appendix.

[387] Proposed rule § ____.4(a)(8)(iii); proposed rule § ____.4(b)(6)(iii).

[388] *See* 83 FR at 33456.

[389] *See* proposed rule § ____.4(a)(8)(iv); proposed rule § ____.4(b)(6)(iv).

c. Commenters' Views

General Approach of a Presumption of Compliance With the Statutory RENTD Requirement

As discussed above, the agencies proposed to establish the articulation and use of internal limits as a key mechanism for conducting trading activity in accordance with the rule's exemptions for underwriting and market making-related activities.[390] A number of commenters expressed support for the general approach of a presumption of compliance to satisfy the RENTD standard.[391] Claiming that the 2013 rule has chilled market making-related activities and is complex and costly and does not provide bright line conditions under which trading can clearly be classified as permissible market making-related activities, one commenter asserted that the general approach would significantly improve upon the approach of the 2013 rule.[392]

One commenter supported the proposed approach on the basis that the presumption would allow banking entities to estimate and manage inventory limits in a more holistic manner to allow for greater and more efficient liquidity and pricing for its clients.[393] That commenter argued that, in comparison to the 2013 rule, a presumption will more effectively leverage existing industry practices and reporting requirements related to managing market-making inventory, such as maintaining daily VaR metrics by product and position limits compared to relative levels of client activity.[394] Another suggested that because internally set limits are developed and applied by each banking entity in light of capital requirements and risk management it would be reasonable to provide a presumption of compliance tied to internally set limits.[395] Finally, one commenter said that the approach would provide a more efficient use of compliance resources and allow banking entities to tailor compliance requirements to its specific underwriting and market making-related activities.[396]

Several commenters, however, expressed concerns about the creation of a presumption of compliance to satisfy the statutory RENTD standard.[397] For example, commenters argued that the proposed presumption is not consistent with the statute,[398] with one commenter claiming that the statutory requirement was intended to constrain bank activities, not bank risks.[399] Commenters expressed concerns that the proposed presumption of compliance is too deferential to banking entities[400] and would reward aggressive banking entities that set their risk limits too high.[401] One commenter argued that the limits would not constrain proprietary trading because the proposed presumption of compliance with RENTD allows banking entities to raise their limits and does not distinguish between permissible and impermissible proprietary trades within risk limits.[402] Another commenter disagreed with a presumption of compliance for underwriting activity, asserting that this approach would undermine well-established principles of safety and soundness, particularly given what the commenter referred to as a general lack of scrutiny over bank-developed risk limits.[403]

Required Analysis for Establishing Risk Limits

As discussed above, the agencies recognized in the proposal that the prescriptive standards in the 2013 rule for meeting the RENTD requirements were complex, costly, and did not provide bright line conditions under which trading can clearly be classified as permissible proprietary trading.[404] As a result, the proposal would not have required that a banking entity's limits be based on any specific or mandated analysis, as was required under the 2013 rule. Rather, under the presumption of compliance with the RENTD requirement in the proposal, a banking entity would have established limits according to its own internal analyses and processes around conducting its underwriting and market making-related activities in accordance with section 13(d)(1)(B) of the BHC Act.[405] Several commenters provided their views on this element of the proposal.

Two commenters supported the agencies' contention in the proposal that the prescriptive standards in the 2013 rule were complex, costly, and did not provide bright line conditions under which trading can clearly be classified as permissible proprietary trading.[406] Some commenters said that removing certain conditions, such as the demonstrable analysis of historical customer demand in § ____.4(b)(2)(ii)(B) of the 2013 rule, would increase flexibility and provide certainty for banking entities to engage in market making-related activities since current or reasonably forecasted market demand may be different than historical data may suggest.[407]

Several commenters, however, expressed concerns about the proposed removal of the demonstrable analysis requirement. Some commenters argued that the removal of this requirement will make it harder to for the agencies to rebut the presumption or determine when banking entities have not properly set their RENTD limits.[408] One commenter argued that by not requiring a demonstrable analysis, the proposed rule will allow banking entities to engage in trading activities only superficially tied to customer demand.[409] One commenter expressed a belief that the demonstrable analysis cannot be effectively replaced by other metrics in the proposal, such as the risk and position limits and usage metric in the Appendix because this metric does not provide information on customer demand relative to trading inventories.[410]

To increase flexibility and certainty for banking entities engaged in permitted activities, several of the commenters that supported the general approach of the presumption of compliance with the RENTD requirement requested that this proposed requirement be modified in certain ways. One commenter suggested that the presumption should be available to trading desks that establish internal limits appropriate for their risk appetite, risk capacity, and business strategy and hold themselves out as a

[390] *See* proposed rule § ____.4(a)(8); proposed rule § ____.4(b)(6).

[391] *See, e.g.,* Credit Suisse; SIFMA; State Street; Real Estate Associations; and BOK.

[392] *See* SIFMA.

[393] *See* State Street.

[394] *Id.*

[395] *See* JBA.

[396] *See* ABA.

[397] *See, e.g.,* Merkley; AFR; Bean; Better Markets; Center for American Progress (CAP); Public Citizen; Volcker Alliance; and Data Boiler.

[398] *See, e.g.,* Bean; Better Markets; CAP; and Public Citizen.

[399] *See* AFR.

[400] *See, e.g.,* AFR; Bean; CAP; Public Citizen; Volcker Alliance; and Data Boiler.

[401] *See, e.g.,* Bean and Volcker Alliance.

[402] *See* Better Markets.

[403] *See* NAFCU.

[404] *See* 83 FR 33459.

[405] *See* 83 FR at 33460. In the proposal, the agencies noted that they expect that the risk and position limits metric that is already required for certain banking entities under the 2013 rule (and would continue to be required under the Appendix to the proposal) would help banking entities and the agencies to manage and monitor the market making-related activities of banking entities subject to the metrics reporting and recordkeeping requirements of the Appendix.

[406] *See, e.g.,* Capital One et al. and SIFMA.

[407] *See* FSF; State Street and SIFMA.

[408] *See* Merkley; Volcker Alliance; and Data Boiler.

[409] *See* Better Markets.

[410] *See* AFR.

market maker.[411] A commenter requested that the agencies revise the presumption to make it available to a banking entity that sets, in a manner agreed to with its onsite prudential examiner and consistent with the intent and purposes of section 13 of the BHC, internal RENTD limits based on factors relevant to the reasonable near-term demand of clients, customers and counterparties, which are calibrated with the intention of not exceeding RENTD.[412] One commenter suggested that, instead of adhering to the more prescriptive aspects of the proposed RENTD presumption, the trading desks of moderate and limited trading assets and liabilities banking entities should be given discretion to adopt internal risk limits appropriate to the activities of the desk subject to other existing bank regulations, supervisory review, and oversight by the appropriate agency and still be able to utilize the presumption of compliance.[413]

Some commenters requested that the agencies clarify aspects of the proposal's RENTD presumption. Commenters asked the agencies to clarify that supervisors and examiners will not impose a one-size fits all approach given the differences in business models among banking entities.[414] While opposed to the general approach of a presumption of compliance with the statutory RENTD requirement, one commenter suggested that, if the agencies adopt the presumption of compliance, additional guidance should be given to banking entities regarding the factors to consider when setting the limits required to establish the presumption of compliance, as the factors in the proposal were too broad and malleable.[415] Another commenter suggested that the agencies clarify that the presumption of compliance should include activity-based limits as a part of its risk-limit structure, such as financial instrument holding periods, notional size and inventory turnover, because activity-based limits are reflective of client demand and an appropriate statutory substitute compared to risk-based limits, which can be hedged.[416]

Specific to the underwriting exemption, one commenter asserted that underwriting activity can be sporadic due to client demand or market factors, which may result in low limit utilization and a rebuttal of the presumption of compliance even when the underwriting position itself is identifiable as part of a primary or follow-on offering of securities.[417] The commenter suggested that the agencies consider corporate actions, such as a debt offering, as an appropriate identifier of permissible underwriting.[418] Another commenter suggested that the agencies permit banking entities to set limits based on the absolute value of profits and losses in the case of an underwriting desk.[419]

Prompt Notifications

As discussed above, the proposal would have required a banking entity to promptly report to the appropriate agency when a trading desk exceeds or increases the internal limits it sets to avail itself of the RENTD presumption with respect to the exemptions for underwriting and market making-related activities.[420] With two exceptions,[421] commenters strongly opposed the proposal's requirement that banking entities promptly report limit breaches.[422] For example, many of these commenters stated that the notifications would be impractical and burdensome to banking entities[423] and would not enhance the oversight capabilities of the agencies because the information is already otherwise available through ordinary supervisory processes,[424] including the internal limits and usage metric.[425] Two commenters asserted that the notices would provide little insight into how risk is managed.[426] Some commenters expressed concern that complying with the requirement would be particularly challenging for banking entities with parents that are FBOs because these banking entities lack on-site examiners to receive notifications.[427] A few commenters claimed that the prompt notification requirement provides incentives for banking entities to set their limits so high that they have fewer breaches and changes to limits.[428] Commenters also noted that, when risk limits are appropriately calibrated, breaches are not uncommon, and notifying the agencies of each breach could overwhelm the agencies.[429] Another commenter argued that the prompt notification may chill traders' willingness to request changes to limits where it would otherwise be appropriate to accommodate legitimate customer demand.[430]

As an alternative to the prompt notification requirement, many commenters suggested that the agencies require banking entities to make detailed records of limit changes and breaches.[431] Other commenters suggested that the agencies rely on existing supervisory processes to monitor limit breaches and increases,[432] including the internal limits and usage metric.[433]

Rebutting the Presumption

As discussed above, under the proposal, the RENTD presumption could have been rebutted by the appropriate agency if the agency determined, based on all relevant facts and circumstances, that a trading desk is engaging in activity that is not based

[411] *See* JBA.

[412] *See* SIFMA (recommended that such factors might include, for example, anticipated market volatility and current client inquiries and other indications of client interest, among many others); FSF.

[413] *See* Capital One et al.

[414] *See* CCMR and JBA (In particular, this commenter argued that the agencies should not compare banking entities as it would be an impediment to banking entities that are not the most conservative in its internal risk controls).

[415] *See* Better Markets.

[416] *See* BB&T.

[417] *Id.*

[418] *Id.*

[419] *See* JBA.

[420] *See* proposed rule § ____.4(a)(8)(iii); proposed rule § ____.4(b)(6)(iii).

[421] *See, e.g.,* CFA at 7 (stating that, some small and mid-sized institutions may not have strong internal controls and may be susceptible to the activities of a rogue trader, so the prompt notice requirements allow regulators to impose stricter controls if necessary); Data Boiler at 36 (representing that the prompt reporting requirement would decrease opportunities for evasion of the rule's requirements).

[422] *See, e.g.,* CCMC; BOK; ISDA; Real Estate Associations; Goldman Sachs; GFMA; CREFC; ABA; SIFMA; IIB; BB&T; JBA; FSF; Credit Suisse; and Capital One et al.

[423] *See, e.g.,* CCMR; Credit Suisse; GFMA; FSF; and JBA.

[424] *See, e.g.,* Credit Suisse; ABA; GFMA; IIB; BOK; and SIFMA.

[425] *See, e.g.,* FSF; JBA; ABA; Goldman Sachs; CREFC; and CCMC.

[426] *See, e.g.,* BOK (stating that limit excesses do not, of themselves, show that an institution has changed it strategy or risk tolerance and that reporting by financial institutions might detract from a focus on risk management and shift to a ''number of times exceeded'' view which provides very little insight into how risk is managed); MBA (stating that prompt reporting would encourage the agencies to view events in isolation without consideration to facts and circumstances and that it would be more appropriate to review limit-events in the ordinary course of established supervisory process).

[427] *See, e.g.,* JBA (stating that it would be operationally difficult and costly for foreign headquarters to collect and report data to US regulators); IIB (stating that foreign trading desks would not have on-site examiners to receive reports and that the requirement could intrude into local supervisory matters).

[428] *See, e.g.,* Better Markets; Capital One et al.; and State Street.

[429] *See, e.g.,* GFMA and BOK (stating that limits that are never exceeded ''may not be very useful limits.'').

[430] *See* CCMC.

[431] *See, e.g.,* CCMR and BB&T.

[432] *See, e.g.,* FSF; GFMA; and Real Estate Associations.

[433] *See, e.g.,* FSF; JBA; and ABA.

on the trading desk's RENTD on an ongoing basis.[434]

A few commenters discussed the rebuttal process. For example, one commenter requested that the agencies specify the procedures for an agency to rebut the presumption of compliance.[435] Another commenter recommended that the agencies adopt a consistent procedure for challenging the presumptions in the rule.[436] Another commenter stated that the proposal would only allow the agencies to challenge the risk limit approval and exception process, not the nexus between RENTD and the limits themselves.[437]

d. Final Presumption of Compliance With the Statutory RENTD Requirement

The agencies are adopting the presumption of compliance with the RENTD requirement for both the exemptions for underwriting and market making-related activities largely as proposed, but with modifications intended to be responsive to commenters' concerns.[438]

The agencies are mindful of the concerns raised by commenters regarding the general approach of relying on a banking entity's internal limits to satisfy the statutory RENTD requirement.[439] With respect to the comments described above that the presumption would not be consistent with the statute, the agencies note that the statute permits underwriting and market making-related activities to the extent that such activities are designed not to exceed RENTD. Accordingly, under the final rule the presumption will be available to each trading desk that establishes, implements, maintains, and enforces internal limits that are designed not to exceed RENTD.[440] In addition, with respect to the commenter who expressed concern that the presumption would undermine safety and soundness due to a perceived lack of general scrutiny over banking entity-developed limits, the agencies note that these internal limits will be subject to supervisory review and oversight, which constrains banking entities' ability to set their limits too high. Further, the agencies may review such limits to assess whether or not those limits are consistent with the statutory RENTD standard. This allows the supervisors and examiners to look to the articulation and use of limits to distinguish between permissible and impermissible proprietary trading. The agencies believe that the presumption of compliance, along with the other requirements of the final rule's exemptions for underwriting and market making-related activities, create a framework that will allow banking entities and the agencies to determine whether a trading activity has been designed not to exceed RENTD.

Further, the agencies are concerned that compliance with the 2013 rule's exemptions for underwriting and market making-related activities may be unnecessarily complex and costly to achieve the intended goal of compliance with these exemptions. For example, as noted in the proposal, a number of banking entities have indicated that even after conducting a number of complex and intensive analyses to meet the ''demonstrable analysis'' requirements for the exemption for market making-related activities, they still may be unable to gain comfort that their bona fide market making-related activity meets the factors.[441] Further, the absence of clear, bright-line standards for assessing compliance with the statutory RENTD standard may be unnecessarily constraining underwriting and market making, two critical functions to the health and well-being of financial markets in the United States.

The agencies note commenters' concerns regarding the removal of ''demonstrable analysis'' requirement will make it harder for agencies to rebut the presumption of compliance with the RENTD requirement or determine when banking entities have not properly set their RENTD limits. The agencies believe, however, that requiring a banking entity's internal limits to be based on RENTD as a requirement for utilizing the presumption of compliance should help to simplify compliance with, and oversight of, that statutory standard by placing the focus on how those limits are established, maintained, implemented, and enforced.

Accordingly, under the rule, a banking entity will be presumed to meet the RENTD requirements in § ____.4 (a)(2)(ii)(A) or § ____.4(b)(2)(ii) with respect to the purchase or sale of a financial instrument if the banking entity has established and implements, maintains, and enforces the limits for the relevant trading desk as described in the final rule.[442] With respect to underwriting activities, the presumption will be available to each trading desk that establishes, implements, maintains, and enforces internal limits that are designed not to exceed RENTD, based on the nature and amount of the trading desk's underwriting activities, on the:

(1) Amount, types, and risk of its underwriting position;

(2) Level of exposures to relevant risk factors arising from its underwriting position; and

(3) Period of time a security may be held.[443]

With respect to market making-related activities, the presumption will be available to each trading desk that establishes, implements, maintains, and enforces risk and position limits that are designed not to exceed RENTD, based on the nature and amount of the trading desk's market making-related activities, that address the:

(1) Amount, types, and risks of its market-maker positions;

(2) Amount, types, and risks of the products, instruments, and exposures the trading desk may use for risk management purposes;

(3) Level of exposures to relevant risk factors arising from its financial exposure; and

(4) Period of time a financial instrument may be held.[444]

---

[434] *See* proposed rule § ____.4(a)(8)(iv); proposed rule § ____.4(b)(6)(iv).

[435] *See* MBA.

[436] *See* IIB.

[437] *See* Better Markets.

[438] In addition to the changes described in this section, the presumption of compliance has been moved into a new paragraph (c) in § ____.4, as opposed to including separate provisions under each of the two relevant exemptions. That change was intended solely for clarity and to avoid any unnecessary duplication in light of the fact that the process for complying with the presumption of compliance is identical for both exemptions. New paragraph (c) does, however, recognize that the limits banking entities will be required to implement, maintain, and enforce will differ as between the exemptions for underwriting and market making-related activities. *See* final rule §§ ____.4(c)(2)(A) and ____.4(c)(2)(B).

[439] As noted above, this includes commenters who argue that such amendments will undermine the operation of the 2013 rule, lead to increased risk taking among banking entities, and conflict with the statutory requirements in section 13(d)(1)(B) of the BHC Act. *See supra* notes 28, 36–41 and accompanying text.

[440] For consistency with the final rule's RENTD requirement, the sub-heading for § ____.4(c)(1) has been changed from ''risk limits'' to ''limits.''

[441] 83 FR at 33459.

[442] *See* final rule, § ____.4(c)(1)(i).

[443] *See* final rule § ____.4(c)(1)(ii)(A). The language in this paragraph of the rule has been modified slightly from the proposal to clarify that such limits should take into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments. As this language comes directly from the RENTD requirement in § ____.4 (a)(2)(ii)(A), the agencies do not view this as a substantive change. Rather, the agencies believe that it is important to emphasize in the rule text that the limit used to satisfy the presumption of compliance for one type of financial instrument will not necessarily be the same for other types of financial instruments and that the particular characteristics of the relevant market should be taken into account throughout the process of setting these limits.

[444] *See* final rule § ____.4(c)(1)(ii)(B). For the reasons described in connection with the limits required as satisfy the presumption of compliance in connection with the underwriting exemption, the

Continued

Some commenters also noted that the agencies should not take a ''one-size-fits-all'' approach to the limits that must be established to satisfy the presumption of compliance with RENTD on the basis that not all of the proposed limits may be applicable to every type of financial instrument, particularly derivatives.[445] In response to these commenters, the agencies have modified the rule text to clarify that the limits required to be established by a banking entity in order to satisfy the presumption of compliance must address certain items. The agencies recognize that certain of the enumerated items, which are unchanged from the proposal, may be more easily applied for desks that engage in market-making in securities rather than derivatives, and emphasize that section ____.4(b), both as currently in effect and as amended, is intended to provide banking entities with the flexibility to determine appropriate limits for market making-related activities that are designed not to exceed RENTD, taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments.

With respect to derivatives, certain of the enumerated items may not be effective for designing market making-related activities not to exceed RENTD, which is ultimately the primary purpose of adopting a presumption of compliance based on the establishment and use of internal limits.[446] Under those circumstances, the agencies acknowledge that it may be appropriate for banking entities to establish limits based on specific conditions that would need to be satisfied in order to utilize the presumption of compliance, rather than a fixed number of market-maker positions.[447]

For example, for a desk that engages in market making-related activities only with respect to derivatives (or derivatives and non-financial instruments), the requirement to establish, implement, maintain, and enforce limits designed not to exceed RENTD could be satisfied to the extent the banking entity establishes limits on the market making desk's level of exposures to relevant risk factors arising from its financial exposure and such limits are designed not to exceed RENTD (including derivatives positions related to a request from a client, customer, or counterparty), based on the nature and amount of the trading desk's market making-related activities. Such limits would be consistent with the underlying purpose of the exemption for market making-related activities, which is to implement the restriction on a banking entity's proprietary trading activities while still allowing market makers to provide intermediation and liquidity services necessary to the functioning of our financial markets.

Consistent with the proposal, the limits used to satisfy the presumption of compliance under the final rule will be subject to supervisory review and oversight by the applicable agency on an ongoing basis.[448] Moreover, the final rule provides that the presumption of compliance may be rebutted by the applicable agency if such agency determines, taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments and based on all relevant facts and circumstances, that a trading desk is engaging in activity that is not designed not to exceed RENTD.[449] In a modification from the proposed rule, the final rule contains additional language that specifies that the agencies will take into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments when determining whether to rebut the presumption of compliance. This change is intended to provide additional clarity regarding the factors the agencies will consider when making this determination. In response to commenters' concerns about the rebuttal process, the final rule specifies that any such rebuttal of the presumption must be made in accordance with the notice and response procedures in subpart D of the rule.[450]

The agencies are, however, persuaded by the arguments raised by some commenters with respect to the proposed requirement that a banking entity promptly report to the appropriate agency when a trading desk exceeds or increases its internal limits to avail itself of the RENTD presumption with respect to the exemptions for underwriting and market making-related activity.[451] The agencies recognize that limits that are set so high as to never be breached are not necessarily meaningful limits. Thus, breaches of appropriately set limits may occur with a frequency that does not justify notifying the agencies for every single breach. The agencies recognize that the burdens associated with preparing and reporting such information may not be justified in light of the potential benefits of such requirement.

Accordingly, the final rule instead requires banking entities to maintain and make available to the applicable agency, upon request, records regarding (1) any limit that is exceeded and (2) any temporary or permanent increase to any limit(s), in each case in the form and manner as directed by the agency.[452] Moreover, when a limit is breached or increased, the presumption of compliance with RENTD will continue to be available so long as the banking entity: (1) Takes action as promptly as possible after a breach to bring the trading desk into compliance; and

(2) follows established written authorization procedures, including escalation procedures that require review and approval of any trade that exceeds a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval.[453] The agencies believe that this requirement will provide the agencies with sufficient information to determine whether a banking entity's existing limits are appropriately calibrated to comply with the RENTD requirement for that particular financial instrument.[454]

language in this paragraph has been modified slightly from the proposal to clarify that such limits must take into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments. *See id.*

[445] *See e.g.,* FSF, SIFMA.

[446] As previously noted, the final rule also replaces the existing definition of ''market maker-inventory'' with a definition of ''market-maker positions.'' This change was intended to reflect the fact that requiring banking entities seeking to rely on the presumption of compliance with the RENTD requirement to have limits on market maker-inventory is generally unworkable in the context of derivatives. *See infra* note 458 and accompanying text.

[447] The agencies note that this discussion does not encompass or impact the CFTC's or SEC's treatment of market-making in derivatives for purposes other than section 13 of the BHC Act and the rule.

[448] *See* final rule § ____.4(c)(2). The supervisory review provision in the proposed rule stated that ''any review of such limits will include assessment of whether the limits are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties.'' Sections______ .4(c)(1)(i)–(ii) of the final rule clearly stipulate that such limits must be designed not to exceed the reasonably expected near term demand of clients, customers, or counterparties. To avoid redundancy, this language has been omitted from § ____.4(c)(2) in the final rule.

[449] *See* final rule § ____.4(c)(4).

[450] *See infra* notes 655–58 and accompanying text (discussion of the notice and response procedures in § ____.20(i)).

[451] *See* proposed rule §§ ____.4(a)(8)(iii) and ____.4(b)(6)(iii). *See also supra* note 387 and accompanying text.

[452] *See* final rule § ____.4(c)(3)(i).

[453] *See* final rule § ____.4(c)(3)(i).

[454] The agencies note that the final rule requires that banking entities with significant trading assets

e. Additional Changes to the Final Rule's Underwriting and Market Making-Related Activities Exemptions

In addition to the changes described above, the final rule's exemptions for underwriting and market making-related activities contain several other conforming and clarifying changes. Consistent with the proposed rule, the structure of § ____.4(a)(ii) in the final rule has been modified to clarify that the applicable paragraph contains two separate and distinct requirements.[455] In addition, several definitions used in the final rule's exemptions for underwriting and market making-related activities have also been modified. Specifically, the phrase ''paragraph (b)'' has been replaced with ''this section'' in the definition of ''underwriting position'' because the defined term is used in several places.[456] The definition of ''financial exposure'' has been similarly modified.[457] Finally, the final rule, however, replaces the existing definition of ''market maker-inventory'' with a definition for ''market-maker positions'' to correspond with the language in § ____.4(c)(ii)(B)(1), which is the only place such definition is used.[458]

f. Compliance Program and Other Requirements for Underwriting and Market Making-Related Activities

2013 Rule Compliance Program Requirements

The underwriting exemption in § ____.4(a) of the 2013 rule requires a banking entity to establish, implement, maintain, and enforce an internal compliance program, as required by subpart D, that is reasonably designed to ensure compliance with the requirements of the exemption. Such compliance program is required to include reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing: (i) The products, instruments, or exposures each trading desk may purchase, sell, or manage as part of its underwriting activities; (ii) certain limits for each trading desk, based on the nature and amount of the trading desk's underwriting activities, including the reasonably expected near term demands of clients, customers, or counterparties;[459] (iii) internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits; and (iv) authorization procedures, including escalation procedures that require review and approval of any trade that would exceed one or more of a trading desk's limits, demonstrable analysis of the basis for any temporary or permanent increase to one or more of a trading desk's limits, and independent review (*i.e.,* by risk managers and compliance officers at the appropriate level independent of the trading desk) of such demonstrable analysis and approval.

The exemption for market making-related activities in the 2013 rule contains similar requirements. Specifically, § ____.4(b) of the 2013 rule requires that a banking entity establish, implement, maintain, and enforce an internal compliance program, as required by subpart D, that is reasonably designed to ensure compliance with the requirements of the exemption. Such a compliance program is required to include reasonably designed written policies and procedures, internal controls, analysis, and independent testing identifying and addressing: (i) The financial instruments each trading desk stands ready to purchase and sell in accordance with the exemption for market making-related activities; (ii) the actions the trading desk will take to demonstrably reduce or otherwise significantly mitigate the risks of its financial exposure consistent with the limits required under paragraph (b)(2)(iii)(C), and the products, instruments, and exposures each trading desk may use for risk management purposes; the techniques and strategies each trading desk may use to manage the risks of its market making-related activities and inventory; and the process, strategies, and personnel responsible for ensuring that the actions taken by the trading desk to mitigate these risks are and continue to be effective; (iii) the limits for each trading desk, based on the nature and amount of the trading desk's market making-related activities, including the reasonably expected near term demands of clients, customers, or counterparties;[460] (iv) internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits; and (v) authorization procedures, including escalation procedures that require review and approval of any trade that would exceed one or more of a trading desk's limits, demonstrable analysis of the basis for any temporary or permanent increase to one or more of a trading desk's limits, and independent review (*i.e.,* by risk managers and compliance officers at the appropriate level independent of the trading desk) of such demonstrable analysis and approval.

Proposed Compliance Program Requirement

Feedback from market participants and agency oversight have indicated that the compliance program requirements of the existing exemptions for underwriting and market making-related activities may be unduly complex and burdensome for banking entities with smaller and less active trading activities. In the proposed rule, the agencies proposed a tiered approach to such compliance program requirements, to make these requirements commensurate with the size, scope, and complexity of the relevant banking entity's trading activities and business structure. Under the proposed rule, a banking entity with significant trading assets and liabilities would continue to be required to establish, implement, maintain, and enforce a comprehensive internal compliance program as a condition for relying on the exemptions for underwriting and market making-related activities. However, the agencies proposed to eliminate such compliance program requirements for banking entities that have moderate or limited trading assets and liabilities.[461]

Comments on the Proposed Compliance Program Requirement

Some commenters did not support the removal of the underwriting or market making-specific compliance program

and liabilities must record and report the quantitative measurements contained in the Appendix to the final rule. *See infra* Subpart E—Metrics: Appendix to Part [•]—Reporting and Recordkeeping Requirements. The agencies believe that the risk and position limits metric will also help banking entities and the agencies monitor the underwriting and market making-related activities of banking entities with significant trading assets and liabilities.

455 Unlike the 2013 rule, § ____.4(a)(ii) in the final rule contains subparagraphs (A) and (B).

456 *See* § ____.4(a)(6).

457 *See* § ____.4(b)(4).

458 *See* § ____.4(c)(ii)(B)(1). With respect to the exemption for market making-related activities, the rebuttable presumption of compliance for the RENTD requirement in the final rule requires, among other things, that a trading desk establish, implement, and enforce limits on the amounts, types, and risks of its market-maker positions.

459 These factors include the: (1) Amount, types, and risk of its underwriting position; (2) level of exposures to relevant risk factors arising from its underwriting position; and (3) period of time a security may be held.

460 Specifically, such limits include the: (1) Amount, types, and risks of its market-maker inventory; (2) amount, types, and risks of the products, instruments, and exposures the trading desk may use for risk management purposes; (3) the level of exposures to relevant risk factors arising from its financial exposure; and (4) period of time a financial instrument may be held.

461 Under the 2013 rule, the compliance program requirement in § ____.4(a)(2)(iii) is part of the compliance program required by subpart D but is specifically used for purposes of complying with the exemption for underwriting activity.

requirements for banking entities with limited and moderate trading assets and liabilities under the proposal. For example, one commenter urged the agencies to require all banking entities to establish, implement, maintain, and enforce such compliance program, independent of any presumption of compliance.[462] This commenter indicated that there are ''exceedingly low incremental costs'' associated with most elements of the RENTD compliance and controls framework for the exemptions for underwriting and market making-related activities, even for those banking entities with limited or moderate trading assets and liabilities.[463] In the commenter's view, minimal incremental costs support the retention of such requirements, which are further justified by the increased stability of financial institutions and financial markets as a result of the 2013 rule.[464]

Further, that same commenter asserted that the compliance requirements under the 2013 rule permit too much discretion for banking entities to implement policies, procedures, and controls, noting that judgments on the effectiveness of implemented controls depend on the methodologies used by banking entities' testing functions, and argued that the agencies should consider additional capital and activities-based requirements specifically tied to the reported inventory of trading assets, taking into account the total size of those trading assets, the overall capital position of the financial institution, and the average holding period or aging of trading assets, which may indicate that inventories are unrelated to underwriting and market making activities.[465] Similarly, another commenter indicated that a tiered compliance approach would not be appropriate because it considered the proposed categorization of entities in terms of trading assets and liabilities to be flawed.[466]

Other commenters supported the revisions under the proposed rule to apply the market making-related activities' compliance program requirements only to those banking entities with significant trading assets and liabilities. For example, one commenter expressed concern that the market making-related activities' compliance program requirements under the 2013 rule have contributed to decreased market making activities with, and increased costs for, banking entities' commercial end-user counterparties.[467] This commenter indicated that applying the market making-related activities' compliance program requirements only to banking entities with significant trading assets and liabilities would allow banking entities to develop more efficient compliance and liquidity risk management programs, which would ultimately reduce transaction costs for commercial end users.[468]

Another commenter expressed the view that the proposed approach of applying the compliance program requirements under the exemptions for underwriting and market making-related activities only to those banking entities with significant trading assets and liabilities was an appropriate means of reducing the regulatory burdens on banks with limited or moderate trading and underwriting exposures.[469] That commenter noted that such approach would continue to allow for the appropriate monitoring of these activities to ensure compliance with the provisions of the 2013 rule.[470]

Final Compliance Program Requirement

The agencies believe that the compliance program requirements that apply specifically to the exemptions for underwriting and market making-related activities play an important role in facilitating and monitoring a banking entity's compliance with the requirements of those exemptions. However, the agencies also believe that those requirements can be appropriately tailored to the nature of the underwriting and market making activities conducted by each banking entity. It also is important to recognize that the removal of such compliance program requirements for banking entities that do not have significant trading assets and liabilities would not relieve those banking entities of the obligation to comply with the other requirements of the exemptions for underwriting and market making-related activities, including RENTD requirements, under the final rule.

Accordingly, and after consideration of the comments, the agencies continue to believe that removing the § ____.4 compliance program requirements for banking entities that do not have significant trading assets and liabilities as a condition to engaging in permitted underwriting and market making-related activities should provide these banking entities with additional flexibility to tailor their compliance programs in a way that takes into account the risk profile and relevant trading activities of each particular trading desk.

The agencies recognize that banking entities that do not have significant trading assets and liabilities may incur costs to establish, implement, maintain, and enforce the compliance program requirements applicable to permitted underwriting activities under the 2013 rule. As the trading activities of banking entities that do not have significant trading activities comprise approximately seven percent of the total U.S. trading activity subject to the Volcker Rule, the agencies believe the costs of the compliance program requirement would be disproportionate to the banking entity's trading activity and the risk posed to U.S. financial stability. Accordingly, eliminating the § ____.4 compliance program requirements for permitted underwriting and market making-related activities conducted by banking entities that do not have significant trading assets and liabilities may reduce compliance costs without materially impacting conformance with the objectives set forth in section 13 of the BHC Act. Applying these specific compliance requirements only to banking entities with significant trading assets and liabilities also is consistent with the modifications to the general compliance program requirements for these banking entities under § ____.20 of the final rule, as discussed below.

Accordingly, § ____.4(a)(2)(iii) of the final rule will require banking entities with significant trading assets and liabilities, as a condition to complying with the underwriting exemption, to establish and implement, maintain, and enforce an internal compliance program required by subpart D that is reasonably designed to ensure the banking entity's compliance with the requirements of the exemption, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The products, instruments or exposures each trading desk may purchase, sell, or manage as part of its underwriting activities;

(B) Limits for each trading desk, in accordance with § ____.4(a)(2)(ii)(A);[471]

[462] *See* Better Markets.

[463] *Id.*

[464] *Id.*

[465] *Id.*

[466] *See* Data Boiler.

[467] *See* Coalition of Derivatives End Users.

[468] *Id.*

[469] *See* CFA.

[470] *Id.*

[471] Final rule § ____.4(a)(2)(ii)(A) requires that the amount and type of the securities in the trading desk's underwriting position are designed not to exceed RENTD, taking into account the liquidity, maturity, and depth of the market for the relevant type of security; and (B) that reasonable efforts are made to sell or otherwise reduce the underwriting

(C) Written authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval; and

(D) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits.

With respect to the exemption for market making-related activities, § ____.4(a)(b)(iii) of the final rule will require banking entities with significant trading assets and liabilities to establish and implement, maintain, and enforce an internal compliance program required by subpart D that is reasonably designed to ensure the banking entity's compliance with the requirements of the exemption, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The financial instruments each trading desk stands ready to purchase and sell in accordance with § ____.4(b)(2)(i);[472]

(B) The actions the trading desk will take to demonstrably reduce or otherwise significantly mitigate promptly the risks of its financial exposure consistent with the limits required under § ____.4 (b)(2)(iii)(C); the products, instruments, and exposures each trading desk may use for risk management purposes; the techniques and strategies each trading desk may use to manage the risks of its market making-related activities and positions; and the process, strategies, and personnel responsible for ensuring that the actions taken by the trading desk to mitigate these risks are and continue to be effective;

(C) Limits for each trading desk, in accordance with § ____.4(b)(2)(ii);[473]

(D) Written authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval; and

(E) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits.

The agencies are clarifying in the final rule that the authorization procedures for banking entities with significant trading assets and liabilities of proposed § ____.4(a)(2)(iii)(D) and § ____.4(b)(2)(iii)(E) are to be in writing pursuant to § ____.4(a)(2)(iii)(C) and § ____.4(b)(2)(iii)(D). Requiring that these authorization procedures are written provides a basis for which banking entities and supervisors can review for compliance with the underwriting and market making exemption compliance requirements.

Sections ____.4(a)(2)(iii) (which sets forth the compliance program requirements for the underwriting exemption) and § ____.4(b)(2)(iii) (which sets forth the compliance program requirements for the exemptions for market making-related activities) further provide that a banking entity with significant trading assets and liabilities may satisfy the requirements pertaining to limits and written authorization procedures by complying with the requirements pursuant to the presumption of compliance with the statutory RENTD requirement in § ____.4(c).[474] As such, § ____.4(c)(1) provides for a rebuttable presumption that a banking entity's purchase or sale of a financial instrument complies with the RENTD requirements in § ____.4(a)(2)(ii)(A) and § ____.4(b)(2)(ii) if the relevant trading desk establishes, implements, maintains, and enforces internal limits that are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, taking into account the liquidity, maturity, and depth of the market for the relevant type of security. In taking this approach, the agencies recognize that requiring a banking entity to establish separate limits in accordance with the statutory RENTD requirement would be unnecessary and may reduce the benefit of relying on internal limits set pursuant to § ____.4(c)(1).

Additionally, in the case of a banking entity with significant trading assets and liabilities, the relevant exemption compliance requirements pertaining to written authorization procedures in § ____.4(a)(2)(iii)(C) are not required if the criteria in § ____.4(c) are satisfied. Without the requirement to establish limits pursuant to § ____.4(a)(iii)(B), such a requirement for written authorization procedures would be unnecessary. Further, because § ____.4(c)(3)(ii)(*2*) contains written authorization procedures, also requiring written authorization procedures in § ____.4(a)(2)(iii)(C) would be duplicative.

These revisions clarify that banking entities with significant trading assets and liabilities that establish limits and written authorization procedures pursuant to the rebuttable presumption of compliance do not have to establish a second set of limits and written authorization procedures pursuant to the compliance program requirements of the underwriting or market making exemptions. Regardless of whether a banking entity with significant trading assets and liabilities relies on the presumption of compliance in § ____.4(c), every banking entity with significant trading assets and liabilities is required to maintain limits and written authorization procedures for purposes of complying with the exemption for permitted underwriting or market making-related activities under § ____.4.

The agencies are removing the proposed rule's requirement for a banking entity with significant trading assets and liabilities that, to the extent that any limit identified pursuant to § ____.4(b)(2)(iii)(C) of the proposed rule is exceeded, the trading desk takes action to bring the trading desk into compliance with the limits as promptly as possible after the limit is exceeded. Instead, this requirement is being moved to § ____.4(c), the rebuttable presumption of compliance for banking entities that establish internal limits pursuant to § ____.4(c)(1). Such requirements would be redundant for a banking entity with significant trading assets and liabilities that is required, on an ongoing basis, to ensure that its trading desk's market making activities are designed not to exceed RENTD while also establishing limits designed not to exceed RENTD.[475] In addition, the written authorization procedures[476]

position within a reasonable period, taking into account the liquidity, maturity, and depth of the market for the relevant type of security.

[472] Final rule § ____.4(b)(2)(i) requires that the trading desk that establishes and manages the financial exposure routinely stands ready to purchase and sell one or more types of financial instruments related to its financial exposure and is willing and available to quote, purchase and sell, or otherwise enter into long and short positions in those types of financial instruments for its own account, in commercially reasonable amounts and throughout market cycles on a basis appropriate for the liquidity, maturity, and depth of the market for the relevant types of financial instruments.

[473] Final rule § ____.4(b)(2)(ii) requires that the trading desk's market making-related activities are designed not to exceed, on an ongoing basis, RENTD, taking into account the liquidity, maturity, and depth of the market for the relevant type of security.

[474] *See supra* section IV.B.2.d (discussing the requirements in the final rule associated with the presumption of compliance with the statutory RENTD requirement).

[475] *See* final rule § ____.4(b)(2)(iii)(C).

[476] *See* final rule § ____.4(b)(2)(iii)(D).

require internal compliance processes to handle such limit breaches.

g. Other Comments

Finally, some commenters recommended changes to certain aspects of the existing exemptions for underwriting and market making-related activities in the 2013 rule that were not specifically proposed. For example, one commenter suggested that the agencies eliminate the limitations on treating banking entities with greater than $50 billion in trading assets and liabilities as clients, customers, or counterparties.[477] As stated in the 2013 rule, the agencies believe that removing this limitation could make it difficult to meaningfully distinguish between permitted market making-related activity and impermissible proprietary trading, and allow a trading desk to maintain an outsized inventory and to justify such inventory levels as being tangentially related to expected market-wide demand.[478] The agencies also believe that banking entities engaged in substantial trading activity do not typically act as customers to other market makers.[479] As a result, the agencies have retained the 2013 rule's definition of client, customer, or counterparty. Another commenter suggested broadening the scope of the exemption for underwriting activities to encompass any activity that assists persons or entities in accessing the capital markets or raising capital.[480] The agencies believe the final rule's changes provide additional clarity while maintaining consistency with statutory objectives. Accordingly, after consideration of these comments, the agencies have decided not to make any changes to the exemptions for underwriting or market making-related activities other than those discussed above.

h. Market Making Hedging

As noted in the proposal, during implementation of the 2013 rule, the agencies received a number of inquiries regarding the circumstances under which banking entities could elect to comply with the market making risk management provisions permitted in § ____.4(b) or alternatively the risk-mitigating hedging requirements under § ____.5. These inquiries generally related to whether a trading desk could treat an affiliated trading desk as a client, customer, or counterparty for purposes of the exemption market making-related activities' RENTD requirement; and whether, and under what circumstances, one trading desk could undertake market making risk management activities for one or more other trading desks.[481]

Each trading desk engaging in a transaction with an affiliated trading desk that meets the definition of proprietary trading must rely on an exemption or exclusion in order for the transaction to be permissible. As noted in the proposal, in one example presented to the agencies, one trading desk of a banking entity may make a market in a certain financial instrument (*e.g.,* interest rate swaps), and then transfer some of the risk of that instrument (*e.g.,* foreign exchange (FX) risk) to a second trading desk (*e.g.,* an FX swaps desk) that may or may not separately engage in market making-related activity. In the proposal, the agencies requested comment as to whether, in such a scenario, the desk taking the risk (in the preceding example, the FX swaps desk) and the market making desk (in the preceding example, the interest rate desk) should be permitted to treat each other as a client, customer, or counterparty for purposes of establishing internal limits or RENTD levels under the exemption for market making-related activities.[482]

The agencies also requested comment as to whether each desk should be permitted to treat swaps executed between the desks as permitted market making-related activities of one or both desks if the swap does not cause the relevant desk to exceed its applicable limits and if the swap is entered into and maintained in accordance with the compliance requirements applicable to the desk, without treating the affiliated desk as a client, customer, or counterparty for purposes of establishing or increasing its limits. This approach was intended to maintain appropriate limits on proprietary trading by not permitting an expansion of a trading desk's market making limits based on internal transactions. At the same time, this approach was intended to permit efficient internal risk management strategies within the limits established for each desk.[483]

The agencies also requested comment on the circumstances in which an organizational unit of an affiliate (affiliated unit) of a trading desk engaged in market making-related activities in compliance with § ____.4(b) (market making desk) would be permitted to enter into a transaction with the market making desk in reliance on the market making desk's risk management policies and procedures. In this scenario, to effect such reliance the market making desk would direct the affiliated unit to execute a risk-mitigating transaction on the market making desk's behalf. If the affiliated unit did not independently satisfy the requirements of the exemption for market making-related activities with respect to the transaction, it would be permitted to rely on the exemption for market making-related activities available to the market making desk for the transaction if: (i) The affiliated unit acts in accordance with the market making desk's risk management policies and procedures; and (ii) the resulting risk-mitigating position is attributed to the market making desk's financial exposure (and not the affiliated unit's financial exposure) and is included in the market making desk's daily profit and loss calculation. If the affiliated unit establishes a risk-mitigating position for the market making desk on its own accord (*i.e.,* not at the direction of the market making desk) or if the risk-mitigating position is included in the affiliated unit's financial exposure or daily profit and loss calculation, then the affiliated unit may still be able to comply with the requirements of the risk-mitigating hedging exemption pursuant to § ____.5 for such activity.[484]

The commenters were generally in favor of permitting affiliated trading desks to treat each other as a client, customer, or counterparty for the purposes of establishing risk limits or RENTD levels under the exemption for market making-related activities,[485] particularly for banking entities that service customers in different jurisdictions. One commenter, however, did not support this approach, and expressed that it would be difficult to validate banking entities' RENTD limits if affiliates could be considered as a client, customer, or counterparty.[486]

One commenter argued that affiliated trading desks with different mandates should be able to treat each other as a client, customer, or counterparty as long as each desk stays within its limits, because such an approach would allow banking entities to take an enterprise-wide view of risk management.[487]

Two commenters explained that, to increase efficiencies, certain internationally active banking entities employ a ''hub-and-spoke'' model, where trading desks at local entities

[477] *See* CCMC.

[478] *See* 79 FR 5607.

[479] *See* 79 FR 5606–5607.

[480] *See* ISDA.

[481] 83 FR at 33464.

[482] *Id.*

[483] *Id.*

[484] *Id.*

[485] *See, e.g.,* HSBC; JBA; and IIB.

[486] *See* Data Boiler.

[487] *See* IIB.

(spoke) enter into transactions with major affiliates (hub) that manage the risks of, and source trading positions for, the local entities.[488] One of these commenters expressed that these trading desks have trouble demonstrating they are indeed market making desks without intra-entity and inter-affiliate transactions being treated as transactions with a client, customer, or counterparty.[489] The other commenter expressed that, under the hub-and-spoke model, treating the ''spoke'' trading desk as a client, customer, or counterparty, would allow the hub desk to look through to the customer of the local entity since the hub is acting as the ultimate market maker.[490]

After consideration of comments, the agencies continue to recognize that, under certain circumstances, a trading desk may undertake market making risk management activities for one or more affiliated trading desks [491] and trading desks may rely on the exemption for market making-related activities for its transactions with affiliated trading desks. The agencies, however, are declining to permit banking entities to treat affiliated trading desks as ''clients, customers, or counterparties'' [492] for the purposes of determining a trading desk's RENTD pursuant to § ____.4(b)(2)(ii) of the exemption for market making-related activities.

The agencies believe that, under the exemption for market making-related activities, each trading desk must be able to independently tie its activities to the RENTD of external customers that the trading desk services. Allowing a desk to treat affiliated trading desks as customers for purposes of RENTD would allow the desk to accumulate financial instruments if it has a reason to believe that other internal desks will be interested in acquiring the positions in the near term. Those other desks could then acquire the positions from the first desk at a later time when they have a reasonable expectation of near term demand from external customers. The agencies also believe that generally allowing a desk to treat other internal desks as customers for purposes of RENTD could impede monitoring of market making-related activity and detection of impermissible proprietary trading since a banking entity could aggregate in a single trading desk the RENTD of trading desks that engage in multiple different trading strategies and aggregate a larger volume of trading activities.[493]

With respect to the arguments raised by these commenters that permitting this treatment would facilitate efficient risk management,[494] the agencies believe that the amendments to the risk-mitigating hedging exemption in the final rule [495] and the amendments to the liquidity management exemption in the final rule [496] will provide banking entities with additional flexibility to manage risks more efficiently than the 2013 rule.

Further, the agencies note that while affiliated trading desks may not consider each other clients, customers, or counterparties, transactions between affiliated trading desks may be permitted under the exemption for market making-related activities in certain circumstances that do not require the expansion of a trading desk's market making limits based on internal transactions. Returning to the example from the proposal and described above [497] concerning an interest rate swaps desk transferring some of the risk of a financial instrument to an affiliated FX swaps desk, if the FX swaps desk acts as a market maker in FX swaps, the FX swaps desk may be able to rely on the exemption for market making-related activities for its transactions with the interest rate swaps desk if those transactions are consistent with the requirements of the exemption for market making-related activities, including the FX swaps desk's RENTD.[498] Further, if the FX swaps desk does not independently satisfy the requirements of the exemption for market making-related activities with respect to the transaction, it would be permitted to rely on the exemption for market making-related activities available to the market making desk for the transaction under certain conditions. If the banking entity has significant trading assets and liabilities, the FX swaps desk would be permitted to rely on the exemption for market making-related activities if: (i) The FX swaps desk acts in accordance with the interest rate swaps desk's risk management policies and procedures established in accordance with § ____.4(b)(2)(iii) and (ii) the resulting risk-mitigating position is attributed to the interest rate swaps desk's financial exposure (and not the FX swaps desk's financial exposure) and is included in the interest rate swaps desk's daily profit and loss calculation. If the banking entity does not have significant trading assets and liabilities, the FX swaps desk would be permitted to rely on the exemption for market making-related activities if the resulting risk-mitigating position is attributed to the interest rate swaps desk's financial exposure (and not the FX swaps desk's financial exposure) and is included in the interest rate swaps desk's daily profit and loss calculation. If the FX swaps desk cannot independently satisfy the requirements of the exemption for market making-related activities with respect to its transactions with the interest rate swaps desk, the risk-mitigating hedging exemption would be available, provided the conditions of that exemption are met.

3. Section ____.5: Permitted Risk-Mitigating Hedging Activities

a. Section ____.5 of the 2013 Rule

Section 13(d)(1)(C) of the BHC Act provides an exemption from the prohibition on proprietary trading for risk-mitigating hedging activities that are designed to reduce the specific risks to a banking entity in connection with and related to individual or aggregated positions, contracts, or other holdings. Section ____.5 of the 2013 rule implements section 13(d)(1)(C).

Section ____.5 of the 2013 rule provides a multi-faceted approach to implementing the hedging exemption to ensure that hedging activity is designed to be risk-reducing and does not mask prohibited proprietary trading. Under the 2013 rule, risk-mitigating hedging activities must comply with certain conditions for those activities to qualify for the exemption. Generally, a banking entity relying on the hedging exemption must have in place an appropriate internal compliance program that meets specific requirements, including the requirement to conduct certain correlation analysis, to support its compliance with the terms of the exemption, and the compensation arrangements of persons performing risk-mitigating hedging activities must be designed not to reward or incentivize

[488] *See* HSBC and JBA.

[489] *See* JBA.

[490] *See* HSBC.

[491] *See* 79 FR at 5594.

[492] § ____.4(b)(3).

[493] *See* 79 FR at 5590.

[494] *See* HSBC; JBA; and IIB.

[495] The agencies are streamlining several aspects of the risk-mitigating hedging exemption for banking entities with and without significant trading assets and liabilities. *See* final rule § ____.5; *See also* section IV.B.3, *infra.*

[496] The agencies have expanded the types of financial instruments eligible for the exclusion to include for exchange forwards and foreign exchange swaps. *See* final rule § ____.3(e); *See also* section IV.B.1.b.i, *supra.*

[497] *See* Part IV.B.2.h, *supra; see also* 83 FR 33463.

[498] The interest rate market making desk can rely on the exemption for market making-related activities for the FX swap it enters into with the FX swaps desk provided the interest rate market making desk enters into the FX swap to hedge its market making-related position and otherwise complies with the requirements of the exemption for market making-related activities.

prohibited proprietary trading.[499] In addition, the hedging activity itself must meet specified conditions. For example, at inception, the hedge must be designed to reduce or otherwise significantly mitigate, and must demonstrably reduce or otherwise significantly mitigate, one or more specific, identifiable risks arising in connection with and related to identified positions, contracts, or other holdings of the banking entity, and the activity must not give rise to any significant new or additional risk that is not itself contemporaneously hedged.[500] Finally, § ____.5 establishes certain documentation requirements with respect to the purchase or sale of financial instruments made in reliance of the risk-mitigating exemption under certain circumstances.[501]

b. Proposed Amendments to Section ____.5

i. Correlation Analysis for Section ____.5(b)(1)(iii)

The agencies proposed to remove the specific requirement to conduct a correlation analysis for risk-mitigating hedging activities.[502] In particular, the agencies proposed to remove the words ''including correlation analysis'' from the requirement that the banking entity seeking to engage in risk-mitigating hedging activities conduct ''analysis, including correlation analysis, and independent testing'' designed to ensure that hedging activities may reasonably be expected to reduce or mitigate the risks being hedged. Thus, the requirement to conduct an analysis would have remained, but the banking entity would have had flexibility to apply a type of analysis that was appropriate to the facts and circumstances of the hedge and the underlying risks targeted.[503]

The agencies noted that they have become aware of practical difficulties with the correlation analysis requirement, which according to banking entities can add delays, costs, and uncertainty to permitted risk-mitigating hedging.[504] The agencies anticipated that removing the correlation analysis requirement would reduce uncertainties in meeting the analysis requirement without significantly impacting the conditions that risk-mitigating hedging activities must meet in order to qualify for the exemption.[505]

The agencies also noted that section 13 of the BHC Act does not specifically require this correlation analysis.[506] Instead, the statute only provides that a hedging position, technique, or strategy is permitted so long as it is ''. . . designed to reduce the specific risks to the banking entity . . . .'' [507] The 2013 rule added the correlation analysis requirement as a measure intended to ensure compliance with this exemption.

ii. Hedge Demonstrably Reduces or Otherwise Significantly Mitigates Specific Risks for Sections ____.5(b)(1)(iii), ____.5(b)(2)(ii), and ____.5(b)(2)(iv)(B)

The agencies stated in the proposal that the requirements in § ____.5(b)(1)(iii), § ____.5(b)(2)(ii), and § ____.5(b)(2)(iv)(B), that a risk-mitigating hedging activity demonstrably reduces or otherwise significantly mitigates specific risks, is not directly required by section 13(d)(1)(C) of the BHC Act.[508] The statute instead requires that the hedge *be designed* to reduce or otherwise significantly mitigate specific risks.[509] Thus, the agencies proposed to remove the ''demonstrably reduces or otherwise significantly mitigates'' specific risk requirement from § ____.5(b)(2)(ii) and § ____.5(b)(2)(iv)(B). This change would retain the requirement that the hedging activity be designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks, while providing banking entities with the flexibility to apply a type of analysis that was appropriate to the facts and circumstances of the hedge and the underlying risks targeted.

The agencies also proposed to remove parallel provisions in § ____.5(b)(1)(iii). In particular, the agencies proposed to delete the word ''demonstrably'' from the requirement that ''the positions, techniques and strategies that may be used for hedging may reasonably be expected to demonstrably reduce or otherwise significantly mitigate the specific, identifiable risk(s) being hedged'' in § ____.5(b)(1)(iii). This change would have meant that the banking entity's analysis and testing would have had to show that the hedging may be expected to reduce or mitigate the risks being hedged, but without the specific requirement that such reduction or mitigation be demonstrable. The agencies also proposed to delete the requirement in § ____.5(b)(1)(iii) that ''such correlation analysis demonstrates that the hedging activity demonstrably reduces or otherwise significantly mitigates the specific, identifiable risk(s) being hedged'' because this requirement was not necessary if the ''correlation analysis'' and ''demonstrable'' requirements were deleted.

The agencies noted that, in practice, it appears that the requirement to show that hedging activity demonstrably reduces or otherwise significantly mitigates a specific, identifiable risk that develops over time can be complex and could potentially reduce bona fide risk-mitigating hedging activity. For example, in some circumstances it would be very difficult, if not impossible, for a banking entity to comply with the continuous requirement to demonstrably reduce or significantly mitigate the identifiable risks, and therefore the firm would not enter into what would otherwise be effective hedges of foreseeable risks.[510]

iii. Reduced Compliance Requirements for Banking Entities That Do Not Have Significant Trading Assets and Liabilities for Section ____.5(b) and (c)

For banking entities that do not have significant trading assets and liabilities, the agencies proposed to eliminate the requirements for a separate internal compliance program for risk-mitigating hedging under § ____.5(b)(1); certain of the specific requirements of § ____.5(b)(2); the limits on compensation arrangements for persons performing risk-mitigating activities in § ____.5(b)(3); and the documentation requirements for certain hedging activities in § ____.5(c).[511] In place of those requirements, the agencies proposed a new § ____.5(b)(2) that would require that the risk-mitigating hedging activities be: (i) At the inception of the hedging activity (including any adjustments), designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks, including the risks specifically enumerated in the proposal; and (ii) subject to ongoing recalibration, as appropriate, to ensure that the hedge remains designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks.[512] The proposal also included conforming changes to § ____.5(b)(1) and § ____.5(c) of the 2013 rule to make the requirements of those sections

[499] *See* 2013 rule § ____.5(b)(1) and (3).
[500] *See* 2013 rule § ____.5(b)(2).
[501] *See* 2013 rule § ____.5(c).
[502] *See* 83 FR at 33465.
[503] *See* 83 FR at 33465.
[504] *See id.*
[505] *See id.*
[506] *See* 83 FR at 33465.
[507] 12 U.S.C. 1851(d)(1)(C).
[508] *See* 83 FR at 33465.
[509] *See id.*
[510] *See id.*
[511] *See* 83 FR at 33466.
[512] *Id.*

applicable only to banking entities that have significant trading assets and liabilities.[513]

The agencies explained that these requirements are overly burdensome and complex for banking entities that do not have significant trading assets and liabilities, which are generally less likely to engage in the types of trading activities and hedging strategies that would necessitate these additional compliance requirements. Given these considerations, the agencies believed that removing the requirements for banking entities that do not have significant trading assets and liabilities would be unlikely to materially increase risks to the safety and soundness of the banking entity or U.S. financial stability. The agencies also believed that the proposed requirements for banking entities without significant trading assets and liabilities would effectively implement the statutory requirement that the hedging transactions be designed to reduce specific risks the banking entity incurs.[514]

iv. Reduced Documentation Requirements for Banking Entities That Have Significant Trading Assets and Liabilities for Section ____.5(c)

For banking entities that have significant trading assets and liabilities, the agencies proposed to retain the enhanced documentation requirements for the hedging transactions identified in § ____.5(c)(1) to permit evaluation of the activity.[515] However, the agencies proposed a new paragraph (c)(4) in § ____.5 that would eliminate the enhanced documentation requirement for hedging activities that meets certain conditions.[516] Under new paragraph (c)(4) in § ____.5, compliance with the enhanced documentation requirement would not apply to purchases and sales of financial instruments for hedging activities that are identified on a written list of financial instruments pre-approved by the banking entity that are commonly used by the trading desk for the specific types of hedging activity for which the financial instrument is being purchased or sold.[517] In addition, at the time of the purchase or sale of the financial instruments, the related hedging activity would need to comply with written, pre-approved hedging limits for the trading desk purchasing or selling the financial instrument, which would be required to be appropriate for the size, types, and risks of the hedging activities commonly undertaken by the trading desk; the financial instruments purchased and sold by the trading desk for hedging activities; and the levels and duration of the risk exposures being hedged.[518]

The agencies explained that certain of the regulatory purposes of these documentation requirements, such as facilitating subsequent evaluation of the hedging activity and prevention of evasion, are less relevant in circumstances where common hedging strategies are used repetitively. Therefore the agencies believed that the enhanced documentation requirements were not necessary in such instances and that reducing them would make beneficial risk-mitigating activity more efficient and effective. The agencies intended that the conditions on the pre-approved limits would provide clarity regarding the limits needed to comply with requirements.[519]

c. Commenters' Views

One commenter argued that the requirements associated with the 2013 rule's risk-mitigating hedging exemption have been overly prescriptive, cumbersome, and unnecessary for sound and efficient risk management.[520] Many commenters supported the agencies' efforts to reduce costs and uncertainty and improve the utility of the risk-mitigating hedging exemption.[521] More specifically, commenters agreed with the recommendations to remove the correlation analysis requirement, remove the requirement that a hedge demonstrably reduce or otherwise significantly mitigate one or more specific risks, and reduce the enhanced documentation requirements.[522]

Although some commenters supported the agencies' effort to reduce the compliance burden in the risk-mitigating hedging exemption, others argued that the agencies did not go far enough. Several commenters argued that the agencies should reduce the enhanced documentation requirements and go further to remove these requirements for all banking entities.[523] Another commenter urged the agencies to eliminate the enhanced documentation requirements altogether in light of the proposed rule's robust compliance framework.[524] In addition, a commenter suggested targeted modifications to the provision, including permitting certain types of hedging in line with internal risk limits, allowing aggregate assessment of hedging, and clarifying how firms can comply with the provision.[525]

In contrast, other commenters did not support the agencies' proposed changes to the compliance obligations associated with the risk-mitigating hedging exemption.[526] One commenter argued that eliminating the correlation analysis requirement would eliminate the primary means used by most banks today to ensure a hedging activity is, in fact, offsetting risk.[527] Moreover, the same commenter argued that eliminating the existing regulatory requirement that banks show a hedge ''demonstrably reduces'' or ''significantly mitigates'' the risks targeted by the hedge would be a direct repudiation of the statute, because that type of demonstration is required by the statute.[528] Another commenter argued that the various changes proposed by the agencies would lead to uncontrollable speculations.[529]

d. Final Rule

i. Correlation Analysis for Section ____.5(b)(1)(i)(C)

The agencies are adopting § ____.5(b)(1)(iii) as proposed, but renumbered as § ____.5(b)(1)(i)(C). Based on the agencies' implementation experience of the 2013 rule and commenters' feedback on the proposed changes, the agencies are removing the requirement that a correlation analysis be the type of analysis used to assess risk-mitigating hedging activities. The agencies continue to believe, as stated in the proposal, that allowing banking entities to use the type of analysis that is appropriate to the hedging activities in question will avoid the uncertainties discussed in the proposal without substantially impacting the conditions that risk-mitigating hedging activities must meet in order to qualify for the exemption.[530]

Furthermore, section 13 of the BHC Act does not require that the analysis used by the banking entity be a correlation analysis. Instead, the statute only provides that a hedging position,

[513] *Id.*
[514] *Id.*
[515] *Id.*
[516] *Id.*
[517] *Id.*
[518] *Id.*
[519] *See* 83 FR at 33466–67.
[520] *See* SIFMA.
[521] *See, e.g.,* State Street; FSF; ABA; BPI; and SIFMA.
[522] *See, e.g.,* State Street; FSF; ABA; BPI; and SIFMA.
[523] *See, e.g.,* SIFMA; JBA; ABA; BPI; FSF; and CREFC.
[524] *See* BPI.
[525] *See* Credit Suisse.
[526] *See, e.g.,* Volcker Alliance; Bean; Data Boiler; CFA; AFR; NAFCU; Merkley; Better Markets; CAP; Systemic Risk Council; and Public Citizen.
[527] *See* Bean.
[528] *See* Bean.
[529] *See* Data Boiler.
[530] *See* 83 FR at 33465.

technique, or strategy is permitted so long as it is ''. . . designed to reduce the specific risks to the banking entity . . . .'' [531] The agencies believe the continuing requirement that the banking entity conduct ''analysis and independent testing designed to ensure that the positions, techniques and strategies that may be used for hedging may reasonably be expected to reduce or otherwise significantly mitigate the specific, identifiable risk(s) being hedged'' will effectively implement the statute.

The agencies anticipate that the banking entity's flexibility to apply the type of analysis that is appropriate to assess the particular hedging activity at issue will facilitate the appropriate use of risk-mitigating hedging under the exemption. Regarding the comment asserting that correlation analysis is the primary means used by banking entities to test whether a hedging activity is offsetting risk, the agencies note that if this is the case it would be reasonable to expect that the banking entity would use correlation analysis to satisfy the regulatory requirements with respect to that hedging activity. However, if another type of analysis is more appropriate, the banking entity would have the flexibility to use that form of analysis instead.

ii. Hedge Demonstrably Reduces or Otherwise Significantly Mitigates Specific Risks for Sections ____.5(b)(1)(i)(C), ____.5(b)(1)(ii)(B) and ____.5(b)(1)(ii)(D)(*2*)

The agencies are adopting § ____.5(b)(1)(iii), § ____.5(b)(2)(ii), and § ____.5(b)(2)(iv)(B) as proposed, but renumbered as § ____.5(b)(1)(i)(C), § ____.5(b)(1)(ii)(B) and § ____.5(b)(1)(ii)(D)(2). As stated in the proposal, the requirement that the reduction or mitigation of specific risks resulting from a risk-mitigating hedging activity be demonstrable is not directly required by section 13(d)(1)(C) of the BHC Act.[532] In practice, it appears that the requirement to show that hedging activity demonstrably reduces or otherwise significantly mitigates a specific, identifiable risk that develops over time can be complex and could potentially reduce bona fide risk-mitigating hedging activity. The agencies continue to believe that in some circumstances, it may be difficult for banking entities to know with sufficient certainty that a potential hedging activity that a banking entity seeks to commence will continuously demonstrably reduce or significantly mitigate an identifiable risk after it is implemented, even if the banking entity is able to enter into a hedge reasonably designed to reduce or significantly mitigate such a risk. As stated in the proposal, unforeseeable changes in market conditions, event risk, sovereign risk, and other factors that cannot be known with certainty in advance of undertaking a hedging transaction could reduce or eliminate the otherwise intended hedging benefits.[533] In these events, the requirement that a hedge ''demonstrably reduce'' or ''significantly mitigate'' the identifiable risks could create uncertainty with respect to the hedge's continued eligibility for the exemption. In such cases, a banking entity may determine not to enter into what would otherwise be a reasonably designed hedge of foreseeable risks out of concern that the banking entity may not be able to effectively comply with the requirement that such a hedge demonstrably reduces such risks due to the possibility of unforeseen risks occur. Therefore, the final rule removes the ''demonstrably reduces or otherwise significantly mitigates'' specific risk requirement from § ____.5(b)(1)(i)(C), § ____.5(b)(1)(ii)(B) and § ____.5(b)(1)(ii)(D)(2).

The agencies do not agree with a commenter's assertion that the requirement that banking entities show that a hedge ''demonstrably'' reduces or significantly mitigates the risks is a core requirement under section 13 of the BHC Act. Instead, the statute expressly permits hedging activities that are ''designed to reduce the specific risks of the banking entity.'' [534] The final rule maintains the requirement that hedging activity undertaken pursuant to § ____.5 be designed to reduce or otherwise mitigate specific, identifiable risks. Hedging activity must also be subject to ongoing recalibration by the banking entity to ensure that the hedging activity satisfies the requirement that the activity is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks even after changes in market conditions or other factors. In light of these requirements, the agencies do not find it necessary to require that the hedge ''demonstrably reduce'' risk to the banking entity on an ongoing basis.

iii. Reduced Compliance Requirements for Banking Entities That Do Not Have Significant Trading Assets and Liabilities for Section ____.5(b)(2) and Section ____.5(c)

The agencies are adopting §§ ____.5(b)(2) and ____.5(c) as proposed. Consistent with the changes in the final rule relating to the scope of the requirements for banking entities that do not have significant trading assets and liabilities, the agencies are also revising the requirements in §§ ____.5(b)(2) and ____.5(c) for banking entities that do not have significant trading assets and liabilities. For these firms, the agencies are eliminating the requirements for a separate internal compliance program for risk-mitigating hedging under § ____.5(b)(1); certain of the specific requirements of § ____.5(b)(2); the limits on compensation arrangements for persons performing risk-mitigating activities in § ____.5(b)(1)(iii); and the documentation requirements for those activities in § ____.5(c). Based on comments received, the agencies have determined that these requirements are overly burdensome and complex for banking entities with moderate trading assets and liabilities, in light of the reduced scale of their trading and hedging activities.

In place of those requirements, new § ____.5(b)(2) requires that risk-mitigating hedging activities for those banking entities be: (i) At the inception of the hedging activity (including any adjustments), designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks, including the risks specifically enumerated in the proposal; and (ii) subject to ongoing recalibration, as appropriate, to ensure that the hedge remains designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks. The agencies continue to believe that these tailored requirements for banking entities without significant trading assets and liabilities effectively implement the statutory requirement that the hedging transactions be designed to reduce specific risks the banking entity incurs. The agencies believe that the remaining requirements for a firm with moderate trading assets and liabilities would be effective in ensuring such banking entities engage only in permissible risk-mitigating hedging activities. The agencies also note that reducing these compliance requirements for banking entities that do not have significant trading assets and liabilities is unlikely to materially increase risks to the safety and soundness of the banking entity or

[531] 12 U.S.C. 1851(d)(1)(C).

[532] *See* 83 FR at 33465.

[533] *See id.*

[534] 12 U.S.C. 1851(d)(1)(C).

U.S. financial stability. Therefore, the agencies are eliminating and modifying these requirements for banking entities that do not have significant trading assets and liabilities. In connection with these changes, the final rule also includes conforming changes to §§ ____.5(b)(1) and ____.5(c) of the 2013 rule to make the requirements of those sections applicable only to banking entities that have significant trading assets and liabilities.

iv. Reduced Documentation Requirements for Banking Entities That Have Significant Trading Assets and Liabilities for Section ____.5(c)

The agencies are adopting § ____.5(c) as proposed. The final rule retains the enhanced documentation requirements for banking entities that have significant trading assets and liabilities for hedging transactions identified in § ____.5(c)(1) to permit evaluation of the activity. Although this documentation requirement results in more extensive compliance efforts, the agencies continue to believe it serves an important role to prevent evasion of the requirements of section 13 of the BHC Act and the final rule.

The hedging transactions identified in § ____.5(c)(1) include hedging activity that is not established by the specific trading desk that creates or is responsible for the underlying positions, contracts, or other holdings the risks of which the hedging activity is designed to reduce; is effected through a financial instrument, exposure, technique, or strategy that is not specifically identified in the trading desk's written policies and procedures as a product, instrument, exposure, technique, or strategy such trading desk may use for hedging; or established to hedge aggregated positions across two or more trading desks. The agencies believe that hedging transactions established at a different trading desk, or which are not identified in the relevant policies, may present or reflect heightened potential for prohibited proprietary trading. In other words, the further removed hedging activities are from the specific positions, contracts, or other holdings the banking entity intends to hedge, the greater the danger that such activity is not limited to hedging specific risks of individual or aggregated positions, contracts, or other holdings of the banking entity. For this reason, the agencies do not agree with commenters who argued that the enhanced documentation requirements should be removed for all banking entities.

However, based on the agencies' experience during the first several years of implementation of the 2013 rule, it appears that many hedges established by one trading desk for other affiliated desks are often part of common hedging strategies that are used regularly and that do not raise the concerns of those trades prohibited by the rule. In those instances, the documentation requirements of § ____.5(c) of the 2013 rule are less necessary for purposes of evaluating the hedging activity and preventing evasion. In weighing the significantly reduced regulatory and supervisory utility of additional documentation of common hedging trades against the complexity of complying with the enhanced documentation requirements, the agencies have determined that the documentation requirements are not necessary in those instances. Reducing the documentation requirement for common hedging activity undertaken in the normal course of business for the benefit of one or more other trading desks would also make beneficial risk-mitigating activity more efficient and potentially improve the timeliness of important risk-mitigating hedging activity, the effectiveness of which can be time sensitive.

Therefore, § ____.5(c)(4) of the final rule eliminates the enhanced documentation requirement for hedging activities that meet certain conditions. In excluding a trading desk's common hedging instruments from the enhanced documentation requirements in § ____.5(c), the final rule seeks to distinguish between those financial instruments that are commonly used for a trading desk's ordinary hedging activities and those that are not. The final rule requires the banking entity to have in place appropriate limits so that less common or more unusual levels of hedging activity would still be subject to the enhanced documentation requirements. The final rule provides that the enhanced documentation requirement does not apply to purchases and sales of financial instruments for hedging activities that are identified on a written list of financial instruments pre-approved by the banking entity that are commonly used by the trading desk for the specific types of hedging activity for which the financial instrument is being purchased or sold. In addition, at the time of the purchase or sale of the financial instruments, the related hedging activity would need to comply with written, pre-approved hedging limits for the trading desk purchasing or selling the financial instrument. These hedging limits must be appropriate for the size, types, and risks of the hedging activities commonly undertaken by the trading desk; the financial instruments purchased and sold by the trading desk for hedging activities; and the levels and duration of the risk exposures being hedged. These conditions on the pre-approved limits are intended to provide clarity as to the types and characteristics of the limits needed to comply with the final rule. The pre-approved limits should be reasonable and set to correspond to the type of hedging activity commonly undertaken and at levels consistent with the hedging activity undertaken by the trading desk in the normal course.

The agencies considered comments that suggested additional targeted modifications to the risk-mitigating hedging requirements, but believe that the suggested modifications would add additional complexity and administrative burden without significantly changing the efficiency and effectiveness of the final rule. Additionally, the agencies believe that because the final rule maintains significant requirements for hedging activities to qualify for the exemption, it should not lead to uncontrollable speculation, as one commenter warned.

4. Section ____.6(e): Permitted Trading Activities of a Foreign Banking Entity

Section 13(d)(1)(H) of the BHC Act [535] permits certain foreign banking entities to engage in proprietary trading that occurs solely outside of the United States (the foreign trading exemption); [536] however, the statute does not define when a foreign banking entity's trading occurs ''solely outside of the United States.'' The 2013 rule includes several conditions on the availability of the foreign trading exemption. Specifically, in addition to limiting the exemption to foreign banking entities where the purchase or sale is made pursuant to paragraph (9)

[535] Section 13(d)(1)(H) of the BHC Act permits trading conducted by a foreign banking entity pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act (12 U.S.C. 1843(c)), if the trading occurs solely outside of the United States, and the banking entity is not directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States. *See* 12 U.S.C. 1851(d)(1)(H).

[536] This section's discussion of the concept of ''solely outside of the United States'' is provided solely for purposes of the rule's implementation of section 13(d)(1)(H) of the BHC Act and does not affect a banking entity's obligation to comply with additional or different requirements under applicable securities, banking, or other laws. Among other differences, section 13 of the BHC Act does not necessarily include the customer protection, transparency, anti-fraud, anti-manipulation, and market orderliness goals of other statutes administered by the agencies. These other goals or other aspects of those statutory provisions may require different approaches to the concept of ''solely outside of the United States'' in other contexts.

or (13) of § ____.4(c) of the BHC Act,[537] the 2013 rule provides that the foreign trading exemption is available only if: [538]

(i) The banking entity engaging as principal in the purchase or sale (including any personnel of the banking entity or its affiliate that arrange, negotiate, or execute such purchase or sale) is not located in the United States or organized under the laws of the United States or of any State.

(ii) The banking entity (including relevant personnel) that makes the decision to purchase or sell as principal is not located in the United States or organized under the laws of the United States or of any State.

(iii) The purchase or sale, including any transaction arising from risk-mitigating hedging related to the instruments purchased or sold, is not accounted for as principal directly or on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State.

(iv) No financing for the banking entity's purchase or sale is provided, directly or indirectly, by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State (the financing prong).

(v) The purchase or sale is not conducted with or through any U.S. entity,[539] except if the purchase or sale is conducted:

(A) With the foreign operations of a U.S. entity, if no personnel of such U.S. entity that are located in the United States are involved in the arrangement, negotiation or execution of such purchase or sale (the counterparty prong); [540]

(B) with an unaffiliated market intermediary acting as principal, provided the transaction is promptly cleared and settled through a clearing agency or derivatives clearing organization acting as a central counterparty; or

(C) through an unaffiliated market intermediary, provided the transaction is conducted anonymously (*i.e.,* each party to the transaction is unaware of the identity of the other party(ies)) on an exchange or similar trading facility and promptly cleared and settled through a clearing agency or derivatives clearing organization acting as a central counterparty.

Since the adoption of the 2013 rule, foreign banking entities have asserted that certain of these criteria limit their ability to make use of the statutory exemption for trading activity that occurs outside of the United States, which has adversely impacted their foreign trading operations. Additionally, many foreign banking entities have suggested that the full set of eligibility criteria to rely on the exemption for foreign trading activity are unnecessary to accomplish the policy objectives of section 13 of the BHC Act. This information has raised concerns that the current requirements for the exemption may be overly restrictive and not effective in permitting foreign banks to engage in foreign trading activities consistent with the policy objective of the statute.

The proposal would have modified the requirements for the foreign trading exemption so that it would be more usable by foreign banking entities. Specifically, the proposal would have retained the first three requirements of the 2013 rule, with a modification to the first requirement, and would have removed the last two requirements of § ____.6(e)(3). As a result, § ____.6(e)(3), as modified by the proposal, would have required that for a foreign banking entity to be eligible for this exemption:

(i) The banking entity engaging as principal in the purchase or sale (including relevant personnel) is not located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to purchase or sell as principal is not located in the United States or organized under the laws of the United States or of any State; and

(iii) The purchase or sale, including any transaction arising from risk-mitigating hedging related to the instruments purchased or sold, is not accounted for as principal directly or on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State.

The proposal would have maintained these three requirements in order to ensure that the banking entity (including any relevant personnel) that engages in the purchase or sale as principal or makes the decision to purchase or sell as principal is not located in the United States or organized under the laws of the United States or any State. Furthermore, the proposal would have retained the 2013 rule's requirement that the purchase or sale, including any transaction arising from a related risk-mitigating hedging transaction, may not be accounted for as principal by the U.S. operations of the foreign banking entity. However, the proposal would have replaced the first requirement that any personnel of the banking entity that arrange, negotiate, or execute such purchase or sale are not located in the United States with one that would restrict only the relevant personnel engaged in the banking entity's decision in the purchase or sale are not located in the United States.

Under the proposed approach, the requirements for the foreign trading exemption focused on whether the banking entity that engages in or that decides to engage in the purchase or sale as principal (including any relevant personnel) is located in the United States. The proposed modifications recognized that some limited involvement by U.S. personnel (*e.g.,* arranging or negotiating) would be consistent with this exemption so long as the principal risk and actions of the purchase or sale do not take place in the United States for purposes of section 13 of the BHC Act and the implementing regulations.

The proposal also would have eliminated the financing prong and the counterparty prong. Under the proposal, these changes would have focused the key requirements of the foreign trading exemption on the principal actions and risk of the transaction. In addition, the proposal would have removed the financing prong to address concerns that the fungibility of financing has made this requirement in certain circumstances difficult to apply in practice to determine whether a particular financing is tied to a particular trade. Market participants have raised a number of questions about the financing prong and have indicated that identifying whether financing has been provided by a U.S. affiliate or branch can be exceedingly complex, in particular with respect to demonstrating that financing has not been provided by a U.S. affiliate or branch with respect to a particular transaction. To address the concerns raised by foreign banking entities and other market participants, the proposal would have amended the exemption to focus on the principal risk of a transaction and the location of the actions as principal and trading decisions, so that a foreign banking entity would be able to make use of the exemption so long as the risk of the transaction is booked outside of the United States. While the agencies

[537] 12 U.S.C. 1843(c)(9), (13). *See* 2013 rule § ____.6(e)(1)(i) and (ii).

[538] *See* 2013 rule § ____.6(e).

[539] "U.S. entity" is defined for purposes of this provision as any entity that is, or is controlled by, or is acting on behalf of, or at the direction of, any other entity that is, located in the United States or organized under the laws of the United States or of any State. *See* 2013 rule § ____.6(e)(4).

[540] A foreign banking entity wishing to engage in trading activities with a U.S. entity's foreign affiliate generally must rely on the counterparty prong.

recognize that a U.S. branch or affiliate that extends financing could bear some risks, the agencies note that the proposed modifications to the foreign trading exemption were designed to require that the principal risks of the transaction occur and remain solely outside of the United States.

Similarly, foreign banking entities have communicated to the agencies that the counterparty prong has been overly difficult and costly for banking entities to monitor, track, and comply with in practice. As a result, the agencies proposed to remove the requirement that any transaction with a U.S. counterparty be executed solely with the foreign operations of the U.S. counterparty (including the requirement that no personnel of the counterparty involved in the arrangement, negotiation, or execution may be located in the United States) or through an unaffiliated intermediary and an anonymous exchange. These changes were intended to materially reduce the reported inefficiencies associated with rule compliance. In addition, market participants have indicated that this requirement has in practice led foreign banking entities to overly restrict the range of counterparties with which transactions can be conducted, as well as disproportionately burdened compliance resources associated with those transactions, including with respect to counterparties seeking to do business with the foreign banking entity in foreign jurisdictions.

The proposal would have removed the counterparty prong and focused the requirements of the foreign trading exemption on the location of a foreign banking entity's decision to trade, action as principal, and principal risk of the purchase or sale. This proposed focus on the location of actions and risk as principal in the United States was intended to align with the statute's definition of ''proprietary trading'' as ''engaging *as principal for the trading account of the banking entity.*'' [541] The proposal would have scaled back those requirements that were not critical for this determination and thus would not be needed in the final rule. Therefore, the proposal would have removed the requirements of § ___.6(e)(3) since they are less directly relevant to these considerations.

Consistent with the 2013 rule, the exemption under the proposal would not have exempted the U.S. or foreign operations of U.S. banking entities from having to comply with the restrictions and limitations of section 13 of the BHC Act. Thus, for example, the U.S. and foreign operations of a U.S. banking entity that is engaged in permissible market making-related activities or other permitted activities may engage in those transactions with a foreign banking entity that is engaged in proprietary trading in accordance with the exemption under § ___.6(e) of the 2013 rule, so long as the U.S. banking entity complies with the requirements of § ___.4(b), in the case of market making-related activities, or other relevant exemption applicable to the U.S. banking entity. The proposal, like the 2013 rule, would not have imposed a duty on the foreign banking entity or the U.S. banking entity to ensure that its counterparty is conducting its activity in conformance with section 13 and the implementing regulations. Rather, that obligation would have been on each party subject to section 13 to ensure that it is conducting its activities in accordance with section 13 and the implementing regulations.

The proposal's exemption for trading of foreign banking entities outside the United States potentially could have given foreign banking entities a competitive advantage over U.S. banking entities with respect to permitted activities of U.S. banking entities because foreign banking entities could trade directly with U.S. counterparties without being subject to the limitations associated with the market making-related activities exemption or other exemptions under the rule. This competitive disparity in turn could create a significant potential for regulatory arbitrage. In this respect, the agencies sought to mitigate this concern through other changes in the proposal; for example, U.S. banking entities would have continued to be able to engage in all of the activities permitted under the 2013 rule and the proposal, including the simplified and streamlined requirements for market making and risk-mitigating hedging and other types of trading activities.

In general, commenters supported the proposed changes.[542] However, a number of commenters requested further modifications to the foreign trading exemption. For example, some commenters requested that the agencies clarify the definition of ''relevant personnel'' to mean employees that conduct risk management, and not the traders or others associated with executing the transaction.[543] One commenter requested clarification that the proposed changes not constrain foreign banking entities from delegating investment authority to non-affiliated U.S. investment advisers.[544] Another commenter supported eliminating the conduct restriction.[545] One commenter proposed several additional modifications, including further simplifying the exemption to only focus on where the transaction is booked, clarifying certain terms (*e.g.,* sub-servicing, dark pools, engaging in), and including inter-affiliate or intra-bank transactions in the exemption.[546] This commenter also requested that the agencies include execution as one of the examples of limited involvement.[547]

A few commenters opposed the proposed changes to eliminate the financing and counterparty requirements.[548] These commenters argued that the proposed changes might provide foreign entities with a competitive advantage over domestic entities.[549] One commenter asserted that the proposed changes would increase uncertainty and could increase the exposure of U.S. institutions to foreign proprietary trading losses.[550] This commenter also argued that the agencies did not provide factual data to support the change and that the proposal was contrary to law.[551]

After consideration of these comments, the agencies are adopting the changes to the foreign trading exemption as proposed. The proposal's modifications in general sought to balance concerns regarding competitive impact while mitigating the concern that an overly narrow approach to the foreign trading exemption may cause market bifurcations, reduce the efficiency and liquidity of markets, make the exemption overly restrictive to foreign banking entities, and harm U.S. market participants. The agencies believe that this approach appropriately balances one of the key objectives of section 13 of the BHC Act by limiting the risks that proprietary trading poses to the U.S. financial system, while also modifying the application of section 13 as it applies to foreign banking entities, as required by section 13(d)(1)(H).

As noted in the preamble to the proposal, the statute contains an exemption that allows foreign banking entities to engage in trading activity that is, only for purposes of the prohibitions of the statute, solely outside the United

[541] *See* 12 U.S.C. 1851(h)(4) (emphasis added).

[542] *See, e.g.,* ISDA; IIB; ABA; New England Council; BVI; HSBC; EBF; Credit Suisse; JBA FSF; and EFAMA.

[543] *See, e.g.,* HSBC and JBA.

[544] *See* EFAMA.

[545] *See* HSBC.

[546] *See* JBA.

[547] *See* JBA.

[548] *See, e.g.,* Bean; Data Boiler; and Better Markets.

[549] *See, e.g.,* Better Markets and FSF.

[550] *See* Bean.

[551] *See* Bean.

States. The statute also contains a prohibition on proprietary trading for U.S. banking entities regardless of where their activity is conducted. The statute generally prohibits U.S. banking entities from engaging in proprietary trading because of the perceived risks of those activities to U.S. banking entities and the U.S. financial system. The modified foreign trading exemption excludes from the statutory prohibitions transactions where the principal risk is booked outside of the United States and the actions and decisions as principal occur outside of the United States by foreign operations of foreign banking entities. The agencies also are confirming that the foreign trading exemption does not preclude a foreign banking entity from engaging a non-affiliated U.S. investment adviser as long as the actions and decisions of the banking entity as principal occur outside of the United States. By continuing to limit the risks of foreign banking entities' proprietary trading activities to the U.S. financial system, the agencies believe that the rule continues to protect and promote the safety and soundness of banking entities and the financial stability of the United States, while also allowing U.S. markets to continue to operate efficiently in conjunction with foreign markets.

C. Subpart C—Covered Fund Activities and Investments

1. Overview of Agencies' Approach to the Covered Fund Provisions

The proposal included several proposed revisions to subpart C (the covered fund provisions). The proposal also sought comments on other aspects of the covered fund provisions beyond those changes for which specific rule text was proposed. As described further below, the agencies have determined to adopt, as proposed, the changes to subpart C for which specific rule text was proposed. The agencies continue to consider other aspects of the covered fund provisions on which the agencies sought comment in the proposal and intend to issue a separate proposed rulemaking that specifically addresses those areas.

The proposal sought comment on the 2013 rule's general approach to defining the term ''covered fund,'' as well as the existing exclusions from the covered fund definition and potential new exclusions from this definition. The agencies received numerous comments on these aspects of the covered fund provisions. Some commenters encouraged the agencies to make significant revisions to these provisions, such as narrowing the covered fund ''base definition'' [552] or providing additional exclusions from this definition.[553] Other commenters argued that the agencies should not narrow the covered fund definition or should retain the definition in section 13 of the BHC Act.[554] Some commenters raised concerns about the agencies' ability to finalize changes to the covered fund provisions for which the proposal did not provide specific rule text.[555] In light of the number and complexity of issues under consideration, the agencies intend to address these and other comments received on the covered fund provisions in a subsequent proposed rulemaking.

In this final rule, the agencies are adopting only those changes to the covered fund provisions for which specific rule text was proposed.[556] Those changes are being adopted as final without change from the proposal for the reasons described below. While the agencies are not including any other changes to subpart C in this final rule, this approach does not reflect any final determination with respect to the comments received on other aspects of the covered fund provisions. The agencies continue to consider comments received and intend to address additional aspects of the covered funds provisions in the future covered funds proposal.

2. Section ____.11: Permitted Organizing and Offering, Underwriting, and Market Making With Respect to a Covered Fund

Section 13(d)(1)(B) of the BHC Act permits a banking entity to purchase and sell securities and other instruments described in section 13(h)(4) of the BHC Act in connection with the banking entity's underwriting or market making-related activities.[557] The 2013 rule provides that the prohibition against acquiring or retaining an ownership interest in or sponsoring a covered fund does not apply to a banking entity's underwriting or market making-related activities involving a covered fund as long as:

- The banking entity conducts the activities in accordance with the requirements of the underwriting exemption in § ____.4(a) of the 2013 rule or market making exemption in § ____.4(b) of the 2013 rule, respectively.
- The banking entity includes the aggregate value of all ownership interests of the covered fund acquired or retained by the banking entity and its affiliates for purposes of the limitation on aggregate investments in covered funds (the aggregate-fund limit) [558] and capital deduction requirement; [559] and
- The banking entity includes any ownership interest that it acquires or retains for purposes of the limitation on investments in a single covered fund (the per-fund limit) if the banking entity (i) acts as a sponsor, investment adviser or commodity trading adviser to the covered fund; (ii) otherwise acquires and retains an ownership interest in the covered fund in reliance on the exemption for organizing and offering a covered fund in § ____.11(a) of the 2013 rule; (iii) acquires and retains an ownership interest in such covered fund and is either a securitizer, as that term is used in section 15G(a)(3) of the Exchange Act, or is acquiring and retaining an ownership interest in such covered fund in compliance with section 15G of that Act and the implementing regulations issued thereunder, each as permitted by § ____.11(b) of the 2013 rule; or (iv) directly or indirectly, guarantees, assumes, or otherwise insures the obligations or performance of the covered fund or of any covered fund in which such fund invests.[560]

The proposal would have removed the requirement that the banking entity include for purposes of the aggregate fund limit and capital deduction the value of any ownership interests of a third-party covered fund (*i.e.,* covered funds that the banking entity does not advise or organize and offer pursuant to § ____.11 of the final rule) acquired or retained in accordance with the underwriting or market-making exemptions in § ____.4. Under the proposal, these limits, as well as the per-fund limit, would have applied only to a covered fund that the banking entity organizes or offers and in which the banking entity acquires or retains an ownership interest pursuant to § ____.11(a) or (b) of the 2013 rule. The agencies proposed this change to more closely align the requirements for engaging in underwriting or market-making-related activities with respect to ownership interests in a covered fund with the requirements for engaging in these activities with respect to other financial instruments.

[552] *See, e.g.,* ABA; AIC; Center for American Entrepreneurship; Goldman Sachs; and JBA.

[553] *See, e.g.,* Capital One et al.; Credit Suisse; and SIFMA.

[554] *See, e.g.,* AFR and Occupy the SEC.

[555] *See, e.g.,* AFR; Bean; and Volcker Alliance.

[556] In addition, consistent with changes described in Part IV.B.1.b.i of this **SUPPLEMENTARY INFORMATION**, the final rule removes references to ''guidance'' from subpart C.

[557] 12 U.S.C. 1851(d)(1)(B).

[558] 2013 rule § ____.12(a)(2)(iii).

[559] 2013 rule § ____.12(d).

[560] *See* 2013 rule § ____.11(c).

Several commenters supported eliminating these requirements for underwriting and market making in ownership interests in covered funds.[561] Many of these commenters said this proposal would reduce the compliance burden for banking entities engaged in client-facing underwriting and market making activities and would facilitate these permitted activities.[562] One of these commenters noted in particular the difficulties for banking entities to determine whether a third-party fund is a covered fund subject to the limits of the 2013 rule and to determine with certainty whether certain non-U.S. securities may be issued by covered funds.[563] Some of these commenters argued that providing underwriting and market making in the interests in such funds increases liquidity and benefits the marketplace generally.[564] One of these commenters also stated that this would facilitate capital-raising activities of covered funds and other issuers.[565] Other commenters opposed this change because they believed that it would greatly expand banking entities' ability to hold ownership interests in covered funds,[566] and is contrary to section 13 of the BHC Act.[567]

Several commenters supported making additional revisions to § ____.11 by eliminating the aggregate fund limit and capital deduction for other funds, such as affiliated funds or sponsored funds [568] and advised funds.[569] Certain of these commenters argued that underwriting and market making in interests in these covered funds would not expose banking entities to greater risk because ownership interests in such funds acquired in accordance with the risk-mitigating hedging, market-making or underwriting exemptions would nevertheless be subject to the restrictions contained in those exemptions.[570]

The agencies are eliminating the aggregate fund limit and the capital deduction requirement for the value of ownership interests in third-party covered funds acquired or retained in accordance with the underwriting or market-making exemption (*i.e.,* covered funds that the banking entity does not advise or organize and offer pursuant to § ____.11(a) or (b) of the final rule).[571] The agencies believe this change will better align the compliance requirements for underwriting and market making involving covered funds with the risks those activities entail. In particular, the agencies understand that it has been difficult for banking entities to determine whether ownership interests in covered funds are being acquired or retained in the context of trading activities, especially for non-U.S. issuers. Banking entities have had to undertake an often time-consuming process to determine whether an issuer is a covered fund and the security issued is an ownership interest, all for the purpose of ensuring compliance with the aggregate fund limit and capital deduction requirement for the period of time that the banking entity holds the ownership interest as part of its otherwise permissible underwriting and market making activities.[572] These compliance challenges are heightened in the case of third-party funds. However, a banking entity can more readily determine whether a fund is a covered fund if the banking entity advises or organizes and offers the fund. Thus, the agencies are not eliminating the aggregate fund limit and capital deduction requirement for advised covered funds or covered funds that the banking entity organizes or offers. The agencies continue to consider whether the approach being adopted in the final rule may be extended to other issuers, such as funds advised by the banking entity, and intend to address and request additional comment on this issue in the future proposed rulemaking.

The agencies disagree with the commenter who argued that eliminating the aggregate fund limit and capital deduction is contrary to section 13 of the BHC Act.[573] An exemption from the prohibition on acquiring or retaining an ownership interest in a covered fund for underwriting and market making involving covered fund ownership interests is consistent with and supported by section 13 of the BHC Act.[574] Section 13(d)(1)(B) provides a statutory exemption for underwriting and market making activities and, by its terms, applies to both prohibitions in section 13(a), whether on proprietary trading or covered fund activities. Section 13 does not require any per-fund or aggregate limits, or capital deduction, with respect to covered fund ownership interests acquired pursuant to the underwriting and market making exemption in section 13(d)(1)(B), and eliminating these requirements with respect to third-party funds will improve the effectiveness of the statutory exemption for these activities.[575]

The agencies also disagree with commenters who asserted that this change will greatly expand banking entities' ability to hold ownership interests in covered funds.[576] This exemption for underwriting and market making involving ownership interests in covered funds applies only to underwriting and market making activities conducted pursuant to the requirements in section 13(d)(1)(B) of the BHC Act and § ____.4 of the final rule. This exemption is intended to allow banking entities to engage in permissible underwriting and market making involving covered fund ownership interests to the same extent as other financial instruments. It is also intended to increase the effectiveness of the underwriting and market making exemptions in § ____.4 by appropriately limiting the covered fund determinations a banking entity must make in the course of these permissible activities. For these reasons, and to limit the potential for evasion, the exemption for underwriting and market making involving ownership interests in covered funds continues to apply only to activities that satisfy the requirements of the underwriting or market making exemptions in § ____.4.

One commenter argued that the aggregate fund limit should apply only at the global consolidated level for all firms.[577] This commenter argued that measuring aggregate covered fund ownership at the parent-level is a better test of immateriality than measuring covered fund investments at a lower level, such as at the level of an

[561] *See, e.g.,* ABA; BPI; FSF; Goldman Sachs; IIB; ISDA; and SIFMA.

[562] *See, e.g.,* BPI; FSF; ISDA; and SIFMA.

[563] *See* SIFMA.

[564] *See* ISDA.

[565] *See* SIFMA.

[566] *See, e.g.,* AFR; Bean; and Volcker Alliance.

[567] *See* Bean.

[568] *See* ISDA.

[569] *See, e.g.,* BPI; ISDA; and SIFMA.

[570] *See, e.g.,* BPI and ISDA.

[571] As in the proposal, this requirement is also eliminated for underwriting and market-making activities involving funds with respect to which the banking entity directly or indirectly, guarantees, assumes, or otherwise insures the obligations or performance of the covered fund or of any covered fund in which such fund invests. Such funds are not organized and offered pursuant to § ____.11(a) or (b) of the final rule and thus treatment as a third-party fund is more appropriate for purposes of the underwriting and market-making exemption for covered funds. The agencies note, however, that other provisions of section 13 of the BHC Act, as well as other laws and regulations, limit banking entities' ability to guarantee, assume, or otherwise insure the obligations or performance of covered funds. See 12 U.S.C. 1851(f); 12 U.S.C. 1851(d)(2); §§ ____.14 and ____.15 of the final rule. See also 12 CFR 7.1017 (limiting authority of national bank to act as a guarantor).

[572] *See* SIFMA.

[573] *See* Bean.

[574] *See* 79 FR 5535, 5722.

[575] The quantitative limits and capital deduction requirements in 12 U.S.C. 1851(d)(4)(B) are required to apply only in the case of seeding investments and other *de minimis* investments made pursuant to 12 U.S.C. 1851(d)(4)(B).

[576] *See, e.g.,* AFR; Bean; and Volcker Alliance.

[577] *See* Credit Suisse.

intermediate holding company.[578] This commenter also said the agencies should expand the per-fund limit to allow bank-affiliated securitization investment managers to rely on applicable foreign risk retention regulations as a basis for exceeding the three percent per-fund limitation, provided that those foreign regulations are generally comparable to U.S. requirements.[579] Another commenter asserted that the preamble to the 2013 rule indicated that direct investments made alongside a covered fund should be aggregated for purposes of the per-fund limit in certain circumstances.[580] This commenter asked the agencies to clarify that the 2013 rule does not prohibit banking entities from making direct investments alongside covered funds, regardless of whether the fund is sponsored or the investments are coordinated, so long as such investments are otherwise authorized for such banking entities (*e.g.,* under merchant banking authority). The agencies continue to consider these issues. As noted above, the agencies expect to address and request additional comments on these and other covered fund provisions in the future proposed rulemaking.

3. Section ____.13: Other Permitted Covered Fund Activities

a. Permitted Risk-Mitigating Hedging

Section 13(d)(1)(C) of the BHC Act provides an exemption for risk-mitigating hedging activities in connection with and related to individual or aggregated positions, contracts, or other holdings of a banking entity that are designed to reduce the specific risks to the banking entity in connection with and related to such positions, contracts, or other holdings.[581] As described in the preamble to the proposal, the 2013 rule implemented this authority narrowly in the context of covered fund activities. Specifically, the 2013 rule permitted only limited risk-mitigating hedging activities involving ownership interests in covered funds for hedging employee compensation arrangements.

Like the proposal, the final rule allows a banking entity to acquire or retain an ownership interest in a covered fund as a hedge when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund. This provision is consistent with the agencies' original 2011 proposal.[582]

The proposal also would have amended § ____.13(a) to align with the proposed modifications to § ____.5. In particular, the proposal would have required that a risk-mitigating hedging transaction pursuant to § ____.13(a) be designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks to the banking entity. It would have removed the requirement that the hedging transaction ''demonstrably'' reduces or otherwise significantly mitigates the relevant risks, consistent with the proposed modifications to § ____.5.[583]

Several commenters supported permitting banking entities to acquire and retain ownership interests in covered funds as a hedge when acting as intermediary on behalf of a customer.[584] Certain of these commenters argued that acquiring or retaining ownership interests in covered funds for this purpose (fund-linked products) is beneficial because it accommodates banking entities' client facilitation and related risk management activities.[585] Two commenters noted that restricting institutions' ability to find the best hedge for a transaction may increase risks to safety and soundness and, conversely, permitting banking entities to use the best available hedge for risks arising from customer facilitation activities would promote safety and soundness and reduce risk.[586] Several of these commenters also argued that fund-linked products are not a high-risk trading strategy.[587] For example, one commenter argued that the magnitude of counterparty default risk that banking entities would face in acquiring or retaining a covered fund ownership interest under these circumstances (*i.e.,* to hedge a position by the banking entity when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate exposure by the customer to a covered fund) is no different than any other counterparty default risk that banking entities face when entering into other risk-mitigating hedges.[588] Other commenters opposed this change and noted that, at the time the 2013 rule was adopted, the agencies considered acting as principal in providing exposure to the profits and losses of a covered fund for a customer, even if hedged by the banking entity with ownership interests of the covered fund, to constitute a high-risk trading strategy.[589] One commenter stated that the proposal did not offer specific examples or explain why such fund-linked products are necessary.[590] Another commenter argued that the exemption for risk-mitigating hedging involving ownership interests in covered funds should be further restricted or completely removed from the rule.[591]

The final rule adopts the proposed revision without change. This exemption is tailored to permit bona fide customer facilitation activities and to limit the risk incurred directly by the banking entity. The new exemption in § ____.13(a) extends only to a position taken by the banking entity when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the customer's exposure to the profits and losses of the covered fund. The banking entity's acquisition or retention of the ownership interest as a hedge must be designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks arising out of a transaction conducted solely to accommodate a specific customer request with respect to the covered fund. As a result, a transaction conducted in reliance on this exemption must be customer-driven. A banking entity cannot rely on this exemption to solicit customer transactions in order to facilitate the banking entity's own exposure to a covered fund.

As some commenters noted, in the preamble to the 2013 rule, the agencies stated that they were not adopting an exemption for customer facilitation activities and related hedging activities involving ownership interests in covered funds because these activities could potentially expose a banking entity to the types of risks that section 13 of the BHC Act sought to address. However, in light of other comments received,[592] the agencies do not believe that a banking entity's customer facilitation activities and related hedging activities involving ownership interests in covered funds necessarily constitute high-risk trading strategies that could threaten the safety and soundness of the banking entity. The agencies believe that, properly monitored and managed, these activities can be conducted without creating a greater degree of risk to the banking entity than the other customer facilitation activities permitted by the

[578] *Id.*

[579] *Id.*

[580] *See* Goldman Sachs.

[581] 12 U.S.C. 1851(d)(1)(C).

[582] *See* 83 FR at 33483–84.

[583] *See* supra Part IV.B.3.b.ii.

[584] *See, e.g.,* ABA; BPI; FSF; Goldman Sachs; IIB; ISDA; SIFMA; and IIB.

[585] *See, e.g.,* BPI and FSF.

[586] *See, e.g.,* FSF and SIFMA.

[587] *See, e.g.,* FSF; ISDA; and SIFMA.

[588] *See* FSF.

[589] *See, e.g.,* AFR and Volcker Alliance.

[590] *See* AFR.

[591] *See* Occupy the SEC.

[592] *See, e.g.,* FSF; ISDA; and SIFMA.

final rule.[593] In particular, these activities remain subject to all of the final rule's requirements for risk-mitigating hedging transactions, including requirements that such transactions must:

• Be designed to reduce or otherwise significantly mitigate the specific, identifiable risks to the banking entity;

• be made in accordance with the banking entity's written policies, procedures and internal controls;

• not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with the risk-mitigating hedging requirements; and

• be subject to continuing review, monitoring and management by the banking entity.[594]

In addition, these activities remain subject to § ____.15 of the final rule and, therefore, to the extent they would in practice significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States, they would not be permissible. The agencies are also adopting without change the amendment to align § ____.13(a) with § ____.5 by eliminating the requirement that a risk-mitigating hedging transaction ''demonstrably'' reduces or otherwise significantly mitigates the relevant risks. The agencies are adopting this amendment to § ____.13(a) for the same reason the agencies are adopting the amendment to § ____.5.

b. Permitted Covered Fund Activities and Investments Outside of the United States

Section 13(d)(1)(I) of the BHC Act permits foreign banking entities to acquire or retain an ownership interest in, or act as sponsor to, a covered fund, so long as those activities and investments occur solely outside the United States and certain other conditions are met (the foreign fund exemption).[595] Section 13 of the BHC Act does not further define ''solely outside of the United States'' (SOTUS).

The 2013 rule established several conditions on the availability of the foreign fund exemption. Specifically, the 2013 rule provided that an activity or investment occurs solely outside the United States for purposes of the foreign fund exemption only if:

• The banking entity acting as sponsor, or engaging as principal in the acquisition or retention of an ownership interest in the covered fund, is not itself, and is not controlled directly or indirectly by, a banking entity that is located in the United States or organized under the laws of the United States or of any State;

• The banking entity (including relevant personnel) that makes the decision to acquire or retain the ownership interest or act as sponsor to the covered fund is not located in the United States or organized under the laws of the United States or of any State;

• The investment or sponsorship, including any transaction arising from risk-mitigating hedging related to an ownership interest, is not accounted for as principal directly or indirectly on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State; and

• No financing for the banking entity's ownership or sponsorship is provided, directly or indirectly, by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State (the ''financing prong'').[596]

Much like the similar requirement under the exemption for permitted trading activities of a foreign banking entity, the proposal would have removed the financing prong of the foreign fund exemption, while leaving in place the other requirements for an activity or investment to be considered ''solely outside of the United States.'' Removing the financing prong was intended to streamline the requirements of the foreign fund exemption with the intention of improving implementation of the statutory exemption.

Several commenters supported removing the financing prong from the foreign fund exemption.[597] One commenter argued that this change would appropriately refocus the foreign fund exemption on the location of the activities of the banking entity as principal.[598] Another commenter argued that the proposed changes to the foreign fund exemption, including removal of the financing prong, could promote international regulatory cooperation.[599] Other commenters argued against eliminating the financing prong because it could result in a U.S. branch or affiliate that extends financing to bear some risks.[600]

The agencies are adopting the proposal to remove the financing prong for the same reasons described above in section IV.B.4 for the trading outside of the United States exemption. This change focuses one of the key requirements of the foreign fund exemption on the principal actions and risk of the transaction. Removing the financing prong would also address concerns that the fungibility of financing has made this requirement in certain circumstances difficult to apply in practice to determine whether a particular financing is tied to a particular activity or investment. Eliminating the financing prong, while retaining the other prongs of the foreign fund exemption, strikes a better balance between the risks posed to U.S. banking entities and the U.S. financial system, on the one hand, and effectuating the statutory exemption for activities conducted solely outside of the United States, on the other. The agencies note that a U.S. banking entity's affiliate lending activities remain subject to other laws and regulations—including sections 23A and 23B of the Federal Reserve Act and prudential safety and soundness standards, as applicable.

One of the restrictions of the statutory exemption for covered fund activities conducted by foreign banking entities solely outside the United States is the restriction that ''no ownership interest in such hedge fund or private equity fund is be offered for sale or sold to a resident of the United States.[601] To implement this restriction, § ____.13(b) of the 2013 rule requires, as one condition of the foreign fund exemption, that ''no ownership interest in the covered fund is offered for sale or sold to a resident of the United States'' (the ''marketing restriction'').[602]

The final rule, like the proposal, clarifies that an ownership interest in a covered fund is not offered for sale or sold to a resident of the United States for purposes of the marketing restriction only if it is not sold and has not been sold pursuant to an offering that targets residents of the United States in which the banking entity or any affiliate of the banking entity participates. The final

[593] *See, e.g.,* final rule § ____.3(d)(11).

[594] *See* final rule § ____.13.

[595] Section 13(d)(1)(I) of the BHC Act permits a banking entity to acquire or retain an ownership interest in, or have certain relationships with, a covered fund notwithstanding the restrictions on investments in, and relationships with, a covered fund, if: (i) Such activity or investment is conducted by a banking entity pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act; (ii) the activity occurs solely outside of the United States; (iii) no ownership interest in such fund is offered for sale or sold to a resident of the United States; and (iv) the banking entity is not directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States. *See* 12 U.S.C. 1851(d)(1)(I).

[596] *See* final rule § ____.13(b)(4).

[597] *See, e.g.,* BPI; BVI; EBF; IIB; JBA; and New England Council.

[598] *See* EBF.

[599] *See* BPI.

[600] *See, e.g.,* Better Markets and CAP.

[601] *See* 12 U.S.C. 1851(d)(1)(I).

[602] *See* final rule § ____.13(b)(1)(iii).

rule, like the proposal, also clarifies that if the banking entity or an affiliate sponsors or serves, directly or indirectly, as the investment manager, investment adviser, commodity pool operator, or commodity trading advisor to a covered fund, then the banking entity or affiliate will be deemed for purposes of the marketing restriction to participate in any offer or sale by the covered fund of ownership interests in the covered fund.[603] This revision adopts existing staff guidance addressing this issue.[604] Several commenters supported this clarification.[605] Some commenters argued that this clarification appropriately excludes from the marketing restriction those activities where the risk occurs and remains outside of the United States and reflects the intended extraterritorial limitations of the section 13 of the BHC Act.[606] In addition, commenters stated that codifying the previously issued staff guidance will provide greater clarity and certainty for non-U.S. banking entities making investments in third party funds (*i.e.,* covered funds that the banking entity does not advise or organize and offer pursuant to § ____.11(a) or (b) of the final rule) and will enable long-term strategies in reliance on this provision.[607]

The agencies are adopting this clarification as proposed to formally incorporate the existing staff guidance. As staff noted in the previous staff guidance, the marketing restriction constrains the foreign banking entity in connection with its own activities with respect to covered funds rather than the activities of unaffiliated third parties.[608] This ensures that the foreign banking entity seeking to rely on the foreign fund exemption does not engage in an offering of ownership interests that targets residents of the United States. This clarification limits the extraterritorial application of section 13 to foreign banking entities while seeking to ensure that the risks of covered fund investments by foreign banking entities occur and remain solely outside of the United States. If the marketing restriction were applied to the activities of third parties, such as the sponsor of a third-party covered fund (rather than the foreign banking entity investing in a third-party covered fund), the foreign fund exemption may not be available in certain circumstances even though the risks and activities of a foreign banking entity with respect to its investment in the covered fund are solely outside the United States.

One commenter asked the agencies to clarify that the requirement that the banking entity (including the relevant personnel) that makes the decision ''to acquire or retain the ownership interest or act as sponsor to the covered fund'' must not be located in the United States does not prohibit non-U.S. investment funds from utilizing the expertise of U.S. investment advisers under delegation agreements.[609] This commenter noted that a foreign investment fund may appoint a qualified U.S. investment adviser for providing investment management or investment advisory services under delegation but that the ultimate responsibility for the investment decisions and compliance with statutory and contractual investment limits remains with the foreign management company that manages the foreign investment fund. As stated in the preamble to the 2013 rule, the foreign fund exemption permits the U.S. personnel and operations of a foreign banking entity to act as investment adviser to a covered fund in certain circumstances. For example, the U.S. personnel of a foreign banking entity may provide investment advice and recommend investment selections to the manager or general partner of a covered fund so long as the investment advisory activity in the United States does not result in U.S. personnel participating in the control of the covered fund or offering or selling an ownership interest to a resident of the United States.[610] Consistent with the foreign trading exemption, as discussed above,[611] the agencies also are confirming that under the final rule, the foreign fund exemption does not preclude a foreign banking entity from engaging a non-affiliated U.S. investment adviser as long as the actions and decisions of the banking entity as principal occur outside of the United States. The agencies intend to address and request further comment on additional covered fund issues in a future proposed rulemaking.

4. Section ____.14: Limitations on Relationships With a Covered Fund

a. Relationships With a Covered Fund

Section 13(f) of the BHC Act provides that, with limited exceptions, no banking entity that serves, directly or indirectly, as the investment manager, investment adviser, or sponsor to a hedge fund or private equity fund, or that organizes and offers a hedge fund or private equity fund pursuant to section 13(d)(1)(G), and no affiliate of such entity, may enter into a transaction with the fund, or with any other hedge fund or private equity fund that is controlled by such fund, that would be a ''covered transaction,'' as defined in section 23A of the Federal Reserve Act, as if such banking entity and the affiliate thereof were a member bank and the hedge fund or private equity fund were an affiliate thereof.[612] The 2013 rule includes this prohibition as well.[613] The proposal included a request for comment regarding the restrictions in section 13(f) of the BHC Act and § ____.14 of the 2013 rule. As with the other covered fund issues for which no specific rule text was proposed, the agencies continue to consider the prohibition in section 13(f) of the BHC Act and intend to issue a separate proposed rulemaking that addresses this issue.

b. Prime Brokerage Transactions

Section 13(f) of the BHC Act provides an exemption from the prohibition on covered transactions with a hedge fund or private equity fund for any prime brokerage transaction with a hedge fund or private equity fund in which a hedge fund or private equity fund managed, sponsored, or advised by a banking entity has taken an ownership interest (a second-tier fund).[614] The statute by its terms permits a banking entity with a relationship to a hedge fund or private equity fund described in section 13(f) of the BHC Act to engage in prime brokerage transactions (that are covered transactions) only with second-tier funds and does not extend to hedge funds or private equity funds more generally.[615] Under the statute, the exemption for prime brokerage transactions is available only so long as certain enumerated conditions are satisfied.[616] The 2013 rule included this exemption as well and similarly required satisfaction of certain enumerated conditions in order for a banking entity to engage in permissible prime brokerage transactions.[617] The

[603] *See* proposal § ____.13(b)(3).

[604] *See supra* note 59, FAQ 13.

[605] *See, e.g.,* AIC; BPI; BVI; IIB; and EBF.

[606] *See, e.g.,* EBF and IIB.

[607] *See, e.g.,* AIC; BPI; and BVI.

[608] *See supra* note 59, FAQ 13.

[609] *See* BVI.

[610] 79 FR at 5741.

[611] *See supra* Part IV.B.4.

[612] *See* U.S.C. 1851(f)(1).

[613] *See* final rule § ____.14(a)(1).

[614] *See* U.S.C. 1851(f)(3).

[615] Neither the statute nor the proposal limits covered transactions between a banking entity and a covered fund for which the banking entity does not serve as investment manager, investment adviser, or sponsor (as defined in section 13 of the BHC Act) or have an interest in reliance on section 13(d)(1)(G) of the BHC Act. Similarly, the final rule does not limit such covered transactions.

[616] *See* 12 U.S.C. 1851(f)(3).

[617] *See* final rule § ____.14(a)(2)(ii).

2013 rule's conditions are that (i) the banking entity is in compliance with each of the limitations set forth in § ____.11 of the 2013 rule with respect to a covered fund organized and offered by the banking entity or any of its affiliates; (ii) the CEO (or equivalent officer) of the banking entity certifies in writing annually that the banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests; and (iii) the Board has not determined that such transaction is inconsistent with the safe and sound operation and condition of the banking entity.

The proposal retained each of the 2013 rule's conditions for the prime brokerage exemption described above, including the requirement that certification be made to the appropriate agency for the banking entity.[618] Staffs of the agencies previously issued guidance explaining when a banking entity was required to provide this certification during the conformance period.[619] The proposal incorporated this guidance into the rule text by requiring banking entities to provide the CEO certification annually no later than March 31 of the relevant year.[620] This change was intended to provide banking entities with certainty about when the required certification must be provided to the appropriate agency in order to comply with the prime brokerage exemption. As under the 2013 rule, under the proposal, the CEO would have a duty to update the certification if the information in the certification materially changes at any time during the year when he or she becomes aware of the material change.[621]

One commenter recommended that the agencies expressly state that the CEO certification for purposes of the prime brokerage exemption is based on a reasonable review by the CEO and is made based on the knowledge and reasonable belief of the CEO.[622] That commenter also requested that the agencies clarify that the term ''prime brokerage transaction'' includes transactions and services commonly provided in connection with prime brokerage transactions, as described under the 2013 rule, including: (1) Lending and borrowing of financial assets, (2) provision of secured financing collateralized by financial assets, (3) repurchase and reverse repurchase of financial assets, (4) derivatives, (5) clearance and settlement of transactions, (6) ''give-up'' agreements, and (7) purchase and sale of financial assets from inventory.[623] Similarly, another commenter requested that the agencies clarify that the term ''prime brokerage transaction'' applies to any transaction provided in connection with custody, clearance and settlement, securities borrowing or lending services, trade execution, financing, or data, operational, and administrative support regardless of which business line within the banking entity conducts the business.[624] The same commenter suggested that any prime brokerage transaction with a second-tier covered fund should be presumed to comply with section ____.14 of the rule and the prime brokerage exemption as long as it is executed in compliance with the requirements of Section 23B of the Federal Reserve Act.[625] In addition, one commenter recommended limiting the prime brokerage exemption by, for instance, excluding financing and securities lending and borrowing from the prime brokerage exemption.[626]

The final rule adopts the proposed revision to the prime brokerage exemption with no changes. The agencies believe that codifying a deadline for CEO certification with respect to prime brokerage transactions will provide banking entities with greater certainty and facilitate supervision and review of the prime brokerage exemption. With respect to the other issues raised by commenters regarding the prime brokerage exemption in section 13(f) of the BHC Act, the agencies continue to consider these issues and intend to issue a separate proposed rulemaking that specifically addresses these issues.

D. Subpart D—Compliance Program Requirement; Violations

1. Section ____.20: Program for Compliance; Reporting

Section ____.20 of the 2013 rule contains compliance program and metrics collection and reporting requirements. The 2013 rule was intended to focus the most significant compliance obligations on the largest and most complex organizations, while minimizing the economic impact on small banking entities.[627] To this end, the 2013 rule included a simplified compliance program for small banking entities and banking entities that did not engage in extensive trading activity.[628] However, as the agencies noted in the proposal, public feedback has indicated that even determining whether a banking entity is eligible for the simplified compliance program could require significant analysis for small banking entities. In addition, certain traditional banking activities of small banks fall within the scope of the proprietary trading and covered fund prohibitions and exemptions, making banks engaging in these activities ineligible for the simplified compliance program. As the agencies noted in the proposal, public feedback has also indicated that the compliance program requirements are unduly burdensome for larger banking entities that must implement the rule's enhanced compliance program, metrics, and CEO attestation requirements. Accordingly, the agencies proposed to revise the compliance program requirements to allow greater flexibility for banking entities in integrating the Volcker compliance and exemption requirements into existing compliance programs and to focus the requirements on the banking entities with the most significant and complex activities.

Specifically, the agencies proposed applying the compliance program requirement to banking entities as follows:

- Banking entities with significant trading assets and liabilities. Banking entities with significant trading assets and liabilities would have been subject to the six-pillar compliance program requirement (§ ____.20(b) of the 2013 rule), the metrics reporting requirements (§ ____.20(d) of the 2013 rule),[629] the covered fund documentation requirements (§ ____.20(e) of the 2013 rule), and the CEO attestation

[618] *See* 83 FR at 33486–87.

[619] *See supra* note 59, FAQ 18.

[620] *See* 83 FR at 33487.

[621] This duty to update the certification is required as a condition of the statutory exemption. *See* 12 U.S.C. 1851(f)(3)(A)(ii).

[622] *See* SIFMA.

[623] *See id.*

[624] *See* ABA.

[625] *See id.*

[626] *See* Occupy the SEC.

[627] *See* 79 FR 5753.

[628] Banking entities did not have any compliance program obligations under the 2013 rule if they do not engage in any covered activities other than trading in certain government, agency, State or municipal obligations. § ____20(f)(1). Additionally, banking entities with $10 billion or less in total consolidated assets could satisfy the compliance program requirements under the 2013 rule by including appropriate references to the requirements of section 13 of the BHC Act and the implementing regulations in their existing policies and procedures. § ____.20(f)(2).

[629] As discussed below, the proposal would have amended the Appendix A metrics requirements to reduce compliance-related inefficiencies while allowing for the collection of data to permit the agencies to better monitor compliance with section 13 of the BHC Act. In addition, the proposal would have eliminated Appendix B of the 2013 rule, which would have resulted in Appendix A being re-designated as the ''Appendix.''

requirement (Appendix B of the 2013 rule).[630]

- Banking entities with moderate trading assets and liabilities. Banking entities with moderate trading assets and liabilities would have been required to establish the simplified compliance program (described in § ____.20(f)(2) of the 2013 rule) and comply with the CEO attestation requirement.
- Banking entities with limited trading assets and liabilities. Banking entities with limited trading assets and liabilities would have been presumed to be in compliance with the proposal and would have had no obligation to demonstrate compliance with subpart B and subpart C of the implementing regulations on an ongoing basis. These banking entities would not have been required to demonstrate compliance with the rule unless and until the appropriate agency, based upon a review of the banking entity's activities, determined that the banking entity should have been treated as if it did not have limited trading assets and liabilities.

After reviewing all of the comments to this section, the agencies are finalizing these changes largely as proposed, except for further tailoring application of the CEO attestation requirement to only banking entities with significant trading assets and liabilities and revising the notice and response procedures in subpart D to be more broadly applicable.

a. Compliance Program Requirements for Banking Entities With Significant Trading Assets and Liabilities

i. Section 20(b)—Six-Pillar Compliance Program

Section ____.20(b) of the 2013 rule specifies six elements that each compliance program required under that section must at a minimum contain.

The six elements specified in § ____.20(b) are:

- Written policies and procedures reasonably designed to document, describe, monitor and limit trading activities and covered fund activities and investments conducted by the banking entity to ensure that all activities and investments that are subject to section 13 of the BHC Act and the rule comply with section 13 of the BHC Act and the 2013 rule;
- A system of internal controls reasonably designed to monitor compliance with section 13 of the BHC Act and the rule and to prevent the occurrence of activities or investments that are prohibited by section 13 of the BHC Act and the 2013 rule;
- A management framework that clearly delineates responsibility and accountability for compliance with section 13 of the BHC Act and the 2013 rule and includes appropriate management review of trading limits, strategies, hedging activities, investments, incentive compensation and other matters identified in the rule or by management as requiring attention;
- Independent testing and audit of the effectiveness of the compliance program conducted periodically by qualified personnel of the banking entity or by a qualified outside party;
- Training for trading personnel and managers, as well as other appropriate personnel, to effectively implement and enforce the compliance program; and
- Records sufficient to demonstrate compliance with section 13 of the BHC Act and the 2013 rule, which a banking entity must promptly provide to the relevant agency upon request and retain for a period of no less than 5 years.

Under the 2013 rule, these six elements have to be part of the required compliance program of each banking entity with total consolidated assets greater than $10 billion that engages in covered trading activities and investments subject to section 13 of the BHC Act and the implementing regulations (excluding trading permitted under § ____.6(a) of the 2013 rule).

The agencies proposed further tailoring the compliance program requirements to make the scale of compliance activity required by the rule commensurate with a banking entity's size and level of trading activity. Specifically, the proposal would have applied the six-pillar compliance program requirements to banking entities with significant trading assets and liabilities and would have afforded flexibility to integrate the § ____.20 compliance program requirements into other compliance programs of the banking entity. The proposal also would have eliminated the enhanced compliance program requirements found in Appendix B of the 2013 rule,[631] except for the CEO attestation requirement discussed below. The proposal also would have revised the covered fund documentation requirements in § ____.20(e), which applied to all banking entities with greater than $10 billion in total consolidated assets under the 2013 rule, to only apply to firms with significant trading assets and liabilities.

Several commenters expressed support for the elimination of the enhanced compliance program requirements in Appendix B of the 2013 rule.[632] One commenter requested that the agencies provide greater discretion to banking entities with significant trading assets and liabilities to tailor their compliance programs to the size and complexity of their activities and structure of their business.[633] A few commenters opposed the elimination of Appendix B of the 2013 rule.[634] One asserted that firms have already made investments in their compliance programs, so there was no justification for the change.[635] Another commenter argued that the remaining controls are not sufficient to ensure compliance with the rule because they lack specificity.[636] This commenter also asserted that merging the Volcker Rule requirements with the safety and soundness compliance framework would be problematic as the Volcker Rule considers market supply and demand dynamics while the safety and soundness compliance framework generally only considers risks.[637] The concern was that a combined program might not adequately consider the activities restrictions of the Volcker Rule.

The agencies are adopting the six-pillar compliance program requirements and retaining the covered fund

[630] Although the proposal would have eliminated Appendix B, as noted above, it would have continued to apply a modified version of the CEO attestation to banking entities without limited trading assets and liabilities.

[631] The enhanced minimum standards in Appendix B of the 2013 rule required that the firm's compliance program: (1) Be reasonably designed to identify, document, monitor, and report the trading and covered fund activities and investments of the banking entity; identify, monitor and promptly address the risks of these activities and investments and potential areas of noncompliance; and prevent activities or investments prohibited by, or that do not comply with, section 13 of the BHC Act and the 2013 rule; (2) establish and enforce appropriate limits on the activities and investments of the banking entity, including limits on the size, scope, complexity, and risks of the individual activities or investments consistent with the requirements of section 13 of the BHC Act and the 2013 rule; (3) subject the effectiveness of the compliance program to periodic independent review and testing, and ensure that the entity's internal audit, corporate compliance and internal control functions involved in review and testing are effective and independent; (4) make senior management, and others as appropriate, accountable for the effective implementation of the compliance program, and ensure that the board of directors and CEO (or equivalent) of the banking entity review the effectiveness of the compliance program; and (5) facilitate supervision and examination by the agencies of the banking entity's trading and covered fund activities and investments.

[632] *See, e.g.,* Insurance Coalition; Real Estate Associations; CREFC; Credit Suisse; JBA; FSF; and ABA.

[633] *See* Credit Suisse.

[634] *See, e.g.,* Bean; Data Boiler; and AFR.

[635] *See* Bean.

[636] *See* AFR.

[637] *Id.*

documentation requirements for banking entities with significant trading assets and liabilities as proposed. The agencies continue to believe that these banking entities are engaged in activities at a scale that warrants the costs of establishing and maintaining the detailed and comprehensive compliance program elements described in §§ ____.20(b) and ____.20(e) of the rule. Accordingly, the agencies believe it is appropriate to require banking entities with significant trading assets and liabilities to maintain a six-pillar compliance program to ensure that banking entities' activities are conducted in compliance with section 13 of the BHC Act and the implementing regulations. Based on experience with the six-pillar compliance program requirements under the 2013 rule, the agencies believe that such requirements are appropriate and effective for firms with significant trading assets and liabilities; these standards impose certain minimum standards, but permit the banking entity flexibility to reasonably design the program in light of the banking entity's activities. The agencies also believe that the prescribed six-pillar compliance requirements are consistent with the standards banking entities use in their traditional risk management and compliance processes.

The agencies believe that banking entities should have discretion to tailor their compliance programs to the structure and activities of their organizations. The flexibility to build on compliance programs that already exist at banking entities, including internal limits, risk management systems, board-level governance protocols, and the level at which compliance is monitored, may reduce the costs and complexity of compliance while also enabling a robust compliance mechanism for the final rule.

The agencies therefore believe that removal of the specific, enhanced minimum standards in Appendix B will afford a banking entity considerable flexibility to satisfy the elements of § ____.20 in a manner that it determines to be most appropriate given its existing compliance regimes, organizational structure, and activities. Allowing banking entities the flexibility to integrate Volcker Rule compliance requirements into existing compliance programs should increase the effectiveness of the § ____.20 requirements by eliminating duplicative governance and oversight structures arising from the Appendix B requirement for a stand-alone compliance program.

ii. CEO Attestation Requirement

The 2013 rule included a requirement in its Appendix B that a banking entity's CEO must review and annually attest in writing to the appropriate agency that the banking entity has in place processes to establish, maintain, enforce, review, test, and modify the compliance program established pursuant to Appendix B and § ____.20 of the 2013 rule in a manner reasonably designed to achieve compliance with section 13 of the BHC Act and the implementing regulations.

Under the proposal, Appendix B would have been eliminated, and a modified CEO attestation requirement would have applied to banking entities with significant trading assets and liabilities or moderate trading assets and liabilities. The agencies believed that, while the revisions to the compliance program requirements under the proposal generally would simplify the compliance program requirements, this simplification should be balanced against the requirement for all banking entities to maintain compliance with section 13 of the BHC Act and the implementing regulations. Accordingly, the agencies believed that applying the CEO attestation requirement to banking entities with meaningful trading activities would ensure that the compliance programs established by these banking entities pursuant to § ____.20(b) or § ____.20(f)(2) of the proposal would be reasonably designed to achieve compliance with section 13 of the BHC Act and the implementing regulations as proposed. The agencies proposed limiting the CEO attestation requirement to banking entities with moderate trading assets and liabilities or significant trading assets and liabilities because, under the proposal, banking entities with limited trading assets and liabilities would have been subject to a rebuttable presumption of compliance. Thus, the agencies did not believe it necessary to require a CEO attestation for banking entities with limited trading assets and liabilities as those banking entities would not be subject to the express requirement to maintain a compliance program pursuant to § ____.20 under the proposal. Further, the agencies proposed retaining the 2013 rule's language concerning how the CEO attestation requirement applies to the U.S. operations of a foreign banking entity. This language states that, in the case of the U.S. operations of a foreign banking entity, including a U.S. branch or agency of a foreign banking entity, the attestation may be provided for the entire U.S. operations of the foreign banking entity by the senior management officer of the U.S. operations of the foreign banking entity who is located in the United States.

Several commenters expressed support for the CEO attestation requirement and recommended that the agencies make no changes to the requirement or apply it to all banking entities.[638] Other commenters believed that the CEO attestation requirement should not apply to banking entities with moderate trading assets and liabilities,[639] as requiring the development of costly and burdensome internal compliance efforts would not be consistent with the activities or risks of such firms.[640] One commenter argued that the CEO attestation requirement duplicates existing quarterly reporting process,[641] and another commenter asserted that imposing such a requirement for firms with moderate trading assets and liabilities would negate the tailoring the agencies proposed for those banking entities.[642] One commenter urged the agencies to limit the application of the compliance program and reporting requirements to only the U.S. operations of foreign banking entities.[643] Other requests for modification included streamlining the CEO attestation requirement,[644] adding a knowledge qualifier,[645] and limiting the scope to only U.S. operations.[646] A few commenters requested that the CEO attestation be completely eliminated.[647]

After reviewing the comments, the agencies have decided to retain the CEO attestation requirement but only for banking entities with significant trading assets and liabilities. The agencies continue to believe that incorporating the CEO attestation requirement (which was previously in Appendix B of the 2013 rule) into § ____.20(c) will help to ensure that the compliance program established pursuant to that section is reasonably designed to achieve compliance with section 13 of the BHC Act and the implementing regulations.

However, the agencies have decided not to apply the CEO attestation requirement to banking entities without significant trading assets and liabilities. Such banking entities will still need to comply with section 13 of the BHC Act and the implementing regulations;

[638] *See, e.g.,* AFR; Merkley; Better Markets; and Data Boiler.

[639] *See, e.g.,* Capital One et al.; ABA; Arvest; BB&T; State Street; BPI; and IIB.

[640] *See* Capital One et al.

[641] *See* BOK.

[642] *See* Capital One et al.

[643] *See* IIB.

[644] *See, e.g.,* ABA and JBA.

[645] *See, e.g.,* ABA and FSF.

[646] *See* JBA.

[647] *See* BOK and Capital One et al.

however, they will not need to provide CEO attestations. This means that the CEO attestation requirement will not be expanded to cover banking entities that did not need to provide CEO attestations under the 2013 rule.[648] The agencies believe that requiring a CEO attestation from banking entities with limited or moderate trading assets and liabilities would result in additional costs and burdens that would not be commensurate with the type of activities or risks of these firms.

b. Compliance Program Requirements for Banking Entities With Moderate Trading Assets and Liabilities

The 2013 rule provided that a banking entity with total consolidated assets of $10 billion or less as measured on December 31 of the previous two years that engages in covered activities or investments pursuant to subpart B or subpart C of the 2013 rule (other than trading activities permitted under § ____.6(a) of the 2013 rule) may satisfy the compliance program requirements by including in its existing compliance policies and procedures appropriate references to the requirements of section 13 of the BHC Act and subpart D of the implementing regulations and adjustments as appropriate given the activities, size, scope, and complexity of the banking entity.[649]

The agencies proposed extending the availability of this simplified compliance program to banking entities with moderate trading assets and liabilities. The agencies believed that streamlining the compliance program requirements for banking entities with moderate trading assets and liabilities would be appropriate because the scale and nature of the activities and investments in which these banking entities are engaged may not justify the additional costs associated with establishing the compliance program elements under §§ ____.20(b) and (e) of the 2013 rule. Such activities may be appropriately managed through an appropriately tailored simplified compliance program. The agencies noted that banking entities with moderate trading assets and liabilities would be able to incorporate their simplified compliance program into existing compliance policies and procedures and tailor their compliance programs to the size and nature of their activities, consistent with the approach for banking entities with significant trading assets and liabilities.

Other commenters expressed support for a tailored compliance program for banking entities with moderate trading assets and liabilities.[650] The agencies are adopting the compliance program requirements, as proposed, for banking entities with moderate trading assets and liabilities, for the aforementioned reasons. Thus, a banking entity with moderate trading assets and liabilities qualifies for the simplified compliance program under § ____.20(f)(2) of the final rule.

c. Compliance Program Requirements for Banking Entities With Limited Trading Assets and Liabilities

Under the proposal, a banking entity with limited trading assets and liabilities would have been presumed to be in compliance with the rule. Banking entities with limited trading assets and liabilities would have had no obligation to demonstrate compliance with subpart B and subpart C of the implementing regulations on an ongoing basis, given the limited scale of their trading operations. The agencies believed, based on experience implementing and supervising compliance with the 2013 rule, that these banking entities generally engage in minimal trading and investment activities subject to section 13 of the BHC Act. Thus, the agencies believed that the limited trading assets and liabilities of the banking entities qualifying for the presumption of compliance would be unlikely to warrant the costs of establishing a compliance program under § ____.20 of the 2013 rule.

Under the proposed approach, the agencies would not have expected a banking entity with limited trading assets and liabilities that qualified for the presumption of compliance to demonstrate compliance with the proposal on an ongoing basis in conjunction with the agencies' normal supervisory and examination processes. However, the appropriate agency would have been able to exercise its authority to treat the banking entity as if it did not have limited trading assets and liabilities if, upon review of the banking entity's activities, the relevant agency determined that the banking entity engaged in proprietary trading or covered fund activities that were otherwise prohibited under subpart B or subpart C. A banking entity would have been expected to remediate any impermissible activity upon being notified of such determination by the agency within a period of time deemed appropriate by the agency.

In addition, irrespective of whether a banking entity had engaged in activities in violation of subpart B or C, the relevant agency would have retained its authority to require a banking entity to apply the compliance program requirements that would otherwise apply if the banking entity had significant or moderate trading assets and liabilities if the relevant agency determined that the size or complexity of the banking entity's trading or investment activities, or the risk of evasion, did not warrant a presumption of compliance.

One commenter expressed support for the rebuttable presumption of compliance for banking entities with limited trading assets and liabilities.[651] Another commenter suggested completely exempting banking entities with limited trading assets and liabilities from section 13 of the BHC Act.[652] One commenter requested that the evidence that an agency would require in response to its attempt to rebut a presumption should not be greater than what is required of the banking entity under the presumption.[653] Another commenter recommended that the agencies treat inadvertent violations of the rule as supervisory matters and not as violations.[654]

The final rule adopts the compliance program requirements for banking entities with limited trading assets and liabilities as proposed. The agencies note that the removal of the standard compliance program requirements in § ____.20 for banking entities with limited trading assets and liabilities does not relieve those banking entities of the obligation to comply with the prohibitions and other requirements of the permitted trading activity exemptions, to the extent that the banking entity engages in such activities, including RENTD requirements for permitted underwriting and market making, under the final rule. The agencies believe the presumption of compliance for banking entities with limited trading assets and liabilities will allow flexibility for these banking entities to take appropriate actions, tailored to the individual activities in which the banking entities engage, to comply with the rule. Such

[648] The 2013 rule applied the CEO attestation requirement to all banking entities with total consolidated assets of $50 billion or more (or, in the case of a foreign banking entity, total U.S. assets of $50 billion or more). By applying the CEO attestation requirement to banking entities with moderate trading assets and liabilities, the proposal would have expanded its applicability to certain banking entities with less than $50 billion in total U.S. assets that were not subject to the requirement under the 2013 rule.

[649] 2013 rule § ____.20(f)(2).

[650] *See, e.g.,* BB&T and JBA.

[651] *See* B&F.

[652] *See* JBA.

[653] *See* SIFMA.

[654] *See* ABA.

actions may include, for example, integrating the requirements for permitted trading activities under the exemptions in § ____.4, ____.5, and ____.6 into existing internal policies and procedures (to the extent the banking entity engages in such activities), or taking other steps to satisfy the criteria to engage in such activities under the final rule. Regarding one commenter's proposal that the agencies completely exempt banking entities with limited trading activities, the agencies note that section 13 of the BHC Act does not give the agencies authority to completely exempt banking entities from the requirements of the Volcker Rule.

d. Notice and Response Procedures

The proposed rule included notice and response procedures that an agency would follow when determining whether to treat a banking entity with limited trading assets and liabilities as if it did not have limited trading assets and liabilities.[655] The notice and response procedures required the relevant agency to provide a written explanation of its determination and allowed the banking entity the opportunity to respond to the agency with any matters that the banking entity would have the agency consider in reaching its determination. The response procedures would have required the banking entity to respond within 30 days unless the agency extended the time period for good cause or if the agency shortened the time period either with the consent of the banking entity or because the conditions or activities of the banking entity so required. Failure to respond within the applicable timeframe would have constituted a waiver of objection to the agency's determination. After the close of the response period, the agency would have decided, based on a review of the banking entity's response and other information concerning the banking entity, whether to maintain the agency's determination and would have notified the banking entity of its decision in writing. These notice and response procedures were similar, but not identical to, notice and response procedures found elsewhere in the proposed rule.[656]

One commenter suggested that there should be a consistent notice and response process regarding all presumptions in the final rule.[657] The agencies agree and have modified the notice and response procedures in subpart D to apply more broadly to several types of determinations under the final rule, including determinations and rebuttals made under §§ ____.3, ____.4, and ____.20.[658] This change will provide consistency and enhance transparency with respect to the processes that an agency will follow for certain determinations throughout the final rule.

E. Subpart E—Metrics: Appendix to Part [•]—Reporting and Recordkeeping Requirements

Under the 2013 rule, a banking entity with substantial trading activity[659] must furnish the following quantitative measurements for each of its trading desks engaged in covered trading activity, calculated in accordance with Appendix A:

- Risk and position limits and usage;
- Risk factor sensitivities;
- Value-at-risk and stressed VaR;
- Comprehensive profit and loss attribution;
- Inventory turnover;
- Inventory aging; and
- Customer-facing trade ratio.

The proposal explained that, based on the agencies' evaluation of the effectiveness of the metrics data in monitoring covered trading activities for compliance with section 13 of the BHC Act and the associated reporting costs,[660] the proposed rule would have amended Appendix A requirements to reduce compliance-related inefficiencies while allowing for the collection of data to permit the agencies to better monitor compliance with section 13 of the BHC Act.[661] Specifically, the proposed rule would have made the following modifications to the reporting requirements in Appendix A:

- Limit the applicability of certain metrics only to market making and underwriting desks.
- Replace the Customer-Facing Trade Ratio with a new Transaction Volumes metric to more precisely cover types of trading desk transactions with counterparties.
- Replace Inventory Turnover with a new Positions metric, which measures the value of all securities and derivatives positions.
- Remove the requirement to separately report values that can be easily calculated from other reported quantitative measurements.
- Streamline and make consistent value calculations for different product types, using both notional value and market value to facilitate better comparison of metrics across trading desks and banking entities.
- Eliminate inventory aging data for derivatives because aging, as applied to derivatives, does not appear to provide a meaningful indicator of potential impermissible trading activity or excessive risk-taking.
- Require banking entities to provide qualitative information specifying for each trading desk the types of financial instruments traded, the types of covered trading activity the desk conducts, and the legal entities into which the trading desk books trades.
- Require a Narrative Statement describing changes in calculation methods, trading desk structure, or trading desk strategies.
- Remove the paragraphs labeled ''General Calculation Guidance'' from the regulation. The Instructions generally would provide calculation guidance.[662]
- Remove the requirement that banking entities establish and report limits on Stressed Value-at-Risk at the trading desk-level because trading desks do not typically use such limits to manage and control risk-taking.
- Require banking entities to provide descriptive information about their reported metrics, including information uniquely identifying and describing

[655] *See* proposed rule § ____.20(g)(2)(ii).

[656] *See* proposed rule §§ ____.3(c), ____.3(g)(2), ____.4(a)(8)(iv), ____.4(b)(6)(iv).

[657] *See* IIB.

[658] *See* final rule § ____.20(i).

[659] Appendix A of the 2013 rule applies to U.S. banking entities with trading assets and liabilities the average gross sum of which equals or exceeds $10 billion on a worldwide consolidated basis over the previous four calendar quarters (excluding trading assets and liabilities involving obligations of or guaranteed by the United States or any agency of the United States), and to foreign banking entities with combined U.S. trading assets and liabilities the average gross sum of which equals or exceeds $10 billion over the previous four calendar quarters (excluding trading assets and liabilities involving obligations of or guaranteed by the United States or any agency of the United States). 2013 rule § ____.20(d)(1).

[660] *See* 79 FR at 5772.

[661] As previously noted in the section entitled ''Enhanced Minimum Standards for Compliance Programs,'' the Agencies are proposing to eliminate Appendix B of the 2013 rule. Current Appendix A is therefore re-designated as the ''Appendix'' in the final rule.

[662] The Instructions will be available on each agency's respective website at the addresses specified in the Paperwork Reduction Act section of this **SUPPLEMENTARY INFORMATION**. For the SEC and CFTC, this document represents the views of SEC staff and CFTC staff; neither Commission has approved nor disapproved them. The Instructions are not a rule, regulation, or statement of the SEC or the CFTC; and like all SEC or CFTC staff guidance, it has no legal force or effect, does not alter or amend applicable law, and creates no new or additional SEC or CFTC obligations for any person. Consistent with changes elsewhere in the final rule and with the Federal banking agencies' Interagency Statement Clarifying the Role of Supervisory Guidance (Sept. 11, 2018; *https://www.federalreserve.gov/supervisionreg/srletters/sr1805.htm, https://www.occ.gov/news-issuances/news-releases/2018/nr-ia-2018-97a.pdf, https://www.fdic.gov/news/news/financial/2018/fil18049.html*), the agencies are removing references to guidance and expectations from the regulatory text of the metrics reporting requirements.

certain risk measurements and information identifying the relationships of these measurements within a trading desk and across trading desks.

• Require electronic submission of the Trading Desk Information, Quantitative Measurements Identifying Information, and each applicable quantitative measurement in accordance with the XML Schema specified and published on each agency's website.[663]

Several commenters objected to the proposed rule's modification of the metrics. Some commenters suggested that the proposed amendments to metrics reporting were inappropriate in light of the lack of public disclosure of previously reported metrics information, and in some cases recommended that the agencies expand metrics reporting requirements.[664] Other commenters recommended that the agencies simplify or eliminate the metrics.[665] As described in detail below, the final rule streamlines the reporting requirements in Appendix A of the 2013 rule and adopts a limited set of the new requirements introduced in the proposal. Among other changes, the final rule entirely eliminates the stressed value-at-risk, risk factor sensitivities, and inventory aging. Taken together, the agencies estimate that the revised metrics in the final rule would result in a 67 percent reduction in the number of data items and approximately 94 percent reduction in the total volume of data, relative to the 2013 rule's reporting requirement. The agencies believe the remaining metrics are generally useful to help firms demonstrate that their covered trading activities are conducted appropriately, and to enable the agencies to identify activities that potentially involve impermissible proprietary trading. Moreover, the agencies believe that these items do not pose a special calculation burden because firms generally already record these values in the regular course of business. The agencies expect that the changes in the final rule will enable banking entities to leverage calculations from their market risk capital programs to meet the requirements for the Volcker Rule quantitative measurements, which will reduce complexity and cost for banking entities, and improve the effectiveness of the final rule.[666] As discussed above, in order to give banking entities a sufficient amount of time to comply with the changes adopted, banking entities will not be required to comply with the final amendments until January 1, 2021 (although banking entities may voluntarily comply, in whole or in part, with the amendments adopted in this release prior to the compliance date, subject to the agencies' completion of necessary technological changes). By providing an extended compliance period, the final amendments also should facilitate firms in integrating these requirements into existing or planned compliance programs.

1. Purpose

Paragraph I.c of Appendix A of the 2013 rule provides that the quantitative measurements that are required to be reported under the rule are not intended to serve as a dispositive tool for identifying permissible or impermissible activities. The proposal would have expanded the qualifying language in paragraph I.c of Appendix A to apply to all of the information required to be reported pursuant to the appendix, rather than only to the quantitative measurements themselves. In addition, the proposed rule would have also removed paragraph I.d. in Appendix A of the 2013 rule, which provides that the agencies would review the metrics data and revise the metrics collection requirements based on that review.

The agencies received no comments on these proposed changes. The final rule adopts the changes, as proposed. The agencies believe that the trading desk information and quantitative measurements identifying information, coupled with the quantitative measurements, should assist the agencies in monitoring compliance. This information will be used to monitor patterns and identify activity that may warrant further review. Additionally, the final rule removes paragraph I.d. Appendix A of the 2013 rule, as the agencies have conducted this preliminary evaluation of the effectiveness of the quantitative measurements collected to date and have adopted modifications based on that review.

2. Definitions

The proposed rule would have clarified the definition of ''covered trading activity'' by adding the phrase ''in its covered trading activity'' to clarify that the term ''covered trading activity,'' as used in the proposed appendix, may include trading conducted under § ____.3(d), ____.6(c), ____.6(d), or ____.6(e) of the proposal.[667] In addition, the proposed rule defined two additional terms for purposes of the appendix, ''applicability'' and ''trading day,'' that were not defined in the 2013 rule. The proposal defined ''applicability'' to clarify when certain metrics are required to be reported for specific trading desks and thus make several metrics applicable only to desks engaged in market making or underwriting. Finally, the proposal defined ''trading day,'' a term used throughout Appendix A of the 2013 rule,[668] to mean a calendar day on which a trading desk is open for trading.

Commenters supported the proposal to define ''applicability'' in order to clarify that certain metrics are only applicable to desks engaged in market making or underwriting.[669] One commenter suggested defining the scope of ''covered trading activity'' to align with activity covered under the Basel Committee's revised standard for market risk capital.[670] While the agencies received no comments on the proposed definition of ''trading day'' in the regulation, several comments expressed serious concerns with the proposed ''trading day'' definition in the 2018 Instructions,[671] specifically requiring banking entities to report metrics for trading days when U.S. markets are closed but non-U.S. locations may be open.[672] These commenters argued that this would impose significant operational costs with no commensurate benefit to the agencies' oversight ability. However, the Agencies feel the definition of trading day is appropriate because the potential for impermissible

[663] The staff-level Technical Specifications Guidance describes the XML Schema. The Technical Specifications Guidance and the XML Schema are available on each agency's respective website at the addresses specified in the Paperwork Reduction Act section of this **SUPPLEMENTARY INFORMATION**.

[664] *See, e.g.,* AFR; Better Markets; Occupy the SEC; Public Citizen; and Volcker Alliance.

[665] *See, e.g.,* ABA; FSF; IIB; New England Council; and SIFMA.

[666] The agencies anticipate the market risk capital calculations and the Volcker Rule quantitative measurements will align particularly closely when the banking agencies adopt a rule implementing the Basel Committee's market risk capital standard in the United States. However, the agencies note that certain anticipated changes resulting from the Basel market risk capital standards may still result in a mismatch between metrics required under the market risk capital rule and the final rule. The agencies are aware of this potential issue and intend to address any such discrepancies at a future date.

[667] The proposed change would clarify that banking entities would have the discretion (but not the obligation) to report metrics with respect to a broader range of activities.

[668] Appendix A of the 2013 rule provides that the calculation period for each quantitative measurement is one trading day, but does not define ''trading day''.

[669] *See, e.g.,* Credit Suisse; FSF; and JBA.

[670] *See* JBA.

[671] The definition in the Instructions require banking entities to calculate each metric for each calendar day on which a trading desk is open for trading, even if the desk is closed for trading in one jurisdiction (for example, due to a national holiday).

[672] *See, e.g.,* ABA; CCMR; FSF; and SIFMA.

trading activity on a desk exists on any day when the desk is open for trading, regardless of which markets are open. The final rule retains the definition.

The agencies believe that the scope of ''covered trading activity'' in the final rule is appropriate, and note that, due to changes in the definition of trading account, the scope of ''covered trading activity'' will align more closely with the scope of activities covered under the Basel Committee's market risk capital standards for certain banking entities. Therefore, the final rule adopts these definitions as proposed.

3. Reporting and Recordkeeping

Paragraph III.a of Appendix A of the 2013 rule required banking entities subject to the appendix to furnish seven quantitative metrics for all trading desks engaged in trading activity conducted pursuant to § ____.4, § ____.5, or § ____ .6(a) (*i.e.,* permitted underwriting, market making, and risk-mitigating hedging activity and trading in certain government obligations).[673]

The proposal would have made several modifications to streamline the reporting requirements in paragraph III.a of Appendix A of the 2013 rule. Specifically, the proposal would have: (1) Replaced the Inventory Turnover and Customer-Facing Trade Ratio metrics with the Positions and Transaction Volumes quantitative measurements, respectively; (2) limited the Inventory Aging metric to only apply to securities[674] and changed the name of the quantitative measurement to the Securities Inventory Aging; (3) added the phrase ''as applicable'' to paragraph III.a in order to limit application of the Positions, Transaction Volumes, and Securities Inventory Aging quantitative measurements to only trading desks that rely on § ____.4(a) or § ____.4(b) to conduct underwriting activity or market making-related activity, respectively; and (4) inserted references in paragraph III.a to the new qualitative information requirements added to the appendix (*i.e.,* Trading Desk Information, Quantitative Measurements Identifying Information, and Narrative Statement requirements).[675]

A number of commenters supported the proposed changes to remove or tailor certain of the metrics provided in Appendix A of the 2013 rule, but opposed the addition of new metrics reporting requirements (*i.e.,* Trading Day definition, Trading Desk Information, Quantitative Measurements Identifying Information, Narrative Statement).[676] These commenters argued that, contrary to the proposal's objective to streamline compliance requirements, the new reporting requirements would significantly increase the overall compliance burden and impose substantial compliance costs on firms.[677] Three commenters argued that the agencies did not provide reasoned cost benefit analysis to justify the inclusion of the new metrics.[678] A few commenters recommended that the agencies should further streamline the current metrics to permit individual supervisors and banking entities to collaborate on determining which metrics are appropriate for that specific institution.[679] One commenter expressed concern that the agencies intended for the newly added metrics to replace onsite supervision and review, as the new qualitative information requirements often duplicate the existing compliance program requirements.[680]

Other commenters opposed all of the proposed revisions to the metrics, with certain limited exceptions (*e.g.,* limiting Inventory Aging to securities).[681] Some of these commenters argued that the agencies should adopt an approach focused on further streamlining the metrics requirements included in Appendix A of the 2013 rule.[682] A few of these commenters argued that the proposed changes to the existing metrics would in effect create entirely new metrics and that the new metrics would not provide new information that cannot be obtained through the existing metrics.[683] Other commenters supported only retaining the Comprehensive Profit and Loss Attribution and Risk Management metrics.[684] Another commenter supported retaining the current requirements, as any revisions would necessitate changes to firms' current systems and thus impose considerable operational burdens and costs.[685] One commenter stressed the inability of the general public to provide informed comment on the proposed changes as the agencies have not publically disclosed any data related to firms' metrics submissions.[686] Another commenter noted that disclosing firms' metrics submissions on an aggregated and/or time-delayed basis would enable the general public to understand the impact of the Volcker Rule.[687] In contrast, other commenters urged the agencies not to publicly disclose the metrics data because the data is confidential supervisory information that could be used by competitors and could create distortions in the capital markets.[688] Another commenter recommended replacing the metrics with a utility platform that would automate and perform trade surveillance in real time.[689]

As described in detail below, the final rule focuses on streamlining the 2013 rule's reporting requirements and only adopts a limited set of the new qualitative requirements introduced in the proposal. The agencies believe the remaining metrics are generally useful tools to help both firms and supervisors identify activities that potentially involve impermissible proprietary trading. Moreover, the agencies believe that these items do not pose a special calculation burden because firms already record these values in the regular course of business.

Finally, although the agencies are not including any changes related to public disclosure of the quantitative measurements in this final rule, the agencies will continue to consider whether some or all of the quantitative measurements should be publicly disclosed, taking into account the need to protect sensitive, confidential information, as well as restrictions on the agencies relating to the disclosure of sensitive, confidential business and supervisory information on a firm-specific basis.

4. Trading Desk Information

The proposed rule added a new paragraph III.b to Appendix A to require

[673] In addition, the 2013 rule permits banking entities to optionally include trading under § ____.3(d), § ____.6(c), § ____.6(d), or § ____.6(e).

[674] Including derivatives or securities that also meet the 2013 rule's definition of a derivative *See infra* Part III.E.2.*i*.v (discussing the Securities Inventory Aging quantitative measurement). The definition of ''security'' and ''derivative'' are set forth in § ____.2 of the 2013 rule. *See* 2013 rule §§ ____.2 (h), (y).

[675] In addition, the proposed rule would have added to paragraph III.a. a requirement that banking entities include file identifying information in each submission to the relevant agency pursuant to Appendix A of the 2013 rule. Specifically, the proposal would have required the file identifying information to include the name of the banking entity, the RSSD ID assigned to the top-tier banking entity by the Board, the reporting period, and the creation date and time.

[676] *See, e.g.,* ABA; CCMR; Credit Suisse; FSF; and Goldman Sachs.

[677] *See, e.g.,* ABA; Credit Suisse; CCMR; and FSF.

[678] *See, e.g.,* CCMR; Public Citizen; and SIFMA.

[679] *See, e.g.,* Goldman Sachs; JBA; and State Street (on leveraging current industry practices for FX).

[680] *See* SIFMA.

[681] *See, e.g.,* Data Boiler; IIB; JBA; SIFMA; and State Street.

[682] *See, e.g.,* IIB; New England Council; SIFMA; and State Street.

[683] *See, e.g.,* IIB and SIFMA.

[684] *See, e.g.,* New England Council and State Street.

[685] *See* JBA.

[686] *See* Public Citizen.

[687] *See* AFR.

[688] *See, e.g.,* SIFMA and IIB.

[689] *See* Data Boiler.

banking entities to report certain descriptive information for each trading desk engaged in covered trading activity, including the trading desk name and identifier, the type of covered activity conducted by the desk, a brief description of the trading desk's general strategy (*i.e.,* the method for conducting authorized trading activities), the types of financial instruments purchased and sold by the trading desk, and the list of legal entities used to book trades including which were the main booking entities. The proposal also would have required firms to indicate for each trading desk whether each calendar date is a trading day or not a trading day and to specify the currency used by a trading desk as well as the conversion rate to U.S. dollars, if applicable.

In general, most commenters opposed requiring banking entities to report any new information outside the scope of the 2013 rule requirements, including qualitative information for each trading desk.[690] These commenters argued that the *de minimis* benefit to the agencies' oversight ability did not justify the significant operational costs associated with the new requirements, in particular identifying the legal entities used as booking entities by the trading desk as well as the financial instruments and other products traded by the desk.[691]

After considering these comments, the final rule retains a modified version of the Trading Desk Information. The final rule eliminates the requirement for each trading desk to identify the financial instruments and other products traded by the desk. The final rule also replaces the requirement to identify the legal entities that serve as booking entities for each trading desk with the simpler requirement that the banking entity's submission for each trading desk list: (1) Each agency receiving the submission for the desk; and (2) the exemptions or exclusions under which the desk conducts trading activity. The exemption/exclusion identification is particularly necessary in light of the fact that some of the quantitative measurements identified below (*i.e.,* the customer-facing activity measurements) are only required for desks operating under the underwriting or market making exemptions. The list of the agencies that have received the submission for a desk should facilitate inter-agency coordination, as generally trading desks encompass multiple legal entities, for which more than one agency may be the primary federal regulator. The agencies believe that this approach appropriately balances the benefit to the agencies and the cost to firms from the new reporting obligations.

5. Quantitative Measurements Identifying Information

The proposed rule added a new paragraph III.c. to Appendix A to require banking entities to prepare and provide five schedules: (i) Risk and Position Limits Information Schedule; (ii) Risk Factor Sensitivities Information Schedule; (iii) Risk Factor Attribution Information Schedule; (iv) Limit/Sensitivity Cross-Reference Schedule; and (v) Risk factor Sensitivity/Attribution Schedule. The proposed schedules would have provided descriptive information on the quantitative measurements on a collective basis for all relevant trading desks. The new proposed Schedules would have required banking entities to provide detailed information regarding each limit and risk factor sensitivity reported in quantitative measurements as well as on the attribution of existing position profit and loss to the risk factor reported in the quantitative measurements. In addition, the new Limit/Sensitivity Cross-Reference Schedule would have required banking entities to cross-reference, by unique identification label, a limit reported in the Risk and Position Limits Information Schedule to any associated risk factor sensitivity reported in the Risk Factor Sensitivities Information Schedule.

Many commenters generally opposed requiring banking entities to report any new information outside the scope of the 2013 rule requirements, including quantitative measurements identifying information.[692] One commenter argued that these new requirements impose undue costs on firms without providing any new supervisory benefit as they duplicate existing requirements in § ____.20, which information the agencies can obtain through the normal supervisory and examination process.[693] This commenter further noted that increasing the scope of the appendix submission may harm the agencies' ability to effectively supervise Volcker compliance, by increasing the supervisory resources necessary to review the data at the detriment of performing normal supervision.

After considering these comments, the final rule retains a modified version of the Quantitative Measurements Identifying Information that eliminates the Risk Factor Sensitivities Information Schedule, the Limit/Sensitivity Cross-Reference Schedule and the Risk-Factor Sensitivity/Attribution Cross-Reference Schedule. Despite the potential benefit to the agencies from having a deeper understanding of the relationship between firms' limits and the risk factor sensitivities, the agencies agree that the proposed requirements could significantly increase firms' reporting burden in a way not commensurate with the potential benefits. The final rule retains the Risk Factor Attribution Information Schedule and a modified version of the Risk and Position Limits Information Schedule that includes identification of the corresponding risk factor attribution for certain limits (''Internal Limits Information Schedule''). While together these schedules add two new reporting elements relative to the 2013 Appendix A (*i.e.,* a description of the limit/risk factor sensitivities and risk factor attribution for certain limits), the agencies generally expect firms to realize a net reduction in reporting burden from the elimination of the duplicative reporting requirements in the current framework. The 2013 rule requires firms report internal limits, including but not limited to risk and position limits, and risk factor sensitivities established for each trading desk on a daily basis. As in practice, firms often use the same limits and risk factors for multiple desks, the 2013 rule results in firms reporting the same limit on a daily basis for multiple desks. These two new schedules reduce reporting burden by allowing firms to submit a comprehensive list of all the internal limits and the risk factor sensitivities that account for a preponderance of the profit or loss for the trading desks. Additionally, the final rule eliminates the requirement to report Risk Factor Sensitivities for each trading desk on a daily basis. Based on the submissions received to date, the agencies expect this change alone will reduce the total volume of data submitted by more than half relative to the 2013 rule.

6. Narrative Statement

The proposed rule would have added a new paragraph III.d. to require banking entities to submit a Narrative Statement in a separate electronic document to the relevant agency that describes any changes in calculation methods used for its quantitative measurements, or the trading desk structure (*e.g.,* adding, terminating, or merging pre-existing desks) or strategies. In addition, in its Narrative Statement, a banking entity, if applicable, would

[690] *See, e.g.,* ABA; Credit Suisse; CCMR; FSF; IIB; JBA; and SIFMA.

[691] *See, e.g.,* ABA; CCMR; and SIFMA.

[692] *See, e.g.,* ABA; CCMR; Credit Suisse; Data Boiler; JBA; and SIFMA.

[693] *See* SIFMA.

have to explain its inability to report a particular quantitative measurement and to provide notice if a trading desk changes its approach to including or excluding products that are not financial instruments in its metrics. The proposed rule would have required that banking entities that do not have any information to report in a Narrative Statement to submit an electronic document stating that the firm does not have any information to report in a Narrative Statement.

Most commenters generally opposed requiring banking entities to report any new information outside the scope of the 2013 rule requirements, including the Narrative Statement.[694] While recognizing that currently banking entities voluntarily provide additional information about their metrics submissions, one commenter argued that requiring the Narrative Statement would impose undue costs on banking entities, as the agencies can already obtain this information through the normal supervisory process.[695]

After considering all comments received, the agencies are not adopting the narrative statement requirement in the final rule. Rather, the final rule retains the provision from the 2013 rule's reporting instructions that permits, but does not require, firms to provide a narrative statement describing any additional information they believe would be helpful to the agencies in identifying material events or changes. Narrative statements may permit the agencies to understand aspects of the metrics without going back to the banking entities to ask questions. While the agencies anticipate that many banking entities will continue to voluntarily provide clarifying information, the agencies agree that the compliance costs associated with requiring a separate document are not commensurate with the potential benefit to the agencies of receiving information in this format from banking entities that do not wish to provide it.

7. Frequency and Method of Required Calculation and Reporting

The 2013 rule established a reporting schedule in § ____.20 that required banking entities with $50 billion or more in trading assets and liabilities to report the information required by Appendix A of the 2013 rule within 10 days of the end of each calendar month. The proposed rule would have extended this reporting schedule for firms with significant trading activities, as defined in the final rule, to be within 20 days of the end of each calendar month.[696]

In general, commenters supported extending the reporting schedule to be within 20 days of the end of each calendar month.[697] Two commenters suggested further extending this to 30 days.[698] Of these, one commenter recommended reducing the frequency from monthly to quarterly in order to better align the metrics reporting with other regulatory reporting regimes.[699]

Under the final rule, metrics filers must submit metrics on a quarterly basis. In addition, the final rule retains the reporting schedule of 30 days after the end of each quarter, consistent with the reporting schedule for quarterly filers under the 2013 rule. Supervisory experience has indicated that this will reduce the incidence of errors and improve the quality of the data in the metrics submissions.

Appendix A of the 2013 rule did not specify a format in which metrics should be reported. To clarify the formatting requirements for the data submissions and to help ensure the quality and consistency of data submissions across banking entities, the proposed rule would have required banking entities to report all the information contained within the proposed appendix in accordance with an XML Schema to be specified and published on the relevant agency's website.[700]

Two commenters opposed transitioning to XML format for reporting due to the costs of changing reporting software to switch formats.[701] One commenter fully supported the use of XML as a standardized format.[702] Another commenter supported XML and estimated the cost of switching formats to be low compared to other costs involved in reporting.[703] Finally, one commenter asserted that reporting in XML could be useful in certain cases but that it was not clear that requiring metrics reporting in XML would be useful. The commenter recommended deferring the decision to adopt the XML until after a final rule is adopted. The commenter stated that the decision of whether to adopt the XML Schema requirement should be subject to separate notice and comment.[704]

The final rule adopts the use of XML for reporting metrics, following the format specified in XML Schema to be posted on the relevant agency's website. The agencies acknowledge that any changes to the metrics will impose some switching costs on banking entities. As a very common standard for data transmission, XML is expected to be a less costly format to employ than a bespoke format. Moreover, the XML Schema allows for clearer specification, which should reduce miscommunication, errors, inconsistencies, and the need for data resubmissions. The agencies believe the benefits of standardization outweigh the one-time switching costs.

8. Recordkeeping

Under paragraph III.c. of Appendix A of the 2013 rule, a banking entity's reported quantitative measurements are subject to the record retention requirements provided in Appendix A. Under the proposed rule, this provision would have been moved to paragraph III.f. and expanded to include the new qualitative information requirements added to the appendix (*i.e.,* Trading Desk Information, Quantitative Measurements Identifying Information, and Narrative Statement requirements). The agencies received no comments on these proposed changes. The final rule's recordkeeping requirement is being adopted largely as proposed.[705]

9. Quantitative Measurements

Section IV of Appendix A of the 2013 rule sets forth the individual quantitative measurements required by the appendix. The proposed rule would have added an ''Applicability'' paragraph to each quantitative measurement to identify the trading desks for which a banking entity would be required to calculate and report a particular metric based on the type of covered trading activity conducted by the desk. The proposed rule also would have removed the ''General Calculation Guidance'' paragraphs in section IV of Appendix A of the 2013 rule for each quantitative measurement, and provided such guidance in the Instructions.

As noted above, commenters generally supported the proposal to define ''applicability'' in order to clarify that certain metrics are only applicable

[694] *See, e.g.,* ABA; CCMR; Credit Suisse; Data Boiler; JBA; and SIFMA.

[695] *See* SIFMA.

[696] *See* § ____.20(d) of the proposal.

[697] *See, e.g.,* FSF and Goldman Sachs.

[698] *See, e.g.,* Credit Suisse and SIFMA.

[699] *See* SIFMA.

[700] To the extent the XML Schema is updated, the version of the XML Schema that must be used by banking entities would be specified on the relevant agency's website. A banking entity must not use an outdated version of the XML Schema to report the Trading Desk Information, Quantitative Measurements Identifying Information, and applicable quantitative measurements to the relevant agency.

[701] *See, e.g.,* Credit Suisse and JBA.

[702] *See* Goldman Sachs.

[703] *See* Data Boiler.

[704] *See* SIFMA.

[705] The recordkeeping requirement in the final rule does not require that banking entities retain a copy of the Narrative Statement.

to desks engaged in market making or underwriting.[706] The agencies' received no comments on providing the metrics calculation guidance in an Instructions document and removing this guidance from the appendix. The metrics are not intended to serve as a dispositive tool for identifying permissible or impermissible activities. Thus, the agencies believe that providing the metrics calculation guidance in the Instructions and not within the regulation is more appropriate.[707] Therefore, the agencies are adopting these changes as proposed.

a. Risk-Management Measurements

i. Internal Limits and Usage

Like the 2013 rule, the proposed rule would have applied the Risk and Position Limits and Usage metric to all trading desks engaged in covered trading activities. Additionally, the proposed rule would have removed references to Stressed Value-at-Risk (Stressed VaR) in the Risk and Position Limits and Usage metric and required banking entities to report the unique identification label for each limit as listed in the Risk and Position Limits Information Schedule, the limit size (distinguishing between the upper bound and lower bound of the limit, where applicable), and the value of usage of the limit.[708]

In general, most commenters supported eliminating requirements to establish limits on Stressed VaR.[709] One commenter did not support this change, as any revisions would necessitate changes to firms' current systems and thus impose considerable operational burdens and costs.[710] Another commenter supported further requiring full reporting of upper and lower bounds of risk and position limits usage.[711]

The final rule largely adopts these changes as proposed. As noted above, the agencies believe requiring firms to submit one consolidated Internal Limits Information Schedule for the entire banking entity's covered trading activity, rather than multiple times in the Risk and Position Limits and Usage metric for different trading desks, will alleviate inefficiencies associated with reporting redundant information and reduce electronic file submission sizes. The unique identification label should allow the agencies to efficiently obtain the descriptive information regarding the limit that is separately reported in the Internal Limits Information Schedule.[712] Recognizing that firms may establish internal limits other than risk and position limits (*e.g.,* inventory aging limits), the final rule adopts an Internal Limits Information Schedule and daily Internal Limits and Usage quantitative metric.

As discussed in more detail below, the final rule removes the metrics for Risk Factor Sensitivities. Accordingly, the final rule also removes the cross reference between Risk and Position Limits and Risk Factor Sensitivities, and the cross-reference between Risk Factor Sensitivities and Profit and Loss Risk Factor Attributions. These cross-references would have provided an essential link between the limits on exposures to risk factors and the factors that are demonstrably important sources of revenue. In place of these two cross-references, the final rule adopts an identifier within the Internal Limits Information Schedule indicating the corresponding Risk Factor Attribution when a desk measures and imposes a limit on exposure to that risk factor. This identifier facilitates the agencies' review of the Internal Limits metric and its relation to gains and losses on the positions measured by that metric.

ii. Risk Factor Sensitivities

Like the 2013 rule, the proposed rule would have applied the Risk Factor Sensitivities metric to all trading desks engaged in covered trading activities. Under the proposal, a banking entity would have to report for each trading desk the unique identification label associated with each risk factor sensitivity of the desk, the magnitude of the change in the risk factor, and the aggregate change in value across all positions of the desk given the change in risk factor.

As discussed above in Quantitative Measurements Identifying Information, to reduce firms' reporting burden the final rule eliminates the Risk Factor Sensitivities quantitative measurement.

iii. Value-at-Risk and Stressed Value-at-Risk

The 2013 rule applies the Value-at-Risk and Stressed Value-at-Risk metric to all trading desks engaged in covered trading activities. The proposed rule would have modified the description of Stressed VaR to align its calculation with that of Value-at-Risk and clarified that Stressed VaR is not required to be reported for trading desks whose covered trading activity is conducted exclusively to hedge products excluded from the definition of financial instrument in § ____.3(d)(2) of the proposal. The proposal would have also revised the definition of Value-at-Risk to provide that Value-at-Risk is the measurement of the risk of future financial loss in the value of a trading desk's aggregated positions at the ninety-nine percent confidence level over a one-day period, based on current market conditions.[713]

In general, a few commenters supported eliminating Stressed VaR, including for non-financial instrument hedging.[714] One commenter did not support this change, as any revisions would necessitate changes to firms' current systems and thus impose considerable operational burdens and costs.[715] One commenter stated that Stressed VaR was not a helpful metric because it bears an attenuated relationship to proprietary trading.[716]

After considering the comments received, the agencies believe that eliminating the Stressed VaR metric altogether will reduce burden without affecting the ability of the agencies to monitor for prohibited proprietary trading. The agencies believe that the other metrics retained or adopted in the final rule provide appropriate data to monitor for prohibited proprietary trading. To avoid duplicative or unnecessary metrics, the final rule eliminates the Stressed VaR metric.

b. Source-of-Revenue Measurements

i. Comprehensive Profit and Loss Attribution

The 2013 rule requires banking entities to calculate and report volatility of comprehensive profit and loss. The proposed rule would have eliminated this requirement as the measurement can be calculated from the profit and loss amounts reported under the Comprehensive Profit and Loss Attribution metric. Additionally, the proposed rule would have required banking entities to provide, for one or more factors that explain the

[706] *See, e.g.,* Credit Suisse; FSF; and JBA.

[707] *See supra* note 662.

[708] If a limit is introduced or discontinued during a calendar month, the banking entity must report this information for each trading day that the trading desk used the limit during the calendar month.

[709] *See, e.g.,* FSF and Data Boiler.

[710] *See* JBA.

[711] *See* Data Boiler.

[712] Such information includes the name of the limit, a description of the limit, the unit of measurement for the limit, the type of limit, and identification of the corresponding risk factor attribution in the particular case that the limit type is a limit on a risk factor sensitivity and profit and loss attribution to the same risk factor is reported.

[713] Banking entities may base their calculations of Value-at-Risk on historical observations consistent with other applicable regulatory requirements relating to the calculation of Value-at-Risk. *See, e.g.,* 12 CFR part 3 subpart F; 12 CFR part 217 subpart F; 12 CFR part 324 subpart F.

[714] *See, e.g.,* FSF and Data Boiler.

[715] *See* JBA.

[716] *See* Goldman Sachs.

preponderance of the profit or loss changes due to risk factor changes, a unique identification label for the factor and the profit or loss due to the factor change. The proposed rule also would have required banking entities to report a unique identification label for the factor so the agencies can efficiently obtain the descriptive information regarding the factor that is separately reported in the Risk Factor Attribution Information Schedule.[717]

In general, commenters did not support requiring firms to attribute profit and loss to specific risk factors.[718] One commenter expressed concern that this could disrupt firms' current infrastructure projects to comply with the Basel Committee's revised market risk capital standards, which also require specific alignment of risk factor attribution and risk factor sensitivity hierarchies.[719] This commenter also noted the limited utility of this information for horizontal comparisons across firms as each banking organization defines these metrics at different levels of granularity. Two commenters supported eliminating the volatility calculation, as proposed.[720]

After considering these comments, the final rule adopts these changes as proposed. Under the final rule, banking entities will no longer be required to report volatility for the Comprehensive Profit and Loss metric. Banking entities will be required to provide certain information regarding the factors that explain the preponderance of the profit or loss changes due to risk factor changes when sub-attributing comprehensive profit and loss from existing positions to specific and other factors.

As in the 2013 rule and the proposal, the final rule requires trading desks to attribute profit and loss into: (i) Profit and loss attributable to a trading desk's existing positions, and (ii) profit and loss attributable to new positions. The final rule retains the category for residual profit and loss,[721] but clarifies that this is a sub-category of profit and loss attributable to existing positions.

c. Customer-Facing Activity Metrics

i. Replacement of Inventory Turnover With Positions Metric

The 2013 rule required banking entities to calculate and report inventory turnover, or the turnover of a trading desk's inventory, over a 30-day, 60-day, and 90-day reporting period. The proposed rule would have replaced the Inventory Turnover metric with the daily data underlying that metric, rather than proposing specific calculation periods. The proposal would have replaced Inventory Turnover with the daily Positions quantitative measurement. As noted in the Supplemental Information to the proposed rule, positions information that is a component of the Inventory Turnover metric would be more useful to the agencies, and is already tracked by banking entities as a component of the Inventory Turnover metric. The proposal would have limited the scope of applicability of the Positions metric to trading desks that rely on § ____.4(a) or § ____.4(b) to conduct underwriting activity or market making-related activity, respectively. As a result, a trading desk that did not rely on § ____.4(a) or § ____.4(b) would not have been subject to the proposed Positions metric.[722]

The proposal would have also required banking entities subject to the appendix to separately report the market value of all long securities positions, the market value of all short securities positions, the market value of all derivatives receivables, the market value of all derivatives payables, the notional value of all derivatives receivables, and the notional value of all derivatives payables.[723] Finally, the proposal also would have clarified that positions reported as ''derivatives'' need not be reported as ''securities,'' thereby clarifying the treatment of certain positions that may have met both definitions. This technical change would have addressed the possibility that a position could have been reported in both the ''securities'' and ''derivatives'' positions, and thus been double-counted.

A few commenters recommended that the agencies eliminate the Positions metric, but retain the inventory turnover metric.[724] These commenters expressed concern that the new ''Positions'' metric would be, in effect, a ''new'' metric that would require reporting banking entities to modify their systems to generate as a standalone metric and noted that this metric could create ''false positives'' due to daily changes in inventory that may be driven by fluctuations in the expectation of customer demand. Other commenters recommended that the agencies eliminate inventory turnover metrics reporting requirements for derivatives, including foreign exchange derivatives.[725] One commenter supported the positions metric, but recommended removing the requirement to report market values for derivative positions—as notional value measures are sufficient to assess the size of a trading desk's derivative inventory.[726]

The final rule adopts the ''Positions'' metric and eliminates the ''Inventory Turnover'' metric consistent with the proposal. The ''Positions'' metric is itself a necessary component firms already must calculate to generate the ''Inventory Turnover'' metric. Therefore, producing the ''Positions'' metric as a standalone figure would not require firms to generate additional data not produced internally today, but will result in a more effective metrics reporting framework. The agencies are aware that all changes to the metrics reporting requirements require changes to the underlying systems required to generate and report metrics to the agencies. However, the Positions metric will allow both the agencies and the firms themselves to analyze firms' trading activities over different time horizons, as appropriate; the Inventory Turnover metric, by contrast, relied on the same underlying positions data as the final rule requires to be reported, but aggregated it in a manner (with 30-day, 60-day, and 90-day rolling averages) that is more complicated than a direct reporting of positions metrics, and is less effective. The final rule differs from the proposal in that it eliminates the requirement to report the notional value of derivatives. Removing the requirement to report notional value of derivative positions will avoid potential complexity arising from using different calculation methods for determining the notional value for different types of derivatives. Additionally, as the definition of financial instrument in section ____.3 lists securities, derivatives and futures as distinct types of financial instruments, the agencies are clarifying that futures positions

[717] Such information includes the name of the risk factor or other factor, a description of the risk factor or other factor, and the change unit of the risk factor or other factor.

[718] *See* SIFMA.

[719] *See* SIFMA.

[720] *See, e.g.,* Goldman Sachs and FSF.

[721] As under the 2013 rule, significant unexplained profit and loss must be escalated for further investigation and analysis under the final rule.

[722] For example, a trading desk that relies solely on § ____.5 to conduct risk-mitigating hedging activity would not have been subject to the Positions metric under the proposed rule.

[723] Under the proposal, banking entities would have been required to report the effective notional value of derivatives receivables and derivatives payables for those derivatives whose stated notional amount is leveraged.

[724] *See, e.g.,* GFMA and SIFMA.

[725] *See, e.g.,* GFMA; Goldman Sachs; and State Street.

[726] *See e.g.,* Credit Suisse.

should be reported as ''derivatives,'' and are not expected to be broken out separately. The agencies are making this technical change to avoid confusion as to whether or how to classify futures for this metric.[727]

ii. Transaction Volumes and the Customer-Facing Trade Ratio

Paragraph IV.c.3. of Appendix A of the 2013 rule requires banking entities to calculate and report a Customer-Facing Trade Ratio comparing transactions involving a counterparty that is a customer of the trading desk to transactions with a counterparty that is not a customer of the desk. Appendix A of the 2013 rule requires the Customer-Facing Trade Ratio to be computed by measuring trades on both a trade count basis and value basis. In addition, Appendix A of the 2013 rule provides that the term ''customer'' for purposes of the Customer-Facing Trade Ratio is defined in the same manner as the terms ''client, customer, and counterparty'' used in § ___.4(b) of the 2013 rule describing the permitted activity exemption for market making-related activities. This metric is required to be calculated on a daily basis for 30-day, 60-day, and 90-day calculation periods.

The proposed rule would have replaced the Customer-Facing Trade Ratio with a daily Transaction Volumes quantitative measurement that would allow the agencies to calculate customer-facing trade ratios over any period of time and to conduct more meaningful analysis of trading desks' customer-facing activity.[728] The proposed Transaction Volumes metric would measure the number and value[729] of all securities and derivatives transactions[730] conducted by a trading desk engaged in permitted underwriting activity or market making-related activity under the 2013 rule with four categories of counterparties: (i) Customers (excluding internal transactions); (ii) non-customers (excluding internal transactions); (iii) trading desks and other organizational units where the transaction is booked into the same banking entity; and (iv) trading desks and other organizational units where the transaction is booked into an affiliated banking entity.[731] The proposed rule would have clarified that the term ''customer'' for purposes of this metric has the same meaning as ''client, customer, and counterparty'' in § ___.4(a) for underwriting desks and in § ___.4(b) for market-making desks. To reduce reporting inefficiencies, the proposed rule would have only required trading desks engaged in underwriting or market making-related activity under § ___.4(a) or § ___.4(b) to calculate this quantitative measurement for each trading day. As with the Positions metric, the proposed rule would also have further reduced reporting volume by replacing the 30-day, 60-day, and 90-day calculation periods for each transaction with a single daily transaction value and count for each type.

The proposed rule would have required banking entities to separately report the value and number of securities and derivatives transactions conducted by a trading desk with the four categories of counterparties described above. The proposed classification of securities and derivatives described above for Positions would have also applied to Transaction Volumes.

A few commenters opposed the replacing the Customer-Facing Trade Ratio with the new Transactions Volume quantitative metric.[732] These commenters argued that the proposed changes would effectively create an entirely new metric, in particular by requiring firms to classify inter-affiliate transactions within the prescribed categories. One commenter also asserted that distinguishing trades that occur across banking entities from those within a single banking entity would not provide any informational value to the agencies in monitoring compliance with section 13 of the BHC Act.[733] One commenter supported the proposal, but also recommended excluding inter-affiliate transactions.[734]

The final rule adopts the proposed change to add a category of counterparty for desk-to-desk transactions within the same legal entity and transactions between affiliates (collectively, Internal Transactions). In order to connect the transactions metric with the other quantitate measurements, for example risk, profit and loss, and positions, it is important for transactions metrics to include all transactions conducted by the desk, including: (i) Desk-to-desk transfers within the same legal entity; (ii) transactions between affiliates; and (iii) transactions with non-affiliated external counterparties. It is also important for supervisors to be able to distinguish Internal Transactions from transactions with external non-affiliated counterparties because, based on supervisory experience under the 2013 rule, firms report these transactions inconsistently depending on a desk's purpose and business model.[735] Considering the trading activities of a desk without Internal Transactions may not give a complete picture of the desk's positions, risk exposure or trading strategies. To understand the activity of the desk the agencies need to observe its Internal Transactions.

Transactions between one trading desk and another trading desk in which the second desk books the position in the same banking entity as the first are not purchases or sales of financial instruments subject to the rule, including the prohibition on proprietary trading in § ___.3. However, in practice many trading desks book positions into multiple affiliated banking entities and also engage in desk-to-desk transactions within the same legal entity. Distinguishing Internal Transactions that move positions to new legal entities from desk-to-desk transactions that occur purely within the same legal entity would require an additional layer of recordkeeping. The agencies agree that the benefit of distinguishing trades across affiliated banking entities from desk-to-desk transactions within the same legal entity does not justify the

[727] *See* final rule § ___.3(c)(1) (defining ''financial instrument'' to mean (i) a security, including an option on a security; (ii) a derivative, including an option on a derivative; or (iii) a contract of sale of a commodity for future delivery, or option on a contract of sale of a commodity for future delivery).

[728] As noted in the proposal the current Customer-Facing Trade Ratio metric does not provide meaningful information when a trading desk only conducts customer-facing trading activity. The numerator of the ratio represents transactions with counterparties that are customers, while the denominator represents transactions with counterparties that are not customers. If a trading desk only trades with customers, it will not be able to calculate this ratio because the denominator will be zero.

[729] The proposal defined value to mean gross market value with respect to securities, gross notional value (*i.e.,* the current dollar market value of the quantity of the commodity underlying the derivative) for commodity derivatives, and gross notional value for all other derivatives.

[730] As noted in the Positions metric preamble, in calculating the Transactions Volume quantitative metric, futures positions should be reported as ''derivatives.''

[731] The proposal noted that in order to avoid double-counting transactions, these four categories would be exclusive of each other (*i.e.,* a transaction could only be reported in one category).

[732] *See, e.g.,* IIB and SIFMA.

[733] *See* SIFMA.

[734] *See, e.g.,* Credit Suisse.

[735] Internal Transactions are used for a number of reasons, including to transfer risk to a desk better equipped to manage the position's risk; to allow a desk with better market access or specialized market knowledge to facilitate another desk better equipped to face customers; or to allocate funding costs via transfer pricing, in which case one desk treats other internal desks or affiliate desks in much the same way as external clients. Supervisory experience has shown that, depending on the purpose of the internal transaction, banking entities sometimes report these internal transactions as transactions with customers, sometimes as transactions with non-customers, and sometimes do not report them at all.

extra record-keeping costs. The final rule consolidates these two proposed categories into one category, transactions with trading desks and other organizational units where the transaction is booked into either the same banking entity or an affiliated banking entity.

d. Securities Inventory Aging

The 2013 rule requires all trading desks engaged in covered trading activities to report Inventory Aging metrics for their securities and derivative positions. The proposed rule would have only required trading desks that relied on § ____.4(a) or § ____.4(b) to conduct underwriting or market making-related activity to report Inventory Aging and limited the scope of this metric to only securities positions.[736] To reflect the revised scope, the proposed rule would have revised the name of this metric to be Securities Inventory Aging. Finally, the proposal would have required a banking entity to calculate and report the Securities Inventory Aging metric according to a specific set of age ranges. Specifically, banking entities would have to calculate and report the market value of security assets and security liabilities over the following holding periods: 0–30 calendar days; 31–60 calendar days; 61–90 calendar days; 91–180 calendar days; 181–360 calendar days; and greater than 360 calendar days.

In general, commenters supported reducing the Inventory Aging metric, as inventory aging data is not readily available or particularly useful for derivative positions.[737] After consideration of comments and in light of the general desire to reduce reporting burden, the agencies believe that the Inventory Aging metric may be overly prescriptive as an indicator of compliance with the rule. Therefore, the final rule no longer requires the Inventory Aging metric for all desks and position types. For those desks where banking entities identify inventory aging as a meaningful control, the entities should report their internal limits on inventory aging under the Internal Limits and Usage metric and consequently ''Inventory Aging'' has been added as a potential type of limit under the Internal Limits Information Schedule.

V. Administrative Law Matters

A. Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act[738] requires the OCC, Board, and FDIC (Federal banking agencies) to use plain language in all proposed and final rules published after January 1, 2000. The Federal banking agencies have sought to present the proposed rule in a simple and straightforward manner and did not receive any comments on plain language.

B. Paperwork Reduction Act

Certain provisions of the final rule contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521). In accordance with the requirements of the PRA, the agencies may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The agencies reviewed the final rule and determined that the final rule revises certain reporting and recordkeeping requirements that have been previously cleared under various OMB control numbers. The agencies did not receive any specific comments on the PRA. The agencies are extending for three years, with revision, these information collections. The information collection requirements contained in this final rule have been submitted by the OCC and FDIC to OMB for review and approval under section 3507(d) of the PRA (44 U.S.C. 3507(d)) and section 1320.11 of the OMB's implementing regulations (5 CFR 1320). The Board reviewed the final rule under the authority delegated to the Board by OMB. The Board will submit information collection burden estimates to OMB and the submission will include burden for Federal Reserve-supervised institutions, as well as burden for OCC-, FDIC-, SEC-, and CFTC-supervised institutions under a holding company. The OCC and the FDIC will take burden for banking entities that are not under a holding company.

Abstract

Section 13 to the BHC Act generally prohibits any banking entity from engaging in proprietary trading or from acquiring or retaining an ownership interest in, sponsoring, or having certain relationships with a covered fund, subject to certain exemptions. The exemptions allow certain types of permissible trading activities such as underwriting, market making, and risk-mitigating hedging, among others. The 2013 rule implementing section 13 became effective on April 1, 2014. Section ____.20(d) and Appendix A of the 2013 final rule require certain of the largest banking entities to report to the appropriate agency certain quantitative measurements.

Current Actions

This final rule contains requirements subject to the PRA and the changes relative to the 2013 rule are discussed herein. The new and modified reporting requirements are found in sections ____.4(c)(3)(i), ____.20(d), ____.20(i), and the Appendix. The new and modified recordkeeping requirements are found in sections, ____.3(d)(3), ____.4(c)(3)(i), ____.5(c), ____.20(b), ____.20(c), ____.20 (d), ____.20(e), ____.20(f), and the Appendix. The modified information collection requirements[739] would implement section 13 of the BHC Act. The respondents are for-profit financial institutions, including small businesses. A covered entity must retain these records for a period that is no less than 5 years in a form that allows it to promptly produce such records to the relevant agency on request.

Reporting Requirements

Section ____.4(c)(3)(i) requires a banking entity to make available to the agency upon request records regarding (1) any limit that is exceeded and (2) any temporary or permanent increase to any limit(s), in each case in the form and manner as directed by the primary financial regulatory agency. The agencies estimate that the average time per response would be 15 minutes.

Section ____.20(d) is modified by extending the reporting period for certain banking entities from within 10 days of the end of each calendar month to 30 days of the end of each calendar quarter. The threshold for reporting under section ____.20(d) is modified from $10 billion or more in trading assets and liabilities to $20 billion or more in trading assets and liabilities. The metrics reporting changes to the Appendix would impact the reporting burden under section ____.20(d). The agencies estimate that the current average hours per response will

[736] The proposed Securities Inventory Aging metric would not require banking entities to prepare an aging schedule for derivatives or include in its securities aging schedules those ''securities'' that are also ''derivatives,'' as those terms are defined under the 2013 rule. *See* 2013 rule §§ ____.2(h), (y). *See also supra* Part III.E.2.i (discussing the classification of securities and derivatives for purposes of the proposed Positions quantitative measurement).

[737] *See, e.g.,* Data Boiler; Credit Suisse; FSF; Goldman Sachs, GFMA; and State Street.

[738] Public Law 106–102, section 722, 113 Stat. 1338, 1471 (1999).

[739] In an effort to provide transparency, the total cumulative burden for each agency is shown. In addition to the changes resulting from this final rule, the agencies are also applying a conforming methodology for calculating the burden estimates in order to be consistent across the agencies.

decrease by 14 hours (decrease 40 hours for initial set-up).

Sections ____.3(b)(4), ____.4(c)(4), ____.20(g)(2), and ____.20(h) would implicate the notice and response procedures pursuant to section ____.20(i) that an agency would follow when rebutting a presumption or exercising a reservation of authority. The agencies estimate that the average hours per response would be 20 hours.

Recordkeeping Requirements

Section ____.3(d)(3) would expand the scope of the recordkeeping to include foreign exchange forward (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)), foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25)), or cross-currency swap. The agencies estimate that the current average hour per response will not change.

Section ____.4(c)(3)(i) requires a banking entity to maintain records regarding (1) any limit that is exceeded and (2) any temporary or permanent increase to any limit(s), in each case in the form and manner as directed by the primary financial regulatory agency. The agencies estimate that the average time per response would be 15 minutes.

Section ____.5(c) is modified by reducing the requirements for banking entities that do not have significant trading assets and liabilities and eliminating documentation requirements for certain hedging activities. The agencies estimate that the current average hours per response will decrease by 20 hours (decrease 10 hours for initial set-up).

Section ____.20(b) is modified by limiting the requirement only to banking entities with significant trading assets and liabilities. The agencies estimate that the current average hour per response will not change.

Section ____.20(c) is modified by limiting the CEO attestation requirement to a banking entity that has significant trading assets and liabilities. The agencies estimate that the current average hours per response will decrease by 1,100 hours (decrease 3,300 hours for initial set-up).

Section ____.20(d) is modified by extending the time period for reporting for certain banking entities from within 10 days of the end of each calendar month to 30 days of the end of each calendar quarter. The agencies estimate that the current average hours per response will decrease by 3 hours.

Section ____.20(e) is modified by limiting the requirement to banking entities with significant trading assets and liabilities. The agencies estimate that the current average hours per response will not change.

Section ____.20(f)(2) is modified by limiting the requirement to banking entities with moderate trading assets and liabilities. The agencies estimate that the current average hours per response will not change.

The Instructions for Preparing and Submitting Quantitative Measurement Information, Technical Specifications Guidance, and XML Schema will be available on each agency's public website:

- *OCC: http://www.occ.treas.gov/topics/capital-markets/financial-markets/trading/volcker-rule-implementation/index-volcker-rule-implementation.html;*
- *Board: https://www.federalreserve.gov/apps/reportforms/review.aspx;*
- *FDIC: https://www.fdic.gov/regulations/reform/volcker/index.html;*
- *CFTC: https://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_28_VolckerRule/index.htm;* and
- *SEC: https://www.sec.gov/structureddata/dera_taxonomies.*

Proposed Revision, With Extension, of the Following Information Collections

Estimated average hours per response:

Reporting

Section ____.4(c)(3)(i)—0.25 hours for an average of 20 times per year.

Section ____.12(e)—20 hours (Initial set-up 50 hours) for an average of 10 times per year.

Section ____.20(d)—41 hours (Initial set-up 125 hours) quarterly.

Section ____.20(i)—20 hours.

Recordkeeping

Section ____.3(d)(3)—1 hour (Initial set-up 3 hours).

Section ____.4(b)(3)(i)(A)—2 hours quarterly.

Section ____.4(c)(3)(i)—0.25 hours for an average of 40 times per year.

Section ____.5(c)—80 hours (Initial setup 40 hours).

Section ____.11(a)(2)—10 hours.

Section ____.20(b)—265 hours (Initial set-up 795 hours).

Section ____.20(c)—100 hours (Initial set-up 300 hours).

Section ____.20(d)– 10 hours.

Section ____.20(e)—200 hours.

Section ____.20(f)(1)—8 hours.

Section ____.20(f)(2)—40 hours (Initial set-up 100 hours).

Disclosure

Section ____.11(a)(8)(i)—0.1 hours for an average of 26 times per year.

OCC

Title of Information Collection: Reporting, Recordkeeping, and Disclosure Requirements Associated with Restrictions on Proprietary Trading and Certain Relationships with Hedge Funds and Private Equity Funds.

Frequency: Annual, quarterly, and event driven.

Affected Public: Businesses or other for-profit.

Respondents: National banks, state member banks, state nonmember banks, and state and federal savings associations.

OMB control number: 1557–0309.

Estimated number of respondents: 39.

Proposed revisions estimated annual burden: −3,503 hours.

Estimated annual burden hours: 19,823 hours (3,482 hours for initial set-up and 16,341 hours for ongoing).

Board

Title of Information Collection: Reporting, Recordkeeping, and Disclosure Requirements Associated with Regulation VV.

Frequency: Annual, quarterly, and event driven.

Affected Public: Businesses or other for-profit.

Respondents: State member banks, bank holding companies, savings and loan holding companies, foreign banking organizations, U.S. State branches or agencies of foreign banks, and other holding companies that control an insured depository institution and any subsidiary of the foregoing other than a subsidiary for which the OCC, FDIC, CFTC, or SEC is the primary financial regulatory agency. The Board will take burden for all institutions under a holding company including:

- OCC-supervised institutions,
- FDIC-supervised institutions,
- Banking entities for which the CFTC is the primary financial regulatory agency, as defined in section 2(12)(C) of the Dodd-Frank Act, and
- Banking entities for which the SEC is the primary financial regulatory agency, as defined in section 2(12)(B) of the Dodd-Frank Act.

Legal authorization and confidentiality: This information collection is authorized by section 13 of the BHC Act (12 U.S.C. 1851(b)(2) and 12 U.S.C. 1851(e)(1)). The information collection is required in order for covered entities to obtain the benefit of engaging in certain types of proprietary trading or investing in, sponsoring, or having certain relationships with a hedge fund or private equity fund, under the restrictions set forth in section 13 and the final rule. If a respondent considers the information to be trade secrets and/or privileged such information could be withheld from the public under the authority of the Freedom of Information Act (5 U.S.C. 552(b)(4)). Additionally, to the extent that such information may be contained in an examination report such information could also be withheld from the public (5 U.S.C. 552 (b)(8)).

Agency form number: FR VV.

OMB control number: 7100–0360.

Estimated number of respondents: 255.

Proposed revisions estimated annual burden: −169,466 hours.

Estimated annual burden hours: 31,044 hours (4,035 hours for initial set-up and 27,009 hours for ongoing).

FDIC

Title of Information Collection: Volcker Rule Restrictions on Proprietary Trading and Relationships with Hedge Funds and Private Equity Funds.

Frequency: Annual, quarterly, and event driven.

Affected Public: Businesses or other for-profit.

Respondents: State nonmember banks, state savings associations, and certain subsidiaries of those entities.

OMB control number: 3064–0184.

Estimated number of respondents: 13.

Proposed revisions estimated annual burden: −15,172 hours.

Estimated annual burden hours: 3,115 hours (1,656 hours for initial set-up and 1,459 hours for ongoing).

C. Regulatory Flexibility Act Analysis

OCC: The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* (RFA), requires an agency, in connection with a final rule, to prepare a Final Regulatory Flexibility Analysis describing the impact of the rule on small entities (defined by the SBA for purposes of the RFA to include commercial banks and savings institutions with total assets of $600 million or less and trust companies with total assets of $41.5 million or less) or to certify that the rule will not have a significant economic impact on a substantial number of small entities.

The OCC currently supervises approximately 782 small entities.[740] Under the EGRRCPA, banking entities with total consolidated assets of $10 billion or less generally are not ''banking entities'' within the scope of Section 13 of the BHCA if their trading assets and trading liabilities do not exceed 5 percent of their total consolidated assets. Thus, the final rule will not impact any OCC-supervised small entities. Therefore, the OCC certifies that the final rule will not have a significant impact on a substantial number of OCC-supervised small entities.

Board: The RFA requires an agency to either provide a regulatory flexibility analysis with a rule or certify that the rule will not have a significant economic impact on a substantial number of small entities. The U.S. Small Business Administration (SBA) establishes size standards that define which entities are small businesses for purposes of the RFA.[741] Except as otherwise specified below, the size standard to be considered a small business for banking entities subject to the proposal is $600 million or less in consolidated assets.[742]

The Board has considered the potential impact of the proposed rule on small entities in accordance with the RFA. Based on the Board's analysis, and for the reasons stated below, the Board believes that this proposed rule will not have a significant economic impact on a substantial of number of small entities. No comments were received related to the Board's initial RFA analysis, which was published with the proposal.

As discussed in the **SUPPLEMENTARY INFORMATION**, the agencies are revising the 2013 rule in order to provide clarity to banking entities about what activities are prohibited, reduce compliance costs, and improve the ability of the agencies to make supervisory assessments regarding compliance relative to the 2013 rule. The agencies are explicitly authorized under section 13(b)(2) of the BHC Act to adopt rules implementing section 13.[743]

The Board's rule generally applies to state-chartered banks that are members of the Federal Reserve System, bank holding companies, foreign banking organizations, and nonbank financial companies supervised by the Board (collectively, Board-regulated entities). However, EGRRCPA, which was enacted on May 24, 2018, amended section 13 of the BHC Act and modified the scope of the definition of banking entity by amending the term ''insured depository institution'' to exclude certain community banks.[744] The Board is not aware of any Board-regulated entities that meet the SBA's definition of ''small entity'' that are subject to section 13 of the BHC Act and the rule following the enactment of EGRRCPA. Furthermore, to the extent that any Board-regulated entities that meet the definition of ''small entity'' are or become subject to section 13 of the BHC Act and the rule, the Board does not expect the total number of such entities to be substantial. Accordingly, the Board's rule is not expected to have a significant economic impact on a substantial number of small entities.

The Board has not identified any federal statutes or regulations that would duplicate, overlap, or conflict with the proposed revisions, and the Board is not aware of any significant alternatives to the rule that would reduce the economic impact on Board-regulated small entities.

FDIC

(a) Regulatory Flexibility Analysis

The RFA generally requires an agency, in connection with a final rule, to prepare and make available for public comment a final regulatory flexibility analysis that describes the impact of a rule on small entities.[745] However, a regulatory flexibility analysis is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The SBA has defined ''small entities'' to include banking organizations with total assets of less than or equal to $600 million.[746]

[740] The number of small entities supervised by the OCC is determined using the SBA's size thresholds for commercial banks and savings institutions, and trust companies, which are $600 million and $41.5 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 a small entity. The OCC used December 31, 2018, 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.*

[741] U.S. SBA, Table of Small Business Size Standards Matched to North American Industry Classification System Codes, available at *https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.*

[742] *See id.* Pursuant to SBA regulations, the asset size of a concern includes the assets of the concern whose size is at issue and all of its domestic and foreign affiliates. 13 CFR 121.103(6).

[743] 12 U.S.C. 1851(b)(2).

[744] Under EGRRCPA, a community bank and its affiliates are generally excluded from the definition of banking entity, and thus section 13 of the BHC Act, if the bank and all companies that control the bank have total consolidated assets equal to $10 billion or less and trading assets and liabilities equal to 5 percent or less of total consolidated assets.

[745] 5 U.S.C. 601 *et seq.*

[746] The SBA defines a small banking organization as having $600 million or less in assets, where an organization's ''assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' See 13 CFR 121.201 (as amended by 84 FR 34261, effective August 19, 2019). In its determination, the ''SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.'' See 13 CFR 121.103. Following these regulations, the FDIC uses

Continued

Generally, the FDIC considers a significant effect to be a quantified effect in excess of 5 percent of total annual salaries and benefits per institution, or 2.5 percent of total noninterest expenses. The FDIC believes that effects in excess of these thresholds typically represent significant effects for FDIC-supervised institutions. As discussed further below, the FDIC certifies that this final rule will not have a significant economic impact on a substantial number of FDIC-supervised small entities.

(b) Reasons for and Policy Objectives of the Final Rule

The agencies are issuing this final rule to amend the 2013 rule in order to provide banking entities with additional clarity and certainty about what activities are prohibited and seek to improve the efficacy of the regulations where possible. The agencies acknowledge that many banking entities have found certain aspects of the 2013 rule to be complex or difficult to apply in practice. This final rule amends the 2013 rule to make its requirements more efficient.

(c) Description of the Rule

First, the FDIC is amending its regulations to tailor the application of the final rule based on the size and scope of a banking entity's trading activities. In particular, the FDIC aims to further reduce compliance obligations for firms that do not have large trading operations and therefore reduce costs and uncertainty faced by firms in complying with the final rule, relative to their amount of trading activity. In addition to tailoring the application of the final rule, the FDIC is also streamlining and clarifying for all banking entities certain definitions and requirements related to the proprietary trading prohibition and limitations on covered fund activities and investments. Finally, the FDIC is reducing reporting, recordkeeping, and compliance program requirements for all banking entities and expanding tailoring to make the scale of compliance activity required by the rule commensurate with a banking entity's size and level of trading activity.

(d) Other Statutes and Federal Rules

On May 24, 2018, EGRRCPA was enacted, which, among other things, amends section 13 of the BHC Act. As a result, section 13 excludes from the definition of ''banking entity'' any institution that, together with their affiliates and subsidiaries, has: (1) Total assets of $10 billion or less, and (2) trading assets and liabilities that comprise 5 percent or less of total assets.

The FDIC has not otherwise identified any likely duplication, overlap, and/or potential conflict between this final rule and any other federal rule.

(e) Small Entities Affected

The FDIC supervises 3,465 depository institutions,[747] of which, 2,705 are defined as small banking organizations according to the RFA.[748] Almost all FDIC-supervised small banking entities are exempt from the requirements of section 13 of the BHC Act, pursuant to EGRRCPA, and hence the final rule does not affect them.

Only one FDIC-supervised small banking entity is not exempt from the requirements of section 13 of the BHC Act under EGRRCPA because it has trading assets and liabilities greater than five percent of total consolidated assets. This bank has trading activity at levels that would place it in the final rule's limited trading assets and liabilities compliance category, and it thus could benefit from the final rule which contains a rebuttable presumption of compliance for such banking entities. The FDIC estimates that banks with limited trading will save, on average, $115,233 from the reduced burden of this rule. This amount is far less than 5 percent of total salaries and 2.5 percent of total non-interest expenses for this one institution.

Consequently, the FDIC does not believe that this rule will have a significant economic impact on a substantial number of small entities.

(f) Certification Statement

Section 13 of the BHC Act, as amended by EGRRCPA, exempts all but one of the 2,705 FDIC-supervised small banking entities from compliance with section 13 of the BHC Act. Therefore, the FDIC certifies that this final rule will not have a significant economic impact on a substantial number of FDIC-supervised small banking entities.

CFTC: Pursuant to 5 U.S.C. 605(b), the CFTC hereby certifies that the amendments to the 2013 final rule will not have a significant economic impact on a substantial number of small entities for which the CFTC is the primary financial regulatory agency.

As discussed in this **SUPPLEMENTARY INFORMATION**, the Agencies are revising the 2013 final rule in order to provide clarity to banking entities about what activities are prohibited, reduce compliance costs, and improve the ability of the Agencies to make assessments regarding compliance relative to the 2013 final rule. To minimize the costs associated with the 2013 final rule, the Agencies are simplifying and tailoring the rule to allow banking entities to more efficiently provide financial services in a manner that is consistent with the requirements of section 13 of the BHC Act.

The revisions will generally apply to banking entities, including certain CFTC-registered entities. These entities include bank-affiliated CFTC-registered swap dealers, futures commission merchants, commodity trading advisors and commodity pool operators.[749] The CFTC has previously determined that swap dealers, futures commission merchants and commodity pool operators are not small entities for purposes of the RFA and, therefore, the requirements of the RFA do not apply to those entities.[750] As for commodity trading advisors, the CFTC has found it appropriate to consider whether such registrants should be deemed small entities for purposes of the RFA on a case-by-case basis, in the context of the particular regulation at issue.[751]

In the context of the revisions to the 2013 final rule, the CFTC believes it is unlikely that a substantial number of the commodity trading advisors that are potentially affected are small entities for purposes of the RFA. In this regard, the CFTC notes that only commodity trading advisors that are registered with the CFTC are covered by the 2013 final rule, and generally those that are registered have larger businesses. Similarly, the 2013 final rule applies to only those commodity trading advisors that are affiliated with banks that are within the scope of the Volcker Rule, which the CFTC expects are larger businesses.[752]

a covered entity's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the covered entity is ''small'' for the purposes of RFA.

[747] Categories of FDIC-supervised depository institutions are set forth in 12 U.S.C. 1813(q)(2).

[748] FDIC Call Report, March 31, 2019.

[749] The revisions may also apply to other types of CFTC registrants that are banking entities, such as introducing brokers, but the CFTC believes it is unlikely that such other registrants will have significant activities that would implicate the revisions. *See* 2013 final rule (CFTC), 79 FR 5808 at 5813 (Jan. 31, 2014).

[750] *See* Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618 (Apr. 30, 1982) (futures commission merchants and commodity pool operators); and Registration of Swap Dealers and Major Swap Participants, 77 FR 2613, 2620 (Jan. 19, 2012) (swap dealers and major swap participants).

[751] *See* Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618, 18620 (Apr. 30, 1982).

[752] In this regard, the CFTC notes that the agencies recently revised the 2013 final rule in

The CFTC requested that commenters address whether any CFTC registrants covered by the proposed revisions to the 2013 final rule are small entities for purposes of the RFA. The CFTC did not receive any public comments on this or any other aspect of the RFA as it relates to the rule.

Because the CFTC believes there are not a substantial number of commodity trading advisors within the scope of the Volcker Rule that are small entities for purposes of the RFA, and the other CFTC registrants that may be affected by the proposed revisions have been determined not to be small entities, the CFTC believes that the revisions to the 2013 final rule will not have a significant economic impact on a substantial number of small entities for which the CFTC is the primary financial regulatory agency.

SEC: In the proposal, the SEC certified that, pursuant to 5 U.S.C. 605(b), the proposal would not, if adopted, have a significant economic impact on a substantial number of small entities. Although the SEC solicited written comments regarding this certification, no commenters responded to this request.

As discussed in the **SUPPLEMENTARY INFORMATION**, the Agencies are adopting revisions to the 2013 rule that are intended to provide banking entities with clarity about what activities are prohibited and improve supervision and implementation of section 13 of the BHC Act.

The revisions the agencies are adopting today will generally apply to banking entities, including certain SEC-registered entities.[753] These entities include SEC-registered broker-dealers, investment advisers, security-based swap dealers, and major security-based swap participants that are affiliates or subsidiaries of an insured depository institution.[754] Based on information in filings submitted by these entities, the SEC believes that there are no banking entity registered investment advisers,[755] broker-dealers,[756] security-based swap dealers, or major security-based swap participants that are small entities for purposes of the RFA.[757] For this reason, the SEC certifies that the rule, as adopted, will not have a significant economic impact on a substantial number of small entities.

D. Riegle Community Development and Regulatory Improvement Act

Section 302(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA)[758] requires that each Federal banking agency, in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, 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. The agencies have considered comment on these matters in other parts of this **SUPPLEMENTARY INFORMATION.**

In addition, under section 302(b) of the RCDRIA, new regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions generally must take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.[759] Therefore, the effective date for the OCC, Board, and FDIC is January 1, 2020, the first day of the calendar quarter.[760]

E. OCC Unfunded Mandates Reform Act Determination

The OCC has analyzed the rule under the factors set forth in the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532). Under this analysis, the OCC considered whether the 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 for inflation). The cost estimate for the final rule is approximately $4.1 million in the first year. Therefore, the OCC finds that the final rule does not trigger the UMRA cost threshold. Accordingly, the OCC has not prepared the written statement described in section 202 of the UMRA.

F. SEC Economic Analysis

1. Broad Economic Considerations

a. Scope

As discussed above, section 13 of the Bank Holding Company (BHC) Act generally prohibits banking entities from engaging in proprietary trading and from acquiring or retaining an ownership interest in, sponsoring, or having certain relationships with a hedge fund or private equity fund (covered funds), subject to certain exemptions. Section 13(h)(1) of the BHC Act defines the term ''banking entity'' to include (i) any insured depository institution (as defined by statute), (ii) any company that controls an insured depository institution, (iii) any company that is treated as a bank holding company for purposes of section 8 of the

---

order to be consistent with statutory amendments made by EGRRCPA to section 13 of the BHC Act. The general result of one of these statutory revisions was to exclude community banks and their affiliates and subsidiaries from the scope of the Volcker Rule. *See* 84 FR 35008. The CFTC believes this exclusion lessens the likelihood that any commodity trading advisors that remain within the scope of the Volcker Rule are small entities.

[753] The SEC's Economic Analysis, below, discusses the economic effects of the final amendments. *See* SEC Economic Analysis, *supra* Part V.F.

[754] *See* 2013 rule § _.2(c) (definition of banking entity); 2013 rule § _.2(r) as amended (definition of insured depository institution).

[755] For the purposes of an SEC rulemaking in connection with the RFA, an investment adviser generally is a small entity if it: (1) Has assets under management having a total value of less than $25 million; (2) did not have total assets of $5 million or more on the last day of the most recent fiscal year; and (3) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year. *See* 17 CFR 275.0–7.

[756] For the purposes of an SEC rulemaking in connection with the RFA, a broker-dealer will be deemed a small entity if it: (1) Had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to 17 CFR 240.17a–5(d), or, if not required to file such statements, had total capital (net worth plus subordinated liabilities) of less than $500,000 on the last day of the preceding fiscal year (or in the time that it has been in business, if shorter); and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization. *See* 17 CFR 240.0–10(c). Under the standards adopted by the SBA, small entities also include entities engaged in financial investments and related activities with $38.5 million or less in annual receipts. *See* 13 CFR 121.201 (Subsector 523).

[757] Based on SEC analysis of Form ADV data, the SEC believes that there are not a substantial number of registered investment advisers affected by the proposal that qualify as small entities under RFA. Based on SEC analysis of broker-dealer FOCUS filings and NIC relationship data, the SEC believes that there are no SEC-registered broker-dealers affected by the proposal that qualify as small entities under RFA. With respect to security-based swap dealers and major security-based swap participants, based on feedback from market participants and information about the security-based swap markets, the Commission believes that the types of entities that would engage in more than a *de minimis* amount of dealing activity involving security-based swaps—which generally would be large financial institutions—would not be ''small entities'' for purposes of the RFA. *See* Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, 81 FR 53546, 53553 (Aug. 12, 2016).

[758] 12 U.S.C. 4802(a).

[759] 12 U.S.C. 4802(b).

[760] Additionally, the Administrative Procedure Act generally requires that the effective date of a rule be no less than 30 days after publication in the **Federal Register.** 5 U.S.C. 553(d)(1). The effective date, January 1, 2020, will be more than 30 days after publication in the **Federal Register.**

International Banking Act of 1978, and (iv) any affiliate or subsidiary of such an entity.[761] In addition, as discussed above, the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA), enacted on May 24, 2018, amended section 13 of the BHC Act to exclude from the definition of ''insured depository institution'' any institution that does not have and is not controlled by a company that has (1) more than $10 billion in total consolidated assets; and (2) total trading assets and trading liabilities, as reported on the most recent applicable regulatory filing filed by the institution, that are more than 5% of total consolidated assets.[762]

Certain SEC-regulated entities, such as broker-dealers, security-based swap dealers (SBSDs), and registered investment advisers (RIAs) affiliated with a banking entity, fall under the definition of ''banking entity'' and are subject to the prohibitions of section 13 of the BHC Act.[763] This economic analysis is limited to areas within the scope of the SEC's function as the primary securities markets regulator in the United States. In particular, the SEC's economic analysis is focused on the potential effects of the final rule on SEC registrants, in their capacity as such, the functioning and efficiency of the securities markets, investor protection, and capital formation. SEC registrants affected by the final rule include SEC-registered broker-dealers, SBSDs, and RIAs. Thus, the below analysis does not consider broker-dealers, SBSDs, and investment advisers that are not banking entities, or banking entities that are not SEC registrants, in either case for purposes of section 13 of the BHC Act, beyond the potential spillover effects on these entities and effects on efficiency, competition, investor protection, and capital formation in securities markets. Other sections of this **SUPPLEMENTARY INFORMATION** discuss the effects of the final rule on banking entities not overseen by the SEC for purposes of section 13 of the BHC Act.

In the proposal, the SEC solicited comment on all aspects of the costs and benefits associated with the proposed amendments for SEC registrants, including any spillover effects the proposed amendments may have on efficiency, competition, and capital formation in securities markets. The SEC has considered these comments, as discussed in greater detail in the sections that follow.

b. Economic Effects and Justification

As stated in the proposal, in implementing section 13 of the BHC Act, the agencies sought to increase the safety and soundness of banking entities, promote financial stability, and reduce conflicts of interest between banking entities and their customers.

In the proposal, the SEC recognized a number of effects of the 2013 rule.[764] The SEC continues to recognize that distinguishing between permissible and prohibited activities may be complex and costly for some firms,[765] which may impede the conduct of permissible activities.[766] The SEC continues to believe that the 2013 rule may have resulted in a complex and costly compliance regime that is unduly restrictive and burdensome for some banking entities, particularly smaller firms that do not qualify for the simplified compliance regime.[767] Since the 2013 rule became effective, new estimates regarding compliance burdens and new information about the various effects of the 2013 rule have become available.[768] The passage of time has also enabled an assessment of the value of individual requirements that enable SEC oversight, such as the requirement to report certain quantitative metrics, relative to reporting and other compliance burdens.[769]

As discussed below, a number of commenters have indicated that the proposed amendments would have altered the scope of permissible activities and compliance requirements of the 2013 rule in a way that significantly affects the economic costs and benefits of the 2013 rule. In addition, commenters offered a variety of views on the baseline economic effects, which include section 13 of the BHC Act, the 2013 rule, sections 203 and 204 of EGRRCPA and conforming amendments, and current practices of banking entities aimed at compliance with these regulations.[770] As part of the proposal's economic baseline, the SEC discussed the effects of the agencies' 2013 rule.[771] The economic baseline section below discusses these effects in greater detail.

The final rule includes amendments that impact the scope of permitted activities for all or a subset of banking entities (*e.g.,* trading account definition, underwriting and market making, and trading and investing activities by foreign banking entities), and amendments that simplify, tailor, or eliminate the application of certain aspects of the 2013 rule intended to reduce compliance and reporting burdens while preserving and, in some cases, enhancing the effectiveness of the 2013 rule. Many of the final amendments seek to provide greater clarity and certainty about which activities are permitted under the 2013 rule, which may increase the ability and willingness of banking entities to engage in permitted activities, and to promote the effective allocation of compliance resources.

Broadly, the SEC believes that a greater ability and willingness to engage in permitted activities would benefit the parties to those transactions and capital markets as a whole. Reduced compliance costs may translate into increased willingness of banking entities to engage in activities that facilitate risk-sharing and capital formation, such as underwriting securities and making markets. Accordingly, the rule may also benefit clients, customers, and counterparties in the form of an increased ability to transact with banking entities.

The SEC continues to recognize that some of these changes may also, in certain circumstances, increase activities involving risk exposure or increase the incidence of conflicts of interest among some market participants. The returns and risks from

[761] *See* 12 U.S.C. 1851(h)(1).

[762] These and other aspects of the regulatory baseline against which the SEC is assessing the economic effects of the final rule on SEC banking entities are discussed in the economic baseline. On July 22, 2019, the agencies adopted a final rule amending the definition of ''insured depository institution'' in a manner consistent with EGRRCPA.

[763] Throughout this economic analysis, the term ''banking entity'' generally refers only to banking entities for which the SEC is the primary financial regulatory agency unless otherwise noted. While section 13 of the BHC Act and its associated rules apply to a broader set of banking entities, this economic analysis is limited to those banking entities for which the SEC is the primary financial regulatory agency as defined in Section 2(12)(B) of the Dodd-Frank Act. *See* 12 U.S.C. 1851(b)(2); 12 U.S.C. 5301(12)(B).

Compliance with SBSD registration requirements is not yet required and there are currently no registered SBSDs. However, the SEC has previously estimated that as many as 50 entities may potentially register as SBSDs and that as many as 16 of these entities may already be SEC-registered broker-dealers. *See* Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital and Segregation Requirements for Broker-Dealers, Exchange Act Release No. 86175 (June 21, 2019), 84 FR at 43872 (Aug. 22, 2019), (henceforth ''Capital, Margin, and Segregation Adopting Release'').

For the purposes of this economic analysis, the term ''dealer'' generally refers to SEC-registered broker-dealers and SBSDs.

[764] *See* 83 FR at 33520–33552.

[765] *See, e.g.,* 83 FR at 33521.

[766] *See, e.g.,* 83 FR at 33532.

[767] *Id.*

[768] *See, e.g.,* 83 FR at 33522.

[769] *Id.*

[770] *See, e.g.,* Occupy the SEC; Better Markets; SIFMA and Center for American Entrepreneurship.

[771] *See* 83 FR at 33520–33521.

the activities of banking entities may flow through to their investors. In general, to the extent that the final rule increases or decreases the scope of permissible activities, the final rule may dampen or magnify some of the economic tensions inherent in this rulemaking. As discussed above, various aspects of the final rule are designed to ensure that the prudential objectives of the rule are not diminished. Moreover, amendments adopted as part of the final rule that redefine the scope of entities subject to certain provisions of the 2013 rule may have an effect on competition, allocative efficiency, and capital formation. Where the final rule reduces burdens on some groups of market participants (*e.g.,* on banking entities without significant trading assets and liabilities and certain foreign banking entities), the final rule is expected to increase competition and trading activity in related market segments.

Other amendments to the 2013 rule reduce compliance program, reporting, and documentation requirements for some banking entities. The SEC believes that these amendments may reduce the compliance burdens of SEC-regulated banking entities, which may enhance competition, trading activity, and capital formation. The SEC recognizes that these amendments may alter the mix of tools available for regulatory oversight and supervision. However, the SEC believes that the final rule as a whole is unlikely to reduce the efficacy of the agencies' regulatory oversight.[772] Further, under the final rule, banking entities (other than banking entities with limited trading assets and liabilities for which the presumption of compliance has not been rebutted) are still required to develop and provide for the continued administration of a compliance program that is reasonably designed to ensure and monitor compliance with the prohibitions and restrictions set forth in section 13 of the BHC Act. Finally, the final rule does not change the scope of entities subject to the statutory obligations and prohibitions of section 13 of the BHC Act.

c. Analytical Approach

The SEC's economic analysis is informed by research on the effects of section 13 of the BHC Act and the 2013 rule and on related incentives conflicts, by comments received by the agencies from a variety of interested parties, and by the agencies' experience administering the 2013 rule since its adoption. Throughout this economic analysis, the SEC discusses how different market participants may respond to various aspects of the final rule and considers the potential effects of the final rule on activities by banking entities that involve risk, on their willingness and ability to engage in client-facilitation activities, and on competition, market quality, and capital formation, as informed, among other things, by research and comment letters. The SEC's analysis also recognizes that the overall risk exposure of banking entities may arise out of a combination of activities, including proprietary trading, market making, and traditional banking, as well as the volume and structure of hedging and other risk-mitigating activities. As discussed further below, the SEC recognizes the complex baseline effects of section 13 of the BHC Act, as amended by sections 203 and 204 of EGRRCPA, and implementing rules, on overall levels and structure of banking entity risk exposures.

The SEC also considered the investor protection implications of the final rule. Broadly, the SEC notes that market liquidity can be important to investors as it may enable investors to exit (in a timely manner and at an acceptable price) from their positions in instruments, products, and portfolios. At the same time, excessive risk exposures of banking entities can adversely affect markets and, therefore, investors.

The final rule tailors, removes, or alters the scope of various requirements in the 2013 rule and adds certain new requirements. Since section 13 of the BHC Act and the 2013 rule combined a number of different requirements, and, as discussed above, the type and level of risk exposure of a banking entity is the result of a combination of activities,[773] it is difficult to attribute the observed effects to a specific provision or set of requirements. In addition, analysis of the effects of the implementation of the 2013 rule is confounded by macroeconomic factors, other policy interventions, and post-crisis changes to market participants' risk aversion and return expectations. Because of the extended timeline of implementation of section 13 of the BHC Act and the overlap of the 2013 rule period with other post-crisis changes affecting the same group or certain sub-groups of SEC registrants, the SEC cannot rely on typical quantitative methods that might otherwise enable causal attribution and quantification of the effects of section 13 of the BHC Act and the 2013 rule on measures of capital formation, liquidity, competition, and informational or allocative efficiency. Moreover, empirical measures of capital formation or liquidity do not reflect issuance and transaction activity that does not occur as a result of the 2013 rule. Accordingly, it is difficult to quantify the primary issuance and secondary market liquidity that would have been observed following the financial crisis absent various provisions of Section 13 of the BHC Act and the 2013 final rule.

Importantly, the existing securities markets—including market participants, their business models, market structure, etc.—differ in significant ways from the securities markets that existed prior to enactment of Section 13 of the BHC Act and the implementation of the 2013 rule. For example, the role of dealers in intermediating trading activity has changed in important ways, including the following: In recent years, on both an absolute and relative basis bank-dealers generally committed less capital to intermediation activities while nonbanking dealers generally committed more; the volume and profitability of certain trading activities after the financial crisis may have decreased for bank-dealers while it may have increased for other intermediaries, including nonbanking entities that provide intraday liquidity using sophisticated electronic trading algorithms and high speed access to data and trading venues; and the introduction of alternative credit markets may have contributed to liquidity fragmentation across markets while potentially increasing access to capital.[774]

Where possible, this analysis attempts to quantify the costs and benefits expected to result from the final rule. In many cases, however, the SEC is unable to quantify these potential economic effects. Some of the primary economic effects, such as the effect on incentives that may give rise to conflicts of interest in various regulated entities and the efficacy of regulatory oversight under various compliance regimes, are inherently difficult to quantify. Moreover, some of the benefits of the 2013 rule's prohibitions that are being amended here, such as potential benefits for resilience during a crisis, are less readily observable under strong economic conditions and cannot be isolated from the effects of other post-crisis regulatory efforts intended to enhance resilience. Lastly, because of overlapping implementation periods of various post-crisis regulations affecting

[772] *See, e.g.,* sections IV.B.2 and IV.D.1.

[773] *See, e.g.,* 79 FR 5541.

[774] *See* Sec. & Exch. Comm'n, Access To Capital And Market Liquidity, (2017) [hereinafter SEC Report 2017].

the same group or certain sub-groups of SEC registrants, the long implementation timeline of the 2013 rule, and the fact that many market participants changed their behavior in anticipation of future changes in regulation, it is difficult to quantify the net economic effects of individual amendments to the 2013 rule adopted here.

In some instances, the SEC lacks the information or data necessary to provide reasonable estimates for the economic effects of the final rule. For example, the SEC lacks information and data, and commenters have not provided such information or data, to allow a quantification of (1) the volume of trading activity that does not occur because of uncertainty about how to demonstrate that underwriting or market making activities satisfy the reasonably expected near-term demand (RENTD) requirement; (2) the extent to which internal limits may capture expected customer demand; (3) how accurately correlation analysis reflects underlying exposures of banking entities with, and without, significant trading assets and liabilities in normal times and in times of market stress; (4) the feasibility and costs of reorganization that may enable some U.S. banking entities to become foreign banking entities for the purposes of relying on the foreign trading exemption; and (5) the extent of the overall risk reduction (if any) caused by the 2013 rule. Where the SEC cannot quantify the relevant economic effects, the SEC discusses them in qualitative terms.

2. Baseline

The baseline against which the SEC is assessing the economic effects of the final rule includes the legal and regulatory framework as it exists at the time of this release and current practices aimed at compliance with these regulations.

a. Regulation

The regulatory baseline includes section 13 of the BHC Act, as amended by EGRRCPA, and the 2013 rule, as amended by the agencies' amendments conforming to EGRRCPA. Further, the baseline accounts for the fact that since the adoption of the 2013 rule, the staffs of the agencies have provided FAQ responses to questions about the 2013 rule.[775] In addition, the federal banking agencies released a 2019 policy statement with respect to foreign excluded funds.[776]

The subsections below discuss in greater detail the legal and regulatory baseline applicable to entities that are registered with the SEC and that the SEC oversees for purposes of section 13 of the BHC Act. In particular, the SEC discusses the exemptions for permissible underwriting and market making-related activities, risk-mitigating hedging, and foreign trading; requirements and exemptions related to covered funds; compliance and metrics reporting requirements; and sections of EGRRCPA and conforming amendments that exempt certain banking entities from section 13 of the BHC Act and the 2013 rule.

i. The 2013 Rule

(1) Definition of the Trading Account

The scope of prohibited proprietary trading activity is determined by the definition of ''trading account'' and related exclusions.[777] As discussed in detail in section IV.B.1.a, the 2013 rule's definition of trading account includes three prongs: The short-term intent prong, the market risk capital rule prong, and the dealer prong. In addition, the 2013 rule includes a rebuttable presumption, under which a purchase (or sale) of a financial instrument is presumed to be for the trading account under the short-term intent prong if the banking entity holds the financial instrument for fewer than 60 days or substantially transfers the risk of the financial instrument within 60 days of the purchase (or sale).

The 2013 rule provides several exclusions from the definition of proprietary trading in section § ____.3(d). In particular, under certain conditions, the 2013 rule excludes from the definition of proprietary trading any purchases or sales that arise under a repurchase or reverse repurchase agreement or under a transaction in which the banking entity lends or borrows a security temporarily, any purchase or sale of a security for the purpose of liquidity management in accordance with a documented liquidity management plan,[778] any purchase or sale by a banking entity that is a derivatives clearing organization or a clearing agency in connection with clearing financial instruments, any excluded clearing activities, any purchase or sale that satisfies an existing delivery obligation or an obligation in connection with a judicial, administrative, self-regulatory organization, or arbitration proceeding, any purchase or sale by a banking entity that is acting solely as agent, broker, or custodian, any purchase or sale through a deferred compensation, stock-bonus, profit-sharing, or pension plan, and any purchase or sale in the ordinary course of collecting a debt previously contracted in good faith.

In addition, section § ____.3(e)(13) of the 2013 rule defines ''trading desk'' as the smallest discrete unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof, and applies certain requirements at the ''trading desk''-level of organization.[779]

(2) Exemption for Underwriting and Market Making-Related Activity

Section 13(d)(1)(B) of the BHC Act contains an exemption from the prohibition on proprietary trading for underwriting and market making-related activities. Under the 2013 rule, all banking entities with covered activities must satisfy several requirements with respect to their underwriting activities to qualify for the exemption for underwriting activities, discussed in detail in section IV.B.2.a above.[780] In addition, under the current baseline, all banking entities with covered activities must satisfy six requirements with respect to their market making-related activities to qualify for the exemption for market making-related activities, as discussed in section IV.B.2.a.[781]

The SEC also notes that, under the baseline, an organizational unit or a trading desk of another banking entity that has consolidated trading assets and liabilities of $50 billion or more is generally not considered a client, customer, or counterparty for the purposes of the RENTD requirement.[782] Thus, such demand does not contribute to RENTD unless such demand is affected through an anonymous trading facility or unless the trading desk documents how and why the organizational unit of said large banking entity should be treated as a client,

[775] *See https://www.sec.gov/divisions/marketreg/faq-volcker-rule-section13.htm,* originally published on June 10, 2014, and most recently updated on March 4, 2016.

[776] *See* Statement regarding Treatment of Certain Foreign Funds under the Rules Implementing Section 13 of the Bank Holding Company Act (July 17, 2019), *available at https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20190717a1.pdf.* This policy statement continued the position of the Federal banking agencies that was released on July 21, 2017, and the position that the agencies expressed in the proposal. *See* 83 FR 33444.

[777] This aspect of the baseline is discussed in section V.F.3.b.

[778] This aspect of the baseline is discussed in section IV.B.1.b.i.

[779] *See* 2013 rule §§ ____.4, ____.5, App. A., App. B; final rule §§ ____.4, ____.5, App. A.

[780] *See* 2013 rule § ____.4 (a).

[781] *See* 2013 rule § ____.4 (b).

[782] *See* 2013 rule § ____.4 (b)(3)(i).

customer, or counterparty. To the extent that such documentation requirements increase the cost of intermediating interdealer transactions, this requirement may affect the volume and cost of interdealer trading.

(3) Exemption for Risk-Mitigating Hedging

Under the baseline, certain risk-mitigating hedging activities may be exempt from the restriction on proprietary trading under the risk-mitigating hedging exemption. To make use of this exemption, the 2013 rule requires all banking entities to comply with a comprehensive and multi-faceted set of requirements, including (1) the establishment, implementation, and maintenance of an internal compliance program; (2) satisfaction of various criteria for hedging activities; and (3) the existence of compensation arrangements for persons performing risk-mitigating hedging activities that are designed not to reward or incentivize prohibited proprietary trading. In addition, certain activities under the exemption for risk-mitigating hedging are subject to documentation requirements.[783]

Specifically, the 2013 rule requires that a banking entity seeking to rely on the exemption for risk-mitigating hedging must establish, implement, maintain, and enforce an internal compliance program that includes reasonably designed written policies and procedures regarding the positions, techniques, and strategies that may be used for hedging, including documentation indicating what positions, contracts, or other holdings a particular trading desk may use in its risk-mitigating hedging activities, as well as position and aging limits with respect to such positions, contracts, or other holdings. The compliance program must also provide for internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures. In addition, the 2013 rule requires that all banking entities, as part of their compliance program, must conduct analysis, including correlation analysis, and independent testing designed to ensure that the positions, techniques, and strategies that may be used for hedging are designed to reduce or otherwise significantly mitigate and demonstrably reduce or otherwise significantly mitigate the specific, identifiable risk(s) being hedged.

The 2013 rule does not require a banking entity to prove correlation mathematically—rather, the nature and extent of the correlation analysis should be dependent on the facts and circumstances of the hedge and the underlying risks targeted. Moreover, if correlation cannot be demonstrated, the analysis needs to state the reason and explain how the proposed hedging position, technique, or strategy is designed to reduce or significantly mitigate risk and how that reduction or mitigation can be demonstrated without correlation.[784] In the proposal, the SEC referenced market participants' estimate that the inability to perform correlation analysis, for instance, for non-trading assets such as mortgage servicing assets, can add as much as 2% of the asset value to the cost of hedging.[785]

To qualify for the exemption for risk-mitigating hedging, the hedging activity, both at inception and at the time of any adjustment to the hedging activity, must be designed to reduce or otherwise significantly mitigate and demonstrably reduce or significantly mitigate one or more specific identifiable risks.[786] Hedging activities also must not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously. Additionally, the hedging activity must be subject to continuing review, monitoring, and management by the banking entity, including ongoing recalibration of the hedging activity to ensure that the hedging activity satisfies the requirements for the exemption and does not constitute prohibited proprietary trading.

Finally, the 2013 rule requires banking entities to document and retain information related to the purchase or sale of hedging instruments that are either (1) established by a trading desk that is different from the trading desk establishing or responsible for the risks being hedged; (2) established by the specific trading desk establishing or responsible for the risks being hedged but that are effected through means not specifically identified in the trading desk's written policies and procedures; or (3) established to hedge aggregate positions across two or more trading desks.[787] The documentation must include the specific identifiable risks being hedged, the specific risk-mitigating strategy that is being implemented, and the trading desk that is establishing and responsible for the hedge. These records must be retained for a period of not less than 5 years in a form that allows them to be promptly produced if requested.[788]

(4) Exemption for Foreign Trading

Under the 2013 rule, a foreign banking entity that has a branch, agency, or subsidiary located in the United States (and is not itself located in the United States) is subject to the proprietary trading prohibitions and related compliance requirements unless the transaction meets five criteria.[789] First, a branch, agency, or subsidiary of a foreign banking organization that is located in the United States or organized under the laws of the United States or of any state may not engage as principal in the purchase or sale of financial instruments (including any personnel that arrange, negotiate, or execute a purchase or sale). Second, the banking entity (including relevant personnel) that makes the decision to engage in the transaction must not be located in the United States or organized under the laws of the United States or of any state. Third, the transaction, including any transaction arising from risk-mitigating hedging related to the transaction, must not be accounted for as principal directly or on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any state. Fourth, no financing for the transaction can be provided by any branch or affiliate of a foreign banking entity that is located in the United States or organized under the laws of the United States or of any state (the financing prong). Fifth, the transaction must generally not be conducted with or through any U.S. entity (the counterparty prong), unless (1) no personnel of a U.S. entity that are located in the United States are involved in the arrangement, negotiation, or execution of such transaction; (2) the transaction is with an unaffiliated U.S. market intermediary acting as principal and is promptly cleared and settled through a central counterparty; or (3) the transaction is executed through an unaffiliated U.S. market intermediary acting as agent, conducted anonymously through an

[783] *See* 2013 rule § ____.5.

[784] *See* 79 FR 5631.

[785] *See* 83 FR at 33534 citing to note 18 regarding Notice Seeking Public Input on the Volcker Rule (August 2017), *available at https://www.occ.gov/news-issuances/news-releases/2017/nr-occ-2017-89a.pdf.* Corresponding comment letters are available at *https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=OCC-2017-0014.* Letter from BOK Financial can be accessed directly at *https://www.regulations.gov/document?D=OCC-2017-0014-0016.*

[786] *See* 2013 rule § ____.5(b)(2)(ii).

[787] *See* 2013 rule § ____.5(c)(1).

[788] *See* 2013 rule § ____.5(c)(3). *See also* 2013 rule § ____.20(b)(6).

[789] *See* 2013 rule § ____.6(e).

exchange or similar trading facility, and is promptly cleared and settled through a central counterparty.[790]

(5) Covered Funds

The 2013 rule generally defines covered funds as issuers that would be investment companies but for section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940 and then excludes specific types of entities from the definition. As described above, the 2013 rule provides for market making and hedging exemptions to the prohibition on proprietary trading. However, the 2013 rule places additional restrictions on the amount of underwriting, market making, and hedging a banking entity can engage in when those transactions involve covered funds. For underwriting and market making transactions in covered funds, if the banking entity sponsors or advises a covered fund, or acts in any of the other capacities specified in § ____.11(c)(2) of the 2013 rule, then any ownership interests acquired or retained by the banking entity and its affiliates in connection with underwriting and market making-related activities for that particular covered fund must be included in the per-fund and aggregate covered fund investment limits in § ____.12 of the 2013 rule and is subject to the capital deduction provided in § ____.12(d) of the 2013 rule.[791] Additionally, a banking entity's aggregate investment in all covered funds is limited to 3% of a banking entity's tier 1 capital, and banking entities must include all ownership interests in covered funds acquired or retained in connection with underwriting and market making-related activities for purposes of this calculation.[792] Moreover, under the 2013 rule, the exemption for risk-mitigating hedging activities related to covered funds is available only for transactions that mitigate risks associated with the compensation of a banking entity employee or an affiliate that provides advisory or other services to the covered fund.[793]

Under the 2013 rule, foreign banking entities can acquire or retain an ownership interest in, or act as sponsor to, a covered fund, so long as those activities and investments occur solely outside of the United States, no ownership interest in such fund is offered for sale or sold to a resident of the United States (the marketing restriction), and certain other conditions are met. Under the 2013 rule, an activity or investment occurs solely outside of the United States if (1) the banking entity is not itself, and is not controlled directly or indirectly by, a banking entity that is located in the United States or established under the laws of the United States or of any state; (2) the banking entity (and relevant personnel) that makes the decision to acquire or retain the ownership interest or act as sponsor to the covered fund is not located in the United States or organized under the laws of the United States or of any state; (3) the investment or sponsorship, including any risk-mitigating hedging transaction related to an ownership interest, is not accounted for as principal by any U.S. branch or affiliate; and (4) no financing is provided, directly or indirectly, by any U.S. branch or affiliate. In addition, the staffs of the agencies have issued FAQs concerning the requirement that no ownership interest in such fund is offered for sale or sold to a resident of the United States.[794]

(6) Compliance Program

For compliance purposes, the 2013 rule differentiates banking entities on the basis of certain thresholds, including the amount of the banking entity's consolidated trading assets and liabilities and total consolidated assets. More specifically, U.S. banking entities that have, together with affiliates and subsidiaries, trading assets and liabilities (excluding trading assets and liabilities involving obligations of or guaranteed by the United States or any agency of the United States) the average gross sum of which—on a worldwide consolidated basis, over the previous consecutive four quarters, as measured as of the last day of each of the four prior calendar quarters—equals $10 billion or more are subject to reporting requirements of Appendix A under the 2013 rule. Banking entities that have $50 billion or more in total consolidated assets as of the previous calendar year end and banking entities with over $10 billion in consolidated trading assets and liabilities are subject to the requirement to adopt an enhanced compliance program pursuant to Appendix B of the 2013 rule. Additionally, banking entities that engage in covered activities and that have total consolidated assets of $10 billion or less as reported on December 31 of the previous 2 calendar years qualify for the simplified compliance regime.

The 2013 rule emphasized the importance of a strong compliance program and sought to tailor the compliance program to the size of banking entities and the size of their trading activity. As noted in the preamble to the 2013 rule, the agencies believed it was necessary to balance compliance burdens posed on smaller banking entities with specificity and rigor necessary for large and complex banking organizations facing high compliance risks. As a result, the compliance regime under the 2013 rule is progressively more stringent with the size of covered activities and/or balance sheet of banking entities.

Under the 2013 rule, all banking entities with covered activities must develop and maintain a compliance program that is reasonably designed to ensure and monitor compliance with section 13 of the BHC Act and the implementing regulations. The terms, scope, and detail of the compliance program depend on the types, size, scope, and complexity of activities and business structure of the banking entity.[795]

Under the 2013 rule, banking entities that qualify for the simplified compliance program (banking entities that have total consolidated assets of less than $10 billion) are able to incorporate compliance with the 2013 rule into their regular compliance policies and procedures by reference, adjusting as appropriate given the entities' activities, size, scope, and complexity.[796]

All other banking entities with covered activities are, at a minimum, required to implement a six-pillar compliance program. The six pillars include (1) written policies and procedures reasonably designed to document, describe, monitor and limit proprietary trading and covered fund activities and investments for compliance; (2) a system of internal controls reasonably designed to monitor compliance; (3) a management framework that clearly delineates responsibility and accountability for compliance, including management review of trading limits, strategies, hedging activities, investments, and incentive compensation; (4) independent testing and audit of the effectiveness of the compliance program; (5) training for personnel to

[790] *See* 2013 rule § ____.6(e)(3).

[791] *See* 2013 rule § ____.12(a)(2)(ii); *see also* § ____.11(c)(2).

[792] *See* 2013 rule § ____.12(a)(2)(iii); *see also* § ____.11(c)(3).

[793] *See* 2013 rule § ____.13(a).

[794] *See* Responses to Frequently Asked Questions Regarding the Commission's Rule under Section 13 of the Bank Holding Company Act, June 10, 2014, updated March 4, 2016, available at *https://www.sec.gov/divisions/marketreg/faq-volcker-rule-section13.htm.*

[795] *See* 2013 rule § ____.20(a).

[796] *See* 2013 rule § ____.20(f). Note that if an entity does not have any covered activities, it is not required to establish a compliance program until it begins to engage in covered activity.

effectively implement and enforce the compliance program; and (6) recordkeeping sufficient to demonstrate compliance.[797]

In addition, under the 2013 rule, banking entities with covered activities that do not qualify as those with modest activity (banking entities that have total consolidated assets in excess of $10 billion) and that are either subject to the reporting requirements of Appendix A or have more than $50 billion in total consolidated total assets as of the previous calendar year end are required to comply with the enhanced minimum standards for compliance as specified in Appendix B of the 2013 rule.[798]

Appendix B requires the compliance program of the banking entities that are subject to it to (1) be reasonably designed to supervise the permitted trading and covered fund activities and investments, identify and monitor the risks of those activities and potential areas of noncompliance, and prevent prohibited activities and investments; (2) establish and enforce appropriate limits on the covered activities and investments, including limits on the size, scope, complexity, and risks of the individual activities or investments consistent with the requirements of section 13 of the BHC Act and the 2013 rule; (3) subject the compliance program to periodic independent review and testing and ensure the entity's internal audit, compliance, and internal control functions are effective and independent; (4) make senior management and others accountable for the effective implementation of the compliance program, and ensure that the chief executive officer and board of directors review the program; and (5) facilitate supervision and examination by the agencies.

Additionally, under the 2013 rule, any banking entity that has more than $10 billion in total consolidated assets as reported in the previous 2 calendar years is required to maintain additional records related to covered funds. In particular, a banking entity must document the exclusions or exemptions relied on by each fund sponsored by the banking entity (including all subsidiaries and affiliates) in determining that such fund is not a covered fund, including documentation that supports such determination; for each seeding vehicle that will become a registered investment company or SEC-regulated business development company, a written plan documenting the banking entity's determination that the seeding vehicle will become a registered investment company or SEC-regulated business development company, the period of time during which the vehicle will operate as a seeding vehicle, and the banking entity's plan to market the vehicle to third-party investors and convert it into a registered investment company or SEC-regulated business development company within the time period specified.[799]

(7) Metrics

Under Appendix A of the 2013 rule, banking entities with trading assets and liabilities (excluding trading assets and liabilities involving obligations of or guaranteed by the United States or any agency of the United States) the average gross sum of which—on a worldwide consolidated basis, over the four previous quarters, as measured by the last day of each of the four prior calendar quarters—equals or exceeds $10 billion to meet requirements concerning recording and reporting certain measurements for each trading desk engaged in covered trading activity.[800] Banking entities subject to Appendix A are required to record and report the following quantitative measurements for each trading day and for each trading desk engaged in covered trading activities: (i) Risk and Position Limits and Usage; (ii) Risk Factor Sensitivities; (iii) Value-at-Risk and Stress Value-at-Risk; (iv) Comprehensive Profit and Loss Attribution; (v) Inventory Turnover; (vi) Inventory Aging; and (vii) Customer-Facing Trade Ratio.

The metrics reporting requirements are intended to assist banking entities, the SEC, and other regulators in achieving the following: A better understanding of the scope, type, and profile of covered trading activities; identification of covered trading activities that warrant further review or examination by the banking entity to verify compliance with the rule's proprietary trading restrictions; evaluation of whether the covered trading activities of trading desks engaged in permitted activities are consistent with the provisions of the permitted activity exemptions; evaluation of whether the covered trading activities of trading desks that are engaged in permitted trading activities (*i.e.,* underwriting and market making-related activity, risk-mitigating hedging, or trading in certain government obligations) are consistent with the requirement that such activity not result, directly or indirectly, in a material exposure to high-risk assets or high-risk trading strategies; identification of the profile of particular covered trading activities of the banking entity, and its individual trading desks, to help establish the appropriate frequency and scope of the SEC's examinations of such activity; and the assessment and addressing of the risks associated with the banking entity's covered trading activities.[801]

Under the 2013 rule, banking entities with significant trading assets and liabilities (Group A entities) and with moderate trading assets and liabilities (Group B entities) that have less than $50 billion in consolidated trading assets and liabilities are required to report metrics for each quarter within 30 days of the end of that quarter. In contrast, Group A and Group B banking entities with total trading assets and liabilities equal to or above $50 billion are required to report metrics more frequently—each month within 10 days of the end of that month.[802]

ii. EGRRCPA and Conforming Amendments

In accordance with section 203 of EGRRCPA,[803] the agencies amended the definition of ''insured depository institution'' in § ____.2(r) of the 2013 rule to exclude an institution if it, and every entity that controls it, has both (1) $10 billion or less in total consolidated assets and (2) total consolidated trading assets and liabilities that are 5% or less of its total consolidated assets. The agencies also amended the 2013 rule to reflect the changes made by section 204 of EGRRCPA. That provision modified section 13 of the BHC Act to permit, in certain circumstances, bank-affiliated investment advisers to share their name with the hedge funds or private equity funds they organize and offer.

As discussed elsewhere,[804] certain SEC-regulated entities, such as dealers and RIAs, fell under the definition of ''banking entity'' for the purposes of section 13 of the BHC Act before the enactment of EGRRCPA and qualified for the final amendments implementing

[797] *See* 2013 rule § ____.20(b).

[798] *See* 2013 rule § ____.20(c) and Appendix B.

[799] *See* 2013 rule § ____.20(e).

[800] *See* 2013 rule § ____.20(d) and Appendix A.

[801] *See* 2013 rule § ____.20 and Appendix A.

[802] *See* 2013 rule § ____.20(d)(3).

[803] Specifically, section 203 of EGRRCPA provides that the term ''insured depository institution,'' for purposes of the definition of ''banking entity'' in section 13(h)(1) of the BHC Act (12 U.S.C. 1851(h)(1)), does not include an insured depository institution that does not have, and is not controlled by a company that has (1) more than $10 billion in total consolidated assets; and (2) total trading assets and trading liabilities, as reported on the most recent applicable regulatory filing filed by the institution, that are more than 5% of total consolidated assets.

[804] *See* EGRRCPA Conforming Amendments Adopting Release, 84 FR at 35008.

sections 203 and 204 of EGRRCPA.[805] Therefore, the economic baseline against which the SEC is assessing the final rule incorporates the economic effects of sections 203 and 204 of EGRRCPA, as analyzed in the agencies' release adopting the conforming amendments.[806]

b. Response to Commenters Regarding Economic Baseline and Effects of Section 13 of the BHC Act and the 2013 Rule

In the proposal, the SEC described the baseline effects of the 2013 rule[807] and recognized that amendments that increase or decrease the scope of permissible activities may magnify or attenuate the baseline economic effects of the 2013 rule.[808] The SEC also noted that amendments that decrease (or increase) compliance program and reporting obligations could alter the economic effects toward (or away from) competition, trading activity, and capital formation on the one hand, and against (or in favor of) regulatory and internal oversight on the other. However, the SEC noted that the proposed amendments may enhance trading liquidity and capital formation and that some of the proposed changes need not reduce the efficacy of the regulation or the agencies' regulatory oversight.[809]

A number of commenters, however, have indicated that the proposed amendments would have changed the scope of permissible activities and the compliance regime in the 2013 rule in a manner that significantly alters the costs and benefits of that rule and offered a variety of assessments of the baseline economic effects of section 13 of the BHC Act and the 2013 rule.[810] In response to those comments, this section expands the discussion of the baseline and supplements the analysis in the proposal with a discussion of the comments received by the agencies and, in response to comments, recent research on that topic. In the 2013 rule, the agencies sought to increase the safety and soundness of banking entities and to promote financial stability,[811] and to reduce conflicts of interest between banking entities and their customers, clients, and counterparties,[812] while preserving the provision of valuable client-oriented services[813] and mitigating unnecessary compliance burdens and related competitive effects.[814] Accordingly, the sections that follow address the SEC's understanding of the baseline effects of section 13 of the BHC Act and the 2013 rule on (a) risk exposures, (b) conflicts of interest between banking entities and their customers and counterparties, (c) client-oriented financial services and market quality, and (d) compliance burdens and competition.

The SEC's analysis of these various effects reflects comments received, academic research, and the SEC's experience overseeing registered entities for purposes of section 13 of the BHC Act. Importantly, research studies cited below are limited to their specific settings and are subject to various methodological and measurement limitations, as discussed in the sections that follow. Moreover, as described below, some studies empirically examine the relevant effects around the implementation of the 2013 rule, while others focus on the anticipatory response of market participants around the enactment of section 13 of the BHC Act and prior to the effective date of the 2013 rule. As a result, the SEC recognizes that these findings may have limited generalizability and may or may not extend to various groups of SEC registrants.

As discussed below, some research suggests that section 13 of the BHC Act and the 2013 rule may have reduced risk exposures of banking entities related to trading, but may not have reduced the overall exposure to risk of some banking entities. Other research suggests that the 2013 rule may have partly mitigated certain conflicts of interest between banking entities and clients in a limited set of banking entity-client relationships. Moreover, some research suggests that the 2013 rule imposed large compliance costs that may have disproportionately affected smaller banking entities and may have decreased the willingness and ability of banking entities to engage in certain client facilitation activities.

In addition, commenters suggested that the agencies must consider the effects of the 2013 rule and proposed amendments in light of the overall effects of new requirements on banking entities, including Basel III, regulations of systemically important financial institutions, the SEC's money market reform, and the liquidity coverage ratio.[815] Where relevant, the analysis that follows discusses the direct effects of section 13 of the BHC Act, the 2013 rule, sections 203 and 204 of EGRRCPA and conforming amendments, and the final rule, as well as how they may interact with the effects of other related financial regulations.

i. Risk Exposure

As discussed in the proposal, in implementing section 13 of the BHC Act, the agencies sought to increase the safety and soundness of banking entities and to promote financial stability, among other things.[816] The regulatory regime created by the 2013 rule was intended to enhance regulatory oversight and compliance with the substantive prohibitions in section 13 of the BHC Act.[817]

In response to the proposal, some commenters indicated that the benefits from the statutory prohibition in section 13 of the BHC Act and implementing rules on proprietary trading include reduced banking profits resulting from proprietary trading and corresponding reductions in the costs associated with bailouts;[818] prudent risk management that makes job-creating functions of banks more viable;[819] greater financial stability;[820] dampened bubbles in products such as synthetic collateralized debt obligations,[821] and reduced highly risky bank trading activities and hedge fund and private equity investments that can threaten financial stability.[822] Other commenters stated that proprietary trading was not the cause of the 2007–2008 financial crisis and that almost every financial crisis in history has been driven by classic extensions of credit;[823] that rather than reducing systemic risk, section 13 of the BHC Act and the implementing rules harm the healthy functioning of the financial services

805 The SEC continues to believe that all bank-affiliated entities that may register with the SEC as security-based swap dealers and major security-based swap participants were unaffected by section 203 of EGRRCPA or the conforming amendments because of the size of their balance sheets and the amount of trading activity of their affiliated banking entities. The SEC's analysis was based on DTCC Derivatives Repository Limited Trade Information Warehouse (TIW) data on single-name credit-default swaps.

806 *See* EGRRCPA Conforming Amendments Adopting Release, 84 FR at 35008.

807 *See* 83 FR at 33520–33521.

808 *See* 83 FR at 33521.

809 *Id.*

810 *See, e.g.,* Occupy the SEC, Better Markets, SIFMA, Center for American Entrepreneurship.

811 *See, e.g.,* 79 FR at 5666, 79 FR at 5574, 79 FR at 5541.

812 *See, e.g.,* 79 FR at 5659.

813 *See, e.g.,* 79 FR at 5541.

814 *See, e.g.,* 79 FR at 5541, 79 FR at 5584, 79 FR at 5616, 79 FR at 5671, 79 FR at 5673, 79 FR at 5675, 79 FR at 5713.

815 *See* CCMC; Oonagh McDonald; JBA; Occupy the SEC and Systemic Risk Council.

816 *See, e.g.,* 79 FR at 5666, 79 FR at 5574, 79 FR at 5541, 79 FR at 5659. *See also* Senators Merkley et al.

817 *See, e.g.,* 83 FR at 33520.

818 *See, e.g.,* Occupy the SEC.

819 *Id.*

820 *See, e.g.,* Better Markets and NAFCU.

821 *See, e.g.,* Volcker Alliance.

822 *See, e.g.,* CAP.

823 *See, e.g.,* American Action Forum.

industry;[824] and that section 13 of the BHC Act and the implementing rules are no longer necessary given Basel III capital requirements, stress testing, and liquidity coverage ratio rules that promote short-term resilience of bank risk profiles.[825]

In response to the comments discussed above, the SEC has analyzed relevant academic research on these issues. Most existing qualitative analysis and quantitative research on moral hazard,[826] incentives to increase risk exposures that arise out of deposit insurance[827] and implicit bailout guarantees,[828] and systemic risk implications of proprietary trading do not explicitly analyze the effects of section 13 of the BHC Act or of the 2013 rule.[829]

Several recent academic studies examined the baseline effects of section 13 of the BHC Act and implementing regulations on activities by banking entities that involve market risk. As discussed in detail below, this research suggests that, although section 13 of the BHC Act and the 2013 rule may have reduced risk exposure related to trading, it is not clear that the 2013 rule reduced the overall risk of individual banking entities and potentially of banking entities as a whole.

For example, one study[830] compares changes in equity returns and CDS spreads of 93 U.S. listed banks affected by post-crisis financial reforms and of those that were not. Specifically, the study finds that news concerning the potential enactment of substantive prohibitions in section 13 of the BHC Act[831] led to a rise in credit default swap (CDS) spreads (by as much as 17–18 basis points) and to a decrease in equity prices (statistically significant in most specifications). The paper interprets the results as an indication that the proprietary trading prohibition reduced bank profitability because of the spinoffs of profitable trading and swap desks. In an additional analysis, the paper finds that these effects were more significant for investment banks, for banks that are more likely to be systemically important,[832] and for banks that are closer to default. Notably, the paper does not examine changes in specific types of risky activities, so it is possible that the observed effects may have occurred for reasons unrelated to the proprietary trading prohibitions.[833] While the paper concludes that the reforms reduced bail-out expectations, the rise in CDS spreads and the decrease in equity prices are also consistent with the interpretation that market participants reacted to the event as a change increasing the risk to banking entities, for instance because of the expected shift to risk taking through lending or reduced hedging of lending activities with trading activities. For instance, a shift away from trading activity and toward more illiquid and potentially less diversified lending or trading activities may have increased banking entities' exposure to liquidity and counterparty risks, and this risk may have been priced in higher CDS spreads of banking entities.

In contrast, another paper[834] examines the cumulative market reaction to 15 events related to section 13 of the BHC Act using a sample of 784 listed banks and seeks to distinguish the events from announcements surrounding Orderly Liquidation Authority events. The paper finds significant negative cumulative abnormal equity returns (−11.97%) for targeted banks,[835] consistent with targeted banks losing out on profitable opportunities, and positive cumulative abnormal returns (7.1%) for non-targeted banks. Similarly, the paper estimates that targeted banks experienced a 0.021% increase in CDS spreads, consistent with the changes making targeted banks riskier, whereas non-targeted banks experienced a decline in CDS spreads of −0.049%. In addition, banks with a higher measure of systemic risk (marginal expected shortfall), higher illiquidity (Amihud (2002)[836] measure and the bid-ask spread), and worse reporting quality (abnormal loan loss provisions) experienced more negative market reactions to events surrounding section 13 of the BHC Act and the 2013 rule. On aggregate, the paper finds that equity returns rose and CDS spreads declined for sample banks, and concludes that the rule targeted larger institutions and enhanced the relative position of smaller banks.

Four factors limit the interpretation of this paper's results. First, the validity of inference from event studies is affected by the presence of confounding events on announcement days. While a study of a greater number of event days may provide a more complete picture of market responses to even minor announcements concerning the reform of interest, it increases the likelihood of confounding events occurring on event days, ceteris paribus. Second, the proprietary trading prohibitions scoped in all, not just a subset of, banking entities, while the paper hypothesizes differential effects of the proprietary trading prohibition on targeted and non-targeted banks. As a result, the measurement of targeted banks may simply be capturing prior performance of an institution during times of severe

[824] *See, e.g.,* American Action Forum and CAP.

[825] *See* Oonagh McDonald. *See also infra* note 849.

[826] A classic definition of moral hazard is ''the loss exposure of an insurer (the FDIC) that results from the character or circumstances of the insured'' (here, the banking entity). *See* Anthony Saunders & Marcia Cornett, Financial Institutions Management: A Risk Management Approach, 573 (8th ed. 2014) p. 573.

[827] Saunders and Cornett (2014) discusses how deposit insurance reduces the risks of depositors or other liability holders engaging in a run on a banking entity and the related costs of a banking entity's failure. However, if the risk of bank failure is not adequately priced in the insurance premium paid by the banking entity, deposit insurance can create incentives to engage in more risky activities. Moreover, even absent deposit insurance, the limited liability of a banking entity's shareholders still creates incentives to risk shift at the expense of depositors, bondholders, and other fixed claimants. *See* Saunders and Cornett (2014), ch. 19.

[828] Deposit insurance and implicit bailout guarantees may give rise to risk taking incentives that are not specific to proprietary trading. In other words, even in the absence of proprietary trading, both deposit insurance and implicit bailout guarantees may create incentives for banking entities to increase risk exposures from permissible activities such as lending, underwriting, and market making. Thus, a prohibition of proprietary trading need not by itself reduce moral hazard or overall risk exposures of banking entities if banking entities increase risk exposures from other activities during the same time.

[829] For a literature review, *see, e.g.,* Sylvain, Benoit et al., *Where the Risks Lie: A Survey on Systemic Risk,* 21 Rev. Fin. 109 (2017). *See also* 83 FR 33533 note 350.

[830] *See* Alexander Schäfer et al., *Financial Sector Reform after the Subprime Crisis: Has Anything Happened?,* 20 Rev. Fin. 77 (2016).

[831] Specifically, the paper performs an event study around January 21, 2010, when President Obama announced support for Volcker Rule-type restrictions on proprietary trading by banking entities. *See* Remarks by the President on Financial Reform, Office of the Press Secretary, The White House, January 21, 2010, available at *https://obamawhitehouse.archives.gov/the-press-office/remarks-president-financial-reform,* last accessed 6/27/2019.

[832] Specifically, the paper measured systemic importance on the basis of the Financial Stability Board's list of 29 global systemically important financial institutions published on November 4, 2011. *See* Financial Stability Board Identifies 29 Global SIFIs and Announces Agreed Policy Measures, Mondaq, November 4, 2011, last accessed 7/9/2013.

[833] Another study by Gropp et al. (2011) finds that government guarantees can increase risk-taking incentives in competitor, but not in protected, banks. *See* Reint Gropp et al., *Competition, Risk-Shifting, and Public Bailout Policies,* 24 Rev. Fin. Stud. 2084 (2011).

[834] *See* Fayez Elayan et al., *The Impact of the Volcker Rule on Targeted Banks, Systemic Risk, Liquidity, and Financial Reporting Quality,* 96 J. Econ. & Bus. 69 (2018).

[835] The paper defines targeted banks as banks that issued or had exposure to mortgage-backed securities or other securitized products or had other asset write-downs reported in news sources.

[836] *See* Amihud Yakov, *Illiquidity and Stock Returns: Cross-section and Time Series Effects,* 5 J. Fin Markets 31 (2002).

stress or the likelihood of an institution being affected by other regulatory restrictions or sanctions and not necessarily the degree of exposure to the proprietary trading prohibition. Third, since the management of bank balance sheets and risk exposures can take several quarters, narrow event windows may reflect market participants' expectations but may not be informative about ex-post changes in risky bank activities in response to the event.[837] Finally, all but one event considered in this study relate to the substantive prohibitions in section 13 of the BHC Act (and not the agencies' implementing rules), and all of the events examined in this study precede the adoption of the 2013 rule.

A recent paper uses regulatory data on net trading profits reported by bank holding companies to the Federal Reserve under the Market Risk Capital Rule and examines the risk-taking of U.S. banks via trading books before and after the 2013 rule.[838] The paper finds that, prior to 2014, U.S. banks had significant exposures to equity risk factors through their trading books, but that such trading exposures declined after the implementing regulations. The paper also finds that, in response to the 2013 rule, the trading desks of U.S. banks have decreased their exposures to interest rate risk but not to credit risk. Consistent with bank reliance on certain exemptions with respect to commodities, foreign exchange, and currency trading, U.S. banks also continue to be exposed to currency risk. Importantly, post-2013 rule credit and dollar risk exposures are far less significant in magnitude compared to pre-2013 rule exposure to equity risk factors. The paper concludes that the ban on proprietary trading was effective in curtailing large exposures. These results seem to suggest that holding companies significantly reduced their exposure to risk from trading activities.

Four considerations limit the interpretation of these results. First, the paper's tests focus on data aggregated to the weekly frequency, and it is not clear if the results would continue to hold using daily, monthly, or quarterly frequencies. For example, the results appear inconsistent with other research analyzing FR Y–9C data on trends in quarterly trading positions and trading revenues, which does not find significant changes in equity profits and losses after the 2013 rule.[839] Second, anticipatory compliance and confounding regulatory and macroeconomic events (unaccounted for in the paper) complicate definitive causal inference. Third, the paper does not examine the possibility that, since higher risk is generally compensated with higher expected returns,[840] banking entities may have offset risk reductions in their trading books by shifting risk into illiquid banking books. Fourth, the paper also does not test changes in the total amount of risk on bank balance sheets before and after the relevant regulatory shocks or consider the effects of the implementing regulations on the overall risk of U.S. banking entities.

Another study empirically examines the effects of the substantive prohibitions of section 13 of the BHC Act on the returns and overall risk of publicly traded U.S. bank holding companies before and after the third quarter of 2010.[841] Consistent with the papers discussed above, this paper finds that most affected bank holding companies, *i.e.* those with the largest trading books before 2010, reduced trading books relative to total assets by 2.34% more than other bank holding companies. However, this result is generally consistent with mean reversion in trading activity by banks that may have suffered the greatest trading losses during the crisis. In addition, the paper does not directly distinguish between proprietary trading and client facilitation trading or hedging trading. Although the paper finds a decline in trading activity and a general decline in overall bank risk (measured by the *z-score*),[842] the paper does not find a pronounced effect on most affected bank holding companies; in fact, some of the results suggest that most affected banks became riskier than less affected banks. The paper finds that the channel for this effect on overall risk is an increase in asset return volatility of affected bank holding companies. In addition, the paper finds no significant differences in the volatility of bank stock prices and liquidity ratios of affected and unaffected entities. The paper concludes that the risk taking incentives of banking entities have not changed and that affected banks have been able to maintain their levels of risk taking by becoming less likely to use remaining trading assets to hedge banking book returns.[843] The SEC notes that the sample period of the paper ends prior to the full effective date of the 2013 final rule, which may partly limit the interpretation of these results.

Another recent paper[844] uses structural methods to isolate and estimate the effects of the limitation of bank proprietary trading in section 13 of the BHC Act on the probability of bank defaults, earnings, and the value of their equity. Using a model calibrated to the data from a sample of 34 of the most affected U.S. banks, this paper finds that banks—and particularly banks most affected by section 13 of the BHC Act—

[837] For example, see the below discussion of a study by Keppo and Korte (2018) examining changes in bank risk taking over a 10 quarter period and finding that banks did not decrease risk-taking.

[838] *See* Antonio Falato et al., ''Banks as Regulated Traders,'' Finance Fin. & Econ. Discussion Series 2019–005, Washington: Board of Governors of the Fed. Reserve System (2019), *available at https://doi.org/10.17016/FEDS.2019.005,* last accessed 5/20/2019.

[839] *See* Begenau, 2019, Discussion of ''Banks as Regulated Traders,'' NBER CF Spring meeting, April 12, available at *https://begenau.people.stanford.edu/sites/g/files/sbiybj1926/f/nber_cfspring2019_begenau_disc.pdf,* last accessed 07/15/2019. *See also* Juliane Begenau et al., *Banks' Risk Exposures,* (Nat'l Bureau of Econ. Research, Working Paper No. 21334, 2015) *available at http://www.nber.org/papers/w21334,* last accessed 07/15/2019.

[840] This effect is commonly known as the ''risk-return tradeoff'': If an investor is willing to take on risk, there is a reward of higher expected returns. *See* ZVI Bodie et al., Investments, G–11 (9th ed. 2011).

[841] *See* Jussi Keppo & Josef Korte, *Risk Targeting and Policy Illusions—Evidence from the Announcement of the Volcker Rule,* 64 Mgmt. Sci. 215 (2018). Also cited as an example of ''pathbreaking work assessing the many costs and benefits of the Rule'' in Robert J. Jackson Jr., ''Proposed Amendments to the Volcker Rule,'' Securities and Exchange Commission, June 5, 2018, note 21 available at *https://www.sec.gov/news/public-statement/jackson-statement-proposed-amendments-volcker-rule.*

[842] The z-score is one of the most popular multiple discriminant analysis models of bankruptcy, originally developed by Altman (1968) and updated frequently since. Multiple discriminant analysis consists of identifying a linear combination of accounting measures that provides the best fit for the observed default and non-default outcomes in a particular sample of firms. The variables that enter into the z-score include: The ratio of working capital to total assets; retained earnings to total assets; earnings before interest and taxes to total assets; market value of equity to total liabilities; and net sales to total assets. While the weights on these components of the z-score are periodically recalibrated using more recent samples, all components enter with a positive sign, such that an increase in each of the variables decreases the probability of bankruptcy. *See* Phillippe Jorion, GARP Financial Risk Manager Handbook: Frm Part I/Part II, 475 (2011).

[843] In another context, Keppo and Korte (2018) also find that, after the passage of the Gramm-Leach-Bliley Act that repealed the Glass-Steagall Act, the overall risk (measured by the z-score) of affected banks relative to unaffected banks did not change. In that context, the paper finds that affected banks did significantly increase their trading risk and decrease the risk of their banking book.

[844] *See* Sohhyun Chung et al., *The Impact of Volcker Rule on Bank Profits and Default Probabilities,* (SSRN Working Paper, Feb. 27, 2019), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2167773,* last accessed 4/23/2019

Also cited in Robert J. Jackson Jr., ''Proposed Amendments to the Volcker Rule,'' Securities and Exchange Commission, June 5, 2018, note 22 available at *https://www.sec.gov/news/public-statement/jackson-statement-proposed-amendments-volcker-rule.*

may have become riskier after the statutory change. In the model, the key mechanism behind this effect is the banks' ability to respond to shocks: Since the rule leads to a reduction in the size of the trading book and increases the relative weight of an illiquid banking book, banks face greater difficulties scaling down the bank book when faced with negative earnings shocks after the rule. The model assumes no implementation costs, as the costs were sunk when the statutory prohibition came into effect and yields an estimate of between −0.72% and 56.72% increase in average bank default probability after the law. This estimate range may suggest that the overall risk of some banks may have increased, in some cases, after the law. In the model, banks for which a small trading book is optimal, banks with a profitable and low-risk bank book, and banks that take more risk through leverage, do not experience this rise in the default risk after the proprietary trading prohibition. Because the banking book is more profitable and volatile than the trading book for most affected banks, the paper actually estimates no significant decrease and, in some cases, an increase in banks' expected earnings and earnings volatility (a range of −0.04% to 0.73% depending on calibration).[845] An important caveat for the interpretation of these results is the sensitivity of the estimates to modeling assumptions, the limited sample used in model calibration, and the extremely broad range of estimates of an increase in average bank default probability after the law.

Finally, a recent paper[846] identified three potential channels behind the effects of section 13 of the BHC Act and the 2013 rule on risky activities of bank holding companies: (i) Risks from proprietary trading activity itself, (ii) risk from a lack of diversification of bank revenue (trading and non-trading revenue), and (iii) risk from similarity among banks. The paper measures overall risk with the z-score (as well as volatility in returns, revenues, and returns on assets) and systemic risk with marginal expected shortfall (average stock return of each bank holding company during bottom 5th percentile shocks to 1-year market returns; it also measures marginal expected shortfall for the financial industry, and tail beta)[847] and documents two main results. First, an index of bank revenue diversification reduces measures of bank and systemic risk, while similarity across banks increases systemic risk, and trading activity increases both. Second, the 2013 rule reduced risks from trading activity of affected banks, reduced the diversification of bank revenue of affected banks, and increased similarity across banks.

The interpretation of these results may be limited because of respective methodologies, measurement, identifying assumptions, and residual confounding, as well as the general limitations noted at the outset. However, these results are broadly consistent with other research that finds that banking entities can respond to regulations by risk shifting within an asset class while remaining in compliance[848] and that the implementation of other financial reforms can create effects inconsistent with the regulators' intentions.[849]

Some commenters indicated that restricting pay practices of banking entities may effectively reduce proprietary trading cross-subsidized by taxpayers and accordingly lower the risks of banking entities.[850] While the final rule does not amend existing requirements or impose new requirements related to compensation practices of banking entities, the SEC notes two incentive effects relevant for the consideration of these issues. First, as discussed above, proprietary trading is one of many activities through which a banking entity can take risk. Both deposit insurance and implicit government bailout guarantees incentivize risk taking that is not specific to proprietary trading. Even in the absence of proprietary trading, deposit insurance and implicit bailout guarantees may lead banking entities to take greater risks through lending and permitted underwriting and market making, among other things. As a result, a prohibition on proprietary trading need not by itself reduce the overall risk of banking entities if banking entities increase risk through other activities during the same time.

Second, the incentives to take on greater risks described above are those of both a banking entity's shareholders who are residual claimants on the banking entity's assets and management. Under limited liability, all shareholders enjoy a limited downside (at worst, shareholders stand to lose their investment) and an unlimited upside if the firm performs well (the value of shareholders' equity depends on the value of the assets net of the value of fixed claims, such as claims of debtholders, depositors, and employees).[851] Thus, the incentives of banking entities to take on greater risks discussed above may persist so long as any restrictions on pay practices leave the incentives of a banking entity's management and employees even partly aligned with those of shareholders.

ii. Conflicts of Interest

As discussed in the proposal, in implementing section 13 of the BHC Act, the agencies also sought to reduce conflicts of interest between banking entities and their customers.[852] Some commenters indicated that bank trading activities and interests in hedge funds and private equity funds resulted in

[845] The estimate of −0.04% was obtained using parameters for ''median hedge fund banks,'' calculated as the median of the 34 sample banks, for which the drift and volatility of the trading earnings were estimated from Credit Suisse Long/Short Equity Hedge Fund Index data for 2000 through the beginning of 2010. The estimate of 0.73% was obtained using drift and trading earnings volatility for an asset-weighted mean of sample banks.

[846] *See* Christina Bui and Talis Putnins, *The Intended and Unintended Effects of the Volcker Rule,* (Aug. 31, 2018) (working paper), *available at http://fmaconferences.org/SanDiego/Papers/Volcker_SubmissionFMA.pdf,* last accessed 4/23/2019.

[847] Acharya et al. (2017) finds that a bank's impact on systemic expected shortfall is affected by its marginal expected shortfall and leverage. *See* Viral Acharya et al., *Measuring Systemic Risk,* 30 Rev. Fin. Stud. 2 (2017).

[848] *See* Ran Duchin and Denis Sosyura, *Safer Ratios, Riskier Portfolios: Banks' Response to Government Aid,* 113 J. Fin. Econ. 1 (2014).

[849] For example, Sundaresan and Xiao (2019) show that the interaction of liquidity requirements of Basel III and the money market fund reform may have increased the reliance of private financial institutions on liquidity provided by Federal Home Loan Banks that enjoy an implicit government guarantee. The paper concludes that the rules increased the role of a government-sponsored enterprise in the aggregate liquidity transformation and the reliance of private institutions on public liquidity backstops. In another context, Baghai et al. (2019) finds that following the money market fund reforms, safer funds exited the industry, the remaining funds increased their portfolio risk, and issuers with lower credit risk experienced a reduced access to money market funding. *See* Suresh Sundaresan and Kairong Xiao, *Unintended Consequences of Post-Crisis Liquidity Regulation* (Aug. 9, 2019) (working paper) *last accessed* 8/29/2019. *See also* Ramin Baghai et al., *Liability Structure and Risk-Taking: Evidence from the Money Market Fund Industry,* (Aug. 18, 2019) (working paper) last accessed 8/29/2019.

[850] *See, e.g.,* CAP and Public Citizen, citing Robert J. Jackson Jr., ''Proposed Amendments to the Volcker Rule,'' Securities and Exchange Commission, June 5, 2018, available at *https://www.sec.gov/news/public-statement/jackson-statement-proposed-amendments-volcker-rule* on potential effects of pay practices on proprietary trading.

[851] *See, e.g.,* Jonathan Berk & Peter DeMarzo, Corporate Finance, 552–53 (3rd ed. 2014), discussing how leverage can (1) incentivize shareholders to shift from lower-risk to higher-risk assets (the ''asset substitution'' problem); and (2) induce shareholders to undertake negative net present value, but sufficiently risky projects (the ''over-investment'' problem). *See also* Michael Jensen and William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure,* 3 J. Fin. Econ. 305 (1976).

[852] *See, e.g.,* 79 FR at 5659.

significant conflicts of interest between banks and their customers.[853] One commenter also indicated that the agencies should amend the provisions concerning material conflicts of interest by permitting banking entities to rely on information barriers under certain circumstances.[854]

In response to these comments, the SEC reviewed relevant research on conflicts of interest between banking entities and their customers. As discussed below, related research generally examines trading of banking entities in stocks, bonds, or options of their advisory and underwriting clients. While the findings are somewhat mixed and limited to their specific empirical settings, this research is consistent with the presence of such conflicts in certain groups of merger and acquisition (M&A) deals. In addition, one study finds that a narrow type of conflicts of interest between banking entities and their clients may have decreased after the implementation of the 2013 rule.

Specifically, a recent study [855] examines both the presence of conflicts of interest between advisor banks and their customers based on banks' options holdings, and changes in such trading activity around the implementation of the Volcker Rule. The paper documents three main results. First, the paper finds that merger advisors tend to increase their holdings in call options relative to put options in merger targets during the quarter before the announcement. Second, merger advisors are significantly more likely to increase put option holdings in the acquirer firm.[856] In combination with the literature's general finding of average negative announcement returns in acquirer firms and positive announcement returns in target firms, the paper argues that these results are suggestive of informed trading by advisor banks on client firms. Third, within the subsample of affected deals (deals in which one or more advisor banks ceased proprietary trading operations around the enactment of section 13 of the BHC Act) after 2011, the paper finds that advisors did not increase their net call option holdings on target firms before merger announcements. The paper concludes that, in this narrow setting, the Volcker Rule may have decreased banks' options trading on client information.

Importantly, the paper finds that some of this bank activity was replaced by hedge fund activity: Specifically, hedge funds increased their informed trading in options of M&A client firms around the same time in the same subsample of deals.

The SEC is also aware of a broader body of research that empirically tests the existence and magnitude of conflicts of interest between banks and their customers in the context of advising and underwriting relationships and that does not directly empirically test the effects of section 13 of the BHC Act or the 2013 rule on the presence or magnitude of such conflicts. One article in the legal literature [857] empirically measures the profitability of trading by banks that have advisory clients and are subject to reporting requirements as temporary insiders. They document that such trading by banks in the stocks of advisory clients is profitable (with an estimated average 25% return on their trades), that the trading centers around adverse events, and that the elimination of Glass-Steagall restrictions in 2002 was associated with more frequent and more profitable trading. However, the paper does not empirically test the effects of section 13 of the BHC Act or of the 2013 rule.

Finance research on this type of conflict of interest between banks and their customers finds mixed effects. One of the earlier papers [858] examines trading in M&A target firms by the advisor banks of bidders and links advisor pre-announcement stakes in target firms with the probability of deal success and with the target premium. They document positive returns of this trading strategy and conclude that advisors acquire positions in deals of their advisory clients, as well as influence deal outcomes. Since such advisor behavior benefits the bidder, the authors recognize that they cannot rule out the alternative explanation that the bidder's board retains the advisor with strong incentives for deal completion. Outside of the M&A context, other work [859] explores the trading activity of IPO underwriters and finds that lead underwriter trades in IPO firms are associated with subsequent IPO abnormal returns.

Another study [860] focuses on bond trading and uses a sample covering 1994 through 2006 to examine the trading of bond dealers affiliated with M&A advisory banks with insurance companies. The study finds weak evidence that when affiliated dealers are one side of a bond transaction, they earn higher bond returns than unaffiliated dealers, and that affiliated dealers sell more of the bonds that may lose value ahead of bad news than unaffiliated dealers. The paper observes only a subset of such dealer trades with insurance companies and is unable to evaluate whether affiliated dealers are net buyers or sellers of affected bonds before bad news. The study concludes that there is weak and suggestive evidence that transfer of information within financial institutions is one of the potential information sources before public announcements.

Similarly, another paper [861] finds no evidence of information leakage because of investment bank M&A advisory, underwriting, or lending relationships from 1997 through 2002. Specifically, the paper finds no evidence that investment bank clients buy shares in takeover targets in advised deals. Similarly, bank clients with previous underwriter or lending relationships do not trade or earn abnormal returns before earnings announcements. The paper also examines market making imbalances and investment returns by connected brokerage houses and finds that they do not trade profitably ahead of earnings announcements by their IPO, SEO, M&A client, or borrower firms. The paper concludes that neither brokerage houses nor their clients trade on inside information available to the brokerage because of their market making or advising roles.

The SEC continues to note that the above studies are limited to their specific empirical settings and, as can be seen above, different empirical design, measurement, and identification approaches limit inference in each of the papers discussed above. Moreover, the SEC continues to note that the scope of this economic analysis is limited to SEC registrants, investors in securities markets, and the functioning of securities markets. While the research discussed above does not focus

[853] *See, e.g.,* CAP.

[854] *See* SIFMA.

[855] *See* Michelle Lowry et al., *Informed Trading By Advisor Banks: Evidence from Options Holdings,* 32 Rev. Fin. Stud 605 (2018).

[856] To the degree that some advisor banks may have an underlying (long) risk exposure to acquirer firms' equity, buying put options is also consistent with risk-mitigating hedging.

[857] *See* Sureyya Avci et al., *Eliminating Conflicts of Interests in Banks: The Significance of the Volcker Rule,* 35 Yale J. Reg. 343 (2017). Also cited in Robert J. Jackson Jr., ''Proposed Amendments to the Volcker Rule,'' Securities and Exchange Commission, June 5, 2018, note 20, available at *https://www.sec.gov/news/public-statement/jackson-statement-proposed-amendments-volcker-rule.*

[858] *See* Andriy Bodnaruk et al., *Investment Banks as Insiders and the Market for Corporate Control,* 22 Rev. Fin. Stud. 4989 (2009).

[859] *See* Yao-Min Chiang et al., *The Information Advantage of Underwriters in IPOs,* Mgmt. Sci. (forthcoming 2019).

[860] *See* Semi Kedia and Xing Zhou, *Informed Trading Around Acquisitions: Evidence From Corporate Bonds,* 18 J. Fin. Mkt. 182 (2014).

[861] *See* John M. Griffin et al., *Examining the Dark Side of Financial Markets: Do Institutions Trade on Information from Investment Bank Connections,* 25 J. Fin. Econ. 2155 (2012).

specifically on banking entities that are SEC registrants, some of the incentive effects and conflicts of interest discussed above may extend to banking entities overseen by the SEC.

iii. Client-Oriented Services and Market Quality

In the 2013 rule, the agencies recognized that client-oriented financial services, such as underwriting and market making, are critical to capital formation and can facilitate the provision of market liquidity and that the ability to hedge is fundamental to prudent risk management as well as capital formation.[862]

In the proposal, the agencies stated that compliance with the conditions of the underwriting and market making exemptions under the 2013 rule, such as RENTD, creates ambiguity for some market participants, is over-reliant on historical demand, and necessitates an accurate calibration of RENTD for different asset classes, time periods, and market conditions.[863] Since forecasting future customer demand involves uncertainty, particularly in less liquid and more volatile instruments and products, banking entity affiliated dealers face uncertainty about the ability to rely on the underwriting and market making exemptions. This uncertainty can reduce a banking entity's willingness to engage in principal transactions[864] with customers, which, along with reducing profits, may reduce the volume of transactions intermediated by banking entities.[865]

Moreover, consistent with the views of some commenters,[866] the SEC believes that, as a baseline matter, the 2013 rule creates significant uncertainty among market participants regarding their ability to rely on the risk-mitigating hedging exemption. For example, there may be considerable uncertainty regarding whether a potential hedging activity will continue to demonstrably reduce or significantly mitigate an identifiable risk after it is implemented.[867] Unforeseeable changes in market conditions and other factors could reduce or eliminate the intended risk-mitigating effect of the hedging activity, making it difficult for a banking entity to comply with the continuous requirement that the hedging activity demonstrably reduce or significantly mitigate specific, identifiable risks.[868] According to commenters, uncertainty and compliance burdens related to the risk-mitigating hedging exemption are leading to less timely, less flexible, and less efficient hedging.[869]

The SEC continues to recognize that SEC-regulated entities routinely engage in both static and dynamic hedging at the portfolio (not the transaction) level and monitor and reevaluate on an ongoing basis aggregate portfolio risk exposures, rather than the risk exposure of individual transactions.[870] Dynamic hedging may be particularly common among dealers with large derivative portfolios, especially when the values of these portfolios are nonlinear functions of the prices of the underlying assets (*e.g.,* gamma hedging of options).[871] As a baseline matter, the SEC notes that the 2013 rule permits dynamic hedging. However, the 2013 rule requires the banking entity to document and support its decisions regarding individual hedging transactions, strategies, and techniques for ongoing activity in the same manner as for its initial activities, rather than permitting a banking entity to provide documentation for the hedging decisions regarding a portfolio as a whole.

The agencies have received a number of comments concerning the baseline effects of section 13 of the BHC Act and the 2013 rule on client facilitation activities, hedging, and market quality. The agencies received comments that the 2013 rule maintains the depth and liquidity of U.S. capital markets and that market liquidity remains within historical norms;[872] that there is no clear evidence that the 2013 rule has affected liquidity at a level that should cause concern;[873] and that liquidity may signal a bubble and should not be a key or even a major metric in assessing the effects of reforms.[874] Other commenters stated that the 2013 rule has imperiled valuable market making and risk-mitigating hedging and reduced market liquidity;[875] that the prescriptive nature of the 2013 rule has raised costs of providing liquidity, which has been passed along to investors and may have exacerbated dislocations,[876] and that less liquid capital markets have made it difficult for derivative end-users to raise capital in times of stress.[877]

The role of dealers in market making and client facilitation may be more significant in dealer markets, such as derivative and corporate bond markets. The SEC has elsewhere discussed several key changes in liquidity in bond markets and security-based swaps after the financial crisis. For example, the SEC found that, in corporate bond markets, although estimated average transaction costs have decreased, trading activity has become more concentrated in less complex bonds and bonds with large issue sizes; that transaction costs have increased for some subgroups of corporate bonds; and that dealers have, in aggregate, reduced their capital commitment since its 2007 peak, consistent with the claim that the Volcker Rule and other reforms potentially reduced the liquidity provision in corporate bonds.[878] The SEC recognizes difficulties in causal attribution of the various provisions of section 13 of the BHC Act and the 2013 rule and notes that some studies do not find significant structural breaks associated with post-crisis financial regulations in several measures of market liquidity.[879] However, the SEC continues to be informed by both comments discussed above and a body of research drawing causal inference concerning the adverse effects of section 13 of the BHC Act and the 2013 rule on dealer provision of liquidity and on the risk of market dislocations in times of stress.[880]

Importantly, the 2013 rule included a large number of requirements and provisions, and aspects of the 2013 rule most likely to affect banking entities' client facilitation activity (such as the RENTD requirement for the underwriting and market making exemptions) are not quantifiable or subject to public or regulatory reporting. As a result, existing research primarily seeks to document trends in various aspects of market liquidity in general and the effects of section 13 of the BHC

[862] *See, e.g.,* 79 FR at 5541, 79 FR at 5546, 79 FR at 5561.

[863] *See, e.g.,* 83 FR at 33532.

[864] Dealers can trade as agents, matching customer buys to customer sells, or as principals, absorbing customer buys and customer sells into inventory and committing the necessary capital.

[865] *See, e.g.,* 83 FR at 33532.

[866] *See, e.g.,* ABA.

[867] *See, e.g.,* 83 FR at 33465.

[868] *Id.*

[869] *See, e.g.,* JBA and SIFMA.

[870] *See, e.g.,* 83 FR at 33535.

[871] *Id.*

[872] *See, e.g.,* NAFCU and CAP.

[873] *See, e.g.,* AFR and Occupy the SEC.

[874] *See, e.g.,* Public Citizen.

[875] *See, e.g.,* SIFMA and American Action Forum.

[876] *See, e.g.,* FSF and SIFMA.

[877] *See, e.g.,* Coalition for Derivative End Users.

[878] *See* SEC Report 2017, *supra* note 774, for a detailed data analysis and literature survey.

[879] *See, e.g.,* Francesco Trebbi and Kairong Xiao, 2018, *Regulation and Market Liquidity,* 6 Mgmt. Sci. 1949 (2019). The generalizability of the paper's result is limited by the sample period, which ends in December 2014 and before the full implementation of the 2013 rule. For more methodological limitations of this paper, such as heuristic choices of parameters, and crucial assumptions, as well as other issues, *see* SEC Report 2017, *supra* note 774, at 118–119. *See also* Tobias Adrian et al., *Liquidity, Leverage, and Regulation 10 Years After the Global Financial Crisis,* 10 Ann. Rev. Fin. Econ. 1 (2018).

[880] *Id. See also* 83 FR at 33520–33522, 33532–33533.

Act and the 2013 rule on dimensions of market liquidity in particular. However, the most likely channels for the below effects of section 13 of the BHC Act and the 2013 rule on client facilitation activities are the requirements for the exemptions (such as RENTD) and uncertainty around the ability to rely on exemptions for client facilitation activities.

As discussed below, several studies show significant declines in various measures of liquidity after the financial crisis and post-crisis reforms, including a recent study that ties the effects to the underwriting exemption of the 2013 rule. In addition, some research that reconciles the deterioration in dealer liquidity provision with improvements in price-based measures of liquidity attributes those effects to the reduced willingness of dealers to provide liquidity on a principal basis after implementation of the 2013 rule. Further, existing research suggests that the 2013 rule resulted in reduced liquidity during times of stress, with an increase in liquidity provision by dealers unaffiliated with banks failing to fully offset the reduction in liquidity provision by bank-affiliated dealers. Moreover, some research suggests that post-crisis financial reforms led to persistent deviations from no-arbitrage conditions across markets, with the effect driven by banking entities and levered nonbanking entities that rely on systemically important banking entities for funding liquidity. Finally, new evidence indicates that post-crisis financial regulations may also be having effects on the co-movement in liquidity metrics across markets. Though the research discussed below is unable to attribute observed trends to specific provisions of the 2013 rule, these findings are largely consistent with the claim that the 2013 rule had adverse effects on certain aspects of client facilitation activity by banking entities, as discussed below.

A number of studies documented declines in several dimensions of liquidity after the financial crisis and post-crisis reforms. For example, one study [881] finds that the willingness of dealers to commit capital overnight, turnover, the frequency of block trades, and average trade size have all declined after the financial crisis. Importantly, the paper finds that the shift away from market-makers absorbing customer imbalances and toward agency trading was most acute when banks were required to comply with the proprietary trading prohibition. Further, the paper finds that these declines in dealer provision of liquidity stem from bank-affiliated dealers. The paper concludes that post-crisis banking regulations, including the 2013 rule, contributed to the reductions in turnover, trade size, frequency of block trades, and the willingness of dealers to commit capital.

Another paper [882] examines the cost of immediacy in corporate bonds, using index exclusions as a setting in which uninformed traders exogenously demand immediacy. The paper finds that the cost of immediacy has more than doubled and that dealers revert back to target inventory far more quickly after the 2007–2008 financial crisis. The paper finds that this post-crisis dealer behavior is most severe for bank dealers and concludes that such changes are consistent with the effects of the Volcker Rule.

Research on changes in liquidity around the post-crisis reforms, including the 2013 rule, presents two seemingly contradictory results: On the one hand, price-based measures of liquidity (such as the bid-ask spread) have improved; on the other hand, measures of dealer liquidity supply have significantly worsened.[883] A few studies seek to reconcile these two effects. One paper [884] focuses on dealers' willingness to provide liquidity in certain types of bonds out of inventory. The paper finds that, when transacting in riskier and less liquid bonds, dealers are significantly more likely to offset trades on the same day instead of committing capital overnight. Specifically, the paper documents that dealers offset approximately 75% of trades in the lowest-rated, least-actively-traded bonds, but only 55% of trades in the highest-credit-quality, most-actively-traded bonds. In addition, liquidity provision out of inventory involves risk to the dealer—a risk that is priced in higher transaction costs. As a result, a decline in transaction costs in observed trades may be a reflection of the decline in dealers' willingness to take certain groups of bonds into inventory.

Another study [885] finds that, after the post-crisis banking regulations, including the 2013 rule, customer provision of liquidity has increased and, as a result, the paper posits that bid-ask spread measures will necessarily underestimate the cost of dealer liquidity provision. The paper estimates that, for a subset of large liquidity demanding customer trades in which dealers provide liquidity from their inventory, customers pay between 35% and 65% higher spreads after the crisis than before the crisis.[886] The paper concludes that a large portion of liquidity provision has moved from dealers to large asset managers and that the effect is consistent with the effects of tighter banking regulations.

A recent paper [887] focuses on the effects of the underwriting exemption of the 2013 rule on trading by affected dealers. Specifically, the paper examines changes in the trading and liquidity of newly issued bonds that affected dealers have underwritten relative to bonds that the dealers have not underwritten around the implementation and conformance of the 2013 rule. This empirical design accounts for potentially confounding dealer effects (as dealers trade in bonds that they both underwrite and bonds that they do not) and bond effects (as both underwriters and non-underwriters trade in a given bond), and isolates the effects of the underwriting exemption in the 2013 rule from the effects of other bank regulations during the implementation period of the 2013 rule. The paper estimates that dealer markups have increased by between 42 and 43 basis points for fast roundtrip trades (15 minutes or less) after April 2014, but finds that the effect is transitional and disappears after August of 2015. However, the paper estimates that the adverse effects on dealer markups for slower roundtrip trades of between 15 minutes and 1 day—trades that involve dealers absorbing trades into inventory—are both economically significant and persist past the

[881] *See* Hendrik Bessembinder et al., *Capital Commitment and Illiquidity in Corporate Bonds,* 73 J. Fin. 1615 (2018). For a more detailed discussion of the paper's limitations and caveats, *see* SEC Report 2017, *supra* note 774, at 101–104.

[882] *See* Jens Dick-Nielsen and Marco Rossi, *The Cost of Immediacy for Corporate Bonds,* 32 Rev. Fin. Stud 1 (2019). For a more detailed discussion, *see* SEC Report 2017, *supra* note 774, at 112–13.

[883] *See, e.g.,* SEC Report 2017, *supra* note 774, at 100–105.

[884] *See* Michael Goldstein and Edith Hotchkiss, *Providing Liquidity in an Illiquid Market: Dealer Behavior in U.S. Corporate Bonds,* J. Fin. Econ. (2019) (in press) (accepted manuscript). *See also, e.g.,* SEC Report 2017, *supra* note 774, at 106–107.

[885] *See* Jaewon Choi and Yesol Huh, *Customer Liquidity Provision: Implications for Corporate Bond Transaction Costs,* (Aug. 1, 2019) (working paper), last accessed 8/27/2019). For a more detailed discussion, *see, e.g.,* SEC Report 2017, *supra* note 774, at 117.

[886] In contrast, Bessembinder et al. (2016) focuses on dealer-to-customer principal trades and finds the average transaction cost, particularly for small trades (less than $100,000) and large trades (over $1,000,000), is lowest in the pre-crisis and regulation periods. As the SEC stated elsewhere, the difference between these two results may stem from different proxies for transaction costs and the measurement of principal trading activity.

[887] *See* Meraj Allahrakha et al., *The Effects of the Volcker Rule on Corporate Bond Trading: Evidence from the Underwriting Exemption* (Off. of Fin. Research Working Paper 19–02, 2019) *available at https://www.financialresearch.gov/working-papers/files/OFRwp-19-02_the-effects-of-the-volcker-rule-on-corporate-bond-trading.pdf,* last accessed 8/9/2019.

implementation period (a range of 27–43 bps increase between April 2014 and July 2015, and a range of 18–35 basis point effect after July 2015).[888] To rule out the selection explanation (that dealers post-2013 rule simply pre-arrange more trades so the non-prearranged trades become costlier), the paper tests changes in short-term, non-inventory trades. The paper finds an increase in such trades around the effective date of the 2013 rule, but no differences when conditioning on dealer underwriting activity, and concludes that endogenous selection of time in inventory cannot explain the above results. Moreover, the paper finds that nonbanking dealers enjoy a significant increase in market share after the conformance period, while bank-affiliated dealers lose market share. Finally, the paper concludes that the 2013 rule increased dealer trading risk on short round-trip trades (15 minutes or less), estimating that the standard deviation of covered dealers' markups on corporate bonds has risen by between 0.09 and 0.1.

These results are subject to three primary caveats. First, the paper relies on a relatively narrow measure of risk (the standard deviation of dealer profits at the bond-month level). Unlike other research discussed in this section, the paper does not examine changes in the overall volume of trading activity, measures of downside risk at the individual banking entity level, or commonality of risk exposures among affected and unaffected dealers. Second, some of the paper's tests are affected by small sample sizes, limiting inference related to transitional and permanent effects of the 2013 rule in certain trades (including the 15 minute–1 day subsample and the 60–90 day subsample). Third, the paper recognizes that these results are specific to dealer provision of liquidity in the corporate bond market, and may not extend to trading by affected firms in other asset classes.

Other research helps inform the SEC's understanding of the effects of section 13 of the BHC Act and the 2013 rule on liquidity in times of stress. Specifically, there is growing evidence that liquidity provision in times of stress may be adversely affected by post-crisis reforms in general and the Volcker Rule in particular. Two studies directly test the effects of the Volcker Rule on market making by dealers in times of stress. One of the papers[889] examines liquidity during corporate bond downgrades that result in selling by certain institutions. The paper suggests that dealers affected by the Volcker Rule decreased market making in newly downgraded bonds, and that unaffected dealers have not fully offset this decline. Moreover, the paper rules out the alternative explanation that these changes are attributable to other financial reforms, finding that the same effects are present for dealers affected by the Volcker Rule but not constrained by Basel III and Comprehensive Capital Analysis and Review (CCAR) regulations. The paper isolates the effect in a relatively small sample of bonds experiencing relatively large stress events (under normal aggregate conditions). This methodological design reflects the common tradeoff between a narrower empirical setting that enables causal inference, and a larger sample that is less amenable to causal interpretations.[890]

A related study[891] compares liquidity during times of stress before and after the crisis, and defines times of stress on the basis of extreme increases in market-wide volatility (measured by the VIX index), bond yield drops, and credit rating downgrades from investment grade to speculative grade. While the study does not find that price-based liquidity measures decreased around idiosyncratic shocks, the study does find that the price impact of large trades surrounding market-wide shocks has increased after the post-crisis financial reforms relative to the pre-crisis period.[892]

A recent report by the International Organization of Securities Commissions (IOSCO)'s Committee on Emerging Risks examined changes in bond market liquidity focusing on stressed conditions.[893] The report notes that the most significant effect of post-crisis financial reforms and reduction in dealer risk appetite is the decline in the capacity of dealers to intermediate transactions on a principal basis, combined with a drastic increase in the size of the market. The report concludes that such effects mean the lack of liquidity in times of stress is likely to be more acute than in past episodes of stressed conditions.

One of the important results identified in this literature is the finding that nonbank dealers may step in but may not fully offset the decline in the liquidity provision of bank dealers caused by section 13 of the BHC Act and the 2013 rule.[894] New research suggests that the fundamental mechanism behind this result may be the effect of other post-crisis regulations on the ability of bank dealers to provide funding liquidity to nonbank intermediaries.[895] Specifically, the paper examines the interplay between post-crisis bank regulations, including the Volcker Rule, the supplementary leverage ratio, the liquidity coverage ratio, and the net stable funding ratio, and their effects on the ability of nonbank intermediaries to arbitrage away mispricing. The paper finds that the profitability of classic arbitrage trades (on-the-run/off-the-run, Treasury-interest swap, CDS-bond basis, and single name-index CDS arbitrage trades) is significantly lower under the supplementary leverage ratio, liquidity coverage ratio, and net stable funding ratio components of Basel III compared with Basel II. In addition, using a differences-in-differences estimation, the paper finds that levered hedge funds relying on prime brokers that are identified in the paper as globally systemically important banks experience lower abnormal returns and a decline in assets under management. The paper concludes that the effects of post-crisis regulations affect not only bank intermediation but also the ability of private funds to rely on banks for funding liquidity supporting arbitrage strategies. The paper notes that the supplementary leverage ratio and the net stable funding ratio disincentivize

[888] The paper also finds an increase of between 8% and 14% in dealer markups on trades around the 60-day cutoff for the rebuttable presumption in the 2013 rule. The paper acknowledges that this result could be consistent with dealers conducting profitable proprietary trades and holding positions past the 60-day rebuttable presumption window but is cautious in interpreting the result given the methodological limitations of its empirical design and very small sample size that does not allow conclusive inference.

[889] *See* Jack Bao et al., *The Volcker Rule and Corporate Bond Market Making in Times of Stress,* 130 J. Fin. Econ. 95 (2018).

[890] For a fulsome discussion of this and other issues and limitations, *see* SEC Report 2017, *supra* note 774, at 109–11.

[891] *See* Mike Anderson & René Stulz, *Is Post-Crisis Bond Liquidity Lower?* (Dice Ctr. Working Paper 2017–09, 2017) *last accessed 6/3/2019.*

[892] Consistent with these results, Goldstein and Hotchkiss (2019) finds that on days with large VIX increases, dealers tend to offset trades more quickly even for highly rated bonds that they normally would take into inventory. For a more detailed discussion, *see* SEC Report 2017, *supra* note 774, at 114–15.

[893] *See* OICU–IOSCO, 2019, Liquidity in Corporate Bond Markets Under Stressed Conditions, FR079/2019, May. Available at *https://www.iosco.org/library/pubdocs/pdf/IOSCOPD634.pdf,* last accessed 7/1/2019.

[894] As discussed above, when examining informed trading of advisor banks in options on the stocks of client firms, Lowry et al. (2018) finds that informed trading by hedge funds increases simultaneously with a decrease in informed trading by banks around the enactment of section 13 of the BHC Act. *See* Michelle Lowry et al., *Informed Trading By Advisor Banks: Evidence from Options Holdings,* 32 Rev. Fin. Stud 605 (2018).

[895] *See* Boyarchenko, Eisenbach, Gupta, Shachar, and Van Tassel, 2018, ''Bank Intermediated Arbitrage,'' Federal Reserve Bank of New York Staff Report No. 858, last accessed 6/3/2019.

low margin activities and a reliance on short-term funding, such as repo, and that the liquidity coverage ratio incentivizes holdings of more liquid securities. The paper concludes that Basel III is the regulation with the biggest effect on the profitability of trades exploiting arbitrage opportunities.[896]

Post-crisis regulations may also be having effects on the co-movement [897] in liquidity metrics across markets. A recent paper [898] exploring this issue posits two channels for this increased co-movement in liquidity. First, liquidity supply is capital intensive, and absorbing trades into inventory in one risky asset class may use up the capital capacity of a dealer to provide liquidity in other assets. Basel III and liquidity requirements for banks may aggravate this effect. Second, bank dealers may face uncertainty about their ability to rely on the market making exemption in the 2013 rule, as the distinctions between prohibited proprietary trading and permissible market making may often be unclear. As discussed above, prior studies suggest that the 2013 rule may have reduced the inventory capacity of bank dealers. Empirically, the paper documents that co-movement among measures of illiquidity of stock, bond, and CDS markets has risen significantly after the 2007–2008 financial crisis, particularly during the regulatory implementation period. For example, the regulatory period is characterized by a much larger fraction of firms exhibiting positive pairwise correlations between measures of illiquidity. The paper concludes that the 2013 rule and the tightening of capital and liquidity regulations reduced the inventory capacity of market makers, resulting in higher co-movement in liquidity across various financial markets. Importantly, the paper argues that these results are not consistent with increased electronic trading as that would have resulted in a reduced reliance on market makers and an increased reliance on customers, which should have reduced (instead of increased) co-movement in liquidity across markets.

With respect to liquidity in the dealer-centric, single-name CDS market, the SEC elsewhere found that, while dealer-customer activity and various trading activity metrics have generally remained stable, interdealer trading, trade sizes, number of quotes, and quoted spreads for certain illiquid borrowers have worsened since 2010.[899] In addition, a recent paper [900] seeks to tie financial reforms to trends in liquidity in the single-name CDS markets. Specifically, the paper finds that the sample period (2010 through 2016) saw a decline in interdealer trading, a decrease in net dealer inventories, and a decline in customer transaction volume. In addition, bid-ask spreads in later years are more heavily dependent on individual dealer inventories rather than aggregate inventories of all dealers. Notably, the paper does not estimate the optimal volume of trading activity. Overall, the paper concludes that increased costs of market making have affected liquidity provision in the single-name CDS market.

While these studies are necessarily limited in scope, methodology, and measurement, their results may indicate that section 13 of the BHC Act and the 2013 rule may have reduced dealer provision of liquidity, particularly in times of stress.[901] There is little empirical evidence concerning whether customers will continue to provide liquidity in times of severe market stress, possibly since such empirical settings are scarce in the post-crisis period. One recent paper builds a theoretical model [902] that suggests that constraints on dealer balance sheets may benefit customers and reduce transaction costs as they can induce dealers to invest in technology designed to match customers to each other. However, this model does not explicitly examine dealer behavior in times of stress. In addition, the results rely on strong modeling assumptions. The model assumes that only bank dealers are able to develop technology to match customers and assumes away the role of an inter-dealer market or competition among dealers in the interdealer market. If these assumptions are violated, it is unclear whether the results will continue to hold. For example, if nonbank dealers (as well as bank dealers) can develop customer matching technology, constraining dealer balance sheets may not be necessary for the development of technology matching customers to other customers or the disintermediation of trading, with its resulting welfare improvements. Similarly, in the presence of an interdealer market, constraining dealer balance sheets may benefit customers by facilitating customer-to-customer trading but may also reduce the ability of dealers to demand liquidity from other dealers.

Moreover, as discussed above, existing research suggests that non-dealer institutions may be constrained in their ability to secure funding from prime brokers that are affected by post-crisis regulations, limiting the ability of non-dealers to arbitrage away mispricings. It is even less clear whether customers would be willing and able to secure funding liquidity and stand on the buy side of customer sells during severe market stress across asset markets.

Finally, the agencies also received comment that end-users are increasingly finding that their bank counterparties have reduced short-term lending and repo activity, while other end-users are experiencing higher discounts to posted collateral as a result of the 2013 rule.[903] The SEC is informed by research on the effects of the constraints dealers face as a result of post-crisis regulations and liquidity provision.[904] One particular study on this issue [905] finds that dealer balance sheet constraints have broad market-wide effects on bond liquidity beyond the liquidity of bonds with a particular credit rating, sector, or issue size. The paper finds that, prior to the crisis, bonds were more liquid when they were traded by more levered dealers, dealers with higher return on assets and lower vulnerability

[896] These findings are also consistent with another paper that finds an exogenous increase in the leverage ratio constraint in the UK to have reduced repo market liquidity—an effect especially pronounced in transactions between dealers and small customers. *See* Antonis Kotidis and Neeltje Horen, *Repo Market Functioning: The Role of Capital Regulation* (2018) (working paper) last accessed June 3, 2019.

[897] Co-movement in two variables generally refers to a positive correlation of changes in the two variables over time. For example, co-movement in returns refers to a pattern of positive correlation in returns among different securities or asset classes. Similarly, co-movement in liquidity metrics suggests a positive correlation of changes in liquidity metrics. *See, e.g.,* Nicholas Barberis et al., *Co-movement,* 75 J. Fin. Econ. 283 (2005).

[898] *See* Xinjie Wang et al., *Do Post-Crisis Regulations Affect Market Liquidity? Evidence from the Co-Movement of Stock, Bond, and CDS Illiquidity* (2018) (working paper) last accessed 6/3/2019.

[899] *See* SEC Report 2017, *supra* note 774.

[900] *See* Mark Paddrik and Stathis Tompaidis, *Market Making Costs and Liquidity: Evidence from CDS Markets* (Off. of Fin. Research Working Paper 19–01, 2019) *available at https://www.financialresearch.gov/working-papers/files/OFRwp-19-01_Market-Making-Costs-and-Liquidity-Evidence-from-CDS-Markets.pdf,* last accessed 7/5/2019.

[901] *See, e.g., supra* notes 881, 887, 889, and 891.

[902] *See* Gideon Saar et al., *From Market Making to Matchmaking: Does Bank Regulation Harm Market Liquidity?* (May 22, 2019) (working paper) last accessed June 3, 2019.

[903] *See* Coalition for Derivatives End Users.

[904] For a more general model of the links between repo market frictions and liquidity in underlying cash markets *see, e.g.,* Yesol Huh and Sebastian Infante, *Bond Market Intermediation and the Role of Repo* (Oct. 22, 2018) (working paper) last accessed 6/3/2019.

[905] *See* Tobias Adrian et al., *Dealer Balance Sheets and Bond Liquidity Provision,* 89 J. Monetary Econ. 92 (2017).

See also SEC Report 2017, *supra* note 774, at 115–16.

(measured by conditional value-at-risk),[906] dealers with lower risk-weighted assets, and dealers with relatively low reliance on repo. However, during the rule implementation period (post-2014) these results have reversed, and bonds are more liquid when they are traded by less-levered dealers, dealers with lower return on assets, dealers with higher risk-weighted assets, and dealers with more reliance on repo funding. Finally, unlike the pre-crisis period, during the rule implementation period (post-2014), dealers with more reliance on repo funding, with higher trading revenues, with larger maturity mismatches, with higher measures of vulnerability, and with fewer assets held as loans are less likely to accommodate customer order flow and are more likely to access the interdealer market instead. Though these results do not speak to dealer behavior in times of stress, they are based on a substantially larger sample compared with the discussed above work showing liquidity declines in times of stress. Overall, while the paper does not delineate the effects of the Volcker Rule from other post-crisis regulations (such as the supplemental leverage ratio), the paper's findings indicate that tightening of dealer balance sheet constraints due to the package of post-crisis financial regulations may adversely affect the ability of affected dealers to intermediate customer trading in bond markets.

The SEC also recognizes that the effects of the 2013 rule on the ability and willingness of banks to engage in repo activity may be compounded by other post-crisis reforms. For example, one study [907] focuses on the effects of the liquidity coverage ratio, exploiting cross-country differences in the implementation of the rule. The paper finds that, as a result of the liquidity coverage ratio, U.S. dealers reduced their reliance on repo in funding high-quality liquid assets by more, and increased the maturity of lower-quality-collateral repos by more, than did foreign dealers.

Importantly, reduced ability and willingness to engage in repo activity are likely to have downstream effects on customers and market quality. For example, a paper [908] recently showed that dealers' ability to rely on repos to finance bond inventory has an effect on bid-ask spreads and bond transaction costs; that dealers with less access to funding liquidity are less likely to provide liquidity on a principal basis and are more likely to trade on an agency basis instead; and that funding liquidity has causal effects on bond market liquidity.

As discussed above, corporate bond dealers, particularly bank-affiliated dealers, may have, on aggregate, reduced their capital commitment post-crisis—a result that is consistent with a reduction in liquidity provision in corporate bonds because of the 2013 rule. In addition, the 2013 rule may have resulted in many corporate bond dealers shifting from trading in a principal capacity to agency trading. Moreover, corporate bond dealers may decrease liquidity provision during certain times of stress in general (*e.g.,* during a financial crisis) [909] and after the 2013 rule in particular, as discussed above. Nonbank dealers and non-dealer intermediaries may not have fully offset the shortfall in liquidity provision, partly because of their reliance on funding from financial institutions affected by post-crisis financial reforms.

The SEC recognizes that the effects of the 2013 rule on the activities of banking entities and conflicts of interest may flow through to SEC-registered dealers and investment advisers affiliated with banks and bank holding companies directly (if banks and holding companies transact through their dealer affiliates) and indirectly (*e.g.,* through effects on capital requirements, profitability, compliance systems, and policies and procedures), and may have an effect on securities markets. As discussed in the proposal,[910] the presence and magnitude of spillover effects across different types of financial institutions vary over time and may be more significant in times of stress.[911]

iv. Compliance Burdens, Profitability, and Competitive Effects

In the proposal, the SEC recognized that the scope and breadth of the compliance obligations impose costs on banking entities, which may be particularly important for smaller entities.[912] The SEC noted commenters' estimates that banking entities may have added as many as 2,500 pages of policies, procedures, mandates, and controls per institution for the purposes of compliance with the 2013 rule, which need to be monitored and updated on an ongoing basis, and that some banking entities may spend, on average, more than 10,000 hours on training each year. In terms of ongoing costs, in the proposal the SEC noted a market participant's estimate that some banking entities may have 15 regularly meeting committees and forums, with as many as 50 participants per institution dedicated to compliance with the 2013 rule.

In connection with the proposal, the agencies have received a number of comments on the compliance burdens of the 2013 rule. Some commenters presented trends in bank profitability, trading revenue, and loan growth, arguing that the proposed amendments are unnecessary.[913] Others indicated that the Volcker Rule may reduce bank profits due to the elimination of proprietary trading but that lost profits are not costs but intended regulatory effects of section 13 of the BHC Act.[914]

[906] *See* Tobias Adrian and Markus Brunnermeier, *CoVar,* 106 Am. Econ. Rev. 1705 (2016).

[907] *See* Marco Macchiavelli and Luke Pettit, *Liquidity Regulation and Financial Intermediaries* (Jul. 29, 2019) (working paper) last accessed 8/29/2019.

[908] *See* Marco Macchiavelli and Xing Zhou, *Funding Liquidity and Market Liquidity: The Broker-Dealer Perspective* (Jul. 17, 2019) (working paper) last accessed 8/29/2019.

[909] Dealers provide less liquidity to clients and peripheral dealers during stress times; during the peak of the crisis, core dealers charged higher spreads to peripheral dealers and clients but lower spreads to dealers with whom they had strong ties. *See* Marco Di Maggio et al., *The Value of Trading Relationships in Turbulent Times,* 124 J. Fin. Econ. 266 (2017). *See also* Jaewon Choi and Or Shachar, *Did Liquidity Providers Become Liquidity Seekers?* (Oct., 2013), New York Fed Staff Report No. 650.

[910] *See* 83 FR at 33534.

[911] *See, e.g.,* Monica Billio et al., *Econometric Measures of Connectedness and Systemic Risk in the Finance and Insurance Sectors,* 104 J. Fin. Econ. 535 (2012). *See also* Zeno Adams et al., *Spillover Effects Among Financial Institutions: A State-Dependent Sensitivity Value at Risk Approach (SDSVar),* 49 J. Fin. & Quantitative Analysis 575 (2014). *See also* Adrian and Brunnermeier (2016) *supra* note 906.

[912] *See, e.g.,* 83 FR at 33550.

[913] *See, e.g.,* Volcker Alliance and AFR.

[914] *See, e.g.,* Occupy the SEC.

In response to those comments, the SEC continues to note that the scope of this economic analysis is limited to SEC registrants, and securities markets and their participants. Importantly, trends in profitability are not informative of the direct causal effect on profitability or compliance burdens of section 13 of the BHC Act or of the 2013 rule, since there is no data about the amount of revenue or compliance burdens that would have occurred in the absence of the 2013 rule. Moreover, the agencies have received a number of comments pointing to large and significant burdens of section 13 of the BHC Act and various components of the agencies' 2013 rule. For example, one commenter estimated that proprietary trading requirements related to RENTD involved annual costs of as much as about $513 million; that the metrics-related policies and procedures requirements involved initial burdens of approximately $41.5 million; that total compliance expenditures of affected entities (including with respect to covered funds) totaled between $402 million and $541 million; and that covered funds requirements involved a cost of between $152 million and $690 million.[915] Another commenter estimated that, for at least one banking entity, sorting counterparties into customers and non-customers for the purposes of calculating RENTD requires dozens of employees spending thousands of hours in initial and ongoing burdens.[916] Another commenter stated that simplifying covered funds requirements would eliminate thousands of unnecessary hours in compliance burdens related to activities that do not raise the concerns intended to be addressed by section 13 of the BHC Act.[917] One trade organization indicated that duplicative examinations drastically increase burdens on registrants, estimating that in 2016 members of the organization spent in aggregate over 50,000 hours responding to inquiries and examinations related to section 13 of the BHC Act.[918]

Moreover, the SEC notes that risk-averse market participants are compensated for bearing greater systematic [919] risks with higher expected returns.[920] If capital markets have a high degree of efficiency and arbitrage opportunities are generally scarce, greater profitability may simply be indicative of greater risks taken on by banking entities. Setting aside the challenges of causal inference discussed above, trends in bank profitability may reflect not only compliance burdens of the 2013 rule, but also the effects of the 2013 rule on banking entity risk exposures from permissible activities. That is, banking entities may have become more willing to take risk through engaging in activities permitted by the 2013 rule. For more discussion of the existing evidence on the effects of the 2013 rule on the activities of banking entities, see the preceding sections of the economic baseline.

The agencies also received a number of comments concerning the need to tailor regulations to banking entities on the basis of risk profile in order to balance the intended regulatory goals with compliance burdens and competitive effects. Specifically, a number of commenters supported tailoring the 2013 rule to more effectively accomplish the underlying goals of section 13 of the BHC Act, reduce unnecessary compliance burdens, particularly on smaller and mid-sized banking entities and entities with small trading books, and more effectively allocate supervisory resources to prudential goals.[921]

The SEC continues to believe that the compliance regime under the 2013 rule and related burdens reduce the profitability of permissible activities by bank-affiliated dealers and investment advisers and may be passed along to customers or clients in the form of reduced provision of services or higher service costs.[922] Moreover, the SEC continues to believe that the extensive compliance program under the 2013 rule detracts resources of some banking entities and their compliance departments and supervisors from other compliance matters, risk management, and supervision. Finally, the SEC continues to believe that prescriptive compliance requirements may not optimally reflect the organizational structures, governance mechanisms, or risk management practices of complex, innovative, and global banking entities.

In the sections that follow the SEC discusses rule provisions of the 2013 rule, how each amendment in the final rule changes the economic effects of the regulatory requirements, and the anticipated costs and benefits of the amendments.

c. Affected Participants

The SEC-regulated entities directly affected by the final rule include broker-dealers, security-based swap dealers, and investment advisers.

i. Broker-Dealers [923]

Under the 2013 rule, some of the largest SEC-regulated broker-dealers are banking entities because they are affiliated with banks or bank holding companies. Table 1 reports the number, total assets, and holdings of broker-dealers by the broker-dealer's bank affiliation.

[915] *See* Data Boiler, citing its own analysis as well as SIA Partners Briefing Note, July 2015, ''Volcker Implementation,'' available at *http://en.finance.sia-partners.com/sites/default/files/post/sia_partners_-_briefing_note_volcker_coveredfunds_blog_version.pdf,* last accessed 6/4/2019.

[916] *See* CCMC.

[917] *See* SFIG.

[918] *See* SIFMA.

[919] The term ''systematic risk'' generally refers to the variability of returns due to macroeconomic factors that affect all risky assets and, thus, cannot be eliminated by diversification. *See* Frank Reilly & Keith Brown, Investment Analysis & Portfolio Management, 1025 (9th ed. 2009). *See also* Bodie, *supra* note 840, at G–12.

[920] *See supra* note 840.

[921] *See, e.g.,* IIB; CCMC; CREFC; CCMR; Covington; Capital One et al. and Credit Suisse.

[922] *See* 83 FR at 33550.

[923] These estimates differ from the estimates in the proposal and in the EGRRCPA Conforming Amendments Adopting Release, as these estimates rely on more recent data and information about both U.S. and global trading assets and liabilities of bank holding companies. This analysis is based on data from Reporting Form FR Y–9C for domestic holding companies on a consolidated basis and Report of Condition and Income for banks regulated by the Board, FDIC, and OCC for the most recent available four-quarter average, as well as data from S&P Market Intelligence LLC on the estimated amount of global trading activity of U.S. and non-U.S. bank holding companies. Broker-dealer bank affiliations were obtained from the Federal Financial Institutions Examination Council's (FFIEC) National Information Center (NIC). Broker-dealer assets and holdings were obtained from FOCUS Report data for Q4 2018.

While the 199 bank-affiliated broker-dealers subject to the 2013 rule (affected broker-dealers) are greatly outnumbered by the 3,595 broker-dealers that are either bank broker-dealers exempt under section 203 of EGRRCPA or nonbank broker-dealers, the affected broker-dealers dominate other broker-dealers in terms of total assets (72.7% of total broker-dealer assets) and aggregate holdings (66.5% of total broker-dealer holdings).

TABLE 1—BROKER-DEALER COUNT, ASSETS, AND HOLDINGS BY AFFILIATION

Broker-dealer bank affiliation	Number	Total assets, $mln [924]	Holdings, $mln [925]	Holdings (altern.), $mln [926]
Bank broker-dealers affected by the final rule [927]	199	3,142,780	761,532	567,387
All other broker-dealers [928]	3,595	1,179,805	382,451	225,675
Total	3,794	4,322,586	1,143,983	793,062

Some of the amendments to the 2013 rule that the agencies are adopting differentiate banking entities on the basis of their consolidated trading assets and liabilities.[929] Table 2 reports affected broker-dealer counts, assets, and holdings by consolidated trading assets and liabilities of the (top-level) parent firm. The SEC estimates that 163 broker-dealer affiliates of firms with less than $20 billion in consolidated trading assets and liabilities account for 20.4% of bank-affiliated broker-dealer assets and 17.8% of holdings (or 7% using the alternative measure of holdings).[930]

TABLE 2—BROKER-DEALER COUNTS, ASSETS, AND HOLDINGS BY CONSOLIDATED TRADING ASSETS AND LIABILITIES OF THE BANKING ENTITY [931]

Consolidated trading assets and liabilities [932]	Number	Total assets, $mln	Percent	Holdings, $mln	Percent	Holdings (altern.), $mln	Percent
≥50bln	28	2,152,225	68	555,787	73	510,325	90
20bln–50bln	8	349,716	11	70,054	9	17,611	3
10bln–20bln	9	198,895	6	49,797	7	13,301	2
5bln–10bln	24	261,622	8	55,316	7	14,295	3
1bln–5bln	33	66,583	2	18,319	2	4,998	1
≤1bln	97	113,740	4	12,259	2	6,857	1
Total	199	3,142,780	100	761,532	100	567,387	100

ii. Security-Based Swap Dealers

The final rule may also affect bank-affiliated SBSDs. As compliance with SBSD registration requirements is not yet required, there are currently no registered SBSDs. However, the SEC has previously estimated that as many as 50 entities may potentially register as security-based swap dealers and that as many as 16 of these entities may already be SEC-registered broker-dealers.[933] Similarly, the SEC previously estimated that between 0 and 5 entities may register as Major Security-Based Swap Participants (MSBSPs).[934] On the basis of the analysis of TIW transaction and positions data on single-name credit-default swaps, the SEC believes that all entities that may register with the SEC as SBSDs are bank-affiliated firms, including those that are SEC-registered broker-dealers. Therefore, the SEC estimates that, in addition to the bank-affiliated SBSDs that are already registered as broker-dealers and included in the discussion above, as many as 34 other bank-affiliated SBSDs may be affected by these amendments. Similarly, on the basis of the analysis of TIW data, the SEC estimates that none of the entities that may register with the SEC as MSBSPs are affected by the final rule.

Importantly, compliance with capital and other substantive requirements for SBSDs under Title VII of the Dodd-Frank Act is not yet required.[935] The SEC recognizes that firms may choose to move security-based swap trading activity into (or out of) an affiliated bank or an affiliated broker-dealer instead of registering as a standalone SBSD, if bank or broker-dealer capital and other regulatory requirements are less (or more) costly than those that may be imposed on SBSDs under Title VII. As a result, the above figures may

[924] Broker-dealer total assets are based on FOCUS report data for ''Total Assets.''

[925] Broker-dealer holdings are based on FOCUS report data for securities and spot commodities owned at market value, including bankers' acceptances, certificates of deposit and commercial paper, state and municipal government obligations, corporate obligations, stocks and warrants, options, arbitrage, other securities, U.S. and Canadian government obligations, and spot commodities.

[926] This alternative measure excludes U.S. and Canadian government obligations and spot commodities.

[927] This category includes all bank-affiliated broker-dealers except those exempted by section 203 of EGRRCPA.

[928] This category includes both bank affiliated broker-dealers subject to section 203 of EGRRCPA and broker-dealers that are not affiliated with banks or holding companies.

[929] *See, e.g.,* 2013 rule § ____.20(d)(1).

[930] *See supra* note 926.

[931] This analysis excludes SEC-registered broker-dealers subject to section 203 of EGRRCPA.

[932] Consolidated trading assets and liabilities are estimated using information reported in form FR Y–9C data and from S&P Market Intelligence LLC on the estimated amount of global trading activity provided for U.S. and non-U.S. firms. These estimates exclude from the definition of consolidated trading assets and liabilities government, agency, and GSE securities. U.S. trading assets and liabilities are calculated on the basis of the most recent four-quarter average, except for foreign firms without an intermediate holding company, for which the amount of trading activity for the nonbank and edge subsidiaries does not exclude securities of government-sponsored enterprises. For top-tier bank holding companies, top-tier independent depositary institutions, and foreign parents with U.S. activity, Ginnie Mae securities are included in the calculation of trading assets and liabilities because of data limitations. (It is not possible to exclude Ginnie Mae securities without also excluding Fannie Mae and Freddie Mac securities.)

[933] *See* Capital, Margin, Segregation Adopting Release, 84 FR at 43960.

[934] *Id.*

[935] *Id.*

overestimate or underestimate the number of SBSDs that are not broker-dealers and that may become SEC-registered entities affected by the final rule. Quantitative cost estimates are provided separately for affected broker-dealers and potential SBSDs.

iii. Private Funds and Private Fund Advisers [936]

This section focuses on RIAs advising private funds. Using Form ADV data, Table 3 reports the number of RIAs advising private funds by fund types, as those types are defined in Form ADV. Table 4 reports the number and gross assets of private funds advised by RIAs and separately reports these statistics for bank-affiliated RIAs. As can be seen from Table 3, the two largest categories of private funds advised by RIAs are hedge funds and private equity funds.

Bank-affiliated RIAs advise a total of 4,316 private funds with approximately $2 trillion in gross assets. Per Form ADV data, bank-affiliated RIAs' gross private fund assets under management are concentrated in hedge funds and private equity funds. On the basis of this data, bank-affiliated RIAs advise 929 hedge funds with approximately $668 billion in gross assets and 1,420 private equity funds with approximately $395 billion in assets. While bank-affiliated RIAs are subject to all of section 13's restrictions, because RIAs do not typically engage in proprietary trading, the SEC continues to believe that they will not be affected by the final rule as it relates to proprietary trading.

TABLE 3—SEC-REGISTERED INVESTMENT ADVISERS ADVISING PRIVATE FUNDS, BY FUND TYPE [937]

Fund type	All RIA	Bank-affiliated RIA
Hedge Funds	2,656	154
Private Equity Funds	1,644	98
Real Estate Funds	526	52
Securitized Asset Funds	220	45
Liquidity Funds	46	16
Venture Capital Funds	193	8
Other Private Funds	1,066	146
Total Private Fund Advisers	4,756	296

TABLE 4—THE NUMBER AND GROSS ASSETS OF PRIVATE FUNDS ADVISED BY SEC-REGISTERED INVESTMENT ADVISERS [938]

Fund type	Number of private funds		Gross assets, $bln	
	All RIA	Bank-affiliated RIA	All RIA	Bank-affiliated RIA
Hedge Funds	10,431	929	7,160	668
Private Equity Funds	14,775	1,420	3,446	395
Real Estate Funds	3,472	320	646	100
Securitized Asset Funds	1,814	358	661	129
Liquidity Funds	83	30	297	195
Venture Capital Funds	1,201	43	136	3
Other Private Funds	4,460	1,217	1,396	474
Total Private Funds	36,230	4,316	13,741	1,964

In addition, for an additional period of 2 years until July 21, 2021, the banking agencies will not treat qualifying foreign excluded funds that meet the conditions included in the policy statement discussed above as banking entities or attribute their activities and investments to the banking entity that sponsors the fund or otherwise may control the fund under the circumstances set forth in the policy statement.[939]

iv. Registered Investment Companies

The potential that a registered investment company (RIC) or a business development company (BDC) would be treated as a banking entity where the fund's sponsor is a banking entity and holds 25% or more of the RIC or BDC's voting securities after a seeding period also forms part of the baseline. On the basis of Commission filings and public data, the SEC estimates that, as of year-end 2018, there were approximately

[936] These estimates are calculated from Form ADV data as of March 31, 2019. An investment adviser is defined as a ''private fund adviser'' if it indicates that it is an adviser to any private fund on Form ADV Item 7.B. An investment adviser is defined as a ''bank-affiliated RIA'' if it indicates on Form ADV Item 6.A.(7) that it is actively engaged in business as a bank, or it indicates on Form ADV Item 7.A.(8) that it has a ''related person'' that is a banking or thrift institution. For purposes of Form ADV, a ''related person'' is any advisory affiliate and any person that is under common control with the adviser. The definition of ''control'' for purposes of Form ADV, which is used in identifying related persons on the form, differs from the definition of ''control'' under the BHC Act. In addition, this analysis does not exclude SEC-registered investment advisers affiliated with banks that have consolidated total assets less than or equal to $10 billion and trading assets and liabilities less than or equal to 5% of total assets. Thus, these figures may overestimate or underestimate the number of bank-affiliated RIAs.

[937] This table includes only the advisers that list private funds on Section 7.B.(1) of Form ADV. The number of advisers in the ''Any Private Fund'' row is not the sum of the rows that follow, since an adviser may advise multiple types of private funds. Each listed private fund type (*e.g.,* real estate fund, liquidity fund) is defined in Form ADV, and those definitions are the same for purposes of the SEC's Form PF.

[938] Gross assets include uncalled capital commitments on Form ADV.

[939] *See* ''Statement regarding Treatment of Certain Foreign Funds under the Rules Implementing Section 13 of the Bank Holding Company Act,'' July 19, 2019, available at *https://www.occ.gov/news-issuances/news-releases/2019/nr-ia-2019-79a.pdf,* last accessed July 19, 2019.

15,700 RICs [940] and 104 BDCs. Although RICs and BDCs are generally not banking entities themselves subject to the 2013 rule, they may be indirectly affected by the 2013 rule and the final rule, for example, if their sponsors or advisers are banking entities. For instance, bank-affiliated RIAs or their affiliates may reduce their level of investment in the funds they advise, or potentially close those funds, to avoid those funds becoming banking entities themselves.

v. Entities Reporting Metrics to the SEC [941]

The regulatory reporting requirements of the 2013 rule with respect to bank-affiliated broker-dealers, SBSDs, and RIAs are described in section V.F.2.a above. As discussed below, the final rule increases the threshold for entities subject to metrics reporting from the $10 billion under the 2013 rule to $20 billion in trading assets and liabilities. Moreover, the final amendments that link the trading desk definition to the market risk capital rule have an effect on the volume of reporting to the SEC and corresponding burdens.

The agencies have received a number of comments opposing the proposed amendments to metrics reporting and challenging the agencies' assessment of the proposed amendments.[942] For example, one commenter indicated that the SEC's assessment of the overall streamlining effects of the amendments to metrics reporting and recordkeeping will not be supported by a full-fledged cost-benefit analysis.[943] Another commenter stated that the proposal presented no analysis showing that the benefits of eliminating some metrics outweigh the costs of imposing new metrics.[944] A number of commenters indicated that the agencies should not adopt any of the proposed amendments to metrics reporting as they would result in a significant net increase in metrics data.[945] One commenter estimated that the proposed requirements would require its member institutions to report hundreds of thousands of additional data points each month.[946] One commenter indicated that the extended reporting timeframe for metrics submission is insufficient and frequent resubmissions are likely to persist.[947] In response to these comments and to enable a quantification of the economic effects of the metrics amendments on the volume and timeliness of metrics reporting, the SEC is updating the economic baseline with summary information about the current volume and resubmission statistics by different groups of Appendix A filers.

TABLE 5—VOLUME OF METRICS RECORDS SUBMITTED TO THE SEC, BY TRADING ASSETS AND LIABILITIES [948]

Trading assets & liabilities	Number of reporters	Records submitted
>50bln	8	40,771,825
20bln–50bln	4	7,357,794
<20bln	6	10,440,677
Total	18	58,570,296

TABLE 6—TRADING DESKS REPORTING METRICS TO THE SEC, BY TRADING ASSETS AND LIABILITIES

Trading assets & liabilities	Average number of desks	Average number of records per submission	Average number of records per desk
>50bln	56	450,921	7,588
20bln–50bln	43	195,010	5,172
<20bln	38	216,433	7,093

TABLE 7—TIME DELAYS AND RESUBMISSIONS OF METRICS RECORDS SUBMITTED TO THE SEC

Trading assets & liabilities	Total number of submitted records	Percent of records not resubmitted	Percent of records resubmitted once	Percent of records resubmitted twice
Panel A. Resubmissions of Initial Records				
>50bln	40,785,033	34	56	10
20bln–50bln	6,908,332	61	39	0
<20bln	10,441,265	96	4	0

[940] This estimate includes open-end companies, exchange-traded funds, closed-end funds, and non-insurance unit investment trusts and does not include fund of funds. The inclusion of fund of funds increases this estimate to approximately 17,200.

[941] The estimates in this section are based on Appendix A information provided by reporters to the SEC under the 2013 rule at the holding company level for April 2018 through March 2019, based on the most complete filing for each reporting period. Appendix A records for a particular trading desk are reported to the SEC if a trading desk books activity into the SEC registrant.

[942] *See, e.g.,* ABA; Credit Suisse; CCMR; FSF, Public Citizen and SIFMA.

[943] *See* SIFMA Annex C.

[944] *See* CCMR.

[945] *See, e.g.,* CCMC and FSF.

[946] *See* FSF.

[947] *See* SIFMA Annex C.

[948] For the purposes of this analysis, each record is one line of the matrix reported to the SEC, with the value filled out by the reporting entity, on a monthly basis, for all its related trading desks. The total number of records also includes the header, body, and footer. Each submission is the full data matrix reported by the reporting entity to the SEC for any specific reporting month.

Trading assets & liabilities	Total records submitted late (initial submission)	Percent of late initial submissions	Average delay in initial submissions (days, simple average)	Average delay in initial submissions (days, weighted by record count)
Panel B. Delayed Submission of Initial Records				
>50bln	4,771,713	12	2	2
20bln–50bln	4,020,778	58	32	32
<20bln	10,437,647	99.97	46	42

The SEC notes two important caveats relevant for the interpretation of these statistics. First, direct attribution of specific trading activity by a trading desk to an SEC registrant or group of registrants is not feasible, since the trading desk may book transactions into multiple legal entities, including both those registered with the SEC as well as those that are not registered. As a result, the scope of activity reported in this section is likely to overestimate the records and reporting by legal entities registered with the SEC. Second, the SEC does not receive reporting from trading desks that do not transact on behalf of SEC-registered entities. Therefore, these estimates may significantly underestimate the overall volume of metrics reporting by all banking entities (including those that are not registered with the SEC) related to the 2013 rule.

3. Economic Effects

a. Treatment of Entities Based on the Size of Trading Assets and Liabilities

As proposed, the agencies are adopting a categorization of banking entities into three groups on the basis of the size of their trading activity. Under the final rule, banking entities with significant trading assets and liabilities (Group A entities) are required to comply with a streamlined but comprehensive version of the 2013 rule's compliance program requirements, as discussed below. Banking entities with moderate trading assets and liabilities (Group B entities) are subject to reduced requirements and an even more tailored approach in light of their smaller trading activities. The burdens are further reduced for banking entities with limited trading assets and liabilities (Group C entities), for which the amendments establish a presumption of compliance, which can be rebutted by the agencies. The sections that follow discuss the economic effects of each of the amendments on these groups of entities.

i. Costs and Benefits

First, banking entities with significant trading assets and liabilities are defined as those that have, together with affiliates and subsidiaries, trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § ____.6(a)(1) and (2) of subpart B) the average gross sum of which, over the previous consecutive four quarters, as measured as of the last day of each of the four previous calendar quarters, equals or exceeds $20 billion.[949] This $20 billion threshold is higher than the threshold that the agencies proposed in the proposal. Accordingly, more banking entities may qualify as Group B entities rather than Group A entities (as compared to those that would have qualified under the proposal's lower threshold), which will reduce compliance burdens for more banking entities relative to the proposal.[950] The agencies received comments that a higher than the proposed $10 billion trading assets and liabilities threshold would provide Group B banking entities that are near or approaching $10 billion threshold with flexibility to have moderate growth over time and to manage their business without triggering the more stringent compliance requirements imposed on Group A banking entities.[951] In addition, some commenters stated that potential fluctuations resulting from customer-driven trades, quarter-end activity, and market and foreign exchange volatility may cause banking entities that are near or approaching the $10 billion threshold to exceed this threshold.[952] The SEC recognizes that fluctuations in customer demand or market events may cause these banking entities to exceed the $10 billion threshold temporarily or permanently, which could trigger a more enhanced compliance regime and expose these banking entities to higher compliance costs.[953] Thus, a $20 billion threshold accounts for such fluctuations and provides banking entities that are near or approaching $10 billion in trading assets and liabilities with more certainty regarding their compliance burdens.

Some commenters stated that changing the threshold from $10 to $20 billion would have minimal effect on the number of banking entities that would remain categorized as having significant trading assets and liabilities.[954] The SEC estimates that there are 66 broker-dealers with approximately 16% of all broker-dealer holdings (or 6% based on the alternative measure) that would qualify as Group B entities with the adopted $20 billion threshold—compared to 57 broker-dealers with between 9% and 4% of all broker-dealer holdings that would have qualified under the proposed threshold value. Thus, relative to the proposal, 15 additional broker-dealers will experience the cost reduction because of reduced compliance burdens.

Second, as in the proposal, the agencies are defining a banking entity with limited trading assets and liabilities as a banking entity that has, together with its affiliates and subsidiaries on a consolidated basis, trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § ____.6(a)(1) and (2) of subpart B) the average gross sum of which, over the previous consecutive four quarters, as measured as of the last day of each of the four previous calendar quarters, is

[949] With respect to a banking entity that is a foreign banking organization or a subsidiary of a foreign banking organization, this threshold for having significant trading assets and liabilities applies according to the trading assets and liabilities of the combined U.S. operations of the top-tier foreign banking organization (including all subsidiaries, affiliates, branches, and agencies of the foreign banking organization operating, located, or organized in the United States).

[950] The final rule defines banking entities with moderate trading assets and liabilities as those that are neither banking entities with significant trading assets and liabilities nor banking entities with limited trading assets and liabilities.

[951] *See, e.g.,* Capital One et al.; ABA; BPI; and Custody Banks.

[952] *See, e.g.,* Custody Banks and BPI.

[953] *See supra* note 123.

[954] *See, e.g.,* ABA; Custody Banks; New England Council; Capital One et al.; SIFMA; State Street and BPI.

less than $1 billion. However, in the proposal, the agencies proposed this threshold to be calculated on the worldwide consolidated basis for both foreign and domestic registrants. Unlike in the proposal, with respect to a banking entity that is a foreign banking organization or a subsidiary of a foreign banking organization, this threshold will be applied on the basis of the combined U.S. operations of the top-tier foreign banking organization (including all subsidiaries, affiliates, branches, and agencies of the foreign banking organization operating, located, or organized in the United States).

The SEC continues to recognize that the 2013 rule may have resulted in significant compliance burdens for banking entities that do not have significant U.S. operations, even though such entities may not pose substantial risks to the U.S. financial system because of their limited presence in the U.S. The SEC estimates that the adopted definition of limited trading assets and liabilities will allow 97 broker-dealers to reduce compliance costs related to the 2013 rule as a result of the final rule's presumption of compliance. In contrast, if the final rule adopted the proposed calculation of limited trading assets and liabilities, some foreign broker-dealers would not qualify as those affiliated with entities with limited trading assets and liabilities, even though the entities these broker-dealers are affiliated with may have very limited activity in the U.S.

Third, in the final rule the calculation of thresholds for limited and significant trading assets and liabilities will exclude—in addition to the proposed exclusion of trading assets and liabilities involving obligations of, or guaranteed by, the United States, or any agency of the United States—trading assets and liabilities involving obligations, participations, or other instruments of, or issued or guaranteed by, government-sponsored enterprises listed in § ____.6(a)(2). Some commenters stated that the calculation of trading assets and liabilities should exclude financial instruments that are not regulated under the 2013 rule.[955] The SEC recognizes that inclusion of trading assets and liabilities involving obligations of, participations by, or other instruments of, or issued or guaranteed by, government-sponsored enterprises in the calculation of trading assets and liabilities may inadvertently scope in entities whose trading assets and liabilities primarily consist of financial instruments that are excluded from the prohibition on proprietary trading under the 2013 rule.[956] Accordingly, the final rule will better align the application of the tiered compliance regime with trading activities that are subject to the proprietary trading prohibitions. The SEC estimates that the exclusion of the aforementioned trading assets and liabilities from the calculation of the $1 billion and $20 billion thresholds will not change the assignment of banking entities into the tiered compliance groups.

The SEC continues to believe that the primary effect of these amendments for SEC registrants is the reduced compliance burdens, as discussed in more detail in later sections. To the extent that the compliance costs are currently passed along to customers and counterparties, some of the cost reductions for these entities associated with the final rule may flow through to counterparties and clients in the form of reduced transaction costs or a greater willingness to engage in activity, including intermediation that facilitates risk-sharing.

The SEC notes that, from above, Group B and Group C broker-dealers currently account for approximately 7% to 18% of total bank broker-dealer holdings and that, to the extent that holdings reflect risk exposure resulting from trading activity, current trading activity by Group B and Group C entities may represent lower risks than the risks posed by Group A entities' trading activities addressed in the 2013 rule. In addition, the SEC continues to recognize that some Group B and Group C entities that currently exhibit low levels of trading activity because of the costs of compliance may respond to the final rule by increasing their trading assets and liabilities while still remaining under the $20 billion or $1 billion threshold, as applicable. Increases in aggregate risk exposure by Group B and Group C entities may be magnified if trading activity becomes more highly correlated among such entities, or dampened if trading activity becomes less correlated among such entities. Since it is difficult to estimate the number of Group B and Group C entities that may increase the riskiness of their activities and the degree to which their trading activity would be correlated, the implications of this effect for aggregate risk and capital market activity are unclear.

The shifts in risk exposure may have two competing effects. On the one hand, if Group B and Group C entities are able to bear risk at a lower cost than their customers, increased risk exposures could promote secondary market trading activity and capital formation in primary markets and increase access to capital for issuers, benefitting issuers and investors. On the other hand, Group B and Group C firms may be incentivized to increase their risk exposures, resulting in more aggregate risk in the banking sector, greater market fragility, and exacerbated conflicts of interest between banking entities and their customers. This may ultimately adversely affect issuers and investors. However, the SEC continues to recognize that the amendments are focused on tailoring the compliance regime based on the amount of trading activity engaged in by each banking entity, and all banking entities would still be subject to the statutory prohibitions related to such activities. Thus, the potential risk of increased market fragility and the severity of conflicts of interest effects is mitigated.

In response to the final rule, it is possible that trading activity that was once consolidated within a small number of unaffiliated banking entities may become fragmented among a larger number of unaffiliated banking entities that each manage down their trading books under the $20 billion and $1 billion trading assets and liabilities thresholds to enjoy reduced hedging compliance and documentation requirements and a less costly compliance and reporting regime described in sections V.F.3.c, V.F.3.d, V.F.3.g, and V.F.3.h. The extent to which banking entities may seek to manage down their trading books will depend on a number of factors, such as the size and complexity of each banking entity's trading activities and organizational structure, along with those of its affiliated entities, as well as forms of potential restructuring and the magnitude of expected compliance savings from such restructuring relative to the cost of restructuring. The SEC anticipates that the incentives to manage the trading book under the $20 billion or $1 billion threshold, as applicable, may be strongest for those holding companies that are near or just above the thresholds. Such management of the trading book may reduce the size of trading activity of some banking entities and reduce the number of banking entities subject to more stringent hedging, compliance, and reporting requirements. At the same time, if the amendments incentivize banking entities to have smaller trading books, they may mitigate moral hazard and reduce market impacts from the failure of a given banking entity.

[955] *See, e.g.,* KeyCorp; BMO and Capital One et al.

[956] *See* § ____.6(a)(2).

ii. Efficiency, Competition, and Capital Formation

The 2013 rule imposes compliance burdens that may be particularly significant for smaller market participants. Moreover, such compliance burdens may be passed along to counterparties and customers in the form of higher costs, reduced capital formation, or a reduced willingness to transact. For example, in the proposal, the SEC cited one commenter's estimate that the funding cost for an average non-financial firm may have increased by as much as $30 million after the 2013 rule's implementation.[957] At the same time, and as discussed in section V.F.2, the SEC continues to recognize that the 2013 rule may have yielded important qualitative benefits, such as reducing certain types of risks in the financial system and mitigating potential incentive conflicts that could be posed by certain types of proprietary trading by dealers, as well as enhancing oversight and supervision.

On one hand, as a result of the amendments, Group B and Group C entities might enjoy a competitive advantage relative to similarly situated Group A and Group B entities respectively. As noted, firms that are near to the $20 billion threshold may actively manage their trading book to avoid triggering stricter requirements, and some firms above the threshold may seek to manage down the trading activity to qualify for streamlined treatment under the amendments. As a result, the amendments may result in greater competition between Group B and Group A entities around the $20 billion threshold, and similarly, between Group B and Group C entities around the $1 billion threshold, to the extent that Group C and Group B entities will increase their trading activity without reaching the $1 and $20 billion thresholds respectively. On the other hand, to the extent that the risk exposure of Group B and Group C entities increases as they compete with Group A and Group B entities, respectively, investors may demand additional compensation for bearing financial risk. A higher required rate of return and higher cost of capital could therefore offset potential competitive advantages for Group B and Group C entities.

In addition, the adopted methods for the calculation of limited and significant trading assets and liabilities may result in lower compliance costs for foreign banking entities relative to the domestic banking entities, increasing the competitive advantage of foreign Group B and C entities.

As in the proposal, the SEC recognizes that cost savings to Group B and Group C entities related to the compliance requirements and requirements described in sections V.F.3.g and V.F.3.h may be partially or fully passed along to clients and counterparties. To the extent that hedging documentation and compliance requirements for Group B and Group C entities are currently resulting in a reduced willingness to make markets or underwrite securities, the amendments may facilitate trading activity and risk-sharing, as well as capital formation and reduced costs of access to capital. Again, the SEC notes that the amendments do not eliminate statutory prohibitions under section 13 of the BHC but create a simplified compliance regime for banking entities that do not have significant trading assets and liabilities. Thus, the statutory prohibitions on proprietary trading and covered funds activities will continue to apply to all affected entities, including Group B and Group C entities.

iii. Alternatives

Alternative approaches were considered. For example, the rule could have used other values for thresholds for total consolidated trading assets and liabilities in the definition of entities with significant trading assets and liabilities. As noted in the discussion of the economic baseline, using different thresholds would affect the scope of application of compliance requirements and requirements described in sections V.F.3.g and V.F.3.h by changing the number and size of affected broker-dealers. For instance, using the proposed $10 billion threshold or a lower threshold, such as $5 billion, in the definition of significant trading assets and liabilities would scope a larger number of entities into Group A, as compared to the final rule's $20 billion threshold, thereby subjecting a larger share of the dealer and investment adviser industries to six-pillar compliance obligations. However, the SEC continues to recognize that trading activity is heavily concentrated in the right tail of the distribution and that using a lower threshold would not significantly increase the volume of trading assets and liabilities scoped into the Group A regime.[958] For example, Table 2 shows that 57 bank-affiliated broker-dealers that have between $1 and $10 billion in consolidated trading assets and liabilities and are subject to section 13 of the BHC Act account for only approximately 10% of bank-affiliated broker-dealer assets and between approximately 4% and 9% of holdings. In addition, 33 broker-dealer affiliates of firms that have between $1 and $5 billion in consolidated trading assets and liabilities and are subject to section 13 of the BHC Act account for only approximately 2% of bank-affiliated broker-dealer assets and between approximately 1% and 2% of holdings.[959] At the same time, with a lower threshold, more banking entities would face higher compliance burdens and related costs. Therefore, as discussed in section IV.A.1.b, the agencies decided against this alternative.

A different threshold for the definition of banking entities with limited trading assets and liabilities was also considered. As pointed out by some commenters, a higher threshold, such as $5 billion, would allow small and mid-size banking entities to have moderate growth over time without triggering more costly compliance requirements.[960] As shown in Table 2, 33 more broker-dealers would qualify for presumed compliance under this alternative. However, as discussed in section IV.A.1.b, the agencies continue to believe that banking entities with $1 billion or less in trading assets and liabilities differ from banking entities with between $1 and $5 billion in trading assets and liabilities in their business models and risk exposures, and that a $1 billion threshold appropriately accounts for the risks posed by Group B and Group C entities; therefore, the agencies are not adopting this alternative.

An alternative of splitting banking entities into only two groups according to their trading assets and liabilities—those with significant trading assets and liabilities and those without, *i.e.* joining the limited and moderate trading assets and liabilities groups was also considered.[961] This alternative could have reduced compliance burdens for Group B entities if the threshold was set at $20 billion. But, if the threshold for this alternative would have been set at $1 billion, the compliance burdens for Group B entities would have been

[957] *See* 83 FR at 33526.

[958] Some commenters supported this view. *See, e.g.,* Capital One et al.

[959] In addition, one commenter stated that firms with $20 billion or more in trading assets and liabilities represented approximately 94.80% of total reported U.S. trading assets and liabilities and firms with $5 billion or less in trading assets and liabilities represented approximately 1.32% of total reported U.S. trading assets and liabilities. *See* BPI.

[960] *See, e.g.,* ABA.

[961] This alternative approach was also suggested by some commenters. *See, e.g.,* Capital One et al.

higher than their compliance costs under the final rule. As shown in Table 2, Group B broker-dealers represent approximately 16% of total assets of bank-affiliated broker-dealers and approximately 16% of their holdings, while Group C broker-dealers account for only 4% of total assets of bank-affiliated broker-dealers and 2% of their holdings. The SEC continues to believe that Groups B and C differ in their business models (*e.g.,* level of trading activity) and the risks posed to the U.S. financial system. For these reasons, the agencies decided not to adopt this alternative.

A percentage-based threshold for determining whether a banking entity has significant trading assets and liabilities was also considered. For example, the amendment could have relied exclusively on a threshold where banking entities are considered to be entities with significant trading assets and liabilities if the firm's total consolidated trading assets and liabilities are above a certain percentage (for example, 10% or 25%) of the firm's total consolidated assets. Under this alternative, a greater number of entities could have benefited from lower compliance costs and a streamlined regime for Group B entities. In addition, as pointed out by a commenter, this alternative could address risk for individual banking entities since it would base the threshold on the materiality of trading activity to the entity's business.[962] However, under this approach, even firms in the extreme right tail of the trading asset distribution could be considered without significant trading assets and liabilities if they are also in the extreme right tail of the total assets distribution. Thus, without placing an additional limit on total assets within such regime, entities with the largest trading books could have been scoped into the Group B regime if they also had a sufficiently large amount of total consolidated assets, while entities with significantly smaller trading books could be categorized as Group A entities if they had fewer assets overall. Thus, the SEC believes that this alternative would not have appropriately accounted for the size of banking entities' trading activity.

In addition, a threshold based on total assets could have been adopted. It is possible that losses on small trading portfolios can be amplified through their effect on non-trading assets held by a banking entity. To that extent, a threshold based on total assets may be useful in potentially capturing both direct and indirect losses that originate from trading activity of a holding company.[963] However, such threshold may not be as meaningful as a threshold based on trading assets and liabilities when applied in the context of section 13 of the BHC Act. A threshold based on total assets would scope in entities merely on the basis of their balance sheet size, even though they may have little or no trading activity of the type that section 13 of the BHC Act is intended to address. Therefore, the agencies decided against this alternative.

Thresholds based on the level of total revenues from permitted trading activities could have been adopted. To the extent that revenues could be a proxy for the structure of a banking entity's business and the focus of its operations, this alternative may apply more stringent compliance requirements to those entities that focus their business the most on covered activities. However, revenues from trading activity fluctuate over time, rising during economic booms and deteriorating during crises and liquidity freezes. As a result, under the alternative, a banking entity that is scoped into the regulatory regime during normal times may be scoped out during a time of market stress because of a decrease in the revenues from permitted activities. That is, under such alternative, the weakest compliance regime may be applied to banking entities with the largest trading books in times of acute market stress, when the performance of trading desks is deteriorating and the underlying requirements of the 2013 rule may be the most valuable.

Finally, the agencies could have excluded from the definition of entities with significant trading assets and liabilities those entities that may be affiliated with a firm with over $20 billion in consolidated trading assets and liabilities but that are operated separately and independently and are not consolidated with the parent company that have total trading assets and liabilities (excluding trading assets and liabilities involving obligations of or guaranteed by the United States or any agency of the United States) under $20 billion. As shown in Table 8 below, the SEC estimates that there are 17 broker-dealers that have holdings of less than $20 billion and are affiliated with bank holding companies that have trading assets and liabilities in excess of $20 billion. The SEC does not have data on how many of these 17 broker-dealers are operated separately and independently and are not consolidated with affiliated entities with significant trading assets and liabilities. However, the SEC notes that, at a maximum, this alternative could decrease the scope of application of the Group A regime for 17 broker-dealers.

TABLE 8—BROKER-DEALER ASSETS AND HOLDINGS, BY GROSS TRADING ASSETS AND LIABILITIES THRESHOLD OF AFFILIATED BANKING ENTITIES

Type of broker-dealer	Number	Total assets, $mln	Holdings, $mln	Holdings (altern.), $mln
Holdings ≥$20bln and affiliated with firms with gross trading assets and liabilities ≥$20bln	19	2,225,989	594,513	514,360
Holdings <$20bln and affiliated with firms with gross trading assets and liabilities ≥$20bln	17	275,951	31,328	13,576
Affiliated with firms with gross trading assets and liabilities <$20bln [964]	163	640,840	135,691	39,451
Total	199	3,142,780	761,532	567,387

Somecommenters indicated that this alternative may be beneficial for banking entities.[965] The SEC recognizes that this alternative would increase the number of entities able to avail themselves of the reduced compliance, documentation, and metrics reporting requirements, potentially resulting in cost reductions flowing through to

[962] *See, e.g.,* KeyCorp.

[963] Some commenters supported this view. *See, e.g.,* Data Boiler.

[965] *See, e.g.,* JBA.

customers and counterparties. At the same time, this alternative would permit more trading activities by entities affiliated with firms that have gross trading assets and liabilities in excess of $20 billion. In addition, it could encourage such firms to fragment their trading activity, for instance, across multiple dealers, and operate them separately and independently, thereby relieving such firms of the requirement to comply with the hedging, compliance, and reporting regime of the 2013 rule. This alternative may, therefore, reduce the regulatory oversight and compliance benefits of the full hedging, documentation, reporting, and compliance requirements for Group A banking entities. The feasibility and costs of such fragmentation would depend, in part, on the organizational complexity of a firm's trading activity, the architecture of trading systems, the location and skillsets of personnel across various dealers affiliated with such entities, and current inter-affiliate hedging and risk mitigation practices.

Some commenters suggested that periodic adjustment to thresholds to account for inflation should be adopted.[966] This alternative would account for changing market conditions in the absence of any changes in a banking entity's business and level of trading activities. In an environment with a moderate level of inflation, Group B and Group C banking entities that are situated just below the thresholds may reduce their level of activity to avoid triggering a more costly compliance regime. However, the agencies do not believe that the additional complexity associated with inflation-indexing the thresholds in the final rule is necessary in light of the other changes to the thresholds and calculation methodologies described above. Therefore, the agencies decided against this alternative.

b. Proprietary Trading

Under section 13 of the BHC act and the 2013 rule, proprietary trading is defined as engaging as principal for the ''trading account'' of a banking entity.[967] Thus, the definition of the trading account determines the trading activity that falls within the scope of the statutory prohibitions and the compliance regime in the 2013 rule associated with such activity. The definition of trading account in the 2013 rule has three prongs, including the dealer prong. The final amendments introduce certain changes to the definition of trading account; however, these amendments do not remove or modify the dealer prong. In addition, the amendments introduce new exclusions from the trading account and a new definition of the trading desk.

i. Trading Account

(1) Costs and Benefits

Under the final rule, the definition of ''trading account'' continues to include purchases and sales of financial instruments by banking entities engaged in the business of a dealer, swap dealer, or security-based swap dealer outside of the United States, to the extent these instruments are purchased or sold in connection with the activities of such business.[968] Thus, the SEC expects that most (if not substantially all) trading activity by SEC-regulated dealers that are banking entities will continue to be captured by the dealer prong of a banking entity, notwithstanding any of the changes made to the definition of the trading account.

Some commenters pointed out that not all of dealers' trading activity is conducted in a dealer capacity.[969] The SEC recognizes the possibility that some dealers engage in transaction activity that, by itself, would not trigger a dealer registration requirement.[970] Under the baseline, such activity may be scoped into the ''trading account'' definition by the short-term prong or the market risk capital prong. Thus, as discussed below, the SEC believes that only a small subset of trading activity by dealers may be affected by the changes to the definition of the trading account.

The agencies are adopting three changes to the definition of the trading account. First, the applicability of the short-term prong and the market risk capital prong is changed under the final rule. In particular, for dealers that are subject to the market risk capital prong, trading activity outside of the dealer prong will be scoped into the trading account only if it is a covered position for the purposes of the market risk capital rule. That is, if the activity is not captured by the dealer prong or the market risk capital prong, it would be scoped out from the definition of the trading account under the final rule. This is in contrast to the 2013 rule, under which, for banking entities that are subject to the market risk capital prong, trading activity that is not captured by the dealer prong or the market risk capital prong could still be captured by the short-term prong.[971] Thus, under the 2013 rule, bank dealers that are subject to the market risk capital prong have to apply three prongs: The dealer prong, the market risk capital prong, and the short-term prong. Under the final rule, these same entities will apply only two prongs: The dealer prong and the market-risk capital prong. To the extent that dealers subject to the market risk capital prong have trading activities that are not captured by the dealer prong currently experience organizational inefficiencies or duplicative costs as a result of being subject to both short-term and market risk capital prongs, this amendment may benefit such dealers by decreasing their compliance costs, as discussed in section V.F.3.g, and decreasing the regulatory complexity, consequently increasing operational efficiency. The SEC expects that these benefits are likely to be greater for banking entities that are not subject to the dealer prong, although, as noted above, the SEC does not analyze those potential benefits here.

In addition, to the extent that the definition of trading account in the 2013 rule involves position-by-position analysis of financial instruments which may be costly, and to the extent that the costs of such analysis discourage dealers that are subject to the market risk capital prong from conducting activities that could be scoped in by the short-term intent prong, this amendment may promote trading activities that would not be captured by the dealer prong or the market risk capital prong. On the one hand, such trading activities may allow dealers that are subject to the market risk capital rule to manage their business more efficiently. On the other hand, to the extent that, under the final rule, trading activity that is not captured by either the dealer prong or the market risk capital prong would have been captured by the short-term intent prong, and to the extent that this activity exposes dealers to additional risks, this amendment may increase risk exposure of dealers that are subject to the market risk capital rule. The SEC does not have information about the amount of trading activity of SEC-registered broker-dealers

[964] This category excludes SEC-registered broker-dealers affiliated with banks that have consolidated total assets less than or equal to $10 billion and trading assets and liabilities less than or equal to 5% of total assets, as well as firms for which bank trading assets and liabilities data was not available.

[966] *See, e.g.,* BPI and Capital One et al.

[968] *See* 2013 rule § ___.3(b)(1)(iii).

[969] *See, e.g.,* SIFMA and BPI.

[970] *See* 79 FR at 5549 (''The Agencies believe the scope of the dealer prong is appropriate because, as noted in the proposal, positions held by a registered dealer in connection with its dealing activity are generally held for sale to customers upon request or otherwise support the firm's trading activities (*e.g.,* by hedging its dealing positions), which is indicative of short term intent.'').

[971] As noted in section IV.B.1.a.iii, the scope of activities captured by the short-term intent prong substantially overlaps with the scope of activities captured by the market risk capital prong.

that is not captured by the dealer prong or the market risk capital prong and about the prevalence of the current application of the market risk capital prong and the short-term prong under the 2013 rule. As shown in Table 9 below, the SEC estimates that there are 100 broker-dealers that in aggregate hold between 98% and 99% of holdings by broker-dealers affected by the final rule that are subject to the market risk capital rule and may be affected by this amendment. The SEC continues to believe that the largest share of dealers' trading activity will continue to be captured by the dealer prong. Thus, the SEC expects that the effects of this amendment on SEC-regulated dealers will be modest.

TABLE 9—MARKET RISK CAPITAL RULE APPLICATION

Market risk capital rule application	Number of broker-dealers	Total assets, $mln	Holdings	Holdings (altern.)
Subject to the market risk capital rule	100	3,002,834	749,867	562,515
Not subject to the market risk capital rule	99	139,946	11,665	4,872
Total	199	3,142,780	761,532	567,387

The second change to the definition of trading account affects banking entities that are not subject to the market risk capital rule and cannot apply the market risk capital prong under the 2013 rule. Under the final rule, these entities will be able to elect to apply the market risk capital prong instead of the short-term prong to determine the scope of the banking entity's trading account. This amendment will affect those dealers that have trading activity that is not captured by the dealer prong and instead captured by the short-term prong. To the extent that the market risk capital prong is less costly to comply with, relative to the short-term prong, this amendment may benefit dealers that are not subject to the market risk capital rule and have trading activity that is not captured by the dealer prong by providing them with flexibility to apply the prong that is more cost-effective. This amendment may particularly benefit foreign banking entities that are not subject to the market risk capital rule but are applying a different market risk framework, to the extent that this framework is similar to the market risk capital rule. To the extent that foreign dealers with frameworks similar to the framework of the market risk capital rule are currently experiencing inefficiencies because they cannot apply the market risk capital prong of the trading account definition, this amendment may reduce the compliance costs of these dealers. The SEC estimates that, at most, 99 broker-dealers that are not subject to the market risk capital rule may be affected by this amendment, to the extent that they have trading activity that is captured by the short-term prong under the 2013 rule. However, the SEC continues to believe that the largest share of dealers' trading activity will continue to be captured by the dealer prong. Thus, the SEC expects that the effects of this amendment for dealers will be modest.

The third amendment to the trading account definition will eliminate the 60-day rebuttable presumption in the short-term prong and instead establish a new rebuttable presumption that financial instruments held for 60 days or more are not within the short-term prong. Many commenters supported the proposed rule's elimination of the 60-day rebuttable presumption,[972] and some commenters suggested that the agencies should presume, for banking entities not subject to the market risk capital rule, that financial instruments held for longer than 60 days, or that have an original maturity or remaining maturity upon acquisition, of fewer than 60 days to their stated maturities, are not for the banking entity's trading account.[973] As recognized in section IV.B.1.a.iv, the agencies have found that the rebuttable presumption has captured many activities that should not be included in the definition of proprietary trading. In addition, as stated by some commenters, the presumption may be difficult to rebut.[974] Therefore, the SEC believes that the reversal of the presumption in the 2013 rule would reduce the compliance burdens for dealers that conduct trading activity that is not otherwise captured by the dealer prong or the market risk capital prong. To the extent that the compliance burdens related to the rebuttable presumption of the 2013 rule limit dealers' ability to conduct customer-accommodating transactions or liquidity management activities, the cost reductions of the amendment may flow through to customers and counterparties and increase operational efficiency of dealers. The SEC estimates that this amendment may affect 99 broker-dealers—the broker-dealers that are not subject to the market risk capital rule—which on aggregate have 1.5% of broker-dealer holdings. However, the SEC expects that the largest share of dealing activity subject to SEC oversight will continue to be captured by the dealer prong. Thus, the SEC expects that the effects of this amendment for dealers will be modest.

(2) Efficiency, Competition, and Capital Formation

To the extent that the compliance related to the rebuttable presumption of the 2013 rule limits dealers' ability to conduct customer-accommodating transactions, or liquidity management or risk management activities that are covered by the short-term prong, the amendments to the definition of trading account may facilitate such activities, which could, in turn, promote capital formation. In addition, to the degree that the amendments to the trading account may provide banking entities with more flexibility to underwrite, market make, and hedge, and to the extent these activities facilitate capital formation, these amendments may improve allocative efficiency. To the extent that the amendments to the short-term prong reduce compliance costs and to the extent that the short-term prong primarily applies to smaller dealers (*i.e.,* those not covered by the market risk capital prong), the amendments to the trading account definition may improve the competitive position of smaller dealers. However, the SEC notes that the largest share of dealing activity subject to SEC oversight is already captured by the dealer prong; and, therefore, the above economic effects of the amendments to the definition of the trading account on SEC-regulated entities, including the effects on efficiency, competition, and capital formation, may be de minimis.

[972] *See, e.g.,* State Street; Chatham; BPI; FSF; CCMR and CFA.

[973] *See, e.g.,* ABA; Arvest; BPI; SIFMA and IIB.

[974] *See, e.g.,* State Street; Chatham; BPI; FSF; CCMR and CFA.

(3) Alternatives

As an alternative to the short-term prong, the agencies proposed replacing the short-term prong in the 2013 rule with an accounting prong that would have included within the definition of ''trading account'' any account used by a banking entity to purchase or sell one or more financial instruments that are recorded at fair value on a recurring basis under applicable accounting standards.[975] As the agencies noted when they proposed this alternative, the accounting prong was designed to provide more certainty and clarity about which financial instruments should be included in the trading account due to the fact that banking entities should know which positions are recorded at fair value on their balance sheets.[976] In addition, as pointed out by some commenters,[977] this alternative could deter noncompliance and facilitate the agencies' supervision. However, a large number of commenters stated that the proposed accounting prong would inadvertently scope in activities that are not principally for the purpose of selling in the near term or otherwise with the intent to resell in order to profit from short-term price movements. For example, some commenters pointed out that longer term positions, such as available-for-sale debt securities,[978] certain long-term investments,[979] static hedging of long term investments,[980] traditional asset-liability management activities,[981] derivative transactions entered into for any purpose and duration,[982] long-term holdings of commercial mortgage-backed securities; [983] would be scoped in under this alternative. Although some of these instruments are held for less than 60 days and may fall under the short-term prong of the trading account under the 2013 rule, these instruments, in general, are not held for trading purposes, *i.e.,* they are not held principally for the purpose of selling in the near term; rather, the majority of the aforementioned instruments are held for investment.[984] Since this alternative would include all instruments reported at fair value, regardless of the purpose with which these instruments are bought or sold and regardless of the period during which these instruments are held (short-term or long-term), the scope of the trading account would be significantly greater under this alternative than the scope of the trading account in the 2013 rule. Given that many of the instruments that would be captured by the accounting prong are not held principally for the purpose of selling in the near term, the agencies are not adopting this alternative. The SEC also notes that if this alternative had been adopted, the effect on SEC-regulated dealers would have been limited because the majority of dealer trading activity falls under the dealer prong.

The agencies also proposed, but are not adopting, including a reservation of authority allowing for a determination, on a case-by-case basis, with appropriate notice and response procedures, that any purchase or sale of one or more financial instruments by a banking entity for which it is the primary financial regulatory agency either is or is not for the trading account. While the SEC continues to recognize that the use of objective factors to define proprietary trading is intended to provide bright lines that simplify compliance, the SEC also recognizes that this approach may, in some circumstances, produce results that are either underinclusive or overinclusive with respect to the definition of proprietary trading. The SEC continues to believe that the reservation of authority may add uncertainty for banking entities about whether a particular transaction could be deemed as a proprietary trade by the regulatory agency, which may affect the banking entity's decision to engage in transactions that are not included in the definition of the trading account under the 2013 rule. As discussed in the proposal, notice and response procedures related to the reservation of authority provision would cost as much as $19,877 for SEC-registered broker-dealers, and $5,006 for entities that may choose to register with the SEC as SBSDs.[985]

The agencies proposed but are not adopting the revision of the market risk capital prong to apply to the activities of FBOs to take into account the different market risk frameworks FBOs may have in their home countries.[986] This alternative may better align foreign banking entities' compliance with the 2013 rule and compliance with market risk regulations of their home counties, increasing organizational efficiency and potentially decreasing compliance costs for such banking entities. However, as suggested by some commenters, under this alternative, positions that are not held for short-term trading would be captured in some foreign market risk capital frameworks.[987] Therefore, the agencies decided against this alternative and instead are adopting a more flexible approach, under which foreign banking entities would be able to apply the market risk capital prong if they choose to do so.[988]

As an alternative, the agencies could have modified the dealer prong of the trading account definition to include only near-term trading, *e.g.,* positions held for less than 60, 90, or 120 days. This alternative would likely narrow the scope of application of the substantive proprietary trading prohibitions to a smaller portion of a banking entity's activities. Under this alternative, bank-affiliated dealers would be able to amass large trading positions at the near-term definition boundary (*e.g.,* for 61, 91, or 121 days) to take advantage of a directional market view, to profit from mispricing in an instrument, or to collect a liquidity premium in a particular instrument. This may significantly increase the risk exposure of bank-affiliated dealers. However, as this alternative could stimulate an increase in potentially impermissible proprietary trading by these dealers, the volume of trading activity in certain instruments and liquidity in certain markets may increase. The SEC also notes that the temporal thresholds necessary to implement such a short-term trading alternative would be difficult to quantify and may have to vary by product, asset class, and aggregate market conditions, among other factors. For instance, the markets for large cap equities and investment grade corporate bonds have different structures, types of participants, latency of trading, and liquidity levels. Therefore, an appropriate horizon for short-term positions will likely vary across these markets. Similarly, the ability to transact quickly differs under strong macroeconomic conditions and in times of stress. A meaningful implementation of this alternative would likely require calibrating and

[975] *See* proposed rule § ____.3(b)(3); 83 FR at 33447–48.

[976] *See id.*

[977] *See, e.g.,* Better Markets.

[978] *See, e.g.,* BPI and SIFMA.

[979] *See, e.g.,* Capital One et al.; BPI; SIFMA; and CCMR.

[980] *See, e.g.,* BPI and ISDA.

[981] *See, e.g.,* KeyCorp; BPI; Capital One et al.; FSF and Goldman Sachs.

[982] *See e.g.,* ISDA and BPI.

[983] *See* MBA.

[984] *See, e.g.,* FASB defines available-for-sale securities as investments that are not classified as trading securities nor as held-to-maturity securities and states that cash flows from these investments should be classified as cash flows from investing activities. *See* ''Statement of Financial Accounting Standards No. 115'', FASB.

[985] *See* 83 FR 33432.

[986] *See* proposed rule § ____. 3(b)(1)(ii); 83 FR at 33447.

[987] *See, e.g.,* IIB.

[988] *See* section IV.B.1.a.v.

recalibrating complex thresholds to exempt non-near-term proprietary trading and so could introduce additional uncertainty and increase the compliance burdens on SEC-regulated banking entities.

As another alternative, the agencies could have categorically excluded financial instruments of dealers purchased in a non-dealing capacity, such as financial instruments purchased for long-term investment purposes. Some commenters pointed out that it is not always clear whether such instruments are scoped in the dealer prong and that banking entities may engage in costly and time-consuming position-by-position analysis to confirm that a long-term investment is captured in the trading account.[989] As discussed in section IV.B.1.a.vi, the agencies continue to believe that only the activities that are done in connection with activities that would require the banking entity to be licensed or registered are covered by the dealer prong. For example, if a banking entity purchases or sells a financial instrument in connection with activities that do not require registration as a dealer, this activity would not be covered by the dealer prong. However, this activity could still be included in the trading account under the short-term prong or the market risk capital prong, as applicable.[990]

ii. Exclusions From Proprietary Trading

The agencies are adopting the proposed expansion of the liquidity management exclusion, as well as an exclusion for trading errors and subsequent correcting transactions, certain matched derivative transactions, certain trades related to hedging mortgage servicing rights or mortgage servicing assets, and transactions in instruments not included in the definition of trading asset or trading liability under the applicable reporting form for a banking entity.

(1) Costs and Benefits

Exclusion for Liquidity Management Activities

The agencies are adopting the proposed expansion of the liquidity management exclusion substantially as proposed, but with a modification to permit the use of non-deliverable cross-currency swaps. Thus, liquidity management exclusion would apply not only to securities, but also to foreign exchange forwards and foreign exchange swaps (each as defined in the Commodity Exchange Act), and to cross-currency swaps (both physically- and cash-settled) that are traded for the purpose of liquidity management in accordance with a documented liquidity management plan. On the one hand, under this amendment, SEC-regulated banking entities would face lower burdens and enjoy greater flexibility in currency-risk management as part of their overall liquidity management plans. In the proposal, the SEC recognized that the liquidity management exclusion in the 2013 rule may be narrow and that the trading account definition may scope in routine asset-liability management and commercial-banking related activities. In their response to the proposal, some commenters supported that view and stated that the 2013 rule may be restricting liquidity-risk management by banking entities.[991] Therefore, the SEC continues to believe that, to the degree that these effects constrain activities of dealers, this amendment could facilitate more efficient risk management, greater secondary market activity, and more capital formation in primary markets.

Some commenters indicated that this amendment may make it easier to trade in currency markets for speculative purposes under the guise of legitimate liquidity management.[992] The SEC continues to recognize that this liquidity-management amendment may lead to currency derivatives exposures, including potentially very large exposures, being scoped out of the trading account definition and the ensuing substantive prohibitions of the 2013 rule, which may increase the risk exposures of banking entities and reduce the effectiveness of regulatory oversight. However, the SEC continues to believe that the conditions maintained in the exemption, including the requirement to conduct liquidity management in accordance with a documented liquidity management plan, will limit these adverse effects.

Exclusion for Error Trades

The agencies are also adopting an exclusion for trading errors and subsequent correcting transactions from the definition of proprietary trading. The 2013 rule excludes from the proprietary trading prohibition certain excluded clearing activities by banking entities that are members of clearing agencies, derivatives clearing organizations, or designated financial market utilities. Specifically, such excluded clearing activities are defined to include, among others, any purchase or sale necessary to correct error trades made by, or on behalf of, customers with respect to customer transactions that are cleared, provided the purchase or sale is conducted in accordance with certain regulations, rules, or procedures.[993] Accordingly, the exclusion for error trades under the 2013 rule is applicable only to clearing members with respect to cleared customer transactions.[994]

[989] *See, e.g.,* SIFMA and BPI.

[990] *See* 79 FR 5549.

[991] *See, e.g.,* ISDA; Goldman Sachs and SIFMA.

[992] *See* Volcker Alliance and Data Boiler.

[993] *See* 2013 rule § ____.3(e)(7).

[994] *Id.*

This amendment primarily benefits dealers that are not clearing members with respect to all customer trades and dealers that are clearing members with respect to customer trades that are not cleared, since under the 2013 rule error trades of these dealers are not considered excluded clearing activity. Table 10 reports information about broker-dealer count, assets, and holdings, by affiliation and clearing type.

TABLE 10—BROKER-DEALER ASSETS AND HOLDINGS, BY CLEARING STATUS [995]

Broker-dealers subject to section 13 of the BHC Act	Number	Total assets, $mln	Holdings, $mln	Holdings (altern.), $mln
Clear or carry (or both)	76	3,101,936	755,975	562,649
Other	123	40,844	5,557	4,738
Total	199	3,142,780	761,532	567,387

Since correcting error trades is not conducted for the purpose of profiting from short-term price movements, as also pointed out by some commenters,[996] this amendment is likely to facilitate valuable customer-facing activities and promote effective risk management by dealers. As discussed in section IV.B.1.b.ii, the agencies continue to believe that banking entities generally should monitor and manage their error trade account because doing so would help prevent personnel from using these accounts for proprietary trading. Some commenters stated that banking entities could still make profits while relying on the error trade exclusion.[997] To the degree that this may happen, banking entities could become incentivized to use error trade exclusion to conduct proprietary trading. However, some commenters noted that bona fide trade error activity is separately managed and classified as an operational loss when there is a loss event or a near miss when error activity results in a gain.[998] The SEC agrees with the commenters' view and believes that existing requirements and operational risk management practices would be sufficient to deter participants from using the error trade exclusion to obfuscate impermissible proprietary trades.

Exclusion for Customer-Driven Swaps and Customer-Driven Security-Based Swaps

In addition, the agencies are adopting an exclusion for transactions in which banking entities contemporaneously enter into a customer-driven swap or security-based swap and a matched swap or security-based swap if (i) the banking entity retains no more than minimal price risk; and (ii) the banking entity is not a registered dealer, swap dealer, or security-based swap dealer. The SEC continues to recognize that loan-related swaps and customer accommodation back-to-back derivatives facilitate lending transactions as a customer service and are not designed to profit from speculative price movements.[999] Some commenters indicated that such customer accommodation loan-related swaps transactions may reduce the risk of banking entities and borrowers, and encourage the extension of credit, commonly for smaller and medium-size banking entities that engage in trading in connection with loans and other extensions of customer credit. Some commenters stated that this amendment increases the scope of permissible trading activity. The SEC notes that under the final rule this exclusion is not available to banking entities that are subject to the market risk or the dealer prong, reducing such risks. Therefore, the SEC believes that the effects of this amendment discussed above on SEC-regulated entities would be de minimis.

Exclusion for Hedges of Mortgage Servicing Rights or Mortgage Servicing Assets

The agencies are adopting an exclusion for transactions involving any purchase or sale of one or more financial instrument that the banking entity uses to hedge mortgage servicing rights or mortgage servicing assets in accordance with a documented hedging strategy. This amendment will provide more clarity to banking entities that are subject to the short-term prong that intangibles, including servicing assets, are not included in the definition of proprietary trading. Because under the market risk capital prong, intangibles, including servicing assets, are explicitly excluded from the definition of ''covered position,'' the exclusion will provide additional certainty to dealers that do not apply the market risk capital prong. To the extent that dealers that do not apply the market risk capital prong currently experience uncertainty as to whether the aforementioned financial instruments are included in the trading account and to the extent that this uncertainty impedes transactions involving these types of financial instruments, the amendment may facilitate permitted trading activity in these financial instruments. In addition, to the extent that these exclusions facilitate more efficient risk management, dealers that are not subject to the market risk capital rule may benefit from this amendment.[1000]

Exclusion for Financial Instruments That Are Not Trading Assets or Trading Liabilities

In addition to the above exclusions, the agencies are adopting an exclusion for purchases or sales of financial instruments that do not meet the definition of trading assets or trading liabilities under the applicable reporting form for a banking entity as of January 1, 2020. Similar to the exclusion for hedges of mortgage servicing rights or assets, this exclusion is intended to clarify the scope of the prohibition on proprietary trading and to provide parity between banking entities that apply the market risk capital prong and banking entities that apply the short-

[995] Broker-dealers clearing or carrying customer accounts (or both) are identified using FOCUS filings. Broadly, broker-dealers that are clearing or carrying firms directly carry customer accounts, maintain custody of the assets, and clear trades. Other broker-dealers may accept customer orders but do not maintain custody of assets. This analysis excludes SEC-registered broker-dealers affiliated with banks that have consolidated total assets less than or equal to $10 billion and trading assets and liabilities less than or equal to 5% of total assets, as well as firms for which bank trading assets and liabilities data was not available.

[996] *See, e.g.,* BPI; FSF and BB&T.

[997] *See, e.g.,* Data Boiler; CAP and Public Citizen.

[998] *See, e.g.,* ABA; BB&T; BPI and Capital One et al.

[999] Commenters agreed with this view. *See, e.g.,* Covington; Credit Suisse; SIFMA; Chatham and ABA.

[1000] The SEC estimates that there are 99 SEC-registered broker-dealers that are not subject to the market risk capital rule, which on aggregate hold approximately 1.5% of broker-dealer holdings.

term intent prong by scoping out of the rule positions that would not be captured by the market risk capital prong. In addition, this amendment will exclude financial instruments purchased by a dealer in its dealing capacity that are not trading assets or liabilities. Therefore, the SEC believes that this amendment will benefit dealers, to the extent that the 2013 rule's dealer prong is overinclusive because it scopes in financial instruments acquired in dealer capacity, regardless of their purpose (*i.e.* both for trading and non-trading purposes). To the extent that this aspect of the 2013 rule leads to inefficiencies or increases costs at the dealer level, the SEC expects that the final rule will promote dealers' organizational efficiency by narrowing the scope of the dealer prong to financial instruments that are considered trading assets and liabilities.

To the extent that some financial instruments that are not trading assets or liabilities are currently scoped-into the rule by the short-term prong due to the fact that they are held for less than 60 days, this amendment may decrease the scope of the trading account. For example, some fair value financial instruments that are not trading assets or liabilities, such as available-for-sale securities or derivatives not reported as trading, may be held for less than 60 days and therefore be presumed to be for the trading account under the 2013 rule. However, under the 2013 rule, banking entities could rebut this presumption by demonstrating that such instruments are not purchased or sold principally for the purpose of selling in the near term.[1001] In addition, the SEC notes that dealers, in general, hold primarily trading assets and trading liabilities due to the nature of their business. The SEC does not have data or information about what fraction of dealers' financial instruments that are not defined as trading assets or liabilities under the applicable banking agency reporting forms is currently being scoped-into the trading account by the short-term prong in the 2013 rule. This is because only non-trading fair value instruments held for fewer than 60 days are likely to be scoped into the trading account via the short-term prong under the 2013 rule, rather than all such financial instruments, and the data disaggregated by maturity of non-trading fair value instruments is not available. However, the SEC reiterates that only a small subset of trading activity by dealers may be affected by this exclusion, as majority of financial instruments purchased or sold by dealers are trading assets and liabilities. For this reason and the reasons discussed above, the SEC expects that this amendment will not substantially affect the scope of the trading account for banking entities that are dealers.

(2) Efficiency, Competition, and Capital Formation

To the degree that the 2013 rule may be restricting liquidity-risk management by banking entities, and to the extent that this affects their trading activity, the liquidity management amendment could facilitate more efficient risk management, greater secondary market activity, and more capital formation in primary markets. Similarly, to the extent that corrections for bona-fide errors and exclusions for customer-driven swaps and customer-driven security-based swaps and transactions related to mortgage servicing rights facilitate customer-driven transactions and increase banking entities' willingness to conduct such transactions, these exclusions could facilitate more efficient risk management and promote capital formation and secondary market activity. In addition, to the degree that the exclusions from proprietary trading may provide banking entities with more flexibility to manage risks, and to the extent these activities facilitate capital formation, these amendments may improve allocative efficiency.

To the extent that these amendments may increase the ability of dealers that are banking entities to hedge risks related to customer transactions, the competitive position of dealers that are banking entities may improve relative to nonbanking dealers. In addition, to the extent that these amendments reduce compliance costs of dealers that are banking entities and to the extent that these compliance costs are currently passed onto customers and counterparties, the reduction in costs related to the exclusions from proprietary trading may result in more competitive prices set by dealers that are banking entities, improving their competitive position further.

(3) Alternatives

The agencies could have taken the approach of expanding the liquidity management exclusion to exclude additional trading activities. For example, the agencies could exclude transactions in other derivatives, such as derivatives related to government securities, derivatives on foreign sovereign debt,[1002] instruments that qualify for certain treatment under the liquidity coverage ratio or section 165 of the Dodd-Frank Act, or transactions executed by SEC-registered dealers on behalf of their asset management customers.[1003]

The 2013 rule exempts all trading in domestic government obligations and trading in foreign government obligations under certain conditions; however, derivatives referencing such obligations that are intended to manage risks—including derivatives portfolios that can replicate the payoffs and risks of such government obligations—are not excluded from the trading account. Therefore, existing requirements reduce the flexibility of banking entities to engage in asset-liability management and result in a different treatment of two groups of financial instruments that have similar risks and payoffs. Excluding derivatives transactions on government obligations from the trading account definition could reduce costs to market participants and provide greater flexibility in their asset-liability management. This alternative could also result in increased volume of trading in markets for derivatives on government obligations, such as Treasury futures. The SEC recognizes, nonetheless, that derivatives portfolios that reference an obligation, including Treasuries, can be structured to magnify the economic exposure to fluctuations in the price of the reference obligation. Moreover, derivatives transactions involve counterparty credit risk not present in transactions in reference obligations themselves. Since the alternative would exclude all derivatives transactions on government obligations, and not just those that are intended to mitigate risk, this alternative could permit banking entities to increase their exposure to counterparty, interest rate, and liquidity risk. For the reasons discussed in section IV.B.1.i, the agencies decided not to expand the liquidity management exclusion further.

The agencies also considered mandating the use of a separately-managed trade error account for the purposes of this amendment. This alternative could deter banking entities from using the error trade exclusion to obfuscate impermissible proprietary trades. However, as indicated by the commenters, this approach may result in duplicative systems and additional

[1001] As discussed above, the final rule eliminates the 60-day rebuttable presumption in the short-term prong and instead establishes a new rebuttable presumption that financial instruments held for 60 days or more are not within the short-term prong.

[1002] Some commenters indicated that all derivatives should be excluded in the liquidity management exclusion. *See, e.g.,* FSF; Capital One et al.; IIB and JBA.

[1003] *See, e.g.,* Capital One et al. and ABA.

compliance costs.[1004] The agencies agree with these commenters and, therefore, are not adopting this alternative.

iii. Trading Desk Definition

The final rule adopts a multi-factor definition of the trading desk that is substantially similar to the definition included in the request for comment in the proposal, except that the reference to incentive compensation has been removed from the first prong. The definition of trading desk includes a new second prong that aligns the definition with the market risk capital rule. Specifically, for a banking entity that is subject to the market risk capital rule, the trading desk established for purposes of the market risk capital rule must be the same unit of organization that is established as a trading desk for purposes of the regulations implementing section 13 of the BHC Act.

(1) Costs and Benefits

The SEC continues to recognize that the definition of trading desk is an important component of the implementation of the 2013 rule in that certain requirements, such as those applicable to the underwriting and market making exemptions, and the metrics-reporting requirements, apply at the trading desk level of organization. Under the 2013 rule, a trading desk is defined as the smallest discrete unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof. Some commenters asserted that the smallest discrete unit language of the 2013 rule was subjective, ambiguous, or could be interpreted in different ways.[1005] Thus, the SEC continues to believe that SEC-regulated banking entities may currently experience substantial compliance costs related to the trading desk designation for the purposes of compliance with section 13 of the BHC Act. Accordingly, the SEC believes that the adopted definition of the trading desk may provide more certainty to SEC-regulated banking entities regarding trading desk designations and will reduce their compliance burdens, as the multi-factor definition better aligns with other operational, management, and compliance purposes,[1006] which typically depend on the type of trading activity, asset class, product line offered, and individual banking entity's structure. Among the metrics submissions from 18 entities received by the SEC, the SEC estimates that the average number of desks reported per entity is approximately 51.[1007] To the extent that the trading desk designations under the final rule will be less granular than those under the 2013 rule, and to the extent that establishing a large number of desks is more costly, this amendment will reduce compliance costs for dealers that are banking entities.

As seen in Table 9, the SEC estimates that 100 broker-dealers with between 98% and 99% of holdings are currently subject to the market risk capital rule and would be able to align their trading desks for the purposes of the Volcker Rule and the market risk capital rule. The SEC continues to believe that such alignment will reduce organizational complexity, consequently reducing compliance burdens for these banking entities.[1008] The SEC also estimates that 99 broker-dealers are not currently subject to the market risk capital rule—these broker-dealers will be able to establish trading desks on the basis of the multi-factor definition. To the extent that the current operational, management, or compliance structure of these entities may not perfectly align with the adopted multi-factor definition of the trading desk, these entities may experience one-time setup costs related to the reorganization of trading activity in order to satisfy the multi-factor definition. The SEC does not have information or data about the costs of this reorganization. However, the SEC believes that these reorganization costs will be offset by a reduction in ongoing compliance costs, which will be reduced as a result of the amended definition of the trading desk for dealers that are not subject to the market risk capital rule, to the extent that the trading desk designations under the final rule will be less granular than those under the 2013 rule and will better align with criteria used to establish trading desks for operational and management purposes.

(2) Efficiency, Competition, and Capital Formation

To the extent that the reduction in compliance costs stemming from this amendment facilitates permitted trading activity by banking entities, capital formation may increase. To the extent that the reduced compliance costs stemming from this amendment flow through to customers and counterparties, bank-affiliated dealers may become more competitive with nonbanking dealers. The amendment to the definition of the trading desk does not change the information available to market participants, and the SEC does not believe that these amendments are likely to have an effect on informational efficiency. To the degree that this amendment facilitates capital formation, allocative efficiency may improve.

(3) Alternatives

The agencies could have adopted an amendment that would allow trading desks to be set completely at the discretion of banking entities.[1009] This would provide banking entities greater flexibility in determining their own optimal organizational structure and allow banking entities organized with various degrees of complexity to reflect their organizational structure in the trading desk definition. This alternative could reduce operational costs from fragmentation of trading activity and compliance program requirements, as well as enable more streamlined metrics reporting. However, under this alternative, a banking entity may be able to aggregate impermissible proprietary trading with permissible activity (*e.g.,* underwriting, market making, or hedging) into the same trading desk and consequently take speculative positions under the guise of permitted activities. To the extent that this alternative would allow banking entities to use a highly aggregated definition of a trading desk, it may increase risk exposures of banking entities and the conflicts of interest that the prohibitions of section 13 of the BHC Act aimed to address.[1010] The SEC does not have data on operating and compliance costs that arise because of the fragmentation of trading activity by SEC-regulated banking entities, or data on their organizational complexity, and the extent of variation therein. For the reasons discussed in section IV.B.1.c, the agencies are not adopting this definition.

c. Permitted Underwriting and Market Making

Underwriting and market making are customer-oriented financial services that are essential to capital formation and market liquidity, and the risks and profit sources related to these activities are distinct from those related to impermissible proprietary trading. Moreover, as discussed above, market liquidity can be important to investors

[1004] *See, e.g.,* ABA; Credit Suisse; JBA and SIFMA.

[1005] *See, e.g.,* ABA and CCMC.

[1006] This was also supported by commenters. *See, e.g.,* ABA; JBA; FSF; Goldman; ISDA; SIFMA and CCMC.

[1007] *See* section V.0.

[1008] *See id.*

[1009] This alternative was also suggested by a commenter. *See* JBA.

[1010] *See, e.g.,* Volcker Alliance.

as it may enable investors to exit (in a timely manner and at an acceptable price) from their positions in instruments, products, and portfolios. At the same time, excessive risk exposure by banking entities can, of course, adversely affect markets and, therefore, investors.

Under the final rule, banking entities with covered activities are presumed compliant with the RENTD requirements of the exemption for underwriting and market making-related activities if the banking entity establishes and implements, maintains, and enforces certain internal limits that are designed not to exceed RENTD, taking into account the liquidity, maturity, and depth of the market for the relevant type of security or financial instrument. These internal limits are subject to supervisory review and oversight on an ongoing basis.

For Group A entities, these limits are required to be established either within the entity's internal compliance program or under the presumption of compliance within the exemptions for permitted underwriting and market making related activities. Under the final rule, Group B entities are not required to establish a separate compliance program for underwriting and market making requirements, including the internal limits for RENTD. However, in order to be presumed compliant with the RENTD requirements under the exemptions for underwriting and market making-related activities, banking entities are required to establish and enforce limits designed not to exceed RENTD, as well as authorization procedures for limit breaches and increases for each trading desk as described below.

With respect to limit increases and breaches, banking entities are required to maintain and make available upon request records regarding any limit that is exceeded and any temporary or permanent increase to any limit. Unlike the proposal, the final rule does not include the requirement of prompt reporting of breaches or limit increases but requires that banking entities keep and provide such records to the agencies upon request. However, consistent with the requirements under the 2013 rule, the final rule includes certain requirements for the continued availability of the presumption of compliance in the event of limit increases or breaches. Specifically, the presumption of compliance will continue to remain available in the event of a breach or limit increase only if (i) the banking entity takes prompt action to bring the trading desk into compliance; and (ii) establishes and complies with a set of written authorization procedures, including escalation procedures that require review and approval of any trade that exceeds a trading desk's limits, demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limits, and independent review of such demonstrable analysis and approval.

i. Costs and Benefits

This section discusses the expected benefits of the final rule and how regulatory oversight of internal limits may reduce such benefits; potential costs related to deterioration of risk management practices and increased risk exposures of banking entities, including with respect to the removal of the demonstrability requirement; aspects of the final rule and baseline that mitigate these costs; and factors likely to affect the overall balance of these economic effects.

The primary expected benefits of the final rule are threefold. First, the agencies have received comments that the 2013 rule has created significant costs and uncertainty about some banking entities' ability to rely on the exemption for underwriting and market making-related activities,[1011] and the economic baseline discusses existing research on the baseline effects of the 2013 rule on market quality, trading, and client facilitation activities. The SEC believes that the final rule may provide SEC-regulated banking entities with beneficial flexibility and certainty in conducting permissible underwriting and market making-related activities. Second, consistent with commenter views,[1012] the SEC recognizes that banking entities may already routinely establish and monitor internally set risk and position limits for purposes of meeting capital requirements and internal risk management. Thus, to the degree that some banking entities already establish limits that meet the requirements under the final rule, the presumption allows the reliance on internal limits in accordance with a banking entity's risk management function that may already be used to meet other regulatory requirements. Therefore, the amendment may prevent unnecessary duplication of risk-management compliance procedures for the purposes of complying with multiple regulations and may reduce compliance costs for SEC-regulated banking entities. Third, to the extent that the uncertainty and compliance burdens related to the RENTD requirements are currently impeding otherwise profitable permissible underwriting and market making by dealers,[1013] the amendments may increase banking entities' profits and the volume of dealer underwriting and market making activity. The SEC notes that the returns and risks arising from banking entity activity may flow through to investors and that investors in securities markets may benefit from market liquidity as it enables exit from investment positions.

Since the 2013 rule requires oversight of internal limits and authorization policies and procedures related to internal limit increases or breaches, this aspect of the final rule is unlikely to result in new compliance burdens for SEC registrants. In addition, the SEC has received comment that some banking entities may already have escalation and recordkeeping procedures when limits are breached or changed.[1014] The SEC continues to believe that agency oversight of internal limits for the purposes of compliance with the final rule may help support the benefits and costs of the substantive prohibitions of section 13 of the BHC Act. The agencies have also received comment that the amendments may allow the agencies to challenge the limit approval and exception process but not the nexus between RENTD and limits.[1015] As discussed above, sections ____.4(c)(1)(i)–(ii) of the final rule require that such limits must be designed not to exceed RENTD.

In the proposal, the SEC noted that some entities may be able to maintain positions that are larger than RENTD and increase risk exposures arising out of trading activities, thus reducing the economic effects of section 13 of the BHC Act and the 2013 rule. The agencies have received comment that limits may be designed to exceed RENTD and banking entities may frequently exceed limits and that introducing the presumption may lead to a deterioration of risk management practices and increase risk taking by banking entity dealers.[1016] However, as discussed above, under the final rule internal limits need to be tied to RENTD, such that if the banking entity complies with the limits it will not maintain positions that are larger than RENTD. The SEC also notes that breaches and changes to internal limits may reflect banking entities' close

[1011] *See, e.g.,* ABA; Credit Suisse; State Street and BB&T.

[1012] *See* JBA.

[1013] *See* section V.F.2.

[1014] *See* JBA.

[1015] *See, e.g.,* Better Markets.

[1016] *See, e.g.,* Volcker Alliance; Better Markets; NAFCU and Public Citizen.

monitoring of market conditions and tailoring such limits, valuable for both internal risk management and supervision and oversight over banking entities. The agencies have received comment that some banking entities may change the way they set internal limits in response to the final rule, for instance, by selecting higher initial limits to avoid breaches or increases for the purposes of section 13 of the BHC Act.[1017] The SEC recognizes these possible effects from entities changing their internal limit setting practices and notes that this effect may reduce the value of closely tailored and dynamically adjusted internal limits for internal oversight and agency supervision. Moreover, the SEC notes that this effect may lead some banking entities to take on greater trading risks. Nevertheless, to satisfy the presumption of compliance, such trading activity must conducted within risk and position limits designed not to exceed RENTD, and thus be consistent with section 13(d)(1)(B) of the BHC Act. The SEC also notes that the final rule contains recordkeeping obligations concerning any exceeded limits or temporary or permanent increases to limits, which may facilitate agency oversight but impose new burdens on banking entities. As discussed in section V.B, this aspect of the final rule may increase initial burdens[1018] by $8,870[1019] for SEC-registered banking entities and ongoing burdens for SEC-registered broker-dealers by approximately $227,278 per year and for SBSDs by approximately $38,831 per year.[1020]

The final rule also eliminates the requirements of the market making exemption related to the demonstrable analysis of historical customer demand, current inventory of financial instruments, and market and other factors concerning financial instruments in which the trading desk makes a market, including though block trades. Some commenters indicated that this aspect of the amendments gives banking entities greater discretion to establish higher risk and inventory limits in excess of RENTD[1021] and that banking entities should be required to demonstrate the analysis behind their RENTD forecasts and compare ex-ante forecasts with ex-post realizations.[1022] However, the agencies also received comment that RENTD can significantly deviate from historically observed levels, particularly in times of severe market stress, and internal limits designed to not to exceed RENTD may be based on current or forward looking customer inquiries, anticipated volatility shocks, and other forward looking information about market conditions and the evolving risks of a particular desk.[1023] The SEC also notes that, under the final rule, the presumption of compliance requires risk and position limits to be designed not to exceed RENTD and that the agencies may rebut the presumption as discussed above.

Four key aspects of the final rule are aimed at mitigating these risks and costs. First, the internal limits, including any changes to limits, used to establish the presumption of compliance are subject to rebuttal procedures discussed above, and the final rule requires that the internal limits are designed not to exceed RENTD and take into account the liquidity, maturity, and depth of the market for the relevant type of security or financial instrument. Second, the presumption of compliance is conditional on the banking entity's prompt action to bring the trading desk into compliance if a limit is exceeded. Third, banking entities are required to establish and comply with a robust set of internal policies and procedures, requiring review of limits, demonstrable analysis of a basis for any limit increase, and independent review of such analysis and approval. Fourth, the economic effects of the presumption of compliance interact with the effects of the amended trading desk definition, which the SEC believes will allow the agencies to better oversee trading activity across a given banking entity's trading desks and across groups of banking entities to determine whether the internal limits are appropriately designed not to exceed RENTD.

The SEC also notes that the final rule tailors compliance obligations of banking entities for purposes of the exemptions for underwriting and market making-related activities. The economic effects of the final amendments related to compliance are discussed in section V.F.3.g.

The SEC continues to believe that the overall economic effect of these amendments will depend on how banking entities choose to comply with the substantive prohibitions in section 13 of the BHC Act and the 2013 rule as amended. Specifically, banking entities are likely to weigh the unmet demand for and profitability of client facilitation activity against the potential costs of establishing and maintaining appropriate internal limits.[1024] The SEC does not have data on the volume of trading activity that does not occur because of the costs associated with complying with the RENTD requirement or data on the profitability of such trading activity for SEC-regulated banking entities. The SEC is not aware of any such data, and commenters did not provide data enabling such quantification.[1025]

ii. Efficiency, Competition, and Capital Formation

The SEC believes that the final rule may reduce the costs of relying on the exemptions for underwriting and market making-related activities, which may facilitate the activities related to these exemptions. The evolution in market structure in some asset classes (*e.g.,* equities) has transformed the role of traditional dealers vis-à-vis other participants, particularly as it relates to high-frequency trading and electronic platforms. However, dealers continue to play a central role in less liquid markets, such as corporate bond and over-the-counter (OTC) derivatives markets. While it is difficult to establish causality, corporate bond dealers, particularly bank-affiliated dealers, have, on aggregate, significantly reduced their capital commitment post-crisis.[1026] Corporate bond dealers are increasingly shifting from trading in a principal capacity to agency trading. To the extent that this change cannot be explained by enhanced ability of dealers to manage corporate bond inventory, electronic trading, post-crisis changes in dealer risk tolerance and macro factors (effects

[1017] *See, e.g.,* Capital One et al.; Better Markets; and State Street.

[1018] For the purposes of the burden estimates in this release, the SEC is assuming the cost of $423 per hour for an attorney, from SIFMA's ''Management & Professional Earnings in the Securities Industry 2013,'' modified to account for an 1,800-hour work year, multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, and adjusted for inflation as of June 2019.

[1019] Initial reporting and recordkeeping burdens: 0.5 hours × 0.18 dealer weight × [199 broker-dealers + 34 SBSDs not already registered as broker-dealers] × Attorney at $423 per hour = $8,870.

[1020] Ongoing burdens for broker-dealers: [10 hours recordkeeping + 5 hours reporting] × 0.18 dealer weight × 199 × Attorney at $423 per hour = $227,278.

Ongoing burdens for SBSDs: [10 hours recordkeeping + 5 hours reporting] × 0.18 dealer weight × 34 SBSDs not already registered as broker-dealers × Attorney at $423 per hour = $38,831.

[1021] *See* Volcker Alliance.

[1022] *See* Data Boiler.

[1023] *See, e.g.,* FSF.

[1024] *See, e.g.,* 83 FR at 33532.

[1025] The SEC observes that, as shown in Table 1, broker-dealers affected by the final rule have total assets of approximately $3.14 trillion and holdings of approximately $761.53 billion. If the final amendments increase affected broker-dealer holdings by even 0.01%, the economic impact of the final rule may exceed $100 million.

[1026] *See, e.g.,* FRB's ''Staff Q2 2017 Report on Corporate Bond Market Liquidity.'' *See also* section V.F.2 above.

which themselves need not be fully independent of the effect of section 13 of the BHC Act and the 2013 rule), such effects may point to a reduced supply of liquidity by dealers. Moreover, corporate bond dealers decrease liquidity provision in times of stress after the 2013 rule.[1027] In dealer-centric single-name CDS markets, interdealer trade activity, trade sizes, quoting activity, and quoted spreads for illiquid underliers have deteriorated since 2010, but dealer-customer activity and various trading activity metrics have remained stable.[1028]

Because of the methodological challenges described earlier in this analysis, the SEC cannot quantify potential effects of the 2013 rule in general—and the RENTD, underwriting, and market making provisions of the 2013 rule in particular—on capital formation and market liquidity. The SEC also recognizes, as discussed above, that these provisions may not be currently affecting all securities markets, asset classes, and products uniformly. If, because of uncertainty and the costs of relying on exemptions for market making-related activity and risk-mitigating hedging, dealers currently limit their market making and hedging activity in certain products, the final rule may facilitate market making. Because secondary market liquidity can affect the willingness to invest in primary markets, and access to liquidity in these markets can enable market participants to mitigate undesirable risk exposures, the amendments may increase trading activity and capital formation in some segments of the market.

While section 13 of the BHC Act and the 2013 rule, as amended, prohibit banking entities from engaging in proprietary trading, some trading desks may attempt to use certain elements of the final RENTD amendments to circumvent those restrictions, which may reduce the economic effects of the 2013 rule outlined in the economic baseline. However, under the final rule, internal limits and policies and procedures regarding breaches and limit increases and other aspects of banking entities' compliance with section 13 of the BHC Act remain subject to the full scope of agency oversight and supervision, and the presumption of compliance is rebuttable.

The SEC continues to recognize that proprietary trading by banking entities may increase the risk exposures of banking entities, may give rise to economic inefficiency because of implicitly subsidized risk exposures of banking entities, and may increase market fragility and conflicts of interest between banking entities and their customers.[1029] However, the SEC also recognizes the comments and research discussed above concerning the unintended effects of the 2013 rule on valuable underwriting and market making activities, and the nuanced effects of section 13 of the BHC Act and the 2013 rule on the overall volume and structure of banking entity risk exposures.

The SEC continues to believe that, where the final rule increases the scope of permissible activities or decreases the risk of detection of proprietary trading, its effect on informational efficiency stems from a balance of two effects.[1030] On the one hand, where proprietary trading strategies are based on superior analysis and prediction models, their enhanced ability to trade on such information may make securities markets more informationally efficient. While such proprietary trading strategies can be executed by dealers that are not affiliated with banking entities and therefore unaffected by the prohibitions on proprietary trading, their ability to do so may be constrained by their limited access to capital and a lack of scale needed to profit from such strategies. On the other hand, if superior information is obtained by an entity from its customer-facing activities and as a result of conflicts of interest, and if such conflicts are recognized by other market participants, proprietary trading may make other market participants less willing to transact with banks or participate in securities markets, potentially reducing informational efficiency.

iii. Alternatives: Prompt Notice, Thresholds

The agencies could have adopted a prompt notice requirement for limit breaches and limit changes, such as internal limit increases, for all or a subgroup of banking entities. Prompt notification of breaches and changes to internal limits under the alternative may provide more immediate information to agencies about limit breaches and changes supporting oversight.[1031] The agencies have received comment that such prompt notice may be especially beneficial for the oversight of smaller and mid-size banking entities with less sophisticated internal controls that may be more susceptible to risks from rogue trading.[1032]

However, consistent with the views of a number of commenters,[1033] the SEC believes that the prompt notice requirement would have imposed considerable costs on registrants. Such information may duplicate metrics reporting for Group A entities and other information provided to the agencies in the ordinary course of prudential supervision.[1034] Further, such costs would likely be most significant for Group B and Group C entities that do not engage in significant trading activity and which may face more difficulties absorbing reporting costs,[1035] as well as for non-U.S. banking entities with large non-U.S. operations.[1036] In addition, internal limit increases or breaches may reflect changes in market conditions and not changes in a banking entity strategy or risk tolerance, and smaller and mid-size banks may currently be setting internal limits considerably below RENTD.[1037] Finally, to the degree that market participants may interpret the prompt reporting requirement as an enhanced regulatory focus on the number of times an entity has breached RENTD, traders may become less willing to request limit increases to accommodate customer demand;[1038] alternatively, entities may set higher internal limits to avoid breaches or increases.[1039]

The final rule balances these considerations by imposing recordkeeping requirements that enable the agencies to access books and records concerning internal limit increases and breaches in the course of other supervision, inspections, and examinations; require prompt action to bring the trading desk back in compliance in the event of a breach; and impose requirements concerning policies and procedures for escalation, for demonstrable analysis of the basis for internal limit increases, and for independent review for such analysis and approval.

The agencies could have also adopted the internal limit approach, but with more or less flexibility provided to banking entities in setting internal limits. For example, the agencies could have specified that a desk's internal

[1027] *See* section V.F.2. above.

[1028] For a literature review and data, *see* SEC Report 2017, *supra* note 774.

[1029] *See* 83 FR at 33533.

[1030] *See* 83 FR at 33534.

[1031] *See, e.g.,* Data Boiler.

[1032] *See, e.g.,* CFA.

[1033] *See, e.g.,* ABA; Committee on Capital Markets; Credit Suisse; GFMA; FSF; JBA and BB&T.

[1034] *See, e.g.,* FSF; SIFMA; ABA; CREFC; GFMA; Goldman Sachs; Real Estate Associations and ISDA.

[1035] *See, e.g.,* Capital One et al.

[1036] *See, e.g.,* JBA and IIB.

[1037] *See* BOK.

[1038] *See, e.g.,* CCMC.

[1039] *See, e.g.,* Capital One et al.; Better Markets; MBA and State Street.

limits can reflect risk appetite, risk capacity, and business strategy, so long as that desk holds itself out as a market maker; the agencies could have also permitted limits based on absolute value of profit and loss (in the case of an underwriting desk).[1040] The agencies could have also adopted an approach under which the internal limits necessary for the presumption of compliance are developed in collaboration with onsite supervisors or prudential examiners.[1041] The agencies could have also adopted an approach under which all or Group B and Group C banking entities would be able to rely on the presumption of compliance if their internal limits were appropriate to the activities of the desk subject to other existing bank regulations, supervisory review, and oversight by the appropriate agency.[1042] Finally, the agencies could have adopted an approach under which the presumption of compliance is available for activity-based internal limits, such as those based on notional size and inventory turnover.[1043] Alternatives that would provide banking entities with greater flexibility in setting internal limits would bolster the ability of market makers and underwriters to proactively adjust their risk exposures to changing market conditions and potentially accommodate a greater volume of customer demand. At the same time, such alternatives may also allow banking entities to engage in a greater degree of trading activity while relying on the presumption of compliance.

Similarly, one commenter suggested an approach that more prescriptively specifies how banking entities should set and adjust internal limits and what factors they should consider.[1044] Another commenter stated that such a one-size-fits all approach ignores differences in the business models of banking entities and desks.[1045] The SEC believes that, while this alternative may decrease the trading activity of banking entities, it would not appropriately tailor the 2013 rule to the differences in organization, operation, and risks of various banking entities and their trading desks; may hamper client facilitation activity when market conditions are in flux; and may have the unintended effect of banking entities delegating certain risk management functions to the agencies. As discussed above, the final rule specifies that internal limits must be designed not to exceed RENTD and that internal limits of banking entities are subject to ongoing regulatory oversight by the agencies.

The agencies could have adopted an approach under which underwriting and market making requirements are tailored to banking entities on the basis of different thresholds. For example, the agencies could have instead relied on the trading assets and liabilities threshold for market making compliance (as in the final rule), but applied a different threshold for underwriting compliance, such as on the basis of the volume or profitability of past underwriting activity. This alternative would have tailored the compliance requirements for SEC-regulated banking entities with respect to underwriting activities. However, the volume and profitability of underwriting activity is highly cyclical and is likely to decline in weak macroeconomic conditions. As a result, under the alternative, SEC-regulated banking entities would face lower limits with respect to underwriting activity during times of economic stress when covered trading activity related to underwriting may pose the highest risk of loss. The alternative may also limit banking entities in their ability to engage in underwriting during economic weakness when economic activity and capital formation are in decline.

One commenter suggested that the agencies interpret the underwriting exemption broadly to accommodate any activity that assists persons or entities in accessing the capital markets or raising capital, as well as any activities done in connection with a capital raise.[1046] Under such an approach, an underwriter's hedging of unsold, contingent, or forward underwriting allotments would be permissible under the underwriting exemption. To the degree that banking entities are unable to engage in such activities in reliance on the hedging or other exemptions under the 2013 rule, this alternative may increase the ability of some banking entities to hedge some of the risks related to underwriting and their willingness to engage in underwriting activity. Moreover, a broad underwriting exemption would eliminate the need to categorize the underwritten instruments, which may be difficult to do in some foreign markets with respect to loans, repos, securities loans, financial instruments, or derivatives. At the same time, the SEC believes that banking entities may currently be able to engage in hedging related to underwriting activity under the rule, such as in reliance on the hedging exemption.

d. Permitted Risk-Mitigating Hedging

i. Costs and Benefits

As discussed in the proposal,[1047] hedging is an essential tool for risk mitigation and can enhance a banking entity's provision of client-facing services, such as market making and underwriting, as well as facilitate financial stability. In recognition of the important role that this activity can play as part of a banking entity's overall operations, the agencies are adopting a number of changes that streamline and clarify the 2013 rule's exemption for risk-mitigating hedging activities to reduce unnecessary compliance burdens and uncertainty some banking entities face concerning their ability to rely on the hedging exemption.

First, the final rule simplifies the requirements of the risk-mitigating hedging exemption for banking entities that do not have significant trading assets and liabilities. The amendment removes the requirement to have a specific risk-mitigating hedging compliance program, as well as the documentation requirements and certain hedging activity requirements for such entities. As a result, these banking entities are subject to the following requirements: (1) The hedging activity, at the inception of the hedging activity, including, without limitation, any adjustments to the hedging activity, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, commodity price risk, basis risk, or similar risks, arising in connection with and related to identified positions, contracts, or other holdings of the banking entity, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof; and (2) the hedging activity is subject, as appropriate, to ongoing recalibration by the banking entity to ensure that the hedging activity satisfies these requirements and is not prohibited proprietary trading.

As discussed in the proposal,[1048] banking entities without significant trading assets and liabilities may be less likely to engage in large or complicated trading activities and hedging strategies. The agencies have received comment supporting such reduced compliance

[1040] *See* JBA.

[1041] *See, e.g.,* FSF and SIFMA.

[1042] *See* Capital One et al.

[1043] *See* BB&T.

[1044] *See* Better Markets.

[1045] *See* Committee on Capital Markets.

[1046] *See, e.g.,* ISDA.

[1047] *See, e.g.,* 83 FR at 33535.

[1048] *See, e.g.,* 83 FR at 33536.

requirements for banking entities that do not have significant trading assets and liabilities.[1049] One commenter stated that reduced compliance requirements for risk-mitigating hedging by Group B and Group C banking entities would not affect the safety and soundness of banking entities or financial stability and pointed to the importance of robust monitoring and banking entity risk management in the context of risk-mitigating hedging.[1050] Another commenter opposed this aspect of the amendments and stated that, absent proprietary trading intent, ensuring that hedging does not increase banking entities' risks at inception of the hedge and that trading personnel are not compensated for doing so is not complex.[1051]

The SEC continues to believe that compliance with the 2013 rule, including compliance with the requirements of § ____.5(b)(2), imposes disproportionate costs on banking entities without significant trading assets and liabilities.[1052] The SEC continues to note that, as quantified in the economic baseline, Group B and Group C broker-dealers represent a very small fraction of total assets and holdings in the broker-dealer industry. In addition, fixed compliance costs represent disproportionately greater burdens for smaller entities as they may face greater difficulty absorbing such costs into revenue. Importantly, the final rule does not waive the substantive proprietary trading prohibitions in section 13 of the BHC Act for any banking entity, including for any Group B or Group C banking entity. Instead, the SEC continues to believe that the amendment reduces the costs of relying on the hedging exemption and, thus, the costs of engaging in hedging activities for Group B and Group C entities. To the extent that the removal of these requirements may reduce the costs of risk-mitigating hedging activity, Group B and Group C entities may increase their intermediation activity while also growing their trading assets and liabilities.

Second, the final rule reduces documentation requirements for Group A entities. In particular, the final rule removes the documentation requirements for some risk-mitigating hedging activity. More specifically, the activity is not subject to the documentation requirement if (1) the financial instrument used for hedging is identified on a written list of pre-approved financial instruments commonly used by the trading desk for the specific type of hedging activity; and (2) at the time the financial instrument is purchased or sold the hedging activity (including the purchase or sale of the financial instrument) complies with written, pre-approved hedging limits for the trading desk purchasing or selling the financial instrument for hedging activities undertaken for one or more other trading desks.

The agencies received comment that this and other final amendments to the risk-mitigating hedging exemption may lead banking entities to engage in less planning, documentation, and testing in their hedging activities, may reduce the effectiveness of agency oversight, and may weaken the proprietary trading prohibitions of the 2013 rule.[1053] Other commenters supported the revisions, but stated that enhanced documentation requirements for the hedging exemption, as a whole, are unnecessary given the robust compliance framework under the 2013 rule and amendments, and supported the complete elimination of the documentation requirements for all banking entities.[1054]

Consistent with the views of some commenters,[1055] the economic effects with respect to internal limits for the purposes of hedging with pre-approved instruments may be similar to the effects of internal limits for the purposes the underwriting and market making exemptions discussed above. The SEC recognizes that the economic effects of this aspect of the final rule depend on the prevalence of hedging activities in each registrant, their organizational structure, business model, and complexity of risk exposures. However, the SEC continues to believe that the flexibility to choose between providing documentation regarding risk-mitigating hedging transactions and establishing hedging limits for pre-approved instruments may be beneficial for Group A entities, as it will allow these entities to tailor their compliance programs to their specific organizational structure and existing policies and procedures.[1056] At the same time, the SEC believes that the remaining documentation requirements for Group A entities being adopted will facilitate effective internal risk management and agency oversight.

Third, the final rule eliminates the requirement that the risk-mitigating hedging activity must demonstrably reduce or otherwise significantly mitigate one or more specific identifiable risks at the inception of the hedge. Additionally, the demonstrability requirement is also removed from the requirement to continually review, monitor, and manage the banking entity's existing hedging activity. Banking entities will continue to be subject to the requirement that the risk-mitigating hedging activity be designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks, as well as to the requirement that the hedging activity be subject to continuing review, monitoring and management by the banking entity to confirm that such activity is designed to reduce or otherwise significantly mitigate the specific, identifiable risks that develop over time from the risk-mitigating hedging.

Consistent with the views of a number of commenters,[1057] the SEC believes that the removal of the demonstrability requirement may benefit banking entity dealers, as it decreases uncertainty about the ability to rely on the risk-mitigating hedging exemption and may reduce the compliance costs of engaging in permitted hedging activities. The SEC continues to recognize that some SEC-regulated banking entities may respond to this aspect of the final rule by accumulating positions that increase the banking entity's risk exposure through adjustments (or lack thereof) to otherwise permissible hedging portfolios.[1058] The SEC also recognizes concerns raised by commenters that some banking entities may forecast changes in correlations and construct hedging portfolios such that they leave the entity exposed to directional market movements.[1059] The SEC continues to recognize that this may result in increased risks from the trading activity of some banking entities.[1060] However, the final rule's requirement concerning ongoing recalibration may mitigate these adverse effects. In addition, as discussed in greater detail in the economic baseline, the SEC recognizes that trading activity is only one form of activity conducted by banking entities that can increase risk exposure, and that market, credit, and liquidity risks of the banking book as well as the degree to which banking book risks are hedged by tradeable assets all contribute to the overall risk of a banking entity or group of banking entities. As a result, the SEC

[1049] *See, e.g.,* Credit Suisse and BB&T.

[1050] *See* BB&T.

[1051] *See* Better Markets.

[1052] *See, e.g.,* 83 FR at 33536.

[1053] *See, e.g.,* Better Markets; Data Boiler and Bean.

[1054] *See, e.g.,* ABA; FSF; CREFC; BPI and SIFMA.

[1055] *See, e.g.,* Credit Suisse.

[1056] *See, e.g.,* 83 FR at 33536.

[1057] *See, e.g.,* ABA; Credit Suisse and SIFMA.

[1058] *See* 83 FR at 33535. *See also, e.g.,* Better Markets; Bean; Data Boiler and CFA.

[1059] *See, e.g.,* Public Citizen.

[1060] *See, e.g.,* 83 FR at 33536.

recognizes that, to the degree that some banking entities may respond to the final rule by increasing risk exposures arising out of trading activity, these effects may be partly offset by changes in the risks these banking entities take in the normal course of their banking activity or more complete hedging of their banking and trading risks through trading portfolios. Moreover, the SEC believes that this aspect of the final rules may not only benefit banking entities by alleviating compliance burdens related to risk management, but may also benefit clients and counterparties by enabling greater trading activity and liquidity provision by dealers that are banking entities. Furthermore, the SEC reiterates that the returns and risks arising from the activity of banking entities may flow through to banking entity's investors and that investors in securities markets may benefit from greater liquidity as it enables exit from investment positions.

Finally, the final rule removes the requirement to perform the correlation analysis. The SEC continues to recognize that a correlation analysis based on returns may be prohibitively complex for some asset classes and that a correlation coefficient may not always serve as a meaningful or predictive risk metric.[1061] The agencies received comment that permitting additional time to provide correlation analysis would better address time-related challenges;[1062] that requiring statistical tests of randomness to the observed returns on the hedged positions may serve to duly constrain hedging;[1063] and that there should be no regulation-related delays when hedging if banking entities rely on documented and stable risk relationships.[1064] The SEC notes that time costs are only one of the issues in the correlation requirement and that banking entities may not be able to rely on documented and stable risk relationships in quickly evolving market conditions. Although in some instances correlation analysis of past returns may be helpful in evaluating whether a hedging transaction was effective in offsetting the risks intended to be mitigated, the SEC continues to recognize that correlation analysis may not be an effective tool for such evaluation in other instances. For example, correlations across assets and asset classes evolve over time and may exhibit jumps at times of idiosyncratic or systematic stress. In such circumstances, historical correlations among the returns on assets or asset classes may not be representative of the way in which they will affect portfolio risk going forward. Moreover, the SEC notes that asset return correlations may not be informative when financial instruments are traded infrequently, if the prices used to construct asset returns are non-binding indicative quotes (and not actual execution prices). Additionally, the hedging activity, even if properly designed to reduce risk, may not be practicable if costly delays or compliance complexities result from a requirement to undertake a correlation analysis.[1065] These costs and delays may be most acute in times of market stress and during spikes in volatility, during which customers and other dealers may demand greater liquidity. The SEC continues to believe that the removal of the correlation analysis requirement may provide dealers with greater flexibility in selecting and executing risk-mitigating hedging activities.[1066]

The SEC received comments that the elimination of the correlation analysis may impede supervisory review, enable some banking entities to disguise proprietary trades as hedges, or result in permissible over- or under-hedging due to changes in asset correlations over time.[1067] Other commenters indicated that correlation analysis is highly automated and forces banking entities to be more purposeful in hedging activities.[1068] The SEC recognizes these concerns and continues to recognize that the removal of the correlation analysis requirement involves the tensions of the effects discussed above.[1069] The SEC continues to recognize that, to the extent that some banking entities may respond to this aspect of the final rule by engaging in more trading activities that leave them exposed to directional market movements while relying on the risk-mitigating hedging exemption, this aspect of the final rule may increase risk taking and conflicts of interest between banking entities and their customers. However, the SEC believes that the final rule's requirement concerning ongoing recalibration by the banking entity to ensure that the hedging activity satisfies the requirements above and is not prohibited proprietary trading may mitigate these concerns. In addition, similar to the discussion above, the SEC continues to recognize that changes in the overall risk of banking entities reflect both changes in the risk of trading activities and their banking activities. Importantly, the SEC continues to believe that the requirement to engage in correlation analysis may have slowed the timing of hedging activities by some banking entities and may not be beneficial for prudent risk management or practical under some circumstances. Moreover, the SEC continues to believe that potential increases in permitted risk-mitigating hedging may benefit clients, customers, and counterparties by increasing trading activity and capital formation by banking entities, particularly in times of market stress and during spikes in volatility. Finally, under the final rule, banking entities remain subject to the full scope of agency oversight over trading activities in reliance on the hedging exemption.

As discussed above, the SEC estimates burden reductions, per firm, as a result of the final rule. The final amendments to § ____.5(c) may result in ongoing cost savings for SEC-registered broker-dealers[1070] estimated at $1,295,903.[1071] Additionally, the final rule will result in lower ongoing costs for potential SBSD registrants relative to the costs that they would incur under the 2013 rule's regime if they were to choose to register with the SEC—this cost reduction is estimated to reach up to $51,775.[1072] However, the SEC recognizes that compliance with SBSD registration

[1061] *See* 83 FR at 33535. *See also, e.g.,* ABA; Credit Suisse; JBA; SIFMA and CREFC.

[1062] *See, e.g.,* Better Markets.

[1063] *Id.*

[1064] *Id.*

[1065] *See, e.g.,* SIFMA.

[1066] *See, e.g.,* 83 FR at 33535.

[1067] *See, e.g.,* AFR; Bean; NAFCU; Public Citizen; Volcker Alliance; Better Markets and Systemic Risk Council.

[1068] *See, e.g.,* AFR and Data Boiler.

[1069] *See* 83 FR at 33536.

[1070] The SEC continues to believe that the burden reduction for SEC-regulated entities will be a fraction of the burden reduction for the holding company as a whole. In the proposal, the SEC attributed 18% of the reductions in holding company (parent) burdens to the dealer affiliates, on the basis of the average weight of broker-dealer assets in holding company assets. The SEC received no comment on this estimate and continues to rely on this figure in estimates of compliance burden reductions for SEC registrants. However, the SEC recognizes that compliance burdens may be borne disproportionately by dealer affiliates because of their role in trading for the holding company. As a result, some dealers may currently be bearing a larger fraction of holding company compliance burdens related to section 13 of the BHC Act. To this extent, the estimates of compliance burden savings may underestimate the magnitude of the benefits enjoyed by SEC registrants under the final amendments.

[1071] Ongoing recordkeeping burden reduction for broker-dealers: (100 hours per firm × 0.18 weight × (Attorney at $423 per hour) × 199 firms) − (80 hours per firm × 0.18 weight × (Attorney at $423 per hour) × 36 firms affiliated with Group A entities) = $1,515,186 − $219,283 = $1,295,903.

[1072] Recordkeeping burden reduction for entities that may register as SBSDs: (100–80) hours per firm × 0.18 weight × (Attorney at $423 per hour) × 34 SBSDs not already registered as broker-dealers = $51,775. This estimate assumes all SBSDs are Group A entities and will still be subject to these ongoing recordkeeping obligations.

requirements is not yet required and that there are currently no registered SBSDs.

ii. Efficiency, Competition, and Capital Formation

The primary efficiency, competition, and capital formation effects of the risk-mitigating hedging amendments stem from competition and capital formation. The final hedging amendments provide greater relief with respect to the requirements of the exemption for hedging activity to Group B and Group C entities relative to Group A entities. Since the fixed costs of relying on such exemptions may be more significant for entities with smaller trading books, the final hedging amendments may permit Group B entities just below the $20 billion threshold to more effectively compete with Group A entities just above the threshold.

The final hedging amendments may also influence the volume of hedging activity and capital formation. To the extent that some registrants currently experience significant compliance costs related to the hedging exemption, these costs may constrain the amount of risk-mitigating hedging they currently engage in. The ability to hedge underlying risks at a low cost can facilitate the willingness of SEC-regulated entities to commit capital and take on underlying risk exposures. Because the final rule may reduce costs of relying on the hedging exemption, these entities may become more incentivized to engage in risk-mitigating hedging activity, which may in turn contribute to greater capital formation.

These amendments to risk-mitigating hedging do not change the amount or type of information available to market participants, and the SEC does not believe that the final rule is likely to have an effect on informational efficiency. To the degree that these amendments may enable some banking entities to more easily rely on the hedging exemption, and to the extent that hedging supports extension of credit and other capital formation, these amendments may somewhat improve allocative efficiency.

iii. Alternatives

The agencies could have adopted an approach that would exclude from the proprietary trading prohibition or allow all or a subset of banking entities (such as Group B and Group C entities) to rely on the presumption of compliance with respect to hedging activity accounted for under hedge accounting principles.[1073] The agencies could have also adopted an approach excluding trading activity of non-U.S. banking entities accounted for under hedge accounting rules in their home jurisdictions.[1074] The SEC believes that such alternatives would effectively replace the compliance and documentation obligations for permitted risk-mitigating hedging in the 2013 rule as amended in this final rule with the compliance obligations necessary for an entity to qualify for hedge accounting treatment. For example, banking entities must generally document the hedge relationship, including hedge objectives, risks being hedged, hedged item and the financial instrument used in the hedge, demonstrate that the hedge is highly effective, and recognize any ineffectiveness in profits and losses.[1075] As a result, some commenters[1076] indicated that such approaches may reduce compliance duplication and further reduce uncertainty regarding the ability of some banking entities to rely on the risk-mitigating hedging exemption with respect to certain hedging transactions.

However, the SEC also recognizes commenter concerns that the compliance and effectiveness testing for the purposes of hedge accounting are designed for the purposes of transparent and informative financial statements and are not designed to distinguish between prohibited proprietary trading and permissible risk-mitigating hedging for the purposes of section 13 of the BHC Act.[1077] Moreover, international accounting standards may not involve the same level of compliance, documentation, and effectiveness testing as either the U.S. hedge accounting standards or the compliance program for the hedging exemption of the 2013 rule. As a result, the SEC continues to believe that the final rule implements the purposes of section 13 of the BHC Act while reducing compliance burdens on most affected registrants.

As another alternative, the agencies could have adopted an approach, under which compliance with the risk-mitigating hedging exemption is applied on the basis of analysis of the trading desk's activities as a whole and not on a trade-by-trade basis.[1078] In a related vein, the agencies could have adopted an approach that allows portfolio hedging that is not contemporaneous with the inception of the position being hedged and that does not occur at the desk to which the risk is booked, so long as the hedging exposure remains within permitted internal limits applicable to each desk and to the banking entity as a whole.[1079] The SEC believes that such alternatives would have the effect of enabling firm-wide macro hedges of a banking entity's risk exposures by centralized risk management desks, which may involve fewer transaction costs and reduce the burden of demonstrating compliance with the hedging exemption for each trade. However, such an approach may make it more difficult for the agencies and banking entities to oversee compliance with the hedging exemption and distinguish between transactions reasonably designed at their inception to hedge specific risks and impermissible proprietary trades intended to profit from asset mispricing or directional changes in the value of assets or asset classes.

As discussed above, the agencies could have also eliminated all enhanced documentation requirements for Group A banking entities and all other conditions of the hedging exemption not expressly required by the statute.[1080] The SEC believes that, relative to the final rule, such an alternative would further reduce compliance burdens on Group A banking entities and uncertainty regarding their ability to rely on the hedging exemption and may increase the volume of risk-mitigating hedging by Group A banking entities. However, the elimination of enhanced documentation requirements as a whole and other conditions of the exemption may also reduce the effectiveness of internal risk management and agency oversight of Group A entities and may result in increased trading activity by Group A entities in reliance on the hedging exemption. This risk may be particularly acute given the size and complexity of trading activity of Group A entities and their role in the dealer industry and in the U.S. financial system as a whole.

The agencies could have adopted an explicit exclusion from the proprietary trading prohibition for hedges of corporate debt issuances. Specifically, the agencies have received comment that financial institutions may routinely hedge debt securities issued for corporate purposes with interest rate swaps, which fall into the trading account under the 60-day rebuttable

[1073] *See, e.g.,* Capital One et al., JBA, ABA and KeyCorp.

[1074] *See* JBA.

[1075] *See* FASB, Derivatives and Hedging (Topic 815) (Aug. 2017). *See also* International Financial Reporting Standard (''IFRS'') 9 (Financial Instruments). *See also* Capital One et al.

[1076] *See* Capital One et al. and JBA.

[1077] *See, e.g.,* Data Boiler.

[1078] *See, e.g.,* Credit Suisse and CCMC.

[1079] *Id.*

[1080] *See, e.g.,* ABA; FSF; CREFC; BPI and SIFMA.

presumption of the 2013 rule.[1081] As discussed above, the final rule modifies the short-term prong of the trading account definition, reducing the likelihood that such activity would fall in to the trading account and require the reliance on the hedging exemption. As a result, the SEC believes that the final rule may enable valuable and routine hedging of corporate debt issued by banking entities subject to the short-term prong without the costs of complying with the risk-mitigating hedging exemption.

e. Exemption for Foreign Trading

i. Costs and Benefits

Foreign banking entities seeking to rely on the exemption for trading outside of the United States under the 2013 rule face a complex set of compliance requirements that may result in significant burdens and implementation inefficiencies, which may have reduced cross-border trading activity and liquidity between U.S. and non-U.S. entities.[1082] In particular, agencies have received comment from some market participants that compliance with the financing prong may be difficult for some non-U.S. banking entities because of the fungibility of some forms of financing.[1083] In addition, the SEC continues to recognize that satisfying the U.S counterparty prong is burdensome for foreign banking entities and may have led some foreign banking entities to reduce the range of counterparties with which they engage in trading activity.[1084] The final rule removes the financing and counterparty prongs.

Under the final rule, financing for a transaction relying on the foreign trading exemption can be provided by U.S. branches or affiliates of foreign banking entities, including U.S. branches or affiliates that are SEC-registered dealers. Foreign banking entities may benefit from the final rule because of the greater flexibility afforded to how they are permitted to finance their transaction activity in reliance on the foreign trading exemption. The agencies have also received comment supporting the focus of the exemption on the location of the principal risk and the location in which decision making behind the trading occurs.[1085] At the same time, the agencies have received comment that the proposed amendments to the exemption may increase the vulnerability of the U.S. financial system to proprietary trading losses of foreign banking entities.[1086] However, for the reasons noted below, the SEC does not believe that the amendments will, on balance, increase vulnerability in the manner described by commenters. Specifically, the SEC continues to recognize that some of the economic exposure and risks of proprietary trading by foreign banking entities may flow not just to the foreign banking entities, but to U.S.-located entities financing the transactions, *e.g.,* through margin loans.[1087] However, potential adverse effects on vulnerability may be mitigated by two primary factors. First, the SEC notes that the final rule retains the condition that any purchases or sales by a foreign banking entity, including any hedging trades, are not accounted for as principal directly or on a consolidated basis by any U.S. branch or affiliate of the foreign banking entity. Thus, under the final rule, the principal risk of proprietary trading by non-U.S. banking entities will remain outside of the United States. Moreover, U.S. banking entities providing financing to their foreign banking entity affiliates are likely to be separately subject to a full range of capital, margin, and other obligations unrelated to section 13 of the BHC Act, which may reduce risks to the U.S. branches and affiliates of foreign banking entities. The SEC believes that the focus on where the principal risk and decision making behind the trading resides tailors the application of the 2013 rule with respect to foreign banks' non-U.S. operations by reducing compliance burdens and uncertainties of foreign banking entities in their trading activity.[1088]

In addition, the final rule removes the counterparty prong and its corresponding clearing and anonymous exchange and personnel requirements. As a result, the final rule makes it easier for foreign banking entities to transact with or through U.S. counterparties. To the extent that foreign banking entities are currently bearing[1089] and passing along compliance burdens to their U.S. counterparties, or are unwilling to intermediate or engage in certain transactions with or through U.S. counterparties, the final rule may reduce transaction costs for U.S. counterparties and may increase the volume of trading activity between U.S. counterparties and foreign banking entities.[1090]

The SEC recognizes that this aspect of the final rule may adversely affect the current competitive standing of U.S. banking entities insofar as foreign banking entities will have greater ability to engage in proprietary trading activities with U.S. counterparties.[1091] However, the removal of the counterparty prong in the final rule maintains a comparable treatment of the U.S. operations of U.S. and non-U.S. banking entities with respect to the transactions that are booked in the U.S., as neither U.S. nor non-U.S. banking entities are able to rely on the foreign trading exemption for such activity.[1092] The agencies have also received comment that the elimination of clearing and exchange requirements may enable U.S. intermediaries to compete for business in OTC financial products with foreign banking entity counterparties, and that the amendments may foster trading activity between foreign affiliates and branches of U.S. banking entities and foreign banking entities without the constraints under the counterparty prong on the involvement of their U.S. personnel.[1093]

When a foreign banking entity engages in proprietary trading through a U.S. dealer, such trades expose the counterparty to risks related to the transaction, though such risks born by U.S. counterparties likely depend on both the identity of the counterparty and the nature of the instrument and terms of trading position. Moreover, the SEC continues to emphasize that concerns about moral hazard and the volume of risk-taking by foreign banking entities may be less relevant for U.S. markets for two reasons.[1094] First, foreign banking entities are less likely to be beneficiaries of U.S. deposit insurance and implicit bailout guarantees. Second, foreign banking entities are likely subject to foreign

[1081] *See* KeyCorp.

[1082] *See, e.g.,* JBA; HSBC; ABA; ISDA; Credit Suisse; Committee on Capital Markets and IIB.

[1083] *See, e.g.,* EBF (citing 83 FR at 33468–69).

[1084] *See, e.g.,* 83 FR at 33537.

[1085] *See, e.g.,* ABA; ISDA; Credit Suisse; Committee on Capital Markets and IIB.

[1086] *See, e.g.,* Bean; NAFCU; Better Markets; Merkley and Data Boiler.

[1087] *Id.*

[1088] In addition, the agencies confirmed in this **SUPPLEMENTARY INFORMATION** that the foreign trading exemption does not preclude a foreign banking entity from engaging a non-affiliated U.S. investment adviser as long as the actions and decisions of the banking entity as principal occur outside of the United States. To the extent that foreign banking entities were restricting engagement of non-affiliated U.S. investment advisers due to uncertainty about the 2013 rule, non-affiliated U.S. investment advisers may become better able to compete for the foreign banking entity's investment mandates.

[1089] *See, e.g.,* HSBC.

[1090] *See, e.g.,* JBA.

[1091] *See, e.g.,* FSF.

[1092] *See, e.g.,* IIB.

[1093] *Id.*

[1094] *See, e.g.,* 83 FR at 33537. *See also* JBA.

securities and prudential regulations that address these concerns.

In addition, as proposed, the final rule replaces references to personnel arranging, negotiating, and executing trades with references to relevant personnel. This change is consistent with the views of some commenters, who stated that the current arrange, negotiate, or execute test is burdensome and may restrain trading activity outside of the U.S.[1095] Specifically, the availability of the foreign trading exemption is amended to be conditioned on the banking entity engaging as a principal (including relevant personnel) not being located in the U.S. or organized under U.S. laws. As discussed elsewhere in this **SUPPLEMENTARY INFORMATION**, the agencies are modifying the rule such that relevant personnel for the purposes of the foreign trading exemption are limited to personnel engaged in the banking entity's decision in the purchase or sale as principal. The SEC believes that the location of the personnel engaged in the banking entity's decision in the purchase or sale is a meaningful trigger for the application of section 13 of the BHC Act and implementing rules. Specifically, the SEC has considered how narrowing the personnel requirement may increase risk exposure of banking entities from trading activity and conflicts of interest between banking entities and their clients on the one hand and may enhance market quality and availability of trading counterparties on the other hand. In addition, as part of the baseline for analysis, the conditions for the foreign trading exemption in the 2013 rule include both requirements concerning relevant personnel that makes the decision to purchase or sell as principal and requirements concerning personnel involved in arranging, negotiating, and executing trades. As a result, under the 2013 rule foreign banking entities have to determine whether a particular employee meets both the requirements related to relevant personnel and related to personnel arranging, negotiating, and executing purchases and sales. This aspect of the final rule eliminates the need for a foreign banking entity to separately establish that a given employee meets both sets of requirements, reducing inefficiencies associated with foreign banking entities relying on the foreign trading exemption from the proprietary trading prohibition.

ii. Efficiency, Competition, and Capital Formation

The final rule likely expands the scope of trading activity by foreign banking entities that may qualify for the foreign trading exemption. As a result, the amendments may reduce the costs, benefits, and effects on efficiency and capital formation of the 2013 rule discussed in the economic baseline, and may increase competition between U.S. and foreign banking entities. The final rule reflects consideration of the potentially inefficient restructuring of activities undertaken by foreign banking entities after the 2013 rule came into effect and the loss of access of U.S. market participants to foreign banking entity counterparties, on the one hand,[1096] and, advancement of the objectives of section 13 of the BHC Act, on the other hand.

Allowing foreign banking entities to be financed by U.S.-dealer affiliates and to transact with U.S. counterparties on an OTC basis (*i.e.,* off-exchange) and without clearing the trades, may reduce costs of non-U.S. banking entities' trading activity under the foreign trading exemption, including with U.S. counterparties. These costs may currently represent barriers to entry for foreign banking entities that contemplate engaging in trading and other transaction activity using a U.S. affiliate's financing and OTC trading with U.S. counterparties. To that extent, the final rule may provide (1) incentives for foreign banking entities that currently receive financing from non-U.S. affiliates or other sources to move financing to U.S. dealer affiliates, and (2) incentives for foreign banking entities that currently do not transact with or through U.S. counterparties (or transact with or through U.S. counterparties only in transactions that are promptly cleared) to transact with or through U.S. counterparties (or transact with or through U.S. counterparties outside of promptly cleared transactions). As a result, the number of banking entities engaging in trading activities in U.S. markets may increase, which may enhance the incorporation of new information into prices. However, the amendments may result in a shift in securities trading activity away from U.S. banking entities to foreign banking entities that are not comparably regulated.

The final rule may increase market entry, as it will decrease the need for foreign banking entities to rely on a narrower set of unaffiliated market intermediaries in order to conduct trading activity under the foreign trading exemption in compliance with the 2013 rule. Additionally, the final rule may increase operational efficiency of trading activity by foreign banking entities in the United States, which may decrease costs to market participants and may increase the level of market participation by U.S-dealer affiliates of foreign banking entities.

Consistent with the views of commenters,[1097] the SEC continues to recognize that the final rule may also affect competition among banking entities.[1098] The statute may introduce competitive disparities between U.S. and foreign banking entities. Under the final rule, foreign banking entities may enjoy a greater degree of flexibility in financing proprietary trading and transacting with or through U.S. counterparties relative to the baseline. At the same time, U.S. banking entities are not able to engage in proprietary trading and are subject to the substantive prohibitions of section 13 of the BHC Act. One commenter indicated that non-U.S. banking entities will continue to bear operational burdens because of the legal entity requirements.[1099] To the degree that the final requirements regarding the location of the principal risk and relevant personnel are still burdensome and constraining foreign banking entities in their reliance on the foreign trading exemption, this may partly dampen the above competitive effect. To the extent that banking entities at the holding company level may be able to reorganize and move their business to a foreign jurisdiction, some U.S. banking entity holding companies may exit from the U.S. regulatory regime. However, under sections 4(c)(9) and 4(c)(13) of the Banking Act, U.S. entities would have to conduct the majority of their business outside of the United States to become eligible for the exemption, reducing potential effects of their activities on U.S. markets. In addition, certain changes in control of banks and bank holding companies require supervisory approval. Hence, the feasibility and magnitude of such regulatory arbitrage remain unclear. The SEC also notes that, as referenced above, the final rule preserves equal competitive treatment of the U.S. operations of both U.S. and

[1095] *See, e.g.,* EBF; HSBC and IIB.

[1096] In the Proposing Release, the SEC noted that, according to one market participant, at least seven international banks have terminated or transferred existing transactions with U.S. counterparties in order to comply with the foreign trading exemption and to avoid compliance costs of relying on alternative exemptions or exclusions. *See* 83 FR at 33537.

[1097] *See, e.g.,* Bean; Data Boiler; FSF and Better Markets.

[1098] *See* 83 FR at 33538.

[1099] *See, e.g.,* JBA.

non-U.S. banking entities that will remain unable to rely on the foreign trading exemption and will remain subject to section 13 of the BHC Act.[1100]

To the extent that foreign banking entities currently engage in cleared transactions with or through U.S. counterparties because of the existing counterparty prong but would have chosen not to do so otherwise, the final rule may reduce the amount of cleared transactions. This may reduce opportunities for risk-sharing among market participants and increase idiosyncratic counterparty risk born by U.S. and foreign counterparties.

At the same time, the final rule may increase the availability of liquidity and reduce transaction costs for market participants seeking to trade in U.S. securities markets. To the extent that non-U.S. banking entities will face lower costs of transacting with U.S. counterparties, it may become easier for U.S. banking entities or customers to find a transaction counterparty willing to engage in, for instance, hedging transactions. To that extent, U.S. market participants accessing securities markets to hedge financial and commercial risks may increase their hedging activity and assume a more efficient amount of risk. The potential consequences of relocation of non-U.S. banking entity activity to the United States for liquidity and risk-sharing may be most concentrated in those asset classes and market segments where activity is most constrained by the requirements in the 2013 rule.

iii. Alternatives

The agencies could have amended the foreign trading exemption to remove all conditions for the exemption, including the engaging as principal and decision-making requirements, except for the booking requirement.[1101] Relative to the final rule, the SEC believes that such an alternative approach would further lower the compliance burdens of non-U.S. banking entities relying on the foreign trading exemption and may foster more trading activity by U.S. affiliates of non-U.S. banking entities. For example, the agencies have received comment that the engaging as principal and decision-making requirements have led Japanese firms to downsize their U.S. affiliates and that the decision-making requirement is operationally difficult for Japanese banks executing trades in U.S. markets because of time zone differences. [1102] To the degree that this alternative encourages more activity of non-U.S. banking entities in the United States, U.S. counterparties may benefit from greater availability and choice of banking entity counterparties. However, the alternative would place U.S. banking entities at a greater competitive disadvantage relative to the final rule, because it would result in more flexibility for the U.S. operations of non-U.S. banking entities to engage in trading activities relative to the U.S. operations of U.S. banking entities.

In addition, the agencies have received comment suggesting an exclusion of non-U.S. banking entities with limited U.S. assets and operations from the scope of section 13 of the BHC Act.[1103] The SEC notes that nothing in the final rule changes or waives ongoing statutory obligations of banking entities. However, to the degree that reliance on the foreign trading exemption is burdensome and prevents non-U.S. entities from trading in the United States, the final rule may reduce compliance burdens related to the 2013 rule by introducing the presumption of compliance for Group C banking entities. As discussed above, the Group C threshold of $1 billion applies to the trading assets and liabilities of the combined U.S. operations of the top-tier foreign banking organization (including all subsidiaries, affiliates, branches, and agencies of the foreign banking organization operating, located, or organized in the United States). As a result, under the final rule, non-U.S. banking entities that have limited trading assets and liabilities in the United States will be able to avail themselves of the rebuttable presumption of compliance and will no longer be required to bear the fixed costs and burdens of demonstrating compliance with section 13 of the BHC Act and the 2013 rule.

f. Covered Funds

The agencies are adopting amendments to § ____.11 and § ____.13, as proposed.

i. Costs and Benefits

First, the final rule removes the requirement in § ____.11(c)(3) of the 2013 rule that a banking entity include, for purposes of the aggregate fund limit and capital deduction, the value of any ownership interests of a third-party covered fund (*i.e.,* a covered fund that the banking entity does not advise or organize and offer pursuant to § ____.11 of the 2013 rule) acquired or retained in accordance with the underwriting or market making exemptions in § ____.4. In addition, the final rule removes the guarantee language in § ____.11(c)(2) of the 2013 rule which requires a banking entity to include, for purposes of the aggregate fund limit and capital deduction, the value of any ownership interests of a covered fund, the obligations or performance of which is directly or indirectly guaranteed, assumed, or insured by the banking entity.

The final amendments aim to more closely align the requirements for engaging in underwriting or market making-related activities with respect to ownership interests in covered funds with the requirements for engaging in these activities with respect to other financial instruments. The SEC agrees with a number of commenters [1104] and continues to believe that the 2013 rule imposed requirements on dealers' transactions in ownership interests in covered funds that may limit the ability of dealers to underwrite and make markets in ownership interests in covered funds, even if dealers are able to underwrite and make markets in the underlying securities owned by covered funds or in securities that are otherwise similar to ownership interests in covered funds. The SEC continues to believe that, as also articulated by a number of commenters,[1105] the final amendments provide banking entities with greater flexibility in underwriting and market making ownership interests in covered funds.

In addition, the SEC continues to recognize that the 2013 rule's restrictions on underwriting and market making-related activities involving ownership interests in covered funds impose costs on banking entities, as also discussed by a number of commenters.[1106] Under the final rule, banking entities are able to engage in potentially profitable market making and underwriting in ownership interests in covered funds that they do not advise or organize or offer without the value of any ownership interests of the covered fund acquired or retained in connection with underwriting or market making-related activities becoming subject to aggregate limits and capital deduction. Some commenters noted that this amendment would facilitate capital-raising activities of covered funds,[1107] increase liquidity, and generally benefit the marketplace.[1108] The SEC agrees with these commenters and continues to believe that SEC-regulated banking

[1100] *See, e.g.,* IIB.

[1101] *See, e.g.,* JBA.

[1102] *Id.*

[1103] *See* IIB.

[1104] *See, e.g.,* SIFMA.

[1105] *See, e.g.,* SIFMA and ISDA.

[1106] *See, e.g.,* BPI; IIB; SIFMA; ABA and Goldman Sachs.

[1107] *See* SIFMA.

[1108] *See* ISDA.

entities will benefit from this amendment to the extent that they engage in underwriting and market making activities involving ownership interests in covered funds, or to the extent that they restricted or eliminated such activities as a result of the requirements in the 2013 rule. These benefits may also, at least partially, flow to funds and investors in those covered funds. In addition, as some commenters pointed out,[1109] banking entities may become more willing and able to underwrite and make markets in ownership interests in covered funds.

Some commenters indicated that these amendments would greatly increase banking entities' exposure to interests in covered funds, which would entail additional risks.[1110] For example, the removal of the guarantee language in § ____.11(c)(2) would allow dealers to have arrangements such as a put option on the ownership interest in the covered fund, which could expose the banking entity to additional risk. The SEC continues to recognize that ownership interests in covered funds expose banking entities to the risks related to covered funds. The SEC agrees with the commenters that it is possible that covered fund ownership interests acquired or retained by a banking entity acting as an underwriter or engaged in market making-related activities may lead to losses for banking entities.[1111] However, the SEC also continues to recognize that the risks of market making or underwriting of ownership interests in covered funds are substantively similar to the risks of market making or underwriting of otherwise comparable financial instruments, the activity which is expressly permitted by section 13 of the BHC Act. Therefore, the same general tensions discussed in section V.F.3.c of this **SUPPLEMENTARY INFORMATION** between potential benefits for capital formation and liquidity and potential costs related to banking entity risk exposures and market fragility apply to banking entities' underwriting and market making activities involving ownership interests in covered funds and other types of securities.

Second, the final rule amends section § ____.13(a) of the 2013 rule to expand the scope of permissible risk-mitigating hedging activities involving ownership interests in covered funds, and to remove the demonstrability requirement of the risk-mitigating hedging exemption for covered funds activities, in each case as proposed.[1112] Under the final rule, in addition to being able to acquire or retain an ownership interest in a covered fund as a risk-mitigating hedge with respect to certain employee compensation agreements as permitted under the 2013 rule, the banking entity will be able to acquire or retain an ownership interest in a covered fund when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund. Some commenters stated that acquiring or retaining ownership interests in covered funds as a hedge when acting as intermediary on behalf of a customer accommodates client facilitation and related risk management activities.[1113] The SEC agrees with those commenters and continues to recognize that the 2013 rule's restrictions on risk-mitigating hedging activities with respect to ownership interests in covered funds limit banking entities' ability to hedge the risks of fund-linked derivatives through ownership interests in the covered funds referenced by those derivatives. In addition, in the proposal the SEC recognized that, as a result of the approach in the 2013 rule, banking entities may not be able to participate in offering certain customer facilitating products related to covered funds.[1114] The final rule is likely to benefit banking entities and their customers, as well as bank-affiliated advisers of covered funds, as the final rule increases the ability of banking entities to facilitate customer-facing transactions while hedging banking entities' own risk exposure.[1115] As a result, this amendment may increase banking entity intermediation and provide customers with more efficient access to the risks and returns of covered funds. To the degree that banking entities' acquisition or retention of ownership interests in covered funds to hedge customer-facing transactions may facilitate banking entities' engagement in customer-facing transactions, customers of banking entities may benefit from greater availability of financial instruments providing exposure to covered funds and related intermediation. Banking entities' ability to hedge customer-facing transactions through the acquisition or retention of ownership interests in covered funds may be particularly valuable as private capital plays an increasingly important role in U.S. capital markets and firm financing.

The SEC recognizes that, under certain circumstances, an increased ability of banking entities to acquire or retain ownership interests in covered funds in connection with risk-mitigating hedging activities may result in banking entities' exposure to greater risk.[1116] Some commenters supported this view.[1117] The SEC continues to recognize that banking entities' transactions in fund-linked products that reference covered funds with customers can expose a banking entity to risk in cases where a customer fails to perform, transforming the banking entity's covered fund hedge of the customer trade into an unhedged, and potentially illiquid, position in the covered fund (unless and until the banking entity takes action to hedge this exposure and bears the corresponding costs of hedging). However, the SEC also continues to recognize that such counterparty default risk is present in any principal transaction in illiquid financial instruments, including when facilitating customer trades in the securities in which covered funds invest, as well as in market making and underwriting activities. Commenters also recognized this.[1118] The SEC continues to note that, under the final rule, risk-mitigating hedging transactions involving covered funds must be conducted consistent with the other requirements of the 2013 rule, including the requirements with respect to risk-mitigating hedging transactions. For example, such transactions must be made in accordance with the banking entity's written policies, procedures, and internal controls; not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously with the risk-mitigating hedging requirements; and be subject to continuing review, monitoring, and management by the banking entity. Therefore, the SEC continues to believe that hedging and customer facilitation in ownership interests in covered funds does not necessarily pose a greater risk to banking entities than hedging or customer facilitation in similar financial instruments that is permissible under the 2013 rule.

Third, the final rule amends section § ____.13(b)(4) of the 2013 rule to remove the financing prong of the foreign fund exemption and formally incorporates existing staff guidance regarding the marketing of ownership

[1109] *See, e.g.,* BPI.

[1110] *See, e.g.,* Volcker Alliance; AFR and Bean.

[1111] *See, e.g.,* AFR and Data Boiler.

[1112] The effects of removal of demonstrability requirement are discussed in section V.F.3.c.

[1113] *See, e.g.,* BPI and FSF.

[1114] *See* 83 FR at 33547–33549.

[1115] This was also supported by commenters. *See, e.g.,* BPI; Forum; ISDA and SIFMA.

[1116] 79 FR at 5737.

[1117] *See, e.g.,* AFR and Volcker Alliance.

[1118] *See, e.g.,* SIFMA; Forum and ISDA.

interests in foreign funds to U.S. residents into section § ____.13(b)(3).[1119] Under the final rule, a foreign banking entity is able to acquire or retain ownership interests in and sponsor covered funds with financing for the banking entity's ownership or sponsorship provided, directly or indirectly, by branches or affiliates of the banking entity, including SEC-regulated dealers, that are located in the United States or organized under the laws of the United States or any state. The costs, benefits, and effects on efficiency, competition, and capital formation of this amendment generally parallel those of the removal of the financing prong with respect to trading activity outside of the United States in section V.F.3.e of this **SUPPLEMENTARY INFORMATION.**[1120]

In light of commenters' responses,[1121] the SEC continues to believe that foreign banking entities may benefit from the final rule and enjoy greater flexibility in financing their covered fund activity. In addition, allowing foreign banking entities to obtain financing of covered fund transactions from U.S.-dealer affiliates may reduce costs to foreign banking entities as the amendment may decrease their need to rely on foreign dealer affiliates solely for the purposes of avoiding the compliance costs and prohibitions of the 2013 rule. This may increase the operational efficiency of covered fund activity by foreign banking entities outside the United States.

Other commenters indicated that elimination of the financing prong could result in a U.S. branch or affiliate that extends financing to bear some risks.[1122] The SEC agrees with the commenters and continues to recognize that the economic exposure and risks of foreign banking entities' covered funds activities may be incurred not just by the foreign banking entities, but by U.S. entities financing the covered fund ownership interests, *e.g.,* through margin loans covering particular transactions. However, the SEC also continues to note that the final rule retains the 2013 rule's requirement that the investment or sponsorship, including any related hedging, is not accounted for as principal by any U.S. branch or affiliate.[1123] The SEC continues to believe that concerns about the size of U.S. banking entity risk exposures are less relevant when the covered fund activity is conducted by, and the risk consolidates to, foreign banking entities. Moreover, as noted above, U.S. banking entities providing financing to their foreign banking entity affiliates are likely to be separately subject to a full range of capital, margin, and other obligations unrelated to section 13 of the BHC Act, which may further mitigate risks to the U.S. branches and affiliates of foreign banking entities.

ii. Efficiency, Competition, and Capital Formation

As discussed above, the SEC believes that the final rule's amendments to the covered fund provisions in subpart C provide banking entities with greater flexibility in underwriting, market making, and hedging ownership interests in covered funds. To the extent that the 2013 rule's restrictions on underwriting and market making with interests in covered funds limit fund formation, the final rule may reduce long-term compliance costs and, as a result, increase capital formation. In addition, to the extent that banking entities experience a reduction in compliance costs and an increased ability to accommodate clients and perform risk management activities, the willingness of SEC-regulated entities to commit capital and take on underlying risk exposures may increase, which may enhance capital formation.

The final rule may affect competition between foreign and domestic entities, as foreign banking entities may benefit from the final rule and enjoy greater flexibility in financing their covered fund activity. To the extent that costs of compliance with the ''financing prong'' of the 2013 rule's foreign fund exemption may represent barriers to entry for foreign banking entities' covered fund activities, the final rule may increase foreign banking entities' operational efficiency and promote their sponsorship and financing of covered funds.

The final rule's amendments to § ____.11 and § ____.13 do not change the information available to market participants, and the SEC does not believe that these amendments are likely to have an effect on informational efficiency. To the degree that these amendments may provide banking entities with more flexibility to underwrite, make markets in, and hedge ownership interests in covered funds, and to the extent these activities facilitate capital formation, these amendments may improve allocative efficiency.

iii. Alternatives

The agencies considered alternatives that would scope out from calculation of the per-fund limit, aggregate fund limit, and capital deduction for banking entities all ownership interests acquired or retained by banking entities in connection with other underwriting and market making. For example, the agencies considered excluding the value of ownership interests acquired or retained in connection with underwriting or market making-related activities with respect to covered funds offered or organized by the banking entity from the calculation of the per-fund and aggregate limits and capital deductions.[1124] If the agencies had adopted this alternative, this would have provided dealers a level of flexibility in underwriting and making markets in ownership interests in covered funds that is more similar to the level of flexibility for dealers in conducting these activities with respect to all other types of financial instruments, including the underlying financial instruments owned by the same covered funds.

Compliance with the 2013 rule for covered funds imposes costs on banking entities. To the extent that, under the baseline, such costs prevent banking entities that are dealers from making markets in or underwriting certain financial instruments, this alternative would enable them to engage in potentially profitable market making in and underwriting ownership interests in covered funds. The benefits of this alternative may also flow through to funds, investors, and customers as

[1119] The SEC understands that, as a practical matter, market participants have adjusted their activity in light of the FAQs regarding the marketing restriction. *See supra* note 59, FAQ 13. Hence, the SEC continues to believe that the economic effects of the amendment to incorporate existing staff guidance are likely to be de minimis, and the SEC focuses this discussion on the removal of the financing prong.

[1120] In addition, the agencies confirmed in this **SUPPLEMENTARY INFORMATION** that the foreign fund exemption (1) permits the U.S. personnel and operations of a foreign banking entity to act as an investment adviser to a covered fund in certain circumstances and (2) does not preclude a foreign banking entity from engaging a non-affiliated U.S. investment adviser as long as the actions and decisions of the banking entity as principal occur outside of the United States. To the extent that foreign banking entities were restricting (1) hiring of U.S. personnel to provide investment advice and recommend investment selections to the manager or general partner of a covered fund relying on the foreign fund exemption, or (2) engagement of non-affiliated U.S. investment advisers due to uncertainty about the 2013 rule, foreign banking entities may be more likely to hire U.S. personnel to provide such services, and non-affiliated U.S. investment advisers may become better able to compete for the foreign banking entity's investment mandates.

[1121] Several commenters supported removing the financing prong from the foreign fund exemption. *See, e.g.,* BPI; EBF; IIB; JBA and New England Council.

[1122] *See, e.g.,* Better Markets and CAP.

[1123] Some commenters supported this view. *See, e.g.,* EBF and BPI.

[1124] Some commenters supported this alternative. *See, e.g.,* ISDA.

banking entities may become more willing and able to underwrite and make markets in products linked to covered funds and to provide customers with an economic interest in the profits and losses of covered funds. This may increase investor access to the returns and risks of private funds, which may be particularly valuable when issuers are increasingly relying on private capital and delaying public offerings. Finally, the increased ability of banking entities to engage in market making and underwriting activities with respect to covered funds under this alternative may have increased market quality for covered funds that are traded.

The SEC also continues to recognize that transactions in covered funds—including transactions with customers, and holdings of ownership interests in covered funds related to underwriting and market making—necessarily involve the risk of losses. However, the risks of market making or underwriting by banking entities of financial instruments held by the covered fund, or financial instruments or securities that are otherwise similar to covered funds, are substantively similar. Therefore, the same tensions among the economic effects discussed in section V.F.3.c of this **SUPPLEMENTARY INFORMATION** between potential benefits to capital formation and liquidity and potential costs related to bank risk exposures and market fragility apply to both banking entity interests from underwriting and market making in financial instruments and underwriting and market making in covered funds. It is not clear that the existence of a legal and management structure of a covered fund per se changes the economic risk exposure of banking entities, and, thus, the capital formation and other tensions of the economic effects discussed above. Therefore, the SEC continues to believe that this alternative would simply involve a more consistent treatment of financial instruments and interests in covered funds as it pertains to underwriting and market making. However, as discussed above in section V.F.1 of this **SUPPLEMENTARY INFORMATION**, some of the effects of the 2013 rule's provisions are difficult to evaluate outside of economic downturns, and the SEC is unable to measure the amount of capital formation or liquidity in covered funds or investments of the covered funds that does not occur because of the existing treatment of underwriting and market making activities by banking entities involving covered funds.

g. Compliance Program

The SEC continues to recognize that the scope and breadth of the compliance obligations under the 2013 rule impose significant costs on banking entities, which may be particularly burdensome for smaller entities. For example, in the proposal, the SEC cited a market participants' estimate that some banking entities have added as many as 2,500 pages, per institution, of policies, procedures, mandates, and controls (which need to be monitored and updated on an ongoing basis) [1125] for purposes of compliance with the 2013 rule, and that some banking entities may spend, on average, more than 10,000 hours on training each year.[1126] The SEC also cited a market participants' estimate that some banking entities may have 15 regularly meeting committees and forums, with as many as 50 participants per institution dedicated to compliance with the 2013 rule.[1127]

The compliance regime of the 2013 rule and related burdens may reduce the profitability of covered activities by dealers and investment advisers that are banking entities and may be passed along to customers or clients in the form of reduced provision of services or higher service costs. Moreover, the SEC recognizes that the extensive compliance program under the 2013 rule may detract resources of banking entities and their compliance departments and supervisors from other compliance matters, risk management, and supervision. Finally, prescriptive compliance requirements may not optimally reflect the organizational structures, governance mechanisms, or risk management practices of complex, innovative, and global banking entities. However, the SEC agrees with commenters [1128] that compliance programs are important to support the safety and soundness of the U.S. financial markets.

i. Costs and Benefits

The final rule is expected to lower compliance burdens in two ways. First, the SEC continues to believe that the amendments would increase flexibility in complying with the final rule for banking entities without significant trading assets and liabilities, reducing compliance costs for these entities. Second, the adopted amendments would streamline the compliance program for banking entities with significant trading assets and liabilities. The SEC continues to believe that, to the extent that the requirements in the 2013 rule are duplicative and that maintaining compliance systems to comply with both the general and an enhanced compliance program requirements is inefficient, banking entities with significant trading assets and liabilities may benefit from the amendments. The specific final amendments are discussed below.

For Group C entities, the agencies are adopting presumed compliance with proprietary trading and covered fund prohibitions. Some commenters noted that the presumed compliance standard proposed for Group C entities may benefit entities with very low levels of trading activity.[1129] In light of the commenters' responses, the SEC continues to believe that the presumption of compliance will provide Group C entities with additional compliance flexibility. The SEC estimates that approximately 97 broker-dealers that hold 3.6% of assets held by broker-dealers subject to the final rule would be able to avail themselves of the rebuttable presumption of compliance and would not have to apply the final rule's compliance program requirements. Out of these 97 broker-dealers, 28 are subject to the enhanced requirements under the 2013 rule, 51 are subject to the standard compliance requirements under the 2013 rule, and 18 qualify for the simplified compliance regime under the 2013 rule. As discussed in section V.B, the agencies estimate recordkeeping or reporting burden reductions related to presumed compliance with the final rule are as high as $1,648,812.[1130]

Some commenters expressed concern that Group C entities may experience uncertainty because of the absence of specific guidance about what events would trigger an agency to rebut the presumption of compliance,[1131] and, as a result, incur compliance costs related to establishing internal systems and controls in anticipation of potential rebuttal of the presumption.[1132] To the extent that some Group C entities experience this uncertainty and costs, they may not fully enjoy the benefits of presumed compliance. One commenter estimated that smaller banking entities would likely incur an additional one-time cost of $50,000–$100,000 in

[1125] *See* 83 FR 33432.

[1126] *Id.*

[1127] *Id.*

[1128] *See, e.g.,* AFR and Bean.

[1129] *See, e.g.,* B&F Capital Markets Inc.

[1130] *See* section V.B. Ongoing cost reduction for broker-dealers: (40 hours per firm × 18 broker-dealers + 265 hours per firm × 79 broker-dealers) × 0.18 dealer weight × (Attorney at $423 per hour) = $1,648,812.

[1131] *See, e.g.,* Chatham; ABA and SIFMA.

[1132] *See, e.g.,* Covington; Chatham; EBF; JBA and Data Boiler.

consulting or legal advice fees.[1133] Using this estimate, the total initial cost related to consulting or legal advice fees for Group C broker-dealers may range between $873,000 and $1,746,000.[1134]

Some commenters opposed the presumption of compliance.[1135] The SEC continues to recognize that the presumption of compliance for Group C entities may increase the risks of non-compliance with the statute. However, the SEC also continues to note that the amendments do not waive the proprietary trading and covered fund prohibitions of section 13 of the BHC Act for such entities.

For Group B entities, the agencies are adopting the simplified compliance program as proposed. Some commenters expressed support for this approach for Group B entities.[1136] In the proposal, the SEC recognized that existing compliance program requirements may burden entities that engage in little covered trading activity but have larger total assets.[1137] The SEC continues to recognize that this amendment may reduce costs for banking entities that have more than $10 billion in total assets but do not have significant trading assets and liabilities, as these banking entities do not qualify for the simplified compliance program under the 2013 rule. As shown in Table 2, the SEC estimates that 66 broker-dealers would qualify for the simplified compliance regime under the final rule. As discussed in section V.B, the agencies estimate recordkeeping or reporting burden reductions related to the simplified compliance program for Group B broker-dealers to be $1,130,679 for registered broker-dealers and up to $582,471 for entities that may choose to register as SBSDs.[1138]

The agencies are amending covered fund recordkeeping requirements to apply to Group A entities only, rather than to banking entities with over $10 billion in total assets. The SEC believes that the covered funds activities of banking entities without significant trading assets and liabilities may generally be smaller in scale and less complex than those of banking entities with significant trading assets and liabilities. Thus, the value of additional documentation requirements for banking entities without significant trading assets and liabilities may be lower. The final amendment reflects these considerations and may reduce the costs associated with these covered funds recordkeeping requirements by reducing the number of banking entities subject to these requirements.[1139] The SEC continues to note that entities with moderate trading assets and liabilities would still be required to comply with all the covered fund provisions and that the proposal simply eliminates recordkeeping for the purposes of demonstrating compliance. However, in general, the SEC believes that SEC oversight of dealers and investment advisers of covered funds should not be adversely affected, as the remaining compliance requirements will be sufficient to monitor compliance with the statute. As discussed in section V.B, the agencies estimate recordkeeping or reporting burden reductions related to the covered fund recordkeeping requirements to be $2,208,060 for registered broker-dealers and up to $517,752 for entities that may choose to register as SBSDs.[1140]

The agencies are also adopting the removal of the requirements in Appendix B of the 2013 rule as proposed, with an exception for the CEO attestation. The removal of Appendix B requirements will affect all banking entities that have trading assets and liabilities above $10 billion, as well as banking entities that have total consolidated assets of $50 billion or more. Some commenters expressed general support for this amendment.[1141] In addition, some commenters indicated that compliance with Appendix B required entities to develop and administer an enhanced compliance program that may not be tailored to the business model or risks of specific institutions.[1142] Further, in the proposal the SEC cited a market participants' estimate that some banking entities have established as many as 500 controls related to Appendix B obligations, some of which may be duplicating other policies and procedures designed as part of prudential safety and soundness.[1143] In light of these comments, the SEC continues to believe that compliance with Appendix B may impose significant costs on SEC-regulated banking entities and that removal of the Appendix B requirements may significantly reduce the number and complexity of the compliance requirements to which such entities are subject. The SEC estimates that there are 122 broker-dealers that may experience reduced compliance costs as a result of this amendment, among which 28 are Group C entities, 58 are Group B entities and 36 are Group A entities. As discussed in section V.B, the removal of Appendix B requirements will result in ongoing annual cost savings estimated as $10,217,988 for registered broker-dealers and up to $2,847,636 for entities that may choose to register as SBSDs.[1144]

Some commenters opposed the removal of Appendix B, arguing that, given the size of affected holding companies, the 2013 rule's stringent compliance regime may help reduce compliance risks related to the substantive prohibitions of section 13 of the BHC Act and the 2013 rule.[1145] However, the SEC notes that, under the final rule, both Group A and Group B entities will be required to establish and maintain a compliance program under § ____.20.

Finally, the agencies are adopting the amendment to require CEO attestation

[1133] *See* Data Boiler.

[1134] Initial set-up burden increase for broker-dealers: 97 broker-dealers × 0.18 dealer weight × $100,000 = $1,746,000. Using the lower bound: 97 broker-dealers × 0.18 dealer weight × $50,000 = $873,000.

[1135] *See, e.g.,* Occupy the SEC and Data Boiler.

[1136] *See, e.g.,* CFA and JBA.

[1137] *See* 83 FR 33432.

[1138] Cost reduction for broker-dealers: 225 hours per firm × 0.18 dealer weight × 66 broker-dealers × (Attorney at $423 per hour) = $1,130,679.

Cost reductions for entities that may register as SBSDs may be as high as 225 hours per firm × 0.18 dealer weight × 34 SBSDs × (Attorney at $423 per hour) = $582,471. The estimate for SBSDs assumes that 34 SBSDs not already registered as broker-dealers would be Group B entities and so may overestimate the cost savings.

[1139] As discussed in section V.F.2.c, RIAs do not typically engage in proprietary trading, and the SEC continues to believe that they will not be affected by the final rule as it relates to proprietary trading. In addition, the SEC does not have the information necessary to quantify the compliance program costs at the RIA level of a BHC. Thus, the SEC does not allocate cost savings from monetized PRA burdens to bank-affiliated RIAs from the proposed Appendix B amendments. To the degree that some bank-affiliated RIAs may be extending compliance resources and systems independent of the affiliated holding company and other affiliates and subsidiaries, this approach may be underestimating the cost savings from the final rule.

[1140] Cost reduction for broker-dealers: 200 hours per firm × 0.18 dealer weight × 145 broker-dealers × (Attorney at $423 per hour) = $2,208,060.

Cost reductions for entities that may register as SBSDs may be as high as 200 hours per firm × 0.18 dealer weight × 34 SBSDs × (Attorney at $423 per hour) = $517,752. The estimate for SBSDs assumes that all 34 SBSDs not already registered as broker-dealers would be Group B entities and so may overestimate the cost savings.

[1141] *See, e.g.,* Insurance Coalition; Real Estate Associations; CREFC; Credit Suisse; JBA; FSF and ABA.

[1142] *See, e.g.,* Credit Suisse; CREFC; SIFMA and Capital One et al.

[1143] *See* 83 FR at 33551.

[1144] Cost reduction for broker-dealers: 1,100 hours per firm × 0.18 dealer weight × 122 broker-dealers × (Attorney at $423 per hour) = $10,217,988.

Cost reductions for entities that may register as SBSDs may be as high as 1,100 hours per firm × 0.18 dealer weight × 34 SBSDs × (Attorney at $423 per hour) = $ 2,847,636. The estimate for SBSDs assumes that all 34 SBSDs not already registered as broker-dealers would be subject to Appendix B requirements and so may overestimate the cost savings.

[1145] *See, e.g.,* AFR and Bean.

for Group A entities only.[1146] In the proposal, the SEC recognized that the CEO attestation process is costly and cited market participants' estimates that some banking entities may spend more than 1,700 hours on the CEO attestation process and that the elimination of this requirement may reduce time dedicated towards the compliance program by as much as 10%.[1147] In addition, as indicated by some commenters, the CEO attestation requirement requires banking entities to undertake costly internal compliance efforts that are not consistent with the activities or risks of such firms.[1148] Therefore, the SEC believes that the amendments to the application of the CEO attestation requirement will benefit SEC-regulated banking entities and their holding companies that do not have significant trading assets and liabilities but are subject to the CEO requirement under the 2013 rule.

The SEC continues to note that, under the 2013 rule, SEC-regulated banking entities have flexibility to comply with the attestation requirement either at the SEC-registrant or at the holding-company level. In 2019, the SEC received a total of 55 attestations that cover compliance for 2018, including 14 attestations directly from SEC registrants, none of which are Group A entities. Therefore, the SEC expects that, under the final rule, these registrants would no longer be providing CEO attestations. The SEC estimates that there are 122 broker-dealers that are subsidiaries or affiliates of bank holding companies that are required to comply with the CEO attestation requirement under the 2013 rule. The SEC estimates that under the final rule this number will decrease to 36 Group A broker-dealers. Therefore, the amendment may result in annual cost savings from $654,804 to $774,000 for broker-dealers and up to between $258,876 and $306,000 for entities that may choose to register as SBSDs.[1149]

The agencies are also adopting notice and response procedures related to sections ____.3(b)(4), ____.4(c)(4), ____.20(g)(2), and ____.20(h) of the final rule. As a result, all broker-dealers and entities that may potentially register as SBSDs may experience increases in initial reporting set-up costs. As discussed in section V.B, the agencies estimate the initial set-up reporting burden increase related to the notice and response procedures to be $303,037 for registered broker-dealers and up to $51,775 for entities that may choose to register as SBSDs.[1150] In addition, as discussed in section V.B, the agencies may exercise a reservation of authority and seek to rebut the presumption in section ____.3(b)(4) in accordance with the notice and response procedures in section ____.20(i) of the final rule, involving a burden of up to 20 hours per entity per response. In such cases, an SEC-regulated banking entity may incur a cost of up to $1,523 (=20 hours per response × 0.18 dealer weight × Attorney at $423 per hour) per response. The SEC is unable to estimate how many entities may bear such costs since this figure will depend on how SEC-regulated banking entities may choose to comply with the final rule.

ii. Efficiency, Competition, and Capital Formation

Under the final amendments, both Group A and Group B entities will benefit from reduced compliance program requirements and Group C entities will be presumed compliant with prohibitions of subparts B and C of the final rule. To the extent that compliance program requirements for Group B entities are less costly, Group A entities close to the $20 billion threshold may choose to manage down their trading book such that they would qualify for the simplified compliance program, resulting in more competition among entities that are close to the threshold. Similarly, the final rule may incentivize Group B entities close to the $1 billion threshold to rebalance their trading book in order to qualify for the presumed compliance treatment of Group C entities. Such management of the trading book may reduce the risk of each individual banking entity and may decrease the risks to the financial system. The SEC notes that entities are likely to weigh potential cost savings related to lighter compliance requirements for Group B and Group C entities against the costs of reducing trading activity below the $20 billion and $1 billion thresholds. Therefore, this competition effect may be particularly significant for Group A entities that are close to the $20 billion threshold and for Group B entities that are close to the $1 billion threshold.

Since the compliance requirements do not affect the scope of information available to investors, the SEC does not anticipate effects on informational efficiency to be significant. To the extent that some dealers are experiencing large compliance costs and partially or fully passing them along to customers in the form of reduced access to capital or higher cost of capital, the amendment may reduce costs of and increase access to capital.

iii. Alternatives

As an alternative, the agencies could have applied the CEO attestation requirement to both Group A and Group B entities. Under this alternative, some banking entities would have become subject to the CEO attestation requirement for the first time, as noted by some commenters.[1151] As discussed above and noted by commenters,[1152] the SEC continues to recognize that Group B entities pose lower risks to the financial system that may not necessarily justify a costly and stringent compliance regime that requires CEO attestation.

As other alternatives, the agencies could have required CEO attestations for Group A entities only if they have over $50 billion in total assets; removed the CEO attestation requirement; or allowed other senior officers, such as the chief compliance officer (CCO), to provide the requisite attestation for some or all affected banking entities. As discussed above, the SEC recognized in the proposal that the CEO attestation process is costly and that some market participants estimated that some banking entities may spend more than 1,700 hours on the CEO attestation process and that eliminating this requirement may reduce time dedicated toward the compliance program by as

[1146] As a baseline matter, under the 2013 rule, the CEO is required to annually attest that the banking entity has in place processes to establish, maintain, enforce, review, test, and modify the compliance program established pursuant to Appendix B in a manner reasonably designed to achieve compliance with section 13 of the BHC Act and the 2013 rule.

[1147] *See* 83 FR at 33551.

[1148] *See, e.g.,* Capital One, et al.

[1149] Cost reduction for broker-dealers: 100 hours per firm × 0.18 dealer weight × 86 broker-dealers × (Attorney at $423 per hour) = $654,804. Alternatively, using the CEO hourly rate, cost reduction for broker-dealers is: 100 hours per firm × 78 broker-dealers × 0.18 dealer weight × (CEO at $500 per hour) = $774,000.

Cost reduction for entities that may register as SBSDs may be as high as: 100 hours per firm × 0.18 dealer weight × 34 SBSDs × (Attorney at $423 per hour) = $258,876. Alternatively, using the CEO hourly rate, cost reduction for broker-dealers is: 100 hours per firm × 34 SBSDs × 0.18 dealer weight × (CEO at $500 per hour) = $306,000. The SEC assumes that all entities that may register as SBSDs would be subject to the CEO attestation requirement, and so may overestimate the cost savings.

[1150] Initial set-up reporting burden increase for broker-dealers: 20 hours per firm × 0.18 dealer weight × 199 broker-dealers × (Attorney at $423 per hour) = $303,037.

Initial set-up reporting burden increase for entities that may register as SBSDs may be as high as: 20 hours per firm × 0.18 dealer weight × 34 SBSDs × (Attorney at $423 per hour) = $51,775.

[1151] *See, e.g.,* IIB.

[1152] *See, e.g.,* Capital One et al.; BB&T; ABA; Arvest; State Street and IIB.

much as 10%.[1153] Under the aforementioned alternatives, more SEC-regulated banking entities would generally experience larger cost reductions. However, as discussed in section IV.D.1, the agencies continue to believe that incorporating the CEO attestation requirement into § ___.20(c) for Group A banking entities will help to ensure that the compliance program established pursuant to that section is reasonably designed to achieve compliance with section 13 of the BHC Act and the final rule.

As an alternative, the agencies could have included a knowledge qualifier for CEO attestation. Since CEOs of banking entities do not necessarily know every single policy, procedure, process, and control, as pointed out by some commenters,[1154] they may rely on multiple layers of sub-attestations within a banking entity. If CEOs of banking entities are risk averse, they may require additional liability insurance, higher compensation, or lower incentive pay as a fraction of overall compensation. Under this alternative, such effects stemming from risk aversion would be mitigated. However, the attestation may also serve as a disciplining mechanism and incentivize compliance. In addition, as one commenter stated, CEOs of publically traded banking entities regularly attest that their company's annual and quarterly reports are accurate and complete and that internal controls have been established and maintained.[1155] The SEC also notes that the covered activities of larger and more complex banking entities with higher volumes of trading activity may involve risk exposures with a larger potential for systemic risk and conflicts of interest.

The agencies also recognize that CEO attestation may be costly for banking entities affiliated with foreign banking organizations. For example, the SEC noted in the proposal that one foreign firm reported that it organized and managed a global controls sub-certification process that takes 6 months to complete and involves over 400 staff (including over 260 outside of the United States) in order for the CEO to sign and deliver the annual attestation.[1156] As an alternative, the agencies could have proposed exempting banking entities affiliated with a foreign banking organization from the CEO attestation requirement. Under the 2013 rule, the requirement covers only the U.S. operations of a foreign banking entity and not its foreign operations. Similar to the analysis of the final amendment to trading outside of the United States, this alternative may decrease compliance costs and increase trading activity by foreign banking entities in the United States but result in losses in market share and profitability for U.S. banking entities that would remain subject to the attestation requirement and would be placed at a competitive disadvantage as a result.

h. Metrics

i. Costs and Benefits

In the proposal, the SEC discussed the compliance burdens related to the metrics reporting and recordkeeping requirements under the 2013 rule. For example, the SEC reported that a market participant estimated that the average cost of collecting and filing metrics subject to the reporting requirements may be as high as $2 million per year per participant, and that market participants may submit an average of over 5 million data points in each filing.[1157] The SEC also reported an estimate from a market participant incurring approximately $3 million in costs associated with the buildout of new IT infrastructure and system enhancements and estimated that this IT infrastructure will require at least $250,000 in maintenance and operating costs year-to-year.[1158] In addition, the SEC noted that the same firm estimated costs related to compliance consultants assisting with the construction of the 2013 rule compliance regime at $3 million.[1159]

The SEC continues to believe that the metrics reporting and recordkeeping requirements of the 2013 rule may involve large compliance costs.[1160] The agencies have received comment that the proposed amendments do not streamline metrics reporting and recordkeeping requirements but impose costly new requirements.[1161] Moreover, the agencies received comment that the new qualitative information requirements, such as the trading desk information, are unlikely to enhance review by regulators.[1162] In addition, the agencies received comment that even where underlying data is already collected by reporters in the regular course of business and for regulatory compliance, reporters will still incur costs of determining how best to compile and standardize the information.[1163]

As discussed below, the SEC continues to recognize that some aspects of the final rule may impose new requirements on reporters. Moreover, the SEC continues to emphasize that quantitative metrics do not clearly identify impermissible proprietary trading, but, rather, inform general agency oversight and supervision. As discussed further below, in response to the comments received, the SEC has revised its estimates of the compliance costs of various amendments and burden savings from metrics amendments as a whole. Importantly, the final metrics amendments include changes from the proposed approach—changes that both reduce the scope of new requirements and eliminate other existing quantitative metrics, such as risk factor sensitivities. For example, as discussed in section IV.E, the agencies estimate that the final rule may significantly reduce both the number of reported data items (by approximately 67%) and the overall volume of submissions (by approximately 94%) relative to baseline.

Overall, the SEC believes that the final rule reduces the costs of metrics requirements for reporters, eliminating certain metrics on the basis of regulatory experience with the data and provides some entities with additional reporting time. Broadly, metrics reporting provides information for regulatory oversight and supervision but presents compliance burdens for registrants. The balance of these effects turns on the value of different metrics in evaluating covered trading activity for compliance with the rule, as well as their usefulness for risk assessment and general supervision. These effects are discussed with respect to each final amendment in the sections that follow.

The SEC considered how to assess the costs of the final rule for SEC-regulated banking entities. The metrics costs are generally estimated at the holding company level for each reporter.[1164] The SEC allocates these costs to the affiliated

[1153] *See* 83 FR at 33551.

[1154] *See, e.g.,* FSF; BPI and SIFMA.

[1155] *See, e.g.,* BOK.

[1156] *See* 83 FR at 33552.

[1157] *See* 83 FR at 33539.

[1158] *Id.*

[1159] To the extent that costs related to compliance consulting include both costs of metrics reporting and related systems, as well as costs related to other compliance requirements under the 2013 rule, the SEC cannot estimate the firm's all-in metrics reporting costs.

[1160] *See, e.g.,* 83 FR at 33538.

[1161] *See, e.g.,* CCMC; JBA; Committee on Capital Markets; SIFMA Annex C and IIB.

[1162] *See* SIFMA.

[1163] *Id.*

[1164] The SEC currently receives metrics from 18 entities, including 2 reporters that are below $10 billion in trading assets and liabilities. Since voluntary reporters are not constrained by the requirements of the amendment, they are not reflected in the SEC's cost estimates. In addition, the SEC believes that the additional systems costs estimated here will be incurred at the holding company level and scope in the trading activity of all SEC-registered banking entity affiliates.

SEC-regulated banking entity.[1165] The SEC believes that estimating the cost savings of the final rule at the individual registrant level would be inconsistent with the SEC's understanding of how these entities are complying with the metrics reporting requirements of the 2013 rule. The SEC continues to believe that SEC-regulated banking entities within the same corporate group will collaborate with one another to comply with the final rule, to take advantage of efficiencies of scale. Further, the SEC continues to note that individual SEC-regulated banking entities may vary in the scope and type of activity they conduct and that not all entities within an organization subject to Appendix A engage in the types of covered trading activity for which metrics must be reported. Thus, to the extent that metrics compliance occurs at the holding company level, estimating costs at the registrant level may overstate the magnitude of the costs and cost savings for SEC-regulated entities as a result of the final rule.

The discussion that follows addresses the effects of the final rule on the reporting and recordkeeping burdens and other compliance costs for banking entities, the effects of the elimination and streamlining of certain metrics, the effects of extended time to report, and amendments related to the XML format.

(1) Reporting and Recordkeeping Burden for SEC-Regulated Banking Entities

The changes in reporting and recordkeeping burdens as a result of the final rule stem from four key groups of changes to the metrics reporting regime. First, the final rule requires metrics reporting for Group A entities only. Under the 2013 rule, banking entities with consolidated trading assets and liabilities above $10 billion are required to record and report certain quantitative measurements for each trading desk engaged in covered trading.[1166] Under the amended rules, entities with $20 billion or more in trading assets and liabilities would be required to furnish metrics. The SEC estimates that three metrics reporters that have affiliated broker-dealers required to submit metrics to the SEC under the 2013 rule will no longer be required to report metrics under the final rule.

Second, as discussed above, the agencies are narrowing the scope of many of the 2013 rule's metrics requirements or eliminating them as a whole. For example, the agencies are eliminating the Inventory Aging metric, the Stress Value-at-Risk (VaR) metric, and the Risk Factor Sensitivities metric. As discussed above, the agencies estimate that the final rule eliminates approximately 67% of data items by number and 94% of data by volume. The reduction in the volume of data required to be compiled, reviewed, and transmitted to the agencies is expected to decrease the volume of data that needs to be produced, manipulated, and submitted to the agencies for purposes of compliance with the 2013 rule.

Third, the amendment to the trading account definition may change the scope of desks required to report metrics. Specifically, some trading desks, such as some asset and liability management desks, under the 2013 rule, may be required to report metrics solely due to activity that falls within the 60-day rebuttable presumption. Because of the nature of their activity, such trading desks may face greater burdens of producing metrics that are routine for other trading desks. The elimination of the 60-day rebuttable presumption may eliminate the need for such desks to report metrics, removing related burdens.

Fourth, the agencies are adopting an amendment to require metrics reporting by all reporters on a quarterly basis within 30 days of the end of each calendar quarter. Under the 2013 rule, banking entities that report metrics and have less than $50 billion in consolidated trading assets and liabilities are required to report metrics for each quarter within 30 days of the end of that quarter. In contrast, under the 2013 rule, banking entities with total trading assets and liabilities equal to or above $50 billion are required to report metrics more frequently—each month within 10 days of the end of that month.[1167] As discussed further below, because processes enabling reporting under tight deadlines may generally be costlier, the SEC anticipates that the amended reporting requirements may reduce compliance costs for entities that are subject to the 2013 rule's metrics requirements and have more than $50 billion in trading assets and liabilities and may result in fewer resubmissions by such filers.

In the proposal, the SEC stated that reporters may incur systems-related costs of approximately $120,000 to $130,000, estimated at the level of the reporter. The agencies have received comment that the SEC's estimates of the costs of the metrics amendments are a significant underestimate, since reporters will need to revise all of their metrics reporting systems and embark on a new round of systems integration with multiple agencies independently.[1168] The commenter indicated that the exercise is not dissimilar from the initial implementation of the 2013 rule's metrics.[1169] Another commenter supported retaining requirements of the 2013 rule, since any metrics amendments would require modifications to measurement tools, involving burdens, testing time, and outsourcing costs of development staff.[1170]

The SEC agrees that compliance with the final rule will involve one-time costs to transition systems and compliance architecture to the metrics amendments for Group A entities, including the new requirements related to granular Transaction Volumes and Positions metrics, Comprehensive Profit and Loss Attribution, Trading Desk and Quantitative Measurements Identifying Information, and the elimination of reporting of other metrics (such as Inventory Turnover, Customer-Facing Trade Ratio, Risk Factor Sensitivities, and Stress VaR). The SEC notes that its analysis is specific to SEC registrants, and the estimates represent only a fraction of the compliance costs of holding companies allocated to affiliated SEC-regulated banking entities. Moreover, the SEC anticipates considerable variation in one-time system transition costs among reporters, depending on the size and complexity of their existing trading activity, the number of trading desks per reporter for the purposes of metrics reporting, the way in which reporters may organize reporting and compliance obligations for the purposes of, for instance, the market risk capital rule, and the complexity of their current systems. However, if transitioning reporting systems to meet the requirements of the final rule impose one-time costs and IT burdens comparable with those of the metrics requirements of the 2013 rule,[1171] the compliance costs related to the 2013 rule can be used to estimate potential one-time switching costs for some banking entities. In the proposal, the SEC reported an estimate from a market participant incurring approximately $3 million in costs associated with the buildout of new IT infrastructure and system enhancements.[1172] Using this estimate, the one-time costs related to transitioning metrics reporting to

[1165] *See supra* note 1070.

[1166] *See* 2013 rule § ____.20(d) and Appendix A.

[1167] *See* 2013 rule § ____.20(d)(3).

[1168] *See* SIFMA.

[1169] *Id.*

[1170] *See, e.g.,* JBA.

[1171] *See* SIFMA.

[1172] *Id.*

comply with the requirements of the final rule may be as high as $540,000 [1173] for SEC-regulated dealers affiliated with a single Group A metrics reporter and as high as $6,480,000 [1174] for all SEC-regulated entities affiliated with all reporters.

However, as discussed earlier in this section, the SEC believes that the final metrics amendments may reduce reporting and recordkeeping burdens.[1175] The SEC estimates that the amendments may decrease ongoing annual reporting and recordkeeping cost by $463,921.[1176] These figures reflect the estimated burden reductions net of any new systems costs imposed by the final rule.

(2) Elimination, Replacement, and Streamlining of Certain Metrics

As discussed above, the final rule includes a number of amendments eliminating, replacing, and streamlining metrics reporting. For example, the final rule eliminates the Inventory Aging, Stress VaR, and Risk Factor Sensitivities metrics, as well as replaces the Inventory Turnover with the Positions metric and the Customer Facing Trade Ratio with the Transaction Volumes metric. As discussed above, both the Transaction Volumes metric and the Positions metric will be required only by desks involved in underwriting or market making-related activity. The SEC continues to believe that the key balancing of economic effects from metrics reporting is between compliance burdens (which may be particularly significant for smaller entities) and the amount and usefulness of information provided for regulatory oversight of the 2013 rule, as well as for general supervision and oversight. As estimated above, the limitation of certain metrics to desks engaged in covered trading activities, elimination of the above metrics, and removal of the Stress VaR limit requirements is expected to reduce burdens related to reporting and recordkeeping for Group A entities. Although metrics do not allow the SEC to clearly identify proprietary trading from permitted market making, risk-mitigating hedging, or underwriting activity, certain metrics may provide additional information that is useful for regulatory oversight.

Replacement of Inventory Turnover With Positions and Customer-Facing Trade Ratio With Transaction Volumes

The final rule replaces the Inventory Turnover metric with the Market Value of Positions quantitative measurement and replaces the Customer-Facing Trade Ratio metric with the Transaction Volumes quantitative measurement. The Inventory Turnover and Customer-Facing Trade Ratio metrics are ratios that measure the turnover of a trading desk's inventory and compare the transactions involving customers and non-customers of the trading desk, respectively.

The Positions and Transaction Volumes metrics are expected to provide information about risk exposure and trading activity at a more granular level. Specifically, the final rule requires that banking entities provide the relevant agency with the underlying data used to calculate the ratios for each trading day, rather than providing more aggregated data over 30-, 60-, and 90-day calculation periods. By providing more granular data, the Positions metric, in conjunction with the Transaction Volumes metric, is expected to provide the SEC with the flexibility to calculate inventory turnover ratios and customer-facing trade ratios over any period of time, including a single trading day, allowing the use of the calculation method the SEC finds most effective for purposes of regulatory oversight.

Moreover, the new Positions and Transaction Volumes metrics will distinguish between securities and derivatives positions, unlike the Inventory Turnover and Customer-Facing Trade Ratio metrics. These metrics would require a banking entity to separately report the value of securities positions and the value of derivatives positions. While the Inventory Turnover and Customer-Facing Trade Ratio metrics require banking entities to use different methodologies for valuing securities positions and derivatives positions because of differences between these asset classes, these metrics currently require banking entities to aggregate such values for reporting purposes. By combining separate and distinct valuation types (*e.g.,* market value and notional value), the Inventory Turnover and Customer-Facing Trade Ratio metrics are providing less meaningful information than was intended by the 2013 rule. Therefore, requiring banking entities to disaggregate the value of securities positions and the value of derivatives positions for reporting purposes may enhance the usability of this information.

In addition to requiring separate reporting of the value of securities positions and the value of derivatives positions, the final rule would also streamline valuation method requirements for different product types. The removal of the notional value of derivative positions in the Positions metric avoids complexities related to mixing various calculation methods for notional value for different derivatives. For example, using delta-adjusted notional for options, bond equivalents for interest rate derivatives, commodity price adjusted values for commodity derivatives, and gross notional for other derivatives increases complexity and reduces comparability. Moreover, certain valuation methodologies required by the 2013 rule's Inventory Turnover and the Customer-Facing Trade Ratio metrics may not be otherwise used by banking entities (*e.g.,* for internal monitoring or external reporting purposes). Furthermore, the 2013 rule's requirements result in information being aggregated and furnished to the SEC in non-comparable units. At the same time, the final rule retains gross notional value of derivatives as part of the Transactions Volumes Metric. The SEC believes that changing market values of positions as well as the volume of derivative contracts in terms of notional are important measures of risk useful for ongoing agency oversight. Therefore, this aspect of the final rule may further enhance the usability of the information provided in the Positions metric.

Moreover, the valuation methods required under the final rule are intended to be more consistent with the agencies' understanding of how banking entities value securities and derivatives positions in other contexts, such as internal monitoring or external reporting purposes, which may allow them to leverage existing systems and

[1173] $3 million × 0.18 × 1 reporter = $540,000.

[1174] $540,000 × 12 reporters = $6,480,000.

[1175] In the proposal, the SEC estimated the effect on SEC-registered broker-dealers and entities that may register as SBS dealers by scaling per-reporter estimates by 0.18 and multiplying by the number of broker-dealers or SBSDs affiliated with reporters in an affected category. This approach assumes that reporters with multiple dealers may allocate metrics compliance costs savings to each dealer. The SEC now more conservatively allocates compliance cost savings to multiple dealers affiliated with a reporter as one dealer entity. This approach also avoids assuming that entities that may register as SBSDs that are not broker-dealers are affiliated with reporters with over $50 billion in trading assets and liabilities (TAL) and is consistent with how the SEC allocates systems costs related to metrics amendments.

[1176] Ongoing reporting cost reduction for SEC entities: [(55 hours per report × 12 reports per year × 9 reporters with over $50 billion) + (55 hours per report × 4 reports per year × 9 reporters with under $50 billion) − (41 hours per report × 4 reports per year × 12 reporters with TAL above $20 billion)] × 0.18 dealer weight × (Attorney at $423 per hour) = $453,185.

Ongoing recordkeeping cost reduction for SEC entities: [(16 hours per firm × 9 reporters with over $50 billion + 13 hours per firm × 9 reporters with <$50 billion) − (10 hours per firm × 12 reporters with >$20 billion TAL)] × 0.18 × (Attorney at $423 per hour) = $10,736.

Total ongoing cost reduction: $453,185 reporting + $10,736 recordkeeping = $463,921.

reduce ongoing costs relative to the costs of reporting requirements under the 2013 rule. While a banking entity may incur one-time costs in modifying how it values certain positions for purposes of metrics reporting, the SEC does not expect such systems costs to be significant, particularly if the banking entity is able to use the systems it currently has in place for purposes of metrics reporting to value positions consistent with the final rule. However, the SEC recognizes that some metrics reporters may incur such costs, and they are reflected in the estimate of the one-time metrics switching costs of up to $540,000 for SEC-registered dealers affiliated with a single Group A metrics reporter in section V.F.3.h.i above.

The agencies have received a number of comments on the proposed replacement of the Inventory Turnover metric with the Positions metric and of the Customer-Facing Trade Ratio metric with the Transaction Volumes metrics. With respect to the replacement of Inventory Turnover with Positions, commenters indicated that the Positions metric will involve costly modifications to existing infrastructure and re-scoping of products.[1177] In addition, commenters indicated that Positions metric will provide few valuable insights regarding each desk's overall risk profile and that the granularity will result in false positives.[1178] Commenters also opposed the replacement of the Customer-Facing Trade Ratio with the Transactions Volume metric, arguing that it would create a new metric, require firms to classify inter-affiliate transactions, increase transition and system update costs, and fail to provide the agencies with valuable information enhancing oversight for the purposes of section 13 of the BHC Act.[1179]

The SEC continues to believe that requiring banking entities to provide more granular data in the Positions and Transaction Volumes metrics will not significantly alter the costs associated with the 2013 rule's Inventory Turnover and Customer-Facing Trade Ratio metrics.[1180] The Positions and Transaction Volumes metrics are based on the same underlying data regarding the trading activity of a trading desk as the Inventory Turnover and Customer-Facing Trade Ratio metrics. The SEC expects that banking entities already keep records of these data and have systems in place that collect these data. Moreover, in response to commenter concerns regarding the extra recordkeeping costs related to distinguishing trades across affiliated banking entities from trades within a single banking entity, the final rule adds a category of counterparty for internal transactions that consolidates the two proposed categories (transactions across affiliated banking entities from trades within a single banking entity) into one category (transactions with trading desks and other organizational units). This additional category of information may facilitate better classification of internal transactions, which may assist the SEC in evaluating whether the trading desk's activities are consistent with the requirements of the exemptions for underwriting or market making-related activity.

The SEC remains cognizant of the costs of the amendments on reporters. In the proposal the SEC anticipated that reporting more granular information in the Positions and Transaction Volumes metrics may result in costs of $24,480.[1181] The SEC revises the estimate to $17,280 to reflect updated information about the number of reporters with affiliated SEC-registered dealers affected by the metrics amendments.[1182] In addition, in the proposal, the SEC estimated that modifying the 2013 rule's requirements of the Customer-Facing Trade Ratio to require SEC-regulated banking entities to further categorize trading desk transactions may impose additional systems costs related to tagging internal transactions and maintaining associated records valued at $21,420 for all reporters.[1183] The SEC now revises this estimate to $15,120 to reflect updated information about the number of reporters with affiliated SEC-registered dealers affected by the metrics amendments.[1184]

Importantly, the Positions and Transaction Volumes metrics requirements as amended may reduce costs compared to the reporting requirements under the 2013 rule by limiting the scope of trading desks that must provide the position- and trade-based data that is currently required by the Inventory Turnover and Customer-Facing Trade Ratio metrics. Under the 2013 rule, banking entities are required to calculate and report the Inventory Turnover and the Customer-Facing Trade Ratio metrics for all trading desks engaged in covered trading activity. The final rule would limit the scope of trading desks for which a banking entity would be required to calculate and report the Positions and Transaction Volumes metrics to only those trading desks engaged in market making-related activity or underwriting activity. These burden reductions are captured in the estimates of reporting and recordkeeping burden reductions in section V.F.3.h.i.

Risk Factor Sensitivities, Inventory Aging, and Stress VaR

The final rule eliminates the Risk Factor Sensitivities, Inventory Aging, and Stress VaR metrics of the 2013 rule. As estimated in section V.F.3.h.i, the SEC expects that the metrics amendments, including the elimination of these quantitative metrics requirements, will reduce burdens related to reporting and recordkeeping for Group A entities without adversely affecting the SEC's ability to oversee banking entities for purposes of section 13 of the BHC Act.

The final rule removes the requirement to report Risk Factor Sensitivities metrics, which is expected to reduce burdens related to data manipulation. The SEC understands that reporters may routinely calculate Risk Factor Sensitivities as part of their risk systems. However, the SEC understands that reporters have to routinely summarize large volumes of highly disaggregated Risk Factor Sensitivities from the risk systems for purposes of compliance with the 2013 rule. As discussed in section IV.E.5, the agencies estimate that the removal of Risk Factor Sensitivities may reduce the total volume of data submitted by reporters by more than half.

In addition, the SEC recognizes that one size may not fit all with respect to risk factors. Specifically, different risk factors at various levels of granularity may be relevant for different banking entities, and the Risk Factor Sensitivities may not adequately capture structural differences among the types of risk managed by trading desks in some banking entities.[1185] The SEC also notes that banking entities may already provide information about risk factor sensitivities as part of market risk

[1177] *See, e.g.,* SIFMA and GFMA.

[1178] *Id.*

[1179] *See* IIB; SIFMA and JBA.

[1180] *See, e.g.,* 83 FR at 33541.

[1181] In the Proposing Release, the SEC anticipated that costs associated with the more granular reporting in the Positions and Transaction Volumes metrics will be $8,000 per affiliated group of SEC-regulated banking entities. ($8,000 × 17 reporters × 0.18 SEC-registered banking entity weight) = $24,480.

[1182] $8,000 × 12 reporters × 0.18 SEC-registered banking entity weight = $17,280.

[1183] In that Release, the SEC estimated that the additional costs associated with categorizing transactions under the Transaction Volumes metric will be $7,000 per reporter. ($7,000 × 17 reporters × 0.18 SEC-registered banking entity weight) = $21,420.

[1184] $7,000 × 12 reporters × 0.18 SEC-registered banking entity weight = $15,120.

[1185] *See* SIFMA.

reporting.[1186] As discussed in section IV.E.9.a.i above, the final rule may reduce redundancy in metrics reporting since banking entities would be required to submit one consolidated Internal Limits Information Schedule for the covered trading activity of the entire entity.

The elimination of the Inventory Aging metric in the final rule recognizes the limitations of this metric for SEC's oversight for purposes of section 13 of the BHC Act, the information in the newly required Positions metric, as well as the fact that the notions of inventory and inventory aging are not meaningful indicators of the scale and risk of derivative positions.[1187] The SEC continues to believe that this amendment does not reduce the benefits of metrics reporting, as inventory aging does not enable a clear identification of prohibited proprietary trading or exempt market making, risk-mitigating hedging, or underwriting activities.

The elimination of the Stress VaR metric is expected to reduce burdens related to reporting and recordkeeping for Group A entities, contributing to the estimates of burden reductions in section V.F.3.h.i. The SEC recognizes one commenter's concerns that banking entities may currently face computational challenges, including those related to the determination of the stressed period and dynamic recalibration and that multinational holding companies may use different stress periods for subsidiaries in different jurisdictions.[1188] As discussed above, under the final rule, banking entities would still be required to submit one consolidated Internal Limits Information Schedule for the covered trading activity of the entire entity. The SEC understands that many banking entities do not routinely set Stress VaR limits at the trading desk level but compute Stress VaR at the entity level. Thus, as discussed above, the final rule may alleviate the need for redundant computations and submissions of Stress VaR at the desk level and may reduce the size of electronic submissions. Importantly, the SEC continues to note that eliminating the Stress VaR metric is unlikely to reduce the benefits of metrics reporting, as Stress VaR does not enable the SEC to distinguish between prohibited proprietary trading and permissible market making, risk-mitigating hedging, or underwriting activities of a trading desk.[1189]

Comprehensive Profit and Loss Attribution

The final rule makes two main changes to the Source-of-Revenue Measurements. First, the final rule eliminates the requirement that banking entities calculate and report the volatility of comprehensive profit and loss. Since the volatility of profit and loss can be calculated from other items being reported by the banking entities, the SEC does not believe that this aspect of the final rule would adversely affect the information available for the oversight of entities for the purposes of section 13 of the BHC Act.

Second, the final rule requires banking entities to provide a complete attribution of their profit and loss and, for one or more factors that explain the preponderance of the profit or loss changes due to risk factor changes, banking entities are required to report a unique identification label for the factor and the profit or loss due to the factor change. The SEC recognizes that the Risk Factor Attribution Information Schedule and the new unique identification label reporting requirement may impose additional burdens on reporters. As discussed in section IV.E, the agencies generally expect that the final rule may enable banking entities to leverage compliance with market risk capital programs to meet the final metrics requirements, which may reduce complexity and cost for banking entities and improve the effectiveness of the final rule. The SEC also notes that the final rule also includes an amendment to the trading desk definition, allowing reporters to use the same trading desk and risk factor attribution and risk factor sensitivity hierarchies. At the same time, profit and loss attribution and the identification label may enhance the ability of regulators to connect risk factors that explain a preponderance of the profit or loss changes due to risk factors with a separate Risk Factor Attribution Information Schedule. Thus, these amendments may help enhance the agencies' understanding of the structure of reporters' activity and the nature of their revenue sources.

(3) Trading Desk Information, Quantitative Measurements Identifying Information, and Narrative Statement

As recognized in Appendix A of the 2013 rule, the effectiveness of particular quantitative measurements may differ depending on the profile of a particular trading desk, including the types of instruments traded and trading activities and strategies.[1190] Thus, the additional qualitative information the agencies would collect in the Trading Desk Information and Quantitative Measurements Identifying Information provision may facilitate SEC review and analysis of covered trading activities and reported metrics. For instance, the trading desk description may help the SEC assess the risks associated with a given activity and establish the appropriate frequency and scope of examination of such activity. Having access to such information may allow the agencies to consider the specifics of each trading desk's activities during the reporting period, which may facilitate regulatory oversight.

In addition, under the final rule, banking entities may choose to provide a Narrative Statement that describes any changes in calculation methods used, a description of and reasons for changes in the trading desk structure or trading desk strategies, and when any such change occurred. The Narrative Statement may include any information the banking entity views as relevant for assessing the information reported, such as further description of calculation methods used. The Narrative Statement may provide banking entities with an opportunity to describe and explain unusual aspects of the data or modifications that may have occurred since the last submission, which may facilitate better evaluation of the reported data.

The SEC has received comments opposing the inclusion of additional descriptive information about metrics, including the Trading Desk Information, Narrative Statement, and Quantitative Measurements Identifying Information, as part of amended metrics reporting requirements.[1191] Specifically, a number of commenters indicated that there are few benefits of such qualitative information for the agencies' ability to oversee registrants for purposes of section 13 of the BHC Act.[1192] In addition, some commenters stated that the requirements are costly and burdensome as they vastly expand the scope of information requested.[1193] With respect to the Narrative Statement, one commenter recognized that banking entities currently provide such additional information voluntarily but indicated that the requirement would impose costs on banking entities that are

[1186] *Id.*

[1187] For example, the value of derivatives fluctuates with the price of an underlying asset and the notional amount of the contract, and derivative contracts are routinely amended and terminated prior to expiry. *See also, e.g.,* GFMA, State Street, Data Boiler.

[1188] *See, e.g.,* Data Boiler.

[1189] *See, e.g.,* Goldman Sachs; FSF and Data Boiler.

[1190] *See* 79 FR 5798.

[1191] *See, e.g.,* Credit Suisse; JBA and SIFMA.

[1192] *See* ABA; CCMR; SIFMA and Credit Suisse.

[1193] *See, e.g.,* Credit Suisse and CCMR.

unnecessary given that the agencies may be able to obtain this information through other supervision.[1194] Another commenter indicated that the proposed amendments significantly expanded the scope of the Narrative Statement requirement relative to current voluntary submissions, and that the Narrative Statement may provide little value to the agencies when assessing data submissions for purposes of compliance with the 2013 rule.[1195]

As discussed above, the SEC continues to believe that the Trading Desk Information and Quantitative Measurements Identifying Information may enhance the efficiency of data review by regulators. Three aspects of the final rule address the cost concerns of commenters regarding the proposed Trading Desk, Narrative Statement, and Quantitative Measurements Identifying Information amendments discussed above. First, the final rule would not require reporters to identify the legal entity used as a booking entity by the trading desk, but instead would require the reporting of a list of agencies receiving the submission of the trading desk and the exemptions or exclusions under which the desk conducts trading activity. Second, the final rule would not require reporters to identify products traded by the desk. Third, under the final rule, the submission of the Narrative Statement would be optional for reporters. The SEC believes that these aspects of the qualitative information amendments would mitigate any new burdens related to these requirements while facilitating oversight by the agencies.

However, the SEC recognizes that several proposed schedules in quantitative measurements identifying information may create reporting burdens. As discussed in section IV.E, the final rule does not require reporting of the risk factor sensitivities information schedule, the limit/sensitivity cross-reference schedule, and the risk-factor sensitivity/attribution cross-reference schedule. However, the final rules would require reporting of Risk Factor Attribution Information Schedules and Internal Limits Information Schedules that includes identification of the corresponding risk factor attribution for certain limits, imposing two new schedule requirements relative to the regulatory baseline under the 2013 rule. However, as discussed above, some reporters may currently use the same limits and risk factors for multiple desks, resulting in duplicative reporting of daily limits by multiple desks for a given reporter. To the extent that these reporters may choose to use the two new schedules to submit a comprehensive list of risk and position limits and risk-factor sensitivities, these schedules may reduce duplicative reporting burdens. The agencies have also received comment that the agencies have alternative tools for monitoring banking entity risk (such as the CCAR process) and that the risk factor attribution schedule does not adequately capture differences between risks managed by different trading desks of a banking entity.[1196] The SEC believes that the descriptions of the Internal Limits Information Schedule and Risk Factor Attribution Information Schedule for certain limits may inform oversight of SEC-regulated banking entities affiliated with reporters with respect to their compliance with the requirements of the final rule.

Moreover, the SEC continues to note that all the SEC-regulated entities that currently report metrics are also currently providing certain elements of the Trading Desk Information to the SEC. The SEC continues to believe that the costs associated with preparing the Narrative Statement will depend on the extent to which a banking entity modifies its calculation methods, makes changes to a trading desk's structure or trading strategies, or otherwise has additional information that it views as relevant for assessing the information reported. Preparation of a Narrative Statement is expected to be more of a manual process involving a written description of pertinent issues. However, all but one SEC reporter already provides a narrative with every submission.

In the proposal, the SEC estimated that the proposed Narrative Statement requirement is expected to result in ongoing personnel and monitoring costs of only $1,980.[1197] The agencies have received comment that this estimate of ongoing costs is a significant underestimate, since reporters will need to revise all of their metrics reporting systems and embark on a new round of systems integration with multiple agencies independently.[1198] The commenter indicated that the exercise is not dissimilar from the initial implementation of the 2013 rule's metrics.[1199] Another commenter supported retaining requirements of the 2013 rule since any metrics amendments would require modifications to measurement tools, involving burdens, testing time, and outsourcing costs of development staff.[1200]

The SEC agrees that the final rule will involve one-time costs to transition their systems and transition their compliance architecture to the amended metrics requirements for Group A entities, which are incorporated in the agencies' estimates in section V.B and in the SEC's analysis in section V.F.3.h.i. The SEC notes that its analysis is specific to SEC regulated banking entities and the estimates only represent a fraction of the compliance costs of holding companies allocated to affiliated SEC-regulated banking entities. The SEC also notes that the $1,980 estimate in the proposal was specific to the Narrative Statement requirement for one reporter, rather than the totality of the burdens imposed on registrants from new metrics requirements; and, under the final rule, the submission of the Narrative Statement is optional. Moreover, the SEC anticipates considerable variation in one-time system transition costs among reporters, depending on the size and complexity of their existing trading activity, the number of trading desks per reporter for the purposes of metrics reporting, the way in which reporters may organize reporting and compliance obligations for the purposes of, for instance, the market risk capital rule, and the complexity of their current systems.

However, recognizing the above comments concerning systems changes that all reporters may have to make for the purposes of reporting of qualitative information, the SEC now estimates that the combined one-time systems costs related to the submission of new qualitative information (including Trading Desk Information, Quantitative Measurements Identifying Information, and the optional Narrative Statement) may be as high as $22,500 for SEC-registered entities affiliated with a single Group A metrics reporter[1201] and

[1194] *See* SIFMA.

[1195] *See* Credit Suisse.

[1196] *See, e.g.,* SIFMA.

[1197] The SEC estimates that costs associated with the proposed Narrative Statement will be $11,000 per affiliated group of SEC-regulated banking entities. ($11,000 × 1 reporter × 0.18) = $1,980.

[1198] *See* SIFMA.

[1199] *Id.*

[1200] *See, e.g.,* JBA.

[1201] In Regulation Crowdfunding, the SEC estimated that intermediaries (whether broker-dealers or funding portals) that already have in place platforms and related systems that will need to tailor their existing platform and systems to comply with the requirements of Regulation Crowdfunding may incur an initial average cost of $250,000. *See* 80 FR 71509. Since the qualitative information requirements in the final rule are considerably more limited than the requirements in Regulation Crowdfunding, the SEC estimates that tailoring existing platforms and systems with respect to the qualitative information requirements for metrics reporters may be half as costly as the

Continued

$270,000 for all SEC-registered entities affiliated with all reporters.[1202] If transitioning reporting systems to meet the requirements of the final rule impose one-time costs and IT burdens comparable with those of the metrics requirements of the 2013 rule,[1203] the compliance costs related to the 2013 rule can be used to estimate potential one-time switching costs for some banking entities. In the proposal, the SEC reported an estimate from a market participant incurring approximately $3 million in costs associated with the buildout of new IT infrastructure and system enhancements.[1204] Using this estimate, the one-time costs related to transitioning metrics reporting to comply with the requirements of the final rule may be as high as $540,000 [1205] for SEC-registered dealers affiliated with a single Group A metrics reporter and as high as $6,480,000 [1206] for all SEC-registered entities affiliated with all reporters.

(4) Time to Report

The agencies are amending the time frame for metrics reporting by requiring quarterly reporting for all reporters and extending the timeline for metrics submissions to 30 days following the end of each calendar quarter. The SEC has received comments supporting a move to quarterly reporting [1207] and an extended reporting timeframe for reporters with more than $50 billion in trading assets and liabilities [1208] and stating that such timeframes account for the scale and complexity of profit and loss reconciliations as well as the internal compliance and governance processes of such banking entities. The SEC also notes that, to the extent that the shorter timeframe for submission may result in later resubmissions to correct errors, the increase in time for some reporters may decrease compliance burdens and make the information collection process more efficient.

As estimated in Table 5 of the economic baseline, this amendment would not affect the reporting schedule of four reporters with between $20 billion and $50 billion in trading assets and liabilities and would provide additional flexibility and time to eight reporters with over $50 billion in trading assets and liabilities. In addition to reductions in compliance burdens, the final rule may also involve greater improvements in the number of banking entities reporting on time and in the quality of submissions. As estimated in Panel A of Table 7, approximately 66% of all records submitted by reporters with over $50 billion in trading assets and liabilities are resubmitted to the SEC at least once. In addition, from Panel B of Table 7, the average delay in initial submissions is approximately 2 days. The SEC notes that in addition to resulting in potentially higher quality submissions with fewer resubmissions, under the final rule the agencies may not receive the information as promptly. However, the SEC will continue to have access to quantitative metrics and related information through the standard examination and review process and existing recordkeeping requirements.

(5) XML Format

The agencies are requiring banking entities to submit the Trading Desk Information, the Quantitative Measurements Identifying Information, and each applicable quantitative measurement in accordance with the XML Schema specified and published on the relevant agency's website.[1209] Under the 2013 rule, the metrics are not required to be reported in a structured format, and banking entities are currently reporting quantitative measurement data electronically. In the proposal, the SEC noted that, on the basis of discussions with metrics reporters, most of these entities indicated a familiarity with XML, and further, several indicated that they use XML internally for other reporting purposes. In addition, banks currently submit quarterly Reports of Condition and Income (''Call Reports'') to the Federal Financial Institutions Examination Council (''FFIEC'') Central Data Repository in eXtensible Business Reporting Language (''XBRL'') format, an XML-based reporting language, so they are generally familiar with the processes and technology for submitting regulatory reports in a structured data format. The SEC believes that familiarity with these practices at the bank level will facilitate the implementation of these practices for SEC registrants. Furthermore, FINRA requires its member broker-dealers to file their FOCUS Reports in a structured format through its eFOCUS system.[1210] The eFOCUS system permits broker-dealers to import the FOCUS Report data into a filing using an Excel, XML, or text file. Therefore, the SEC continues to believe that SEC-regulated dealers covered by the metrics reporting and recordkeeping requirements may have experience applying the XML format to their data.

Reporting metrics and other information in XML allows data to be tagged, which in turn identifies the content of the underlying information. The data then becomes instantly machine readable through the use of standard software. Requiring banking entities to submit the metrics in accordance with the XML Schema would enhance the agencies' ability to process and analyze the data. Once the data is in a structured format, it can be easily organized for viewing, manipulation, and analysis through the use of commonly used software tools and applications. Structured data can allow the agencies to discern patterns from large quantities of information much more easily than unstructured data. The SEC continues to believe that structured data also facilitates the ability to dynamically search, aggregate, and compare information across submissions, whether within a banking entity, across multiple banking entities, or across multiple date ranges. The data supplied in a structured format could help the SEC identify outliers or trends that could warrant further investigation.

Specifying the format in which banking entities must report information may help ensure that the agencies receive consistently comparable information in an efficient manner across banking entities. The costs associated with providing XML data lie in the specialized software or services required to make the submission and the time required to map the required data elements to the requisite taxonomy. In addition to enhanced viewing, manipulation, and analysis, the benefits associated with providing XML data lie in the enhanced validation tools that minimize the likelihood that data are reported with errors. Therefore, subsequent reporting periods may require fewer resources, relative to both initial reporting periods under the final rule and the current reporting process.

In the proposal, the SEC recognized that, as a result of the proposed amendments, banking entities will be

cost estimate in Regulation Crowdfunding. $250,000 × 0.5 × 0.18 = $22,500.

[1202] $22,500 × 12 reporters = $270,000.

[1203] *See* SIFMA.

[1204] *Id.*

[1205] $3 million × 0.18 × 1 reporter = $540,000.

[1206] $540,000 × 12 reporters = $6,480,000.

[1207] *See, e.g.,* SIFMA.

[1208] *See, e.g.,* Goldman Sachs; Credit Suisse and FSF.

[1209] XML is an open standard, meaning that it is a technological standard that is widely available to the public at no cost. XML is also widely used across the industry.

[1210] For example, FINRA members commonly use FINRA's Web EFT system, which requires that all data be submitted in XML. *See http://www.finra.org/industry/web-crd/web-eft-schema-documentation-and-schema-files. Also see* 81 FR 49499. Information about FINRA's eFOCUS system is available at *http://www.finra.org/industry/focus.*

required to establish and implement systems in accordance with the XML Schema that will result in one-time costs and estimated such costs at an average of $75,000 [1211] per reporter, for an expected aggregate one-time cost of approximately $229,500 for all SEC registrants.[1212]

The agencies received several comments regarding the costs of transitioning to metrics reporting in an XML format. Some commenters indicated that they did not support the amendment as it would increase costs related to switching formats of reporting software and systems and supported the retention of existing (.DAT) format used for submissions but did not provide any quantification for the costs of switching to the .XML format.[1213] Other commenters generally supported metrics reporting in a standardized data format and the proposed transition to XML reporting.[1214] One commenter indicated that the transition to XML reporting of metrics will require significant switching costs and that there will also be ongoing costs because of potential changes to the XML schema or the underlying information to which the XML schema relates over time.[1215] Another commenter supported the XML reporting format and estimated that reporters would incur a one-time switching cost related to equipment, systems, training, and staffing or maintenance of $40,000 per banking entity.[1216]

The SEC continues to estimate that each reporter may incur a one-time switching cost of up to $75,000 but is adjusting the total aggregate reporting costs to reflect an updated count of metrics reporters with affiliated SEC-registered banking entities. As discussed in the economic baseline, using data from March 2018 through March 2019, the SEC estimates that 12 reporters with trading assets and liabilities in excess of $20 billion may be subject to the final metrics reporting amendments, resulting in an aggregate estimate of a one-time switching cost of $162,000 for all SEC registrants.[1217] Moreover, since the final rule involves a single one-time change to the reporting format, the SEC continues to believe that SEC-regulated banking entities will not incur significant ongoing costs from this aspect of the final rule. Moreover, the SEC continues to believe that XML reporting will result in a more efficient submission process, including validation of submissions, and anticipates that some of the implementation costs may be offset over time by these greater efficiencies.

ii. Competition, Efficiency, and Capital Formation

Under the amendments, entities that have between $10 and $20 billion in trading assets and liabilities would incur lower costs of compliance as they would no longer be subject to metrics requirements. To the extent that these compliance burdens may be significant for some entities, and since Group B entities are not subject to any metrics requirements, Group A entities close to the threshold may become more competitive with Group B entities. To the extent that some entities are currently experiencing significant metrics-reporting costs and partially or fully passing them along to customers in the form of reduced willingness to transact or higher costs, the final rule may reduce costs of and increase access to capital. However, estimated reporting and recordkeeping burden savings resulting from the final rule are relatively modest, and the SEC does not anticipate a substantial increase in access to capital as a result of the final rule to metrics reporting requirements.

iii. Alternatives

The agencies could have taken several alternative approaches. First, the agencies could have kept the metrics being reported unchanged, but increased or decreased the trading activity thresholds used to determine metrics recordkeeping and reporting by filers and the frequency of such reporting. For instance, the agencies could have used the $10 billion trading activity threshold as proposed. As shown in Table 2, the SEC estimates that this alternative would affect nine bank-affiliated SEC-registered broker-dealers. The alternative would increase the amount and frequency of quantitative data available for regulatory oversight of banking entities. However, under the alternative, these dealers would be required to keep or report metrics, experiencing higher compliance burdens. Similarly, increasing the recordkeeping and reporting thresholds would reduce the scope of application of the metrics reporting requirement, lowering accompanying recordkeeping and reporting obligations as well as potential oversight and supervision benefits. The SEC continues to recognize that while metrics may be used to flag risks and enhance general supervision, as well as demonstrate prudent risk management, metrics being reported under the 2013 rule do not clearly distinguish proprietary trading from market making or hedging activities.

In addition, the agencies could have eliminated the VaR requirement [1218] or replaced VaR with Expected Shortfall [1219] as a potentially better measure of tail risk of a trading desk or banking entity.[1220] The SEC recognizes that VaR and Expected Shortfall are normally based on firm-wide activity, and some entities may not be routinely using such measures to manage and control risk at the trading desk level. As a result, VaR, or Expected Shortfall limits may not be meaningful at the trading desk level. These alternatives

---

[1211] These cost estimates were based in part on the SEC's recent estimates of the one-time systems costs associated with the proposed requirement that security-based swap data repositories (SDRs) make transaction-level security-based swap data available to the SEC in Financial products Markup Language (FpML) and Financial Information eXchange Markup Language (FIXML). *See* Establishing the Form and Manner with which Security-Based Swap Data Repositories Must Make Security-Based Swap Data Available to the Commission, Exchange Act Release No. 76624 (Dec. 11, 2015), 80 FR 79757 (Dec. 23, 2015) (SBS Taxonomy rule proposing release). The SBS Taxonomy rule proposing release estimates a one-time cost per SDR of $127,000. Although the substance of reporting associated with the metrics is different from the information collected and made available by SDRs, in the Proposing Release, the SEC stated that similar costs may apply to the implementation of XML for the reporting metrics. In particular, on the basis of its experience with similar structured data reporting requirements in other contexts (*e.g.,* the SBS Taxonomy rule), the SEC expected that systems engineering fixed costs will represent the bulk of the costs related to the XML requirement. Among other things, the proposed SBS Taxonomy rule would require SDRs to make available to the SEC in a specific format (in this case, FpML or FIXML) transaction-level data that they are already required to provide. Similarly, in the Proposing Release, the SEC noted that the proposed metrics amendments would require banking entities to produce in XML metrics reports that they are already required (or will be required) to provide. However, the SEC's estimate was reduced to account for the fact that registered broker-dealers already provide eFOCUS reports to FINRA in XML and, therefore, must have the requisite systems in place. The SEC's cost estimates at proposal included responsibilities for modifications of information technology systems to an attorney, a compliance Manager, a programmer analyst, and a senior business analyst and responsibilities for policies and procedures to an attorney, a compliance Manager, a senior systems analyst, and an operations specialist.

[1212] In the Proposing Release, the SEC computed total costs as follows: $75,000 × 17 reporters × 0.18 entity weight = $229,500.

[1213] *See, e.g.,* JBA and Credit Suisse.

[1214] *See, e.g.,* Goldman Sachs and Data Boiler.

[1215] *See* SIFMA.

[1216] *See* Data Boiler.

[1217] $75,000 × 12 reporters × 0.18 entity weight = $162,000.

[1218] *See, e.g.,* Goldman Sachs.

[1219] Expected Shortfall is an estimate of the expected value of losses beyond a given confidence level and is generally calculated as the area under the probability distribution of asset or portfolio returns in the left tail. For an expected shortfall at the 99 percent confidence level, the measure would capture the area under the probability distribution from the 99th percentile to the 100th percentile. *See* Saunders and Cornett (2014), pp. 458–461.

[1220] *See, e.g.,* Data Boiler.

may reduce the burden of reporting and compliance costs relative to the approach being adopted without necessarily reducing the effectiveness of regulatory oversight by the SEC. In addition, VaR and Expected Shortfall may not be informative about banking entity compliance with section 13 of the BHC Act but may help agencies understand the tail risk of supervised entities as a part of ongoing oversight and supervision.

The agencies could have required all Group A banking entities to report metrics on a monthly basis within 20 days of the end of the calendar month. The SEC believes that this alternative would have two partly offsetting effects relative to the baseline. First, the reporters with more than $50 billion in trading assets and liabilities, which are required to report metrics monthly and within 10 days of the end of each calendar month under the 2013 rule, would, under the alternative, have 20 days after the end of each calendar month to report metrics. As estimated in Table 5 of the economic baseline, this aspect of the alternative would affect eight reporters with SEC-registered affiliated banking entities. Second, reporters with more than $20 billion but less than $50 billion in trading assets and liabilities are required to report metrics on a quarterly basis and have 30 days after the end of reach calendar month to do so under the 2013 rule. Under the alternative, these reporters would be required to report on a monthly basis and would have 10 fewer days to do so, relative to the baseline. As estimated in Table 5, this aspect of the alternative would affect four reporters with SEC-registered affiliated banking entities. Thus, the effects of the alternative on the compliance costs and resubmissions of data, as well on changes to the timeliness of data available to the SEC, would likely to be partly offsetting for these two groups of reporters.

The SEC recognizes that the alternative would increase how promptly the SEC receives data from some SEC-registered banking entities relative to the baseline and the final rule. However, more frequent reporting may also decrease the quality of submissions and the need for resubmissions by some SEC-registered banking entities. In addition, because processes enabling more frequent reporting under tight deadlines may generally be costlier, the alternative would result in even smaller reductions in compliance costs for reporters.

The agencies could have eliminated all quantitative metrics recordkeeping and reporting requirements under Appendix A of the 2013 rule.[1221] Alternatively, the agencies could have eliminated all quantitative metrics except for Risk Management and Source of Revenue Metrics.[1222] The SEC recognizes that these alternatives would reduce the amount of data produced and transmitted to the agencies. Metrics reporting enables regulators to have a more complete picture of risk exposures from trading and profit and loss attribution for supervised entities. However, the metrics reporting regime is costly, and banking entities subject to the 2013 rule and SEC oversight are also subject to other compliance and reporting requirements unrelated to the 2013 rule, as well as the standard examination and review process. It is not clear that metrics are superior to internal quantitative risk measurements or other data (such as metrics in the FOCUS reports) reported by SEC-registered broker-dealers in illustrating risk exposures and profitability of various activities by SEC registrants. As previously noted, metrics—such as VaR, dealer inventory, transaction volume, and profit and loss attribution—do not delineate a prohibited proprietary trade and a permitted market making, underwriting or hedging trade. In addition, reporting at the trading desk level may obscure potential prohibited proprietary trades since a banking entity could attempt to accumulate large proprietary trading exposures by allocating them to a large number of trading desks and comingling these proprietary positions with customer facilitation positions for reporting purposes. For example, as can be seen from Table 6 of the economic baseline, reporters across various trading assets and liabilities thresholds currently report metrics for an average or 38 to 56 trading desks. Moreover, reporters' flexibility in defining the metrics may reduce their comparability. The SEC continues to recognize that metrics do not delineate a prohibited proprietary trade and a permitted market making, underwriting or hedging trade, but they may be used to enhance regulatory oversight. The SEC notes that reporters are already currently subject to a large number of reporting obligations unrelated to section 13 of the BHC Act, such as those under the Market Risk Capital rule and Form FOCUS reporting requirements, providing large volumes of distinct data that can be used to flag risks and enhance general supervision. However, as discussed above, the SEC recognizes that metrics may have value for ongoing oversight, and the final rule tailors and streamlines metrics reporting requirements rather than eliminating all metrics as a whole.

[1221] *See* New England Council.

[1222] *See, e.g.,* New England Council and State Street.

As discussed elsewhere in this supplementary information, the final rule has a compliance date of January 1, 2021, while enabling early voluntary compliance with the final rule (subject to the agencies' completion of necessary technological changes). This approach recognizes the heterogeneity in the existing compliance burdens related to the 2013 rule and in the one-time burdens and time costs that different banking entities may incur as a result of transitioning their compliance programs, while preserving continuity of metrics reporting and agency oversight. The SEC has considered alternative approaches adopting more (or less) delayed compliance dates and disallowing voluntary early compliance with some aspects of the final rule. Such alternatives would provide more (or less) time to transition their compliance programs and adapt reporting systems to the requirements of the final rule. Moreover, as discussed elsewhere in this economic analysis, the SEC continues to believe that the final rule may result in significant burden reductions for some banking entities. Alternatives disallowing early voluntary compliance would delay the benefits of such burden reductions for the most affected banking entities.

G. Congressional Review Act

For the SEC, the Office of Information and Regulatory Affairs, pursuant to the Congressional Review Act (CRA), has designated this rule as a ''major rule'' as defined by 5 U.S.C. 804(2). For the FDIC and OCC, the Office of Information and Regulatory Affairs, pursuant to the CRA, has designated this rule as not a ''major rule.''

List of Subjects

12 CFR Part 44

Banks, Banking, Compensation, Credit, Derivatives, Government securities, Insurance, Investments, National banks, Penalties, Reporting and recordkeeping requirements, Risk, Risk retention, Securities, Trusts and trustees.

12 CFR Part 248

Administrative practice and procedure, Banks, Banking, Conflict of interests, Credit, Foreign banking, Government securities, Holding companies, Insurance, Insurance companies, Investments, Penalties, Reporting and recordkeeping requirements, Securities, State nonmember banks, State savings associations, Trusts and trustees.

12 CFR Part 351

Banks, Banking, Conflicts of interest, Credit, Government securities, Insurance, Insurance companies, Investments, Penalties, Reporting and recordkeeping requirements, Securities, Trusts and trustees.

17 CFR Part 75

Banks, Banking, Compensation, Credit, Derivatives, Federal branches and agencies, Federal savings associations, Government securities, Hedge funds, Insurance, Investments, National banks, Penalties, Proprietary trading, Reporting and recordkeeping requirements, Risk, Risk retention, Securities, Swap dealers, Trusts and trustees, Volcker rule.

17 CFR Part 255

Banks, Brokers, Dealers, Investment advisers, Recordkeeping, Reporting, Securities.

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Chapter I

Authority and Issuance

For the reasons stated in the Common Preamble, the Office of the Comptroller of the Currency amends chapter I of Title 12, Code of Federal Regulations as follows:

PART 44—PROPRIETARY TRADING AND CERTAIN INTERESTS IN AND RELATIONSHIPS WITH COVERED FUNDS

■ 1. The authority citation for part 44 continues to read as follows:

Authority: 7 U.S.C. 27 *et seq.,* 12 U.S.C. 1, 24, 92a, 93a, 161, 1461, 1462a, 1463, 1464, 1467a, 1813(q), 1818, 1851, 3101 3102, 3108, 5412.

Subpart A—Authority and Definitions

■ 2. Section 44.2 is revised to read as follows:

§ 44.2 Definitions.

Unless otherwise specified, for purposes of this part:

(a) *Affiliate* has the same meaning as in section 2(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(k)).

(b) *Bank holding company* has the same meaning as in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

(c) *Banking entity.* (1) Except as provided in paragraph (c)(2) of this section, *banking entity* means:

(i) Any insured depository institution;

(ii) Any company that controls an insured depository institution;

(iii) Any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(iv) Any affiliate or subsidiary of any entity described in paragraph (c)(1)(i), (ii), or (iii) of this section.

(2) Banking entity does not include:

(i) A covered fund that is not itself a banking entity under paragraph (c)(1)(i), (ii), or (iii) of this section;

(ii) A portfolio company held under the authority contained in section 4(k)(4)(H) or (I) of the BHC Act (12 U.S.C. 1843(k)(4)(H), (I)), or any 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), so long as the portfolio company or portfolio concern is not itself a banking entity under paragraph (c)(1)(i), (ii), or (iii) of this section; or

(iii) The FDIC acting in its corporate capacity or as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(d) *Board* means the Board of Governors of the Federal Reserve System.

(e) *CFTC* means the Commodity Futures Trading Commission.

(f) *Dealer* has the same meaning as in section 3(a)(5) of the Exchange Act (15 U.S.C. 78c(a)(5)).

(g) *Depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(h) *Derivative.* (1) Except as provided in paragraph (h)(2) of this section, *derivative* means:

(i) Any swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68));

(ii) Any purchase or sale of a commodity, that is not an excluded commodity, for deferred shipment or delivery that is intended to be physically settled;

(iii) Any foreign exchange forward (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)) or foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25));

(iv) Any agreement, contract, or transaction in foreign currency described in section 2(c)(2)(C)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(C)(i));

(v) Any agreement, contract, or transaction in a commodity other than foreign currency described in section 2(c)(2)(D)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(D)(i)); and

(vi) Any transaction authorized under section 19 of the Commodity Exchange Act (7 U.S.C. 23(a) or (b));

(2) A derivative does not include:

(i) Any consumer, commercial, or other agreement, contract, or transaction that the CFTC and SEC have further defined by joint regulation, interpretation, or other action as not within the definition of swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)); or

(ii) Any identified banking product, as defined in section 402(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b)), that is subject to section 403(a) of that Act (7 U.S.C. 27a(a)).

(i) *Employee* includes a member of the immediate family of the employee.

(j) *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(k) *Excluded commodity* has the same meaning as in section 1a(19) of the Commodity Exchange Act (7 U.S.C. 1a(19)).

(l) *FDIC* means the Federal Deposit Insurance Corporation.

(m) *Federal banking agencies* means the Board, the Office of the Comptroller of the Currency, and the FDIC.

(n) *Foreign banking organization* has the same meaning as in § 211.21(o) of the Board's Regulation K (12 CFR 211.21(o)), but does not include a foreign bank, as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(7)), that is organized under the laws of the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, or the Commonwealth of the Northern Mariana Islands.

(o) *Foreign insurance regulator* means the insurance commissioner, or a similar official or agency, of any country other than the United States that is engaged in the supervision of insurance companies under foreign insurance law.

(p) *General account* means all of the assets of an insurance company except those allocated to one or more separate accounts.

(q) *Insurance company* means a company that is organized as an insurance company, primarily and predominantly engaged in writing insurance or reinsuring risks underwritten by insurance companies, subject to supervision as such by a state insurance regulator or a foreign insurance regulator, and not operated for the purpose of evading the provisions of section 13 of the BHC Act (12 U.S.C. 1851).

(r) *Insured depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)), but does not include:

(1) An insured depository institution that is described in section 2(c)(2)(D) of the BHC Act (12 U.S.C. 1841(c)(2)(D)); or

(2) An insured depository institution if it has, and if every company that controls it has, total consolidated assets of $10 billion or less and total trading assets and trading liabilities, on a consolidated basis, that are 5 percent or less of total consolidated assets.

(s) *Limited trading assets and liabilities* means with respect to a banking entity that:

(1)(i) The banking entity has, together with its affiliates and subsidiaries, trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 44.6(a)(1) and (2) of subpart B) the average gross sum of which over the previous consecutive four quarters, as measured as of the last day of each of the four previous calendar quarters, is less than $1 billion; and

(ii) The OCC has not determined pursuant to § 44.20(g) or (h) of this part that the banking entity should not be treated as having limited trading assets and liabilities.

(2) With respect to a banking entity other than a banking entity described in paragraph (s)(3) of this section, trading assets and liabilities for purposes of this paragraph (s) means trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 44.6(a)(1) and (2) of subpart B) on a worldwide consolidated basis.

(3)(i) With respect to a banking entity that is a foreign banking organization or a subsidiary of a foreign banking organization, trading assets and liabilities for purposes of this paragraph (s) means the trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 44.6(a)(1) and (2) of subpart B) of the combined U.S. operations of the top-tier foreign banking organization (including all subsidiaries, affiliates, branches, and agencies of the foreign banking organization operating, located, or organized in the United States).

(ii) For purposes of paragraph (s)(3)(i) of this section, a U.S. branch, agency, or subsidiary of a banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary. For purposes of paragraph (s)(3)(i) of this section, all foreign operations of a U.S. agency, branch, or subsidiary of a foreign banking organization are considered to be located in the United States, including branches outside the United States that are managed or controlled by a U.S. branch or agency of the foreign banking organization, for purposes of calculating the banking entity's U.S. trading assets and liabilities.

(t) *Loan* means any loan, lease, extension of credit, or secured or unsecured receivable that is not a security or derivative.

(u) *Moderate trading assets and liabilities* means, with respect to a banking entity, that the banking entity does not have significant trading assets and liabilities or limited trading assets and liabilities.

(v) *Primary financial regulatory agency* has the same meaning as in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5301(12)).

(w) *Purchase* includes any contract to buy, purchase, or otherwise acquire. For security futures products, purchase includes any contract, agreement, or transaction for future delivery. With respect to a commodity future, purchase includes any contract, agreement, or transaction for future delivery. With respect to a derivative, purchase includes the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(x) *Qualifying foreign banking organization* means a foreign banking organization that qualifies as such under § 211.23(a), (c), or (e) of the Board's Regulation K (12 CFR 211.23(a), (c), or (e)).

(y) *SEC* means the Securities and Exchange Commission.

(z) *Sale* and *sell* each include any contract to sell or otherwise dispose of. For security futures products, such terms include any contract, agreement, or transaction for future delivery. With respect to a commodity future, such terms include any contract, agreement, or transaction for future delivery. With respect to a derivative, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(aa) *Security* has the meaning specified in section 3(a)(10) of the Exchange Act (15 U.S.C. 78c(a)(10)).

(bb) *Security-based swap dealer* has the same meaning as in section 3(a)(71) of the Exchange Act (15 U.S.C. 78c(a)(71)).

(cc) *Security future* has the meaning specified in section 3(a)(55) of the Exchange Act (15 U.S.C. 78c(a)(55)).

(dd) *Separate account* means an account established and maintained by an insurance company in connection with one or more insurance contracts to hold assets that are legally segregated from the insurance company's other assets, under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(ee) *Significant trading assets and liabilities* means with respect to a banking entity that:

(1)(i) The banking entity has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which over the previous consecutive four quarters, as measured as of the last day of each of the four previous calendar quarters, equals or exceeds $20 billion; or

(ii) The OCC has determined pursuant to § 44.20(h) of this part that the banking entity should be treated as having significant trading assets and liabilities.

(2) With respect to a banking entity, other than a banking entity described in paragraph (ee)(3) of this section, trading assets and liabilities for purposes of this paragraph (ee) means trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 44.6(a)(1) and (2) of subpart B) on a worldwide consolidated basis.

(3)(i) With respect to a banking entity that is a foreign banking organization or a subsidiary of a foreign banking organization, trading assets and liabilities for purposes of this paragraph (ee) means the trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 44.6(a)(1) and (2) of subpart B) of the combined U.S. operations of the top-tier foreign banking organization (including all subsidiaries, affiliates, branches, and agencies of the foreign banking organization operating, located, or organized in the United States as well as branches outside the United States that are managed or controlled by a branch or agency of the foreign banking entity operating, located or organized in the United States).

(ii) For purposes of paragraph (ee)(3)(i) of this section, a U.S. branch, agency, or subsidiary of a banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary. For purposes of paragraph (ee)(3)(i) of this section, all foreign operations of a U.S. agency, branch, or subsidiary of a foreign banking organization are considered to be located in the United States for purposes of calculating the banking entity's U.S. trading assets and liabilities.

(ff) *State* means any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(gg) *Subsidiary* has the same meaning as in section 2(d) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(d)).

(hh) *State insurance regulator* means the insurance commissioner, or a similar official or agency, of a State that is engaged in the supervision of insurance companies under State insurance law.

(ii) *Swap dealer* has the same meaning as in section 1(a)(49) of the Commodity Exchange Act (7 U.S.C. 1a(49)).

Subpart B—Proprietary Trading

■ 3. Section 44.3 is amended by:
■ a. Revising paragraphs (b), (d)(3), and (d)(8) and (9);
■ b. Adding paragraphs (d)(10) through (13);
■ c. Redesignating paragraphs (e)(5) through (13) as paragraphs (e)(6) through (14);
■ d. Adding new paragraph (e)(5); and
■ e. Revising newly redesignated paragraphs (e)(11), (12), and (14).

The revisions and additions read as follows:

§ 44.3 Prohibition on proprietary trading.

* * * * *

(b) *Definition of trading account.* (1) *Trading account.* Trading account means:

(i) Any account that is used by a banking entity to purchase or sell one or more financial instruments principally for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging one or more of the positions resulting from the purchases or sales of financial instruments described in this paragraph;

(ii) Any account that is used by a banking entity to purchase or sell one or more financial instruments that are both market risk capital rule covered positions and trading positions (or hedges of other market risk capital rule covered positions), if the banking entity, or any affiliate with which the banking entity is consolidated for regulatory reporting purposes, calculates risk-based capital ratios under the market risk capital rule; or

(iii) Any account that is used by a banking entity to purchase or sell one or more financial instruments, if the banking entity:

(A) Is licensed or registered, or is required to be licensed or registered, to engage in the business of a dealer, swap dealer, or security-based swap dealer, to the extent the instrument is purchased or sold in connection with the activities that require the banking entity to be licensed or registered as such; or

(B) Is engaged in the business of a dealer, swap dealer, or security-based swap dealer outside of the United States, to the extent the instrument is purchased or sold in connection with the activities of such business.

(2) *Trading account application for certain banking entities.* (i) A banking entity that is subject to paragraph (b)(1)(ii) of this section in determining the scope of its trading account is not subject to paragraph (b)(1)(i) of this section.

(ii) A banking entity that does not calculate risk-based capital ratios under the market risk capital rule and is not a consolidated affiliate for regulatory reporting purposes of a banking entity that calculates risk based capital ratios under the market risk capital rule may elect to apply paragraph (b)(1)(ii) of this section in determining the scope of its trading account as if it were subject to that paragraph. A banking entity that elects under this section to apply paragraph (b)(1)(ii) of this section in determining the scope of its trading account as if it were subject to that paragraph is not required to apply paragraph (b)(1)(i) of this section.

(3) *Consistency of account election for certain banking entities.* (i) Any election or change to an election under paragraph (b)(2)(ii) of this section must apply to the electing banking entity and all of its wholly owned subsidiaries. The primary financial regulatory agency of a banking entity that is affiliated with but is not a wholly owned subsidiary of such electing banking entity may require that the banking entity be subject to this uniform application requirement if the primary financial regulatory agency determines that it is necessary to prevent evasion of the requirements of this part after notice and opportunity for response as provided in subpart D of this part.

(ii) A banking entity that does not elect under paragraph (b)(2)(ii) of this section to be subject to the trading account definition in (b)(1)(ii) of this section may continue to apply the trading account definition in paragraph (b)(1)(i) of this section for one year from the date on which it becomes, or becomes a consolidated affiliate for regulatory reporting purposes with, a banking entity that calculates risk-based capital ratios under the market risk capital rule.

(4) *Rebuttable presumption for certain purchases and sales.* The purchase (or sale) of a financial instrument by a banking entity shall be presumed not to be for the trading account of the banking entity under paragraph (b)(1)(i) of this section if the banking entity holds the financial instrument for sixty days or longer and does not transfer substantially all of the risk of the financial instrument within sixty days of the purchase (or sale).

* * * * *

(d) * * *

(3) Any purchase or sale of a security, foreign exchange forward (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)), foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25)), or cross-currency swap by a banking entity for the purpose of liquidity management in accordance with a documented liquidity management plan of the banking entity that:

(i) Specifically contemplates and authorizes the particular financial instruments to be used for liquidity management purposes, the amount, types, and risks of these financial instruments that are consistent with liquidity management, and the liquidity circumstances in which the particular financial instruments may or must be used;

(ii) Requires that any purchase or sale of financial instruments contemplated and authorized by the plan be principally for the purpose of managing the liquidity of the banking entity, and not for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging a position taken for such short-term purposes;

(iii) Requires that any financial instruments purchased or sold for liquidity management purposes be highly liquid and limited to financial instruments the market, credit, and other risks of which the banking entity does not reasonably expect to give rise to appreciable profits or losses as a result of short-term price movements;

(iv) Limits any financial instruments purchased or sold for liquidity management purposes, together with any other financial instruments purchased or sold for such purposes, to an amount that is consistent with the banking entity's near-term funding needs, including deviations from normal operations of the banking entity or any affiliate thereof, as estimated and documented pursuant to methods specified in the plan;

(v) Includes written policies and procedures, internal controls, analysis, and independent testing to ensure that the purchase and sale of financial instruments that are not permitted under § 44.6(a) or (b) of this subpart are for the purpose of liquidity management and in accordance with the liquidity management plan described in this paragraph (d)(3); and

(vi) Is consistent with the OCC's regulatory requirements regarding liquidity management;

* * * * *

(8) Any purchase or sale of one or more financial instruments by a banking entity through a deferred compensation, stock-bonus, profit-sharing, or pension plan of the banking entity that is established and administered in accordance with the law of the United States or a foreign sovereign, if the purchase or sale is made directly or indirectly by the banking entity as trustee for the benefit of persons who are or were employees of the banking entity;

(9) Any purchase or sale of one or more financial instruments by a banking entity in the ordinary course of collecting a debt previously contracted in good faith, provided that the banking entity divests the financial instrument as soon as practicable, and in no event may the banking entity retain such instrument for longer than such period permitted by the OCC;

(10) Any purchase or sale of one or more financial instruments that was made in error by a banking entity in the course of conducting a permitted or excluded activity or is a subsequent transaction to correct such an error;

(11) Contemporaneously entering into a customer-driven swap or customer-driven security-based swap and a matched swap or security-based swap if:

(i) The banking entity retains no more than minimal price risk; and

(ii) The banking entity is not a registered dealer, swap dealer, or security-based swap dealer;

(12) Any purchase or sale of one or more financial instruments that the banking entity uses to hedge mortgage servicing rights or mortgage servicing assets in accordance with a documented hedging strategy; or

(13) Any purchase or sale of a financial instrument that does not meet the definition of trading asset or trading liability under the applicable reporting form for a banking entity as of January 1, 2020.

(e) * * *

(5) *Cross-currency swap* means a swap in which one party exchanges with another party principal and interest rate payments in one currency for principal and interest rate payments in another currency, and the exchange of principal occurs on the date the swap is entered into, with a reversal of the exchange of principal at a later date that is agreed upon when the swap is entered into.

* * * * *

(11) *Market risk capital rule covered position and trading position* means a financial instrument that meets the criteria to be a covered position and a trading position, as those terms are respectively defined, without regard to whether the financial instrument is reported as a covered position or trading position on any applicable regulatory reporting forms:

(i) In the case of a banking entity that is a bank holding company, savings and loan holding company, or insured depository institution, under the market risk capital rule that is applicable to the banking entity; and

(ii) In the case of a banking entity that is affiliated with a bank holding company or savings and loan holding company, other than a banking entity to which a market risk capital rule is applicable, under the market risk capital rule that is applicable to the affiliated bank holding company or savings and loan holding company.

(12) *Market risk capital rule* means the market risk capital rule that is contained in 12 CFR part 3, subpart F, with respect to a banking entity for which the OCC is the primary financial regulatory agency, 12 CFR part 217 with respect to a banking entity for which the Board is the primary financial regulatory agency, or 12 CFR part 324 with respect to a banking entity for which the FDIC is the primary financial regulatory agency.

* * * * *

(14) *Trading desk* means a unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof that is:

(i)(A) Structured by the banking entity to implement a well-defined business strategy;

(B) Organized to ensure appropriate setting, monitoring, and management review of the desk's trading and hedging limits, current and potential future loss exposures, and strategies; and

(C) Characterized by a clearly defined unit that:

(*1*) Engages in coordinated trading activity with a unified approach to its key elements;

(*2*) Operates subject to a common and calibrated set of risk metrics, risk levels, and joint trading limits;

(*3*) Submits compliance reports and other information as a unit for monitoring by management; and

(*4*) Books its trades together; or

(ii) For a banking entity that calculates risk-based capital ratios under the market risk capital rule, or a consolidated affiliate for regulatory reporting purposes of a banking entity that calculates risk-based capital ratios under the market risk capital rule, established by the banking entity or its affiliate for purposes of market risk capital calculations under the market risk capital rule.

■ 4. Section 44.4 is revised to read as follows:

§ 44.4 Permitted underwriting and market making-related activities.

(a) *Underwriting activities*—(1) *Permitted underwriting activities.* The prohibition contained in § 44.3(a) does not apply to a banking entity's underwriting activities conducted in accordance with this paragraph (a).

(2) *Requirements.* The underwriting activities of a banking entity are permitted under paragraph (a)(1) of this section only if:

(i) The banking entity is acting as an underwriter for a distribution of securities and the trading desk's underwriting position is related to such distribution;

(ii)(A) The amount and type of the securities in the trading desk's underwriting position are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, taking into account the liquidity, maturity, and depth of the market for the relevant types of securities; and

(B) Reasonable efforts are made to sell or otherwise reduce the underwriting position within a reasonable period, taking into account the liquidity, maturity, and depth of the market for the relevant types of securities;

(iii) In the case of a banking entity with significant trading assets and liabilities, the banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of paragraph (a) of this section, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The products, instruments or exposures each trading desk may purchase, sell, or manage as part of its underwriting activities;

(B) Limits for each trading desk, in accordance with paragraph (a)(2)(ii)(A) of this section;

(C) Written authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval; and

(D) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits.

(iv) A banking entity with significant trading assets and liabilities may satisfy the requirements in paragraphs (a)(2)(iii)(B) and (C) of this section by complying with the requirements set forth in paragraph (c) of this section;

(v) The compensation arrangements of persons performing the activities described in this paragraph (a) are designed not to reward or incentivize prohibited proprietary trading; and

(vi) The banking entity is licensed or registered to engage in the activity described in this paragraph (a) in accordance with applicable law.

(3) *Definition of distribution.* For purposes of this paragraph (a), a distribution of securities means:

(i) An offering of securities, whether or not subject to registration under the Securities Act of 1933, that is distinguished from ordinary trading transactions by the presence of special selling efforts and selling methods; or

(ii) An offering of securities made pursuant to an effective registration statement under the Securities Act of 1933.

(4) *Definition of underwriter.* For purposes of this paragraph (a), *underwriter* means:

(i) A person who has agreed with an issuer or selling security holder to:

(A) Purchase securities from the issuer or selling security holder for distribution;

(B) Engage in a distribution of securities for or on behalf of the issuer or selling security holder; or

(C) Manage a distribution of securities for or on behalf of the issuer or selling security holder; or

(ii) A person who has agreed to participate or is participating in a distribution of such securities for or on behalf of the issuer or selling security holder.

(5) *Definition of selling security holder.* For purposes of this paragraph (a), *selling security holder* means any person, other than an issuer, on whose behalf a distribution is made.

(6) *Definition of underwriting position.* For purposes of this section, *underwriting position* means the long or short positions in one or more securities held by a banking entity or its affiliate, and managed by a particular trading desk, in connection with a particular distribution of securities for which such banking entity or affiliate is acting as an underwriter.

(7) *Definition of client, customer, and counterparty.* For purposes of this paragraph (a), the terms *client, customer, and counterparty,* on a collective or individual basis, refer to market participants that may transact with the banking entity in connection with a particular distribution for which the banking entity is acting as underwriter.

(b) *Market making-related activities*—(1) *Permitted market making-related activities.* The prohibition contained in § 44.3(a) does not apply to a banking entity's market making-related activities conducted in accordance with this paragraph (b).

(2) *Requirements.* The market making-related activities of a banking entity are permitted under paragraph (b)(1) of this section only if:

(i) The trading desk that establishes and manages the financial exposure, routinely stands ready to purchase and sell one or more types of financial instruments related to its financial exposure, and is willing and available to quote, purchase and sell, or otherwise enter into long and short positions in those types of financial instruments for its own account, in commercially reasonable amounts and throughout market cycles on a basis appropriate for the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(ii) The trading desk's market-making related activities are designed not to exceed, on an ongoing basis, the reasonably expected near term demands of clients, customers, or counterparties, taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(iii) In the case of a banking entity with significant trading assets and liabilities, the banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this paragraph (b), including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The financial instruments each trading desk stands ready to purchase and sell in accordance with paragraph (b)(2)(i) of this section;

(B) The actions the trading desk will take to demonstrably reduce or otherwise significantly mitigate promptly the risks of its financial exposure consistent with the limits required under paragraph (b)(2)(iii)(C) of this section; the products, instruments, and exposures each trading desk may use for risk management purposes; the techniques and strategies each trading desk may use to manage the risks of its market making-related activities and positions; and the process, strategies, and personnel responsible for ensuring that the actions taken by the trading desk to mitigate these risks are and continue to be effective;

(C) Limits for each trading desk, in accordance with paragraph (b)(2)(ii) of this section;

(D) Written authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval; and

(E) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits.

(iv) A banking entity with significant trading assets and liabilities may satisfy the requirements in paragraphs (b)(2)(iii)(C) and (D) by complying with the requirements set forth in paragraph (c) of this section;

(v) The compensation arrangements of persons performing the activities described in this paragraph (b) are designed not to reward or incentivize prohibited proprietary trading; and

(vi) The banking entity is licensed or registered to engage in activity described in this paragraph (b) in accordance with applicable law.

(3) *Definition of client, customer, and counterparty.* For purposes of this paragraph (b), the terms *client, customer, and counterparty,* on a collective or individual basis refer to market participants that make use of the banking entity's market making-related services by obtaining such services, responding to quotations, or entering into a continuing relationship with respect to such services, provided that:

(i) A trading desk or other organizational unit of another banking entity is not a client, customer, or counterparty of the trading desk if that other entity has trading assets and liabilities of $50 billion or more as measured in accordance with the methodology described in § 44.2(ee) of this part, unless:

(A) The trading desk documents how and why a particular trading desk or other organizational unit of the entity should be treated as a client, customer, or counterparty of the trading desk for purposes of paragraph (b)(2) of this section; or

(B) The purchase or sale by the trading desk is conducted anonymously on an exchange or similar trading facility that permits trading on behalf of a broad range of market participants.

(ii) [Reserved]

(4) *Definition of financial exposure.* For purposes of this section, *financial exposure* means the aggregate risks of one or more financial instruments and any associated loans, commodities, or foreign exchange or currency, held by a banking entity or its affiliate and managed by a particular trading desk as part of the trading desk's market making-related activities.

(5) *Definition of market-maker positions.* For the purposes of this section, *market-maker positions* means all of the positions in the financial instruments for which the trading desk stands ready to make a market in accordance with paragraph (b)(2)(i) of this section, that are managed by the trading desk, including the trading desk's open positions or exposures arising from open transactions.

(c) *Rebuttable presumption of compliance*—(1) *Internal limits.* (i) A banking entity shall be presumed to meet the requirement in paragraph (a)(2)(ii)(A) or (b)(2)(ii) of this section with respect to the purchase or sale of a financial instrument if the banking entity has established and implements, maintains, and enforces the internal limits for the relevant trading desk as described in paragraph (c)(1)(ii) of this section.

(ii)(A) With respect to underwriting activities conducted pursuant to paragraph (a) of this section, the presumption described in paragraph (c)(1)(i) of this section shall be available to each trading desk that establishes, implements, maintains, and enforces internal limits that should take into account the liquidity, maturity, and depth of the market for the relevant types of securities and are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, based on the nature and amount of the trading desk's underwriting activities, on the:

(*1*) Amount, types, and risk of its underwriting position;

(*2*) Level of exposures to relevant risk factors arising from its underwriting position; and

(*3*) Period of time a security may be held.

(B) With respect to market making-related activities conducted pursuant to paragraph (b) of this section, the presumption described in paragraph (c)(1)(i) of this section shall be available to each trading desk that establishes, implements, maintains, and enforces internal limits that should take into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments and are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, based on the nature and amount of the trading desk's market-making related activities, that address the:

(*1*) Amount, types, and risks of its market-maker positions;

(*2*) Amount, types, and risks of the products, instruments, and exposures the trading desk may use for risk management purposes;

(*3*) Level of exposures to relevant risk factors arising from its financial exposure; and

(*4*) Period of time a financial instrument may be held.

(2) *Supervisory review and oversight.* The limits described in paragraph (c)(1) of this section shall be subject to supervisory review and oversight by the OCC on an ongoing basis.

(3) *Limit breaches and increases.* (i) With respect to any limit set pursuant to paragraph (c)(1)(ii)(A) or (B) of this section, a banking entity shall maintain and make available to the OCC upon request records regarding:

(A) Any limit that is exceeded; and

(B) Any temporary or permanent increase to any limit(s), in each case in the form and manner as directed by the OCC.

(ii) In the event of a breach or increase of any limit set pursuant to paragraph (c)(1)(ii)(A) or (B) of this section, the presumption described in paragraph (c)(1)(i) of this section shall continue to be available only if the banking entity:

(A) Takes action as promptly as possible after a breach to bring the trading desk into compliance; and

(B) Follows established written authorization procedures, including escalation procedures that require review and approval of any trade that exceeds a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval.

(4) *Rebutting the presumption.* The presumption in paragraph (c)(1)(i) of this section may be rebutted by the OCC if the OCC determines, taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments and based on all relevant facts and circumstances, that a trading desk is engaging in activity that is not based on the reasonably expected near term demands of clients, customers, or counterparties. The OCC's rebuttal of the presumption in paragraph (c)(1)(i) must be made in accordance with the notice and response procedures in subpart D of this part.

■ 5. Section 44.5 is amended by revising paragraphs (b) and (c)(1) introductory text and adding paragraph (c)(4) to read as follows:

§ 44.5 Permitted risk-mitigating hedging activities.

* * * * *

(b) *Requirements.* (1) The risk-mitigating hedging activities of a banking entity that has significant trading assets and liabilities are permitted under paragraph (a) of this section only if:

(i) The banking entity has established and implements, maintains and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(A) Reasonably designed written policies and procedures regarding the positions, techniques and strategies that may be used for hedging, including documentation indicating what positions, contracts or other holdings a particular trading desk may use in its risk-mitigating hedging activities, as well as position and aging limits with respect to such positions, contracts or other holdings;

(B) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(C) The conduct of analysis and independent testing designed to ensure that the positions, techniques and strategies that may be used for hedging may reasonably be expected to reduce or otherwise significantly mitigate the specific, identifiable risk(s) being hedged;

(ii) The risk-mitigating hedging activity:

(A) Is conducted in accordance with the written policies, procedures, and internal controls required under this section;

(B) At the inception of the hedging activity, including, without limitation, any adjustments to the hedging activity, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, commodity price risk, basis risk, or similar risks, arising in connection with and related to identified positions, contracts, or other holdings of the banking entity, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof;

(C) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section;

(D) Is subject to continuing review, monitoring and management by the banking entity that:

(*1*) Is consistent with the written hedging policies and procedures required under paragraph (b)(1)(i) of this section;

(*2*) Is designed to reduce or otherwise significantly mitigate the specific, identifiable risks that develop over time from the risk-mitigating hedging activities undertaken under this section and the underlying positions, contracts, and other holdings of the banking entity, based upon the facts and circumstances of the underlying and hedging positions, contracts and other holdings of the banking entity and the risks and liquidity thereof; and

(*3*) Requires ongoing recalibration of the hedging activity by the banking entity to ensure that the hedging activity satisfies the requirements set out in paragraph (b)(1)(ii) of this section and is not prohibited proprietary trading; and

(iii) The compensation arrangements of persons performing risk-mitigating hedging activities are designed not to reward or incentivize prohibited proprietary trading.

(2) The risk-mitigating hedging activities of a banking entity that does not have significant trading assets and liabilities are permitted under paragraph (a) of this section only if the risk-mitigating hedging activity:

(i) At the inception of the hedging activity, including, without limitation, any adjustments to the hedging activity, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, commodity price risk, basis risk, or similar risks, arising in connection with and related to identified positions, contracts, or other holdings of the banking entity, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof; and

(ii) Is subject, as appropriate, to ongoing recalibration by the banking entity to ensure that the hedging activity satisfies the requirements set out in paragraph (b)(2) of this section and is not prohibited proprietary trading.

(c) * * *

(1) A banking entity that has significant trading assets and liabilities must comply with the requirements of paragraphs (c)(2) and (3) of this section, unless the requirements of paragraph (c)(4) of this section are met, with respect to any purchase or sale of financial instruments made in reliance on this section for risk-mitigating hedging purposes that is:

* * * * *

(4) The requirements of paragraphs (c)(2) and (3) of this section do not apply to the purchase or sale of a financial instrument described in paragraph (c)(1) of this section if:

(i) The financial instrument purchased or sold is identified on a written list of pre-approved financial instruments that are commonly used by the trading desk for the specific type of hedging activity for which the financial instrument is being purchased or sold; and

(ii) At the time the financial instrument is purchased or sold, the hedging activity (including the purchase or sale of the financial instrument) complies with written, pre-approved limits for the trading desk purchasing or selling the financial instrument for hedging activities undertaken for one or more other trading desks. The limits shall be appropriate for the:

(A) Size, types, and risks of the hedging activities commonly undertaken by the trading desk;

(B) Financial instruments purchased and sold for hedging activities by the trading desk; and

(C) Levels and duration of the risk exposures being hedged.

■ 6. Section 44.6 is amended by revising paragraph (e)(3), removing paragraphs (e)(4) and (6), and redesignating paragraph (e)(5) as paragraph (e)(4).

The revision reads as follows:

§ 44.6 Other permitted proprietary trading activities.

* * * * *

(e) * * *

(3) A purchase or sale by a banking entity is permitted for purposes of this paragraph (e) if:

(i) The banking entity engaging as principal in the purchase or sale (including relevant personnel) is not located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to purchase or sell as principal is not located in the United States or organized under the laws of the United States or of any State; and

(iii) The purchase or sale, including any transaction arising from risk-mitigating hedging related to the instruments purchased or sold, is not accounted for as principal directly or on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State.

* * * * *

Subpart C—Covered Funds Activities and Investments

■ 7. Section 44.10 is amended by revising paragraphs (c)(7)(ii) and (c)(8)(i)(A) to read as follows:

§ 44.10 Prohibition on Acquiring or Retaining an Ownership Interest in and Having Certain Relationships with a Covered Fund.

* * * * *

(c) * * *

(7) * * *

(ii) Participates in the profits and losses of the separate account other than in compliance with applicable requirements regarding bank owned life insurance.

(8) * * *

(i) * * *

(A) Loans as defined in § 44.2(t) of subpart A;

* * * * *

■ 8. Section 44.11 is amended by revising paragraph (c) to read as follows:

§ 44.11 Permitted organizing and offering, underwriting, and market making with respect to a covered fund.

* * * * *

(c) *Underwriting and market making in ownership interests of a covered fund.* The prohibition contained in § 44.10(a) of this subpart does not apply to a banking entity's underwriting activities or market making-related activities involving a covered fund so long as:

(1) Those activities are conducted in accordance with the requirements of § 44.4(a) or (b) of subpart B, respectively; and

(2) With respect to any banking entity (or any affiliate thereof) that: Acts as a sponsor, investment adviser or commodity trading advisor to a particular covered fund or otherwise acquires and retains an ownership interest in such covered fund in reliance on paragraph (a) of this section; or acquires and retains an ownership interest in such covered fund and is either a securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78*o*–11(a)(3)), or is acquiring and retaining an ownership interest in such covered fund in compliance with section 15G of that Act (15 U.S.C. 78*o*–11) and the implementing regulations issued thereunder each as permitted by paragraph (b) of this section, then in each such case any ownership interests acquired or retained by the banking entity and its affiliates in connection with underwriting and market making related activities for that particular covered fund are included in the calculation of ownership interests permitted to be held by the banking entity and its affiliates under the limitations of § 44.12(a)(2)(ii) and (iii) and (d).

§ 44.12 [Amended]

■ 9. Section 44.12 is amended by redesignating the second instance of paragraph (e)(2)(vi) as paragraph (e)(2)(vii).

■ 10. Section 44.13 is amended by revising paragraphs (a), (b)(3) and (4), and (c) to read as follows:

§ 44.13 Other permitted covered fund activities and investments.

(a) *Permitted risk-mitigating hedging activities.* (1) The prohibition contained in § 44.10(a) of this subpart does not apply with respect to an ownership interest in a covered fund acquired or retained by a banking entity that is designed to reduce or otherwise significantly mitigate the specific, identifiable risks to the banking entity in connection with:

(i) A compensation arrangement with an employee of the banking entity or an affiliate thereof that directly provides investment advisory, commodity trading advisory or other services to the covered fund; or

(ii) A position taken by the banking entity when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund.

(2) The risk-mitigating hedging activities of a banking entity are permitted under this paragraph (a) only if:

(i) The banking entity has established and implements, maintains and enforces an internal compliance program in accordance with subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(A) Reasonably designed written policies and procedures; and

(B) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(ii) The acquisition or retention of the ownership interest:

(A) Is made in accordance with the written policies, procedures, and internal controls required under this section;

(B) At the inception of the hedge, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks arising:

(*1*) Out of a transaction conducted solely to accommodate a specific customer request with respect to the covered fund; or

(*2*) In connection with the compensation arrangement with the employee that directly provides investment advisory, commodity trading advisory, or other services to the covered fund;

(C) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section; and

(D) Is subject to continuing review, monitoring and management by the banking entity.

(iii) With respect to risk-mitigating hedging activity conducted pursuant to paragraph (a)(1)(i) of this section, the compensation arrangement relates solely to the covered fund in which the banking entity or any affiliate has acquired an ownership interest pursuant to paragraph (a)(1)(i) and such compensation arrangement provides that any losses incurred by the banking entity on such ownership interest will be offset by corresponding decreases in amounts payable under such compensation arrangement.

(b) * * *

(3) An ownership interest in a covered fund is not offered for sale or sold to a resident of the United States for purposes of paragraph (b)(1)(iii) of this section only if it is not sold and has not been sold pursuant to an offering that targets residents of the United States in which the banking entity or any affiliate of the banking entity participates. If the banking entity or an affiliate sponsors or serves, directly or indirectly, as the investment manager, investment adviser, commodity pool operator or commodity trading advisor to a covered fund, then the banking entity or affiliate will be deemed for purposes of this paragraph (b)(3) to participate in any offer or sale by the covered fund of ownership interests in the covered fund.

(4) An activity or investment occurs solely outside of the United States for purposes of paragraph (b)(1)(iv) of this section only if:

(i) The banking entity acting as sponsor, or engaging as principal in the acquisition or retention of an ownership interest in the covered fund, is not itself, and is not controlled directly or indirectly by, a banking entity that is located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to acquire or retain the ownership interest or act as sponsor to the covered fund is not located in the United States or organized under the laws of the United States or of any State; and

(iii) The investment or sponsorship, including any transaction arising from risk-mitigating hedging related to an ownership interest, is not accounted for as principal directly or indirectly on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State.

* * * * *

(c) *Permitted covered fund interests and activities by a regulated insurance company.* The prohibition contained in § 44.10(a) of this subpart does not apply to the acquisition or retention by an insurance company, or an affiliate thereof, of any ownership interest in, or the sponsorship of, a covered fund only if:

(1) The insurance company or its affiliate acquires and retains the ownership interest solely for the general account of the insurance company or for one or more separate accounts established by the insurance company;

(2) The acquisition and retention of the ownership interest is conducted in compliance with, and subject to, the insurance company investment laws and regulations of the State or jurisdiction in which such insurance company is domiciled; and

(3) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and foreign jurisdictions, as appropriate, have not jointly determined, after notice and comment, that a particular law or regulation described in paragraph (c)(2) of this section is insufficient to protect the safety and soundness of the banking entity, or the financial stability of the United States.

■ 11. Section 44.14 is amended by revising paragraph (a)(2)(ii)(B) to read as follows:

§ 44.14 Limitations on relationships with a covered fund.

(a) * * *

(2) * * *

(ii) * * *

(B) The chief executive officer (or equivalent officer) of the banking entity certifies in writing annually no later than March 31 to the OCC (with a duty to update the certification if the information in the certification materially changes) that the banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests; and

* * * * *

Subpart D—Compliance Program Requirement; Violations

■ 12. Section 44.20 is amended by revising paragraphs (a), (b) introductory text, (c), (d), (e) introductory text, and (f)(2) and adding paragraphs (g), (h), and (i) to read as follows:

§ 44.20 Program for compliance; reporting.

(a) *Program requirement.* Each banking entity (other than a banking entity with limited trading assets and liabilities) shall develop and provide for the continued administration of a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part. The terms, scope, and detail of the compliance program shall be appropriate for the types, size, scope, and complexity of activities and business structure of the banking entity.

(b) *Banking entities with significant trading assets and liabilities.* With respect to a banking entity with significant trading assets and liabilities, the compliance program required by paragraph (a) of this section, at a minimum, shall include:

* * * * *

(c) *CEO attestation.* The CEO of a banking entity that has significant trading assets and liabilities must, based on a review by the CEO of the banking entity, attest in writing to the OCC, each year no later than March 31, that the banking entity has in place processes to establish, maintain, enforce, review, test and modify the compliance program required by paragraph (b) of this section in a manner reasonably designed to achieve compliance with section 13 of the BHC Act and this part. In the case of a U.S. branch or agency of a foreign banking entity, the attestation may be provided for the entire U.S. operations of the foreign banking entity by the senior management officer of the U.S. operations of the foreign banking entity who is located in the United States.

(d) *Reporting requirements under appendix A to this part.* (1) A banking entity engaged in proprietary trading activity permitted under subpart B of this part shall comply with the reporting requirements described in appendix A to this part, if:

(i) The banking entity has significant trading assets and liabilities; or

(ii) The OCC notifies the banking entity in writing that it must satisfy the reporting requirements contained in appendix A to this part.

(2) *Frequency of reporting:* Unless the OCC notifies the banking entity in writing that it must report on a different basis, a banking entity subject to the Appendix shall report the information required by appendix A to this part for each quarter within 30 days of the end of the quarter.

(e) *Additional documentation for covered funds.* A banking entity with significant trading assets and liabilities shall maintain records that include:

* * * * *

(f) * * *

(2) *Banking entities with moderate trading assets and liabilities.* A banking entity with moderate trading assets and liabilities may satisfy the requirements of this section by including in its existing compliance policies and procedures appropriate references to the requirements of section 13 of the BHC Act and this part and adjustments as appropriate given the activities, size, scope, and complexity of the banking entity.

(g) *Rebuttable presumption of compliance for banking entities with limited trading assets and liabilities*—(1) *Rebuttable presumption.* Except as otherwise provided in this paragraph, a banking entity with limited trading assets and liabilities shall be presumed to be compliant with subpart B and subpart C of this part and shall have no obligation to demonstrate compliance with this part on an ongoing basis.

(2) *Rebuttal of presumption.* If upon examination or audit, the OCC determines that the banking entity has engaged in proprietary trading or covered fund activities that are otherwise prohibited under subpart B or subpart C of this part, the OCC may require the banking entity to be treated under this part as if it did not have limited trading assets and liabilities. The OCC's rebuttal of the presumption in this paragraph must be made in accordance with the notice and response procedures in paragraph (i) of this section.

(h) *Reservation of authority.* Notwithstanding any other provision of this part, the OCC retains its authority to require a banking entity without significant trading assets and liabilities to apply any requirements of this part that would otherwise apply if the banking entity had significant or moderate trading assets and liabilities if the OCC determines that the size or complexity of the banking entity's trading or investment activities, or the risk of evasion of subpart B or subpart C of this part, does not warrant a presumption of compliance under paragraph (g) of this section or treatment as a banking entity with moderate trading assets and liabilities, as applicable. The OCC's exercise of this reservation of authority must be made in accordance with the notice and response procedures in paragraph (i) of this section.

(i) *Notice and response procedures*—(1) *Notice.* The OCC will notify the banking entity in writing of any determination requiring notice under this part and will provide an explanation of the determination.

(2) *Response.* The banking entity may respond to any or all items in the notice described in paragraph (i)(1) of this section. The response should include any matters that the banking entity would have the OCC consider in deciding whether to make the determination. The response must be in writing and delivered to the designated OCC official within 30 days after the date on which the banking entity received the notice. The OCC may shorten the time period when, in the opinion of the OCC, the activities or condition of the banking entity so requires, provided that the banking

entity is informed of the time period at the time of notice, or with the consent of the banking entity. In its discretion, the OCC may extend the time period for good cause.

(3) *Waiver.* Failure to respond within 30 days or such other time period as may be specified by the OCC shall constitute a waiver of any objections to the OCC's determination.

(4) *Decision.* The OCC will notify the banking entity of the decision in writing. The notice will include an explanation of the decision.

■ 13. Revise appendix A to part 44 to read as follows:

Appendix A to Part 44—Reporting and Recordkeeping Requirements for Covered Trading Activities

I. Purpose

a. This appendix sets forth reporting and recordkeeping requirements that certain banking entities must satisfy in connection with the restrictions on proprietary trading set forth in subpart B (''proprietary trading restrictions''). Pursuant to § 44.20(d), this appendix applies to a banking entity that, together with its affiliates and subsidiaries, has significant trading assets and liabilities. These entities are required to (i) furnish periodic reports to the OCC regarding a variety of quantitative measurements of their covered trading activities, which vary depending on the scope and size of covered trading activities, and (ii) create and maintain records documenting the preparation and content of these reports. The requirements of this appendix must be incorporated into the banking entity's internal compliance program under § 44.20.

b. The purpose of this appendix is to assist banking entities and the OCC in:

(1) Better understanding and evaluating the scope, type, and profile of the banking entity's covered trading activities;

(2) Monitoring the banking entity's covered trading activities;

(3) Identifying covered trading activities that warrant further review or examination by the banking entity to verify compliance with the proprietary trading restrictions;

(4) Evaluating whether the covered trading activities of trading desks engaged in market making-related activities subject to § 44.4(b) are consistent with the requirements governing permitted market making-related activities;

(5) Evaluating whether the covered trading activities of trading desks that are engaged in permitted trading activity subject to § 44.4, § 44.5, or § 44.6(a) and (b) (*i.e.,* underwriting and market making-related activity, risk-mitigating hedging, or trading in certain government obligations) are consistent with the requirement that such activity not result, directly or indirectly, in a material exposure to high-risk assets or high-risk trading strategies;

(6) Identifying the profile of particular covered trading activities of the banking entity, and the individual trading desks of the banking entity, to help establish the appropriate frequency and scope of examination by the OCC of such activities; and

(7) Assessing and addressing the risks associated with the banking entity's covered trading activities.

c. Information that must be furnished pursuant to this appendix is not intended to serve as a dispositive tool for the identification of permissible or impermissible activities.

d. In addition to the quantitative measurements required in this appendix, a banking entity may need to develop and implement other quantitative measurements in order to effectively monitor its covered trading activities for compliance with section 13 of the BHC Act and this part and to have an effective compliance program, as required by § 44.20. The effectiveness of particular quantitative measurements may differ based on the profile of the banking entity's businesses in general and, more specifically, of the particular trading desk, including types of instruments traded, trading activities and strategies, and history and experience (*e.g.,* whether the trading desk is an established, successful market maker or a new entrant to a competitive market). In all cases, banking entities must ensure that they have robust measures in place to identify and monitor the risks taken in their trading activities, to ensure that the activities are within risk tolerances established by the banking entity, and to monitor and examine for compliance with the proprietary trading restrictions in this part.

e. On an ongoing basis, banking entities must carefully monitor, review, and evaluate all furnished quantitative measurements, as well as any others that they choose to utilize in order to maintain compliance with section 13 of the BHC Act and this part. All measurement results that indicate a heightened risk of impermissible proprietary trading, including with respect to otherwise-permitted activities under §§ 44.4 through 44.6(a) and (b), or that result in a material exposure to high-risk assets or high-risk trading strategies, must be escalated within the banking entity for review, further analysis, explanation to the OCC, and remediation, where appropriate. The quantitative measurements discussed in this appendix should be helpful to banking entities in identifying and managing the risks related to their covered trading activities.

II. Definitions

The terms used in this appendix have the same meanings as set forth in §§ 44.2 and 44.3. In addition, for purposes of this appendix, the following definitions apply:

Applicability identifies the trading desks for which a banking entity is required to calculate and report a particular quantitative measurement based on the type of covered trading activity conducted by the trading desk.

Calculation period means the period of time for which a particular quantitative measurement must be calculated.

Comprehensive profit and loss means the net profit or loss of a trading desk's material sources of trading revenue over a specific period of time, including, for example, any increase or decrease in the market value of a trading desk's holdings, dividend income, and interest income and expense.

Covered trading activity means trading conducted by a trading desk under § 44.4, § 44.5, § 44.6(a), or § 44.6(b). A banking entity may include in its covered trading activity trading conducted under § 44.3(d), § 44.6(c), § 44.6(d), or § 44.6(e).

Measurement frequency means the frequency with which a particular quantitative metric must be calculated and recorded.

Trading day means a calendar day on which a trading desk is open for trading.

III. Reporting and Recordkeeping

a. Scope of Required Reporting

1. Quantitative measurements. Each banking entity made subject to this appendix by § 44.20 must furnish the following quantitative measurements, as applicable, for each trading desk of the banking entity engaged in covered trading activities and calculate these quantitative measurements in accordance with this appendix:

i. Internal Limits and Usage;

ii. Value-at-Risk;

iii. Comprehensive Profit and Loss Attribution;

iv. Positions; and

v. Transaction Volumes.

2. Trading desk information. Each banking entity made subject to this appendix by § 44.20 must provide certain descriptive information, as further described in this appendix, regarding each trading desk engaged in covered trading activities.

3. Quantitative measurements identifying information. Each banking entity made subject to this appendix by § 44.20 must provide certain identifying and descriptive information, as further described in this appendix, regarding its quantitative measurements.

4. Narrative statement. Each banking entity made subject to this appendix by § 44.20 may provide an optional narrative statement, as further described in this appendix.

5. File identifying information. Each banking entity made subject to this appendix by § 44.20 must provide file identifying information in each submission to the OCC pursuant to this appendix, including the name of the banking entity, the RSSD ID assigned to the top-tier banking entity by the Board, and identification of the reporting period and creation date and time.

b. Trading Desk Information

1. Each banking entity must provide descriptive information regarding each trading desk engaged in covered trading activities, including:

i. Name of the trading desk used internally by the banking entity and a unique identification label for the trading desk;

ii. Identification of each type of covered trading activity in which the trading desk is engaged;

iii. Brief description of the general strategy of the trading desk;

v. A list identifying each Agency receiving the submission of the trading desk;

2. Indication of whether each calendar date is a trading day or not a trading day for the trading desk; and

3. Currency reported and daily currency conversion rate.

c. Quantitative Measurements Identifying Information

Each banking entity must provide the following information regarding the quantitative measurements:

1. An Internal Limits Information Schedule that provides identifying and descriptive information for each limit reported pursuant to the Internal Limits and Usage quantitative measurement, including the name of the limit, a unique identification label for the limit, a description of the limit, the unit of measurement for the limit, the type of limit, and identification of the corresponding risk factor attribution in the particular case that the limit type is a limit on a risk factor sensitivity and profit and loss attribution to the same risk factor is reported; and

2. A Risk Factor Attribution Information Schedule that provides identifying and descriptive information for each risk factor attribution reported pursuant to the Comprehensive Profit and Loss Attribution quantitative measurement, including the name of the risk factor or other factor, a unique identification label for the risk factor or other factor, a description of the risk factor or other factor, and the risk factor or other factor's change unit.

d. Narrative Statement

Each banking entity made subject to this appendix by § 44.20 may submit in a separate electronic document a Narrative Statement to the OCC with any information the banking entity views as relevant for assessing the information reported. The Narrative Statement may include further description of or changes to calculation methods, identification of material events, description of and reasons for changes in the banking entity's trading desk structure or trading desk strategies, and when any such changes occurred.

e. Frequency and Method of Required Calculation and Reporting

A banking entity must calculate any applicable quantitative measurement for each trading day. A banking entity must report the Trading Desk Information, the Quantitative Measurements Identifying Information, and each applicable quantitative measurement electronically to the OCC on the reporting schedule established in § 44.20 unless otherwise requested by the OCC. A banking entity must report the Trading Desk Information, the Quantitative Measurements Identifying Information, and each applicable quantitative measurement to the OCC in accordance with the XML Schema specified and published on the OCC's website.

f. Recordkeeping

A banking entity must, for any quantitative measurement furnished to the OCC pursuant to this appendix and § 44.20(d), create and maintain records documenting the preparation and content of these reports, as well as such information as is necessary to permit the OCC to verify the accuracy of such reports, for a period of five years from the end of the calendar year for which the measurement was taken. A banking entity must retain the Narrative Statement, the Trading Desk Information, and the Quantitative Measurements Identifying Information for a period of five years from the end of the calendar year for which the information was reported to the OCC.

IV. Quantitative Measurements

a. Risk-Management Measurements

1. Internal Limits and Usage

i. *Description:* For purposes of this appendix, Internal Limits are the constraints that define the amount of risk and the positions that a trading desk is permitted to take at a point in time, as defined by the banking entity for a specific trading desk. Usage represents the value of the trading desk's risk or positions that are accounted for by the current activity of the desk. Internal limits and their usage are key compliance and risk management tools used to control and monitor risk taking and include, but are not limited to, the limits set out in §§ 44.4 and 44.5. A trading desk's risk limits, commonly including a limit on ''Value-at-Risk,'' are useful in the broader context of the trading desk's overall activities, particularly for the market making activities under § 44.4(b) and hedging activity under § 44.5. Accordingly, the limits required under §§ 44.4(b)(2)(iii)(C) and 44.5(b)(1)(i)(A) must meet the applicable requirements under §§ 44.4(b)(2)(iii)(C) and 44.5(b)(1)(i)(A) and also must include appropriate metrics for the trading desk limits including, at a minimum, ''Value-at-Risk'' except to the extent the ''Value-at-Risk'' metric is demonstrably ineffective for measuring and monitoring the risks of a trading desk based on the types of positions traded by, and risk exposures of, that desk.

A. A banking entity must provide the following information for each limit reported pursuant to this quantitative measurement: The unique identification label for the limit reported in the Internal Limits Information Schedule, the limit size (distinguishing between an upper and a lower limit), and the value of usage of the limit.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks engaged in covered trading activities.

2. Value-at-Risk

i. *Description:* For purposes of this appendix, Value-at-Risk (''VaR'') is the measurement of the risk of future financial loss in the value of a trading desk's aggregated positions at the ninety-nine percent confidence level over a one-day period, based on current market conditions.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks engaged in covered trading activities.

b. Source-of-Revenue Measurements

1. Comprehensive Profit and Loss Attribution

i. *Description:* For purposes of this appendix, Comprehensive Profit and Loss Attribution is an analysis that attributes the daily fluctuation in the value of a trading desk's positions to various sources. First, the daily profit and loss of the aggregated positions is divided into two categories: (i) Profit and loss attributable to a trading desk's existing positions that were also positions held by the trading desk as of the end of the prior day (''existing positions''); and (ii) profit and loss attributable to new positions resulting from the current day's trading activity (''new positions'').

A. The comprehensive profit and loss associated with existing positions must reflect changes in the value of these positions on the applicable day. The comprehensive profit and loss from existing positions must be further attributed, as applicable, to (i) changes in the specific risk factors and other factors that are monitored and managed as part of the trading desk's overall risk management policies and procedures; and (ii) any other applicable elements, such as cash flows, carry, changes in reserves, and the correction, cancellation, or exercise of a trade.

B. For the attribution of comprehensive profit and loss from existing positions to specific risk factors and other factors, a banking entity must provide the following information for the factors that explain the preponderance of the profit or loss changes due to risk factor changes: The unique identification label for the risk factor or other factor listed in the Risk Factor Attribution Information Schedule, and the profit or loss due to the risk factor or other factor change.

C. The comprehensive profit and loss attributed to new positions must reflect commissions and fee income or expense and market gains or losses associated with transactions executed on the applicable day. New positions include purchases and sales of financial instruments and other assets/liabilities and negotiated amendments to existing positions. The comprehensive profit and loss from new positions may be reported in the aggregate and does not need to be further attributed to specific sources.

D. The portion of comprehensive profit and loss from existing positions that is not attributed to changes in specific risk factors and other factors must be allocated to a residual category. Significant unexplained profit and loss must be escalated for further investigation and analysis.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks engaged in covered trading activities.

c. Positions and Transaction Volumes Measurements

1. Positions

i. *Description:* For purposes of this appendix, Positions is the value of securities and derivatives positions managed by the trading desk. For purposes of the Positions quantitative measurement, do not include in the Positions calculation for ''securities'' those securities that are also ''derivatives,'' as those terms are defined under subpart A; instead, report those securities that are also derivatives as ''derivatives.'' [1223] A banking

[1223] *See* § 44.2(h), (aa). For example, under this part, a security-based swap is both a ''security'' and a ''derivative.'' For purposes of the Positions quantitative measurement, security-based swaps are reported as derivatives rather than securities.

entity must separately report the trading desk's market value of long securities positions, short securities positions, derivatives receivables, and derivatives payables.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks that rely on § 44.4(a) or (b) to conduct underwriting activity or market-making-related activity, respectively.

2. Transaction Volumes

i. *Description:* For purposes of this appendix, Transaction Volumes measures three exclusive categories of covered trading activity conducted by a trading desk. A banking entity is required to report the value and number of security and derivative transactions conducted by the trading desk with: (i) Customers, excluding internal transactions; (ii) non-customers, excluding internal transactions; and (iii) trading desks and other organizational units where the transaction is booked into either the same banking entity or an affiliated banking entity. For securities, value means gross market value. For derivatives, value means gross notional value. For purposes of calculating the Transaction Volumes quantitative measurement, do not include in the Transaction Volumes calculation for ''securities'' those securities that are also ''derivatives,'' as those terms are defined under subpart A; instead, report those securities that are also derivatives as ''derivatives.'' [1224] Further, for purposes of the Transaction Volumes quantitative measurement, a customer of a trading desk that relies on § 44.4(a) to conduct underwriting activity is a market participant identified in § 44.4(a)(7), and a customer of a trading desk that relies on § 44.4(b) to conduct market making-related activity is a market participant identified in § 44.4(b)(3).

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks that rely on § 44.4(a) or (b) to conduct underwriting activity or market-making-related activity, respectively.

Appendix B to Part 44—[Removed]

■ 14. Appendix B to part 44 is removed.

■ 15. Effective January 1. 2020 until December 31, 2020, appendix Z to part 44 is added to read as follows:

Appendix Z to Part 44—Proprietary Trading and Certain Interests in and Relationships With Covered Funds (Alternative Compliance)

Note: The content of this appendix reproduces the regulation implementing Section 13 of the Bank Holding Company Act as of November 13, 2019.

Subpart A—Authority and Definitions

§ 44.1 Authority, purpose, scope, and relationship to other authorities.

(a) *Authority.* This part is issued by the OCC under section 13 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1851).

(b) *Purpose.* Section 13 of the Bank Holding Company Act establishes prohibitions and restrictions on proprietary trading and on investments in or relationships with covered funds by certain banking entities, including national banks, Federal branches and agencies of foreign banks, Federal savings associations, and certain subsidiaries thereof. This part implements section 13 of the Bank Holding Company Act by defining terms used in the statute and related terms, establishing prohibitions and restrictions on proprietary trading and on investments in or relationships with covered funds, and explaining the statute's requirements.

(c) *Scope.* This part implements section 13 of the Bank Holding Company Act with respect to banking entities for which the OCC is authorized to issue regulations under section 13(b)(2) of the Bank Holding Company Act (12 U.S.C. 1851(b)(2)) and take actions under section 13(e) of that Act (12 U.S.C. 1851(e)). These include national banks, Federal branches and Federal agencies of foreign banks, Federal savings associations, Federal savings banks, and any of their respective subsidiaries (except a subsidiary for which there is a different primary financial regulatory agency, as that term is defined in this part), but do not include such entities to the extent they are not within the definition of banking entity in § 44.2(c).

(d) *Relationship to other authorities.* Except as otherwise provided under section 13 of the Bank Holding Company Act or this part, and notwithstanding any other provision of law, the prohibitions and restrictions under section 13 of the Bank Holding Company Act and this part shall apply to the activities and investments of a banking entity identified in paragraph (c) of this section, even if such activities and investments are authorized for the banking entity under other applicable provisions of law.

(e) *Preservation of authority.* Nothing in this part limits in any way the authority of the OCC to impose on a banking entity identified in paragraph (c) of this section additional requirements or restrictions with respect to any activity, investment, or relationship covered under section 13 of the Bank Holding Company Act or this part, or additional penalties for violation of this part provided under any other applicable provision of law

§ 44.2 Definitions.

Unless otherwise specified, for purposes of this part:

(a) *Affiliate* has the same meaning as in section 2(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(k)).

(b) *Bank holding company* has the same meaning as in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

(c) *Banking entity.* (1) Except as provided in paragraph (c)(2) of this section, *banking entity* means:

(i) Any insured depository institution;

(ii) Any company that controls an insured depository institution;

(iii) Any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(iv) Any affiliate or subsidiary of any entity described in paragraphs (c)(1)(i), (ii), or (iii) of this section.

(2) Banking entity does not include:

(i) A covered fund that is not itself a banking entity under paragraphs (c)(1)(i), (ii), or (iii) of this section;

(ii) A portfolio company held under the authority contained in section 4(k)(4)(H) or (I) of the BHC Act (12 U.S.C. 1843(k)(4)(H), (I)), or any 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), so long as the portfolio company or portfolio concern is not itself a banking entity under paragraphs (c)(1)(i), (ii), or (iii) of this section; or

(iii) The FDIC acting in its corporate capacity or as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(d) *Board* means the Board of Governors of the Federal Reserve System.

(e) *CFTC* means the Commodity Futures Trading Commission.

(f) *Dealer* has the same meaning as in section 3(a)(5) of the Exchange Act (15 U.S.C. 78c(a)(5)).

(g) *Depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(h) *Derivative.* (1) Except as provided in paragraph (h)(2) of this section, *derivative* means:

(i) Any swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68));

(ii) Any purchase or sale of a commodity, that is not an excluded

[1224] *See* § 44.2(h), (aa).

commodity, for deferred shipment or delivery that is intended to be physically settled;

(iii) Any foreign exchange forward (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)) or foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25));

(iv) Any agreement, contract, or transaction in foreign currency described in section 2(c)(2)(C)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(C)(i));

(v) Any agreement, contract, or transaction in a commodity other than foreign currency described in section 2(c)(2)(D)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(D)(i)); and

(vi) Any transaction authorized under section 19 of the Commodity Exchange Act (7 U.S.C. 23(a) or (b));

(2) A derivative does not include:

(i) Any consumer, commercial, or other agreement, contract, or transaction that the CFTC and SEC have further defined by joint regulation, interpretation, guidance, or other action as not within the definition of swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)); or

(ii) Any identified banking product, as defined in section 402(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b)), that is subject to section 403(a) of that Act (7 U.S.C. 27a(a)).

(i) *Employee* includes a member of the immediate family of the employee.

(j) *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(k) *Excluded commodity* has the same meaning as in section 1a(19) of the Commodity Exchange Act (7 U.S.C. 1a(19)).

(l) *FDIC* means the Federal Deposit Insurance Corporation.

(m) *Federal banking agencies* means the Board, the Office of the Comptroller of the Currency, and the FDIC.

(n) *Foreign banking organization* has the same meaning as in section 211.21(o) of the Board's Regulation K (12 CFR 211.21(o)), but does not include a foreign bank, as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(7)), that is organized under the laws of the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, or the Commonwealth of the Northern Mariana Islands.

(o) *Foreign insurance regulator* means the insurance commissioner, or a similar official or agency, of any country other than the United States that is engaged in the supervision of insurance companies under foreign insurance law.

(p) *General account* means all of the assets of an insurance company except those allocated to one or more separate accounts.

(q) *Insurance company* means a company that is organized as an insurance company, primarily and predominantly engaged in writing insurance or reinsuring risks underwritten by insurance companies, subject to supervision as such by a state insurance regulator or a foreign insurance regulator, and not operated for the purpose of evading the provisions of section 13 of the BHC Act (12 U.S.C. 1851).

(r) *Insured depository institution,* unless otherwise indicated, has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)), but does not include:

(1) An insured depository institution that is described in section 2(c)(2)(D) of the BHC Act (12 U.S.C. 1841(c)(2)(D)); or

(2) An insured depository institution if it has, and if every company that controls it has, total consolidated assets of $10 billion or less and total trading assets and trading liabilities, on a consolidated basis, that are 5 percent or less of total consolidated assets.

(s) *Loan* means any loan, lease, extension of credit, or secured or unsecured receivable that is not a security or derivative.

(t) *Primary financial regulatory agency* has the same meaning as in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5301(12)).

(u) *Purchase* includes any contract to buy, purchase, or otherwise acquire. For security futures products, purchase includes any contract, agreement, or transaction for future delivery. With respect to a commodity future, purchase includes any contract, agreement, or transaction for future delivery. With respect to a derivative, purchase includes the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(v) *Qualifying foreign banking organization* means a foreign banking organization that qualifies as such under section 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c), or (e)).

(w) *SEC* means the Securities and Exchange Commission.

(x) *Sale* and *sell* each include any contract to sell or otherwise dispose of. For security futures products, such terms include any contract, agreement, or transaction for future delivery. With respect to a commodity future, such terms include any contract, agreement, or transaction for future delivery. With respect to a derivative, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(y) *Security* has the meaning specified in section 3(a)(10) of the Exchange Act (15 U.S.C. 78c(a)(10)).

(z) *Security-based swap dealer* has the same meaning as in section 3(a)(71) of the Exchange Act (15 U.S.C. 78c(a)(71)).

(aa) *Security future* has the meaning specified in section 3(a)(55) of the Exchange Act (15 U.S.C. 78c(a)(55)).

(bb) *Separate account* means an account established and maintained by an insurance company in connection with one or more insurance contracts to hold assets that are legally segregated from the insurance company's other assets, under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(cc) *State* means any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(dd) *Subsidiary* has the same meaning as in section 2(d) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(d)).

(ee) *State insurance regulator* means the insurance commissioner, or a similar official or agency, of a State that is engaged in the supervision of insurance companies under State insurance law.

(ff) *Swap dealer* has the same meaning as in section 1(a)(49) of the Commodity Exchange Act (7 U.S.C. 1a(49)).

Subpart B—Proprietary Trading

§ 44.3 Prohibition on proprietary trading.

(a) *Prohibition.* Except as otherwise provided in this subpart, a banking entity may not engage in proprietary trading. *Proprietary trading* means engaging as principal for the trading account of the banking entity in any purchase or sale of one or more financial instruments.

(b) *Definition of trading account.* (1) Trading account means any account that is used by a banking entity to:

(i) Purchase or sell one or more financial instruments principally for the purpose of:

(A) Short-term resale;

(B) Benefitting from actual or expected short-term price movements;

(C) Realizing short-term arbitrage profits; or

(D) Hedging one or more positions resulting from the purchases or sales of financial instruments described in paragraphs (b)(1)(i)(A), (B), or (C) of this section;

(ii) Purchase or sell one or more financial instruments that are both market risk capital rule covered positions and trading positions (or hedges of other market risk capital rule covered positions), if the banking entity, or any affiliate of the banking entity, is an insured depository institution, bank holding company, or savings and loan holding company, and calculates risk-based capital ratios under the market risk capital rule; or

(iii) Purchase or sell one or more financial instruments for any purpose, if the banking entity:

(A) Is licensed or registered, or is required to be licensed or registered, to engage in the business of a dealer, swap dealer, or security-based swap dealer, to the extent the instrument is purchased or sold in connection with the activities that require the banking entity to be licensed or registered as such; or

(B) Is engaged in the business of a dealer, swap dealer, or security-based swap dealer outside of the United States, to the extent the instrument is purchased or sold in connection with the activities of such business.

(2) *Rebuttable presumption for certain purchases and sales.* The purchase (or sale) of a financial instrument by a banking entity shall be presumed to be for the trading account of the banking entity under paragraph (b)(1)(i) of this section if the banking entity holds the financial instrument for fewer than sixty days or substantially transfers the risk of the financial instrument within sixty days of the purchase (or sale), unless the banking entity can demonstrate, based on all relevant facts and circumstances, that the banking entity did not purchase (or sell) the financial instrument principally for any of the purposes described in paragraph (b)(1)(i) of this section.

(c) *Financial instrument.* (1) *Financial instrument* means:

(i) A security, including an option on a security;

(ii) A derivative, including an option on a derivative; or

(iii) A contract of sale of a commodity for future delivery, or option on a contract of sale of a commodity for future delivery.

(2) A financial instrument does not include:

(i) A loan;

(ii) A commodity that is not:

(A) An excluded commodity (other than foreign exchange or currency);

(B) A derivative;

(C) A contract of sale of a commodity for future delivery; or

(D) An option on a contract of sale of a commodity for future delivery; or

(iii) Foreign exchange or currency.

(d) *Proprietary trading.* Proprietary trading does not include:

(1) Any purchase or sale of one or more financial instruments by a banking entity that arises under a repurchase or reverse repurchase agreement pursuant to which the banking entity has simultaneously agreed, in writing, to both purchase and sell a stated asset, at stated prices, and on stated dates or on demand with the same counterparty;

(2) Any purchase or sale of one or more financial instruments by a banking entity that arises under a transaction in which the banking entity lends or borrows a security temporarily to or from another party pursuant to a written securities lending agreement under which the lender retains the economic interests of an owner of such security, and has the right to terminate the transaction and to recall the loaned security on terms agreed by the parties;

(3) Any purchase or sale of a security by a banking entity for the purpose of liquidity management in accordance with a documented liquidity management plan of the banking entity that:

(i) Specifically contemplates and authorizes the particular securities to be used for liquidity management purposes, the amount, types, and risks of these securities that are consistent with liquidity management, and the liquidity circumstances in which the particular securities may or must be used;

(ii) Requires that any purchase or sale of securities contemplated and authorized by the plan be principally for the purpose of managing the liquidity of the banking entity, and not for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging a position taken for such short-term purposes;

(iii) Requires that any securities purchased or sold for liquidity management purposes be highly liquid and limited to securities the market, credit, and other risks of which the banking entity does not reasonably expect to give rise to appreciable profits or losses as a result of short-term price movements;

(iv) Limits any securities purchased or sold for liquidity management purposes, together with any other instruments purchased or sold for such purposes, to an amount that is consistent with the banking entity's near-term funding needs, including deviations from normal operations of the banking entity or any affiliate thereof, as estimated and documented pursuant to methods specified in the plan;

(v) Includes written policies and procedures, internal controls, analysis, and independent testing to ensure that the purchase and sale of securities that are not permitted under §§ 44.6(a) or (b) of this subpart are for the purpose of liquidity management and in accordance with the liquidity management plan described in paragraph (d)(3) of this section; and

(vi) Is consistent with the OCC's supervisory requirements, guidance, and expectations regarding liquidity management;

(4) Any purchase or sale of one or more financial instruments by a banking entity that is a derivatives clearing organization or a clearing agency in connection with clearing financial instruments;

(5) Any excluded clearing activities by a banking entity that is a member of a clearing agency, a member of a derivatives clearing organization, or a member of a designated financial market utility;

(6) Any purchase or sale of one or more financial instruments by a banking entity, so long as:

(i) The purchase (or sale) satisfies an existing delivery obligation of the banking entity or its customers, including to prevent or close out a failure to deliver, in connection with delivery, clearing, or settlement activity; or

(ii) The purchase (or sale) satisfies an obligation of the banking entity in connection with a judicial, administrative, self-regulatory organization, or arbitration proceeding;

(7) Any purchase or sale of one or more financial instruments by a banking entity that is acting solely as agent, broker, or custodian;

(8) Any purchase or sale of one or more financial instruments by a banking entity through a deferred compensation, stock-bonus, profit-sharing, or pension plan of the banking entity that is established and administered in accordance with the law of the United

States or a foreign sovereign, if the purchase or sale is made directly or indirectly by the banking entity as trustee for the benefit of persons who are or were employees of the banking entity; or

(9) Any purchase or sale of one or more financial instruments by a banking entity in the ordinary course of collecting a debt previously contracted in good faith, provided that the banking entity divests the financial instrument as soon as practicable, and in no event may the banking entity retain such instrument for longer than such period permitted by the OCC.

(e) *Definition of other terms related to proprietary trading.* For purposes of this subpart:

(1) *Anonymous* means that each party to a purchase or sale is unaware of the identity of the other party(ies) to the purchase or sale.

(2) *Clearing agency* has the same meaning as in section 3(a)(23) of the Exchange Act (15 U.S.C. 78c(a)(23)).

(3) *Commodity* has the same meaning as in section 1a(9) of the Commodity Exchange Act (7 U.S.C. 1a(9)), except that a commodity does not include any security;

(4) *Contract of sale of a commodity for future delivery* means a contract of sale (as that term is defined in section 1a(13) of the Commodity Exchange Act (7 U.S.C. 1a(13)) for future delivery (as that term is defined in section 1a(27) of the Commodity Exchange Act (7 U.S.C. 1a(27))).

(5) *Derivatives clearing organization* means:

(i) A derivatives clearing organization registered under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1);

(ii) A derivatives clearing organization that, pursuant to CFTC regulation, is exempt from the registration requirements under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1); or

(iii) A foreign derivatives clearing organization that, pursuant to CFTC regulation, is permitted to clear for a foreign board of trade that is registered with the CFTC.

(6) *Exchange,* unless the context otherwise requires, means any designated contract market, swap execution facility, or foreign board of trade registered with the CFTC, or, for purposes of securities or security-based swaps, an exchange, as defined under section 3(a)(1) of the Exchange Act (15 U.S.C. 78c(a)(1)), or security-based swap execution facility, as defined under section 3(a)(77) of the Exchange Act (15 U.S.C. 78c(a)(77)).

(7) *Excluded clearing activities* means:

(i) With respect to customer transactions cleared on a derivatives clearing organization, a clearing agency, or a designated financial market utility, any purchase or sale necessary to correct trading errors made by or on behalf of a customer provided that such purchase or sale is conducted in accordance with, for transactions cleared on a derivatives clearing organization, the Commodity Exchange Act, CFTC regulations, and the rules or procedures of the derivatives clearing organization, or, for transactions cleared on a clearing agency, the rules or procedures of the clearing agency, or, for transactions cleared on a designated financial market utility that is neither a derivatives clearing organization nor a clearing agency, the rules or procedures of the designated financial market utility;

(ii) Any purchase or sale in connection with and related to the management of a default or threatened imminent default of a customer provided that such purchase or sale is conducted in accordance with, for transactions cleared on a derivatives clearing organization, the Commodity Exchange Act, CFTC regulations, and the rules or procedures of the derivatives clearing organization, or, for transactions cleared on a clearing agency, the rules or procedures of the clearing agency, or, for transactions cleared on a designated financial market utility that is neither a derivatives clearing organization nor a clearing agency, the rules or procedures of the designated financial market utility;

(iii) Any purchase or sale in connection with and related to the management of a default or threatened imminent default of a member of a clearing agency, a member of a derivatives clearing organization, or a member of a designated financial market utility;

(iv) Any purchase or sale in connection with and related to the management of the default or threatened default of a clearing agency, a derivatives clearing organization, or a designated financial market utility; and

(v) Any purchase or sale that is required by the rules or procedures of a clearing agency, a derivatives clearing organization, or a designated financial market utility to mitigate the risk to the clearing agency, derivatives clearing organization, or designated financial market utility that would result from the clearing by a member of security-based swaps that reference the member or an affiliate of the member.

(8) *Designated financial market utility* has the same meaning as in section 803(4) of the Dodd-Frank Act (12 U.S.C. 5462(4)).

(9) *Issuer* has the same meaning as in section 2(a)(4) of the Securities Act of 1933 (15 U.S.C. 77b(a)(4)).

(10) *Market risk capital rule covered position and trading position* means a financial instrument that is both a covered position and a trading position, as those terms are respectively defined:

(i) In the case of a banking entity that is a bank holding company, savings and loan holding company, or insured depository institution, under the market risk capital rule that is applicable to the banking entity; and

(ii) In the case of a banking entity that is affiliated with a bank holding company or savings and loan holding company, other than a banking entity to which a market risk capital rule is applicable, under the market risk capital rule that is applicable to the affiliated bank holding company or savings and loan holding company.

(11) *Market risk capital rule* means the market risk capital rule that is contained in subpart F of 12 CFR part 3, 12 CFR parts 208 and 225, or 12 CFR part 324, as applicable.

(12) *Municipal security* means a security that is a direct obligation of or issued by, or an obligation guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, or any municipal corporate instrumentality of one or more States or political subdivisions thereof.

(13) *Trading desk* means the smallest discrete unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof.

§ 44.4 Permitted underwriting and market making-related activities.

(a) *Underwriting activities*—(1) *Permitted underwriting activities.* The prohibition contained in § 44.3(a) does not apply to a banking entity's underwriting activities conducted in accordance with this paragraph (a).

(2) *Requirements.* The underwriting activities of a banking entity are permitted under paragraph (a)(1) of this section only if:

(i) The banking entity is acting as an underwriter for a distribution of securities and the trading desk's underwriting position is related to such distribution;

(ii) The amount and type of the securities in the trading desk's underwriting position are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, and reasonable efforts are made to sell or otherwise reduce the underwriting position within a reasonable period, taking into account the liquidity, maturity, and depth of the market for the relevant type of security;

(iii) The banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of paragraph (a) of this section, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The products, instruments or exposures each trading desk may purchase, sell, or manage as part of its underwriting activities;

(B) Limits for each trading desk, based on the nature and amount of the trading desk's underwriting activities, including the reasonably expected near term demands of clients, customers, or counterparties, on the:

(*1*) Amount, types, and risk of its underwriting position;

(*2*) Level of exposures to relevant risk factors arising from its underwriting position; and

(*3*) Period of time a security may be held;

(C) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits; and

(D) Authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval;

(iv) The compensation arrangements of persons performing the activities described in this paragraph (a) are designed not to reward or incentivize prohibited proprietary trading; and

(v) The banking entity is licensed or registered to engage in the activity described in this paragraph (a) in accordance with applicable law.

(3) *Definition of distribution.* For purposes of this paragraph (a), a *distribution* of securities means:

(i) An offering of securities, whether or not subject to registration under the Securities Act of 1933, that is distinguished from ordinary trading transactions by the presence of special selling efforts and selling methods; or

(ii) An offering of securities made pursuant to an effective registration statement under the Securities Act of 1933.

(4) *Definition of underwriter.* For purposes of this paragraph (a), *underwriter* means:

(i) A person who has agreed with an issuer or selling security holder to:

(A) Purchase securities from the issuer or selling security holder for distribution;

(B) Engage in a distribution of securities for or on behalf of the issuer or selling security holder; or

(C) Manage a distribution of securities for or on behalf of the issuer or selling security holder; or

(ii) A person who has agreed to participate or is participating in a distribution of such securities for or on behalf of the issuer or selling security holder.

(5) *Definition of selling security holder.* For purposes of this paragraph (a), *selling security holder* means any person, other than an issuer, on whose behalf a distribution is made.

(6) *Definition of underwriting position.* For purposes of this paragraph (a), *underwriting position* means the long or short positions in one or more securities held by a banking entity or its affiliate, and managed by a particular trading desk, in connection with a particular distribution of securities for which such banking entity or affiliate is acting as an underwriter.

(7) *Definition of client, customer, and counterparty.* For purposes of this paragraph (a), the terms *client, customer, and counterparty,* on a collective or individual basis, refer to market participants that may transact with the banking entity in connection with a particular distribution for which the banking entity is acting as underwriter.

(b) *Market making-related activities*—(1) *Permitted market making-related activities.* The prohibition contained in § 44.3(a) does not apply to a banking entity's market making-related activities conducted in accordance with this paragraph (b).

(2) *Requirements.* The market making-related activities of a banking entity are permitted under paragraph (b)(1) of this section only if:

(i) The trading desk that establishes and manages the financial exposure routinely stands ready to purchase and sell one or more types of financial instruments related to its financial exposure and is willing and available to quote, purchase and sell, or otherwise enter into long and short positions in those types of financial instruments for its own account, in commercially reasonable amounts and throughout market cycles on a basis appropriate for the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(ii) The amount, types, and risks of the financial instruments in the trading desk's market-maker inventory are designed not to exceed, on an ongoing basis, the reasonably expected near term demands of clients, customers, or counterparties, based on:

(A) The liquidity, maturity, and depth of the market for the relevant types of financial instrument(s); and

(B) Demonstrable analysis of historical customer demand, current inventory of financial instruments, and market and other factors regarding the amount, types, and risks, of or associated with financial instruments in which the trading desk makes a market, including through block trades;

(iii) The banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of paragraph (b) of this section, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The financial instruments each trading desk stands ready to purchase and sell in accordance with paragraph (b)(2)(i) of this section;

(B) The actions the trading desk will take to demonstrably reduce or otherwise significantly mitigate promptly the risks of its financial exposure consistent with the limits required under paragraph (b)(2)(iii)(C) of this section; the products, instruments, and exposures each trading desk may use for risk management purposes; the techniques and strategies each trading desk may use to manage the risks of its market making-related activities and inventory; and the process, strategies, and personnel responsible for ensuring that the actions taken by the trading desk to mitigate these risks are and continue to be effective;

(C) Limits for each trading desk, based on the nature and amount of the trading desk's market making-related activities, that address the factors prescribed by paragraph (b)(2)(ii) of this section, on:

(*1*) The amount, types, and risks of its market-maker inventory;

(*2*) The amount, types, and risks of the products, instruments, and exposures the trading desk may use for risk management purposes;

(*3*) The level of exposures to relevant risk factors arising from its financial exposure; and

(*4*) The period of time a financial instrument may be held;

(D) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits; and

(E) Authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis that the basis for any temporary or permanent increase to a trading desk's limit(s) is consistent with the requirements of this paragraph (b), and independent review of such demonstrable analysis and approval;

(iv) To the extent that any limit identified pursuant to paragraph (b)(2)(iii)(C) of this section is exceeded, the trading desk takes action to bring the trading desk into compliance with the limits as promptly as possible after the limit is exceeded;

(v) The compensation arrangements of persons performing the activities described in this paragraph (b) are designed not to reward or incentivize prohibited proprietary trading; and

(vi) The banking entity is licensed or registered to engage in activity described in this paragraph (b) in accordance with applicable law.

(3) *Definition of client, customer, and counterparty.* For purposes of paragraph (b) of this section, the terms *client, customer, and counterparty,* on a collective or individual basis refer to market participants that make use of the banking entity's market making-related services by obtaining such services, responding to quotations, or entering into a continuing relationship with respect to such services, provided that:

(i) A trading desk or other organizational unit of another banking entity is not a client, customer, or counterparty of the trading desk if that other entity has trading assets and liabilities of $50 billion or more as measured in accordance with § 44.20(d)(1) of subpart D, unless:

(A) The trading desk documents how and why a particular trading desk or other organizational unit of the entity should be treated as a client, customer, or counterparty of the trading desk for purposes of paragraph (b)(2) of this section; or

(B) The purchase or sale by the trading desk is conducted anonymously on an exchange or similar trading facility that permits trading on behalf of a broad range of market participants.

(4) *Definition of financial exposure.* For purposes of this paragraph (b), *financial exposure* means the aggregate risks of one or more financial instruments and any associated loans, commodities, or foreign exchange or currency, held by a banking entity or its affiliate and managed by a particular trading desk as part of the trading desk's market making-related activities.

(5) *Definition of market-maker inventory.* For the purposes of this paragraph (b), *market-maker inventory* means all of the positions in the financial instruments for which the trading desk stands ready to make a market in accordance with paragraph (b)(2)(i) of this section, that are managed by the trading desk, including the trading desk's open positions or exposures arising from open transactions.

§ 44.5 Permitted risk-mitigating hedging activities.

(a) *Permitted risk-mitigating hedging activities.* The prohibition contained in § 44.3(a) does not apply to the risk-mitigating hedging activities of a banking entity in connection with and related to individual or aggregated positions, contracts, or other holdings of the banking entity and designed to reduce the specific risks to the banking entity in connection with and related to such positions, contracts, or other holdings.

(b) *Requirements.* The risk-mitigating hedging activities of a banking entity are permitted under paragraph (a) of this section only if:

(1) The banking entity has established and implements, maintains and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(i) Reasonably designed written policies and procedures regarding the positions, techniques and strategies that may be used for hedging, including documentation indicating what positions, contracts or other holdings a particular trading desk may use in its risk-mitigating hedging activities, as well as position and aging limits with respect to such positions, contracts or other holdings;

(ii) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(iii) The conduct of analysis, including correlation analysis, and independent testing designed to ensure that the positions, techniques and strategies that may be used for hedging may reasonably be expected to demonstrably reduce or otherwise significantly mitigate the specific, identifiable risk(s) being hedged, and such correlation analysis demonstrates that the hedging activity demonstrably reduces or otherwise significantly mitigates the specific, identifiable risk(s) being hedged;

(2) The risk-mitigating hedging activity:

(i) Is conducted in accordance with the written policies, procedures, and internal controls required under this section;

(ii) At the inception of the hedging activity, including, without limitation, any adjustments to the hedging activity, is designed to reduce or otherwise significantly mitigate and demonstrably reduces or otherwise significantly mitigates one or more specific, identifiable risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, commodity price risk, basis risk, or similar risks, arising in connection with and related to identified positions, contracts, or other holdings of the banking entity, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof;

(iii) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section;

(iv) Is subject to continuing review, monitoring and management by the banking entity that:

(A) Is consistent with the written hedging policies and procedures required under paragraph (b)(1) of this section;

(B) Is designed to reduce or otherwise significantly mitigate and demonstrably reduces or otherwise significantly mitigates the specific, identifiable risks that develop over time from the risk-mitigating hedging activities undertaken under this section and the underlying positions, contracts, and other holdings of the banking entity, based upon the facts and circumstances of the underlying and hedging positions, contracts and other holdings of the banking entity and the risks and liquidity thereof; and

(C) Requires ongoing recalibration of the hedging activity by the banking entity to ensure that the hedging activity satisfies the requirements set out in paragraph (b)(2) of this section and is not prohibited proprietary trading; and

(3) The compensation arrangements of persons performing risk-mitigating hedging activities are designed not to reward or incentivize prohibited proprietary trading.

(c) *Documentation requirement*—(1) A banking entity must comply with the requirements of paragraphs (c)(2) and (3) of this section with respect to any purchase or sale of financial instruments made in reliance on this section for risk-mitigating hedging purposes that is:

(i) Not established by the specific trading desk establishing or responsible for the underlying positions, contracts, or other holdings the risks of which the hedging activity is designed to reduce;

(ii) Established by the specific trading desk establishing or responsible for the underlying positions, contracts, or other holdings the risks of which the purchases or sales are designed to reduce, but that is effected through a financial instrument, exposure, technique, or strategy that is not specifically identified in the trading desk's written policies and procedures established under paragraph (b)(1) of this section or under § 44.4(b)(2)(iii)(B) of this subpart as a product, instrument, exposure, technique, or strategy such trading desk may use for hedging; or

(iii) Established to hedge aggregated positions across two or more trading desks.

(2) In connection with any purchase or sale identified in paragraph (c)(1) of this section, a banking entity must, at a minimum, and contemporaneously with the purchase or sale, document:

(i) The specific, identifiable risk(s) of the identified positions, contracts, or other holdings of the banking entity that the purchase or sale is designed to reduce;

(ii) The specific risk-mitigating strategy that the purchase or sale is designed to fulfill; and

(iii) The trading desk or other business unit that is establishing and responsible for the hedge.

(3) A banking entity must create and retain records sufficient to demonstrate compliance with the requirements of this paragraph (c) for a period that is no less than five years in a form that allows the banking entity to promptly produce such records to the OCC on request, or such longer period as required under other law or this part.

§ 44.6 Other permitted proprietary trading activities.

(a) *Permitted trading in domestic government obligations.* The prohibition contained in § 44.3(a) does not apply to the purchase or sale by a banking entity of a financial instrument that is:

(1) An obligation of, or issued or guaranteed by, the United States;

(2) An obligation, participation, or other instrument of, or issued or guaranteed by, an agency of the United States, the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, a Federal Home Loan Bank, the Federal Agricultural Mortgage Corporation or a Farm Credit System institution chartered under and subject to the provisions of the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*);

(3) An obligation of any State or any political subdivision thereof, including any municipal security; or

(4) An obligation of the FDIC, or any entity formed by or on behalf of the FDIC for purpose of facilitating the disposal of assets acquired or held by the FDIC in its corporate capacity or as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(b) *Permitted trading in foreign government obligations*—(1) *Affiliates of foreign banking entities in the United States.* The prohibition contained in § 44.3(a) does not apply to the purchase or sale of a financial instrument that is an obligation of, or issued or guaranteed by, a foreign sovereign (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of such foreign sovereign, by a banking entity, so long as:

(i) The banking entity is organized under or is directly or indirectly controlled by a banking entity that is organized under the laws of a foreign sovereign and is not directly or indirectly controlled by a top-tier banking entity that is organized under the laws of the United States;

(ii) The financial instrument is an obligation of, or issued or guaranteed by, the foreign sovereign under the laws of which the foreign banking entity referred to in paragraph (b)(1)(i) of this section is organized (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of that foreign sovereign; and

(iii) The purchase or sale as principal is not made by an insured depository institution.

(2) *Foreign affiliates of a U.S. banking entity.* The prohibition contained in § 44.3(a) does not apply to the purchase or sale of a financial instrument that is an obligation of, or issued or guaranteed by, a foreign sovereign (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of that foreign sovereign, by a foreign entity that is owned or controlled by a banking entity organized or established under the laws of the United States or any State, so long as:

(i) The foreign entity is a foreign bank, as defined in section 211.2(j) of the Board's Regulation K (12 CFR 211.2(j)), or is regulated by the foreign sovereign as a securities dealer;

(ii) The financial instrument is an obligation of, or issued or guaranteed by, the foreign sovereign under the laws of which the foreign entity is organized (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of that foreign sovereign; and

(iii) The financial instrument is owned by the foreign entity and is not financed by an affiliate that is located in the United States or organized under the laws of the United States or of any State.

(c) *Permitted trading on behalf of customers*—(1) *Fiduciary transactions.* The prohibition contained in § 44.3(a) does not apply to the purchase or sale of financial instruments by a banking entity acting as trustee or in a similar fiduciary capacity, so long as:

(i) The transaction is conducted for the account of, or on behalf of, a customer; and

(ii) The banking entity does not have or retain beneficial ownership of the financial instruments.

(2) *Riskless principal transactions.* The prohibition contained in § 44.3(a) does not apply to the purchase or sale of financial instruments by a banking entity acting as riskless principal in a transaction in which the banking entity, after receiving an order to purchase (or sell) a financial instrument from a customer, purchases (or sells) the financial instrument for its own account to offset a contemporaneous sale to (or purchase from) the customer.

(d) *Permitted trading by a regulated insurance company.* The prohibition contained in § 44.3(a) does not apply to the purchase or sale of financial instruments by a banking entity that is an insurance company or an affiliate of an insurance company if:

(1) The insurance company or its affiliate purchases or sells the financial instruments solely for:

(i) The general account of the insurance company; or

(ii) A separate account established by the insurance company;

(2) The purchase or sale is conducted in compliance with, and subject to, the insurance company investment laws, regulations, and written guidance of the State or jurisdiction in which such insurance company is domiciled; and

(3) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and foreign jurisdictions, as appropriate, have not jointly determined, after notice and comment, that a particular law, regulation, or written guidance described in paragraph (d)(2) of this

section is insufficient to protect the safety and soundness of the covered banking entity, or the financial stability of the United States.

(e) *Permitted trading activities of foreign banking entities.* (1) The prohibition contained in § 44.3(a) does not apply to the purchase or sale of financial instruments by a banking entity if:

(i) The banking entity is not organized or directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of any State;

(ii) The purchase or sale by the banking entity is made pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act; and

(iii) The purchase or sale meets the requirements of paragraph (e)(3) of this section.

(2) A purchase or sale of financial instruments by a banking entity is made pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act for purposes of paragraph (e)(1)(ii) of this section only if:

(i) The purchase or sale is conducted in accordance with the requirements of paragraph (e) of this section; and

(ii)(A) With respect to a banking entity that is a foreign banking organization, the banking entity meets the qualifying foreign banking organization requirements of section 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c) or (e)), as applicable; or

(B) With respect to a banking entity that is not a foreign banking organization, the banking entity is not organized under the laws of the United States or of any State and the banking entity, on a fully-consolidated basis, meets at least two of the following requirements:

(*1*) Total assets of the banking entity held outside of the United States exceed total assets of the banking entity held in the United States;

(*2*) Total revenues derived from the business of the banking entity outside of the United States exceed total revenues derived from the business of the banking entity in the United States; or

(*3*) Total net income derived from the business of the banking entity outside of the United States exceeds total net income derived from the business of the banking entity in the United States.

(3) A purchase or sale by a banking entity is permitted for purposes of this paragraph (e) if:

(i) The banking entity engaging as principal in the purchase or sale (including any personnel of the banking entity or its affiliate that arrange, negotiate or execute such purchase or sale) is not located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to purchase or sell as principal is not located in the United States or organized under the laws of the United States or of any State;

(iii) The purchase or sale, including any transaction arising from risk-mitigating hedging related to the instruments purchased or sold, is not accounted for as principal directly or on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State;

(iv) No financing for the banking entity's purchases or sales is provided, directly or indirectly, by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State; and

(v) The purchase or sale is not conducted with or through any U.S. entity, other than:

(A) A purchase or sale with the foreign operations of a U.S. entity if no personnel of such U.S. entity that are located in the United States are involved in the arrangement, negotiation, or execution of such purchase or sale;

(B) A purchase or sale with an unaffiliated market intermediary acting as principal, provided the purchase or sale is promptly cleared and settled through a clearing agency or derivatives clearing organization acting as a central counterparty; or

(C) A purchase or sale through an unaffiliated market intermediary acting as agent, provided the purchase or sale is conducted anonymously on an exchange or similar trading facility and is promptly cleared and settled through a clearing agency or derivatives clearing organization acting as a central counterparty.

(4) For purposes of this paragraph (e), a U.S. entity is any entity that is, or is controlled by, or is acting on behalf of, or at the direction of, any other entity that is, located in the United States or organized under the laws of the United States or of any State.

(5) For purposes of this paragraph (e), a U.S. branch, agency, or subsidiary of a foreign banking entity is considered to be located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(6) For purposes of this paragraph (e), *unaffiliated market intermediary* means an unaffiliated entity, acting as an intermediary, that is:

(i) A broker or dealer registered with the SEC under section 15 of the Exchange Act or exempt from registration or excluded from regulation as such;

(ii) A swap dealer registered with the CFTC under section 4s of the Commodity Exchange Act or exempt from registration or excluded from regulation as such;

(iii) A security-based swap dealer registered with the SEC under section 15F of the Exchange Act or exempt from registration or excluded from regulation as such; or

(iv) A futures commission merchant registered with the CFTC under section 4f of the Commodity Exchange Act or exempt from registration or excluded from regulation as such.

§ 44.7 Limitations on permitted proprietary trading activities.

(a) No transaction, class of transactions, or activity may be deemed permissible under §§ 44.4 through 44.6 if the transaction, class of transactions, or activity would:

(1) Involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties;

(2) Result, directly or indirectly, in a material exposure by the banking entity to a high-risk asset or a high-risk trading strategy; or

(3) Pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.

(b) *Definition of material conflict of interest.* (1) For purposes of this section, a material conflict of interest between a banking entity and its clients, customers, or counterparties exists if the banking entity engages in any transaction, class of transactions, or activity that would involve or result in the banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, and the banking entity has not taken at least one of the actions in paragraph (b)(2) of this section.

(2) Prior to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, the banking entity:

(i) *Timely and effective disclosure.* (A) Has made clear, timely, and effective disclosure of the conflict of interest, together with other necessary information, in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest; and

(B) Such disclosure is made in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty created by the conflict of interest; or

(ii) *Information barriers.* Has established, maintained, and enforced information barriers that are memorialized in written policies and procedures, such as physical separation of personnel, or functions, or limitations on types of activity, that are reasonably designed, taking into consideration the nature of the banking entity's business, to prevent the conflict of interest from involving or resulting in a materially adverse effect on a client, customer, or counterparty. A banking entity may not rely on such information barriers if, in the case of any specific transaction, class or type of transactions or activity, the banking entity knows or should reasonably know that, notwithstanding the banking entity's establishment of information barriers, the conflict of interest may involve or result in a materially adverse effect on a client, customer, or counterparty.

(c) *Definition of high-risk asset and high-risk trading strategy.* For purposes of this section:

(1) *High-risk asset* means an asset or group of related assets that would, if held by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

(2) *High-risk trading strategy* means a trading strategy that would, if engaged in by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

§§ 44.8–44.9 [Reserved]

Subpart C—Covered Funds Activities and Investments

§ 44.10 Prohibition on acquiring or retaining an ownership interest in and having certain relationships with a covered fund.

(a) *Prohibition.* (1) Except as otherwise provided in this subpart, a banking entity may not, as principal, directly or indirectly, acquire or retain any ownership interest in or sponsor a covered fund.

(2) Paragraph (a)(1) of this section does not include acquiring or retaining an ownership interest in a covered fund by a banking entity:

(i) Acting solely as agent, broker, or custodian, so long as;

(A) The activity is conducted for the account of, or on behalf of, a customer; and

(B) The banking entity and its affiliates do not have or retain beneficial ownership of such ownership interest;

(ii) Through a deferred compensation, stock-bonus, profit-sharing, or pension plan of the banking entity (or an affiliate thereof) that is established and administered in accordance with the law of the United States or a foreign sovereign, if the ownership interest is held or controlled directly or indirectly by the banking entity as trustee for the benefit of persons who are or were employees of the banking entity (or an affiliate thereof);

(iii) In the ordinary course of collecting a debt previously contracted in good faith, provided that the banking entity divests the ownership interest as soon as practicable, and in no event may the banking entity retain such ownership interest for longer than such period permitted by the OCC; or

(iv) On behalf of customers as trustee or in a similar fiduciary capacity for a customer that is not a covered fund, so long as:

(A) The activity is conducted for the account of, or on behalf of, the customer; and

(B) The banking entity and its affiliates do not have or retain beneficial ownership of such ownership interest.

(b) *Definition of covered fund.* (1) Except as provided in paragraph (c) of this section, covered fund means:

(i) An issuer that would be an investment company, as defined in the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), *but for* section 3(c)(1) or 3(c)(7) of that Act (15 U.S.C. 80a–3(c)(1) or (7));

(ii) Any commodity pool under section 1a(10) of the Commodity Exchange Act (7 U.S.C. 1a(10)) for which:

(A) The commodity pool operator has claimed an exemption under 17 CFR 4.7; or

(B)(*1*) A commodity pool operator is registered with the CFTC as a commodity pool operator in connection with the operation of the commodity pool;

(*2*) Substantially all participation units of the commodity pool are owned by qualified eligible persons under 17 CFR 4.7(a)(2) and (3); and

(*3*) Participation units of the commodity pool have not been publicly offered to persons who are not qualified eligible persons under 17 CFR 4.7(a)(2) and (3); or

(iii) For any banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State, an entity that:

(A) Is organized or established outside the United States and the ownership interests of which are offered and sold solely outside the United States;

(B) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities; and

(C)(*1*) Has as its sponsor that banking entity (or an affiliate thereof); or

(*2*) Has issued an ownership interest that is owned directly or indirectly by that banking entity (or an affiliate thereof).

(2) An issuer shall not be deemed to be a covered fund under paragraph (b)(1)(iii) of this section if, were the issuer subject to U.S. securities laws, the issuer could rely on an exclusion or exemption from the definition of ''investment company'' under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) other than the exclusions contained in section 3(c)(1) and 3(c)(7) of that Act.

(3) For purposes of paragraph (b)(1)(iii) of this section, a U.S. branch, agency, or subsidiary of a foreign banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(c) Notwithstanding paragraph (b) of this section, unless the appropriate Federal banking agencies, the SEC, and the CFTC jointly determine otherwise, a covered fund does not include:

(1) *Foreign public funds.* (i) Subject to paragraphs (ii) and (iii) below, an issuer that:

(A) Is organized or established outside of the United States;

(B) Is authorized to offer and sell ownership interests to retail investors in the issuer's home jurisdiction; and

(C) Sells ownership interests predominantly through one or more public offerings outside of the United States.

(ii) With respect to a banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State and any issuer for which such banking entity acts as sponsor, the sponsoring banking entity may not rely on the exemption in paragraph (c)(1)(i) of this section for such issuer unless ownership interests in the issuer are sold predominantly to persons other than:

(A) Such sponsoring banking entity;

(B) Such issuer;

(C) Affiliates of such sponsoring banking entity or such issuer; and

(D) Directors and employees of such entities.

(iii) For purposes of paragraph (c)(1)(i)(C) of this section, the term ''public offering'' means a distribution (as defined in § 44.4(a)(3) of subpart B) of securities in any jurisdiction outside the United States to investors, including retail investors, provided that:

(A) The distribution complies with all applicable requirements in the jurisdiction in which such distribution is being made;

(B) The distribution does not restrict availability to investors having a minimum level of net worth or net investment assets; and

(C) The issuer has filed or submitted, with the appropriate regulatory authority in such jurisdiction, offering disclosure documents that are publicly available.

(2) *Wholly-owned subsidiaries.* An entity, all of the outstanding ownership interests of which are owned directly or indirectly by the banking entity (or an affiliate thereof), except that:

(i) Up to five percent of the entity's outstanding ownership interests, less any amounts outstanding under paragraph (c)(2)(ii) of this section, may be held by employees or directors of the banking entity or such affiliate (including former employees or directors if their ownership interest was acquired while employed by or in the service of the banking entity); and

(ii) Up to 0.5 percent of the entity's outstanding ownership interests may be held by a third party if the ownership interest is acquired or retained by the third party for the purpose of establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.

(3) *Joint ventures.* A joint venture between a banking entity or any of its affiliates and one or more unaffiliated persons, provided that the joint venture:

(i) Is comprised of no more than 10 unaffiliated co-venturers;

(ii) Is in the business of engaging in activities that are permissible for the banking entity or affiliate, other than investing in securities for resale or other disposition; and

(iii) Is not, and does not hold itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities.

(4) *Acquisition vehicles.* An issuer:

(i) Formed solely for the purpose of engaging in a *bona fide* merger or acquisition transaction; and

(ii) That exists only for such period as necessary to effectuate the transaction.

(5) *Foreign pension or retirement funds.* A plan, fund, or program providing pension, retirement, or similar benefits that is:

(i) Organized and administered outside the United States;

(ii) A broad-based plan for employees or citizens that is subject to regulation as a pension, retirement, or similar plan under the laws of the jurisdiction in which the plan, fund, or program is organized and administered; and

(iii) Established for the benefit of citizens or residents of one or more foreign sovereigns or any political subdivision thereof.

(6) *Insurance company separate accounts.* A separate account, provided that no banking entity other than the insurance company participates in the account's profits and losses.

(7) *Bank owned life insurance.* A separate account that is used solely for the purpose of allowing one or more banking entities to purchase a life insurance policy for which the banking entity or entities is beneficiary, provided that no banking entity that purchases the policy:

(i) Controls the investment decisions regarding the underlying assets or holdings of the separate account; or

(ii) Participates in the profits and losses of the separate account other than in compliance with applicable supervisory guidance regarding bank owned life insurance.

(8) *Loan securitizations*—(i) *Scope.* An issuing entity for asset-backed securities that satisfies all the conditions of this paragraph (c)(8) and the assets or holdings of which are comprised solely of:

(A) Loans as defined in § 44.2(s) of subpart A;

(B) Rights or other assets designed to assure the servicing or timely distribution of proceeds to holders of such securities and rights or other assets that are related or incidental to purchasing or otherwise acquiring and holding the loans, provided that each asset meets the requirements of paragraph (c)(8)(iii) of this section;

(C) Interest rate or foreign exchange derivatives that meet the requirements of paragraph (c)(8)(iv) of this section; and

(D) Special units of beneficial interest and collateral certificates that meet the requirements of paragraph (c)(8)(v) of this section.

(ii) *Impermissible assets.* For purposes of this paragraph (c)(8), the assets or holdings of the issuing entity shall not include any of the following:

(A) A security, including an asset-backed security, or an interest in an equity or debt security other than as permitted in paragraph (c)(8)(iii) of this section;

(B) A derivative, other than a derivative that meets the requirements of paragraph (c)(8)(iv) of this section; or

(C) A commodity forward contract.

(iii) *Permitted securities.* Notwithstanding paragraph (c)(8)(ii)(A) of this section, the issuing entity may hold securities if those securities are:

(A) Cash equivalents for purposes of the rights and assets in paragraph (c)(8)(i)(B) of this section; or

(B) Securities received in lieu of debts previously contracted with respect to the loans supporting the asset-backed securities.

(iv) *Derivatives.* The holdings of derivatives by the issuing entity shall be limited to interest rate or foreign exchange derivatives that satisfy all of the following conditions:

(A) The written terms of the derivative directly relate to the loans, the asset-backed securities, or the contractual rights of other assets described in paragraph (c)(8)(i)(B) of this section; and

(B) The derivatives reduce the interest rate and/or foreign exchange risks related to the loans, the asset-backed securities, or the contractual rights or other assets described in paragraph (c)(8)(i)(B) of this section.

(v) *Special units of beneficial interest and collateral certificates.* The assets or holdings of the issuing entity may include collateral certificates and special units of beneficial interest issued by a special purpose vehicle, provided that:

(A) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate meets the requirements in this paragraph (c)(8);

(B) The special unit of beneficial interest or collateral certificate is used for the sole purpose of transferring to the issuing entity for the loan securitization the economic risks and benefits of the assets that are permissible for loan securitizations under this paragraph (c)(8) and does not directly or indirectly transfer any interest in any other economic or financial exposure;

(C) The special unit of beneficial interest or collateral certificate is created solely to satisfy legal requirements or otherwise facilitate the structuring of the loan securitization; and

(D) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate and the issuing entity are established under the direction of the same entity that initiated the loan securitization.

(9) *Qualifying asset-backed commercial paper conduits.* (i) An issuing entity for asset-backed commercial paper that satisfies all of the following requirements:

(A) The asset-backed commercial paper conduit holds only:

(*1*) Loans and other assets permissible for a loan securitization under paragraph (c)(8)(i) of this section; and

(*2*) Asset-backed securities supported solely by assets that are permissible for loan securitizations under paragraph (c)(8)(i) of this section and acquired by the asset-backed commercial paper conduit as part of an initial issuance either directly from the issuing entity of the asset-backed securities or directly from an underwriter in the distribution of the asset-backed securities;

(B) The asset-backed commercial paper conduit issues only asset-backed securities, comprised of a residual interest and securities with a legal maturity of 397 days or less; and

(C) A regulated liquidity provider has entered into a legally binding commitment to provide full and unconditional liquidity coverage with respect to all of the outstanding asset-backed securities issued by the asset-backed commercial paper conduit (other than any residual interest) in the event that funds are required to redeem maturing asset-backed securities.

(ii) For purposes of this paragraph (c)(9), a regulated liquidity provider means:

(A) A depository institution, as defined in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c));

(B) A bank holding company, as defined in section 2(a) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(a)), or a subsidiary thereof;

(C) A savings and loan holding company, as defined in section 10a of the Home Owners' Loan Act (12 U.S.C. 1467a), provided all or substantially all of the holding company's activities are permissible for a financial holding company under section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)), or a subsidiary thereof;

(D) A foreign bank whose home country supervisor, as defined in § 211.21(q) of the Board's Regulation K (12 CFR 211.21(q)), has adopted capital standards consistent with the Capital Accord for the Basel Committee on banking Supervision, as amended, and that is subject to such standards, or a subsidiary thereof; or

(E) The United States or a foreign sovereign.

(10) *Qualifying covered bonds*—(i) *Scope.* An entity owning or holding a dynamic or fixed pool of loans or other assets as provided in paragraph (c)(8) of this section for the benefit of the holders of covered bonds, provided that the assets in the pool are comprised solely of assets that meet the conditions in paragraph (c)(8)(i) of this section.

(ii) *Covered bond.* For purposes of this paragraph (c)(10), a covered bond means:

(A) A debt obligation issued by an entity that meets the definition of foreign banking organization, the payment obligations of which are fully and unconditionally guaranteed by an entity that meets the conditions set forth in paragraph (c)(10)(i) of this section; or

(B) A debt obligation of an entity that meets the conditions set forth in paragraph (c)(10)(i) of this section, provided that the payment obligations are fully and unconditionally guaranteed by an entity that meets the definition of foreign banking organization and the entity is a wholly-owned subsidiary, as defined in paragraph (c)(2) of this section, of such foreign banking organization.

(11) *SBICs and public welfare investment funds.* An issuer:

(i) That is a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662), or that has received from the Small Business Administration notice to proceed to qualify for a license as a small business investment company, which notice or license has not been revoked; or

(ii) The business of which is to make investments that are:

(A) Designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs); or

(B) Qualified rehabilitation expenditures with respect to a qualified rehabilitated building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program.

(12) *Registered investment companies and excluded entities.* An issuer:

(i) That is registered as an investment company under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8), or that is formed and operated pursuant to a written plan to become a registered investment company as described in § 44.20(e)(3) of subpart D and that complies with the requirements of section 18 of the Investment Company Act of 1940 (15 U.S.C. 80a–18);

(ii) That may rely on an exclusion or exemption from the definition of ''investment company'' under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) other than the exclusions contained in section 3(c)(1) and 3(c)(7) of that Act; or

(iii) That has elected to be regulated as a business development company pursuant to section 54(a) of that Act (15 U.S.C. 80a–53) and has not withdrawn its election, or that is formed and operated pursuant to a written plan to become a business development company as described in § 44.20(e)(3) of subpart D and that complies with the requirements of section 61 of the Investment Company Act of 1940 (15 U.S.C. 80a–60).

(13) *Issuers in conjunction with the FDIC's receivership or conservatorship operations.* An issuer that is an entity formed by or on behalf of the FDIC for the purpose of facilitating the disposal of assets acquired in the FDIC's capacity as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(14) *Other excluded issuers.* (i) Any issuer that the appropriate Federal banking agencies, the SEC, and the CFTC jointly determine the exclusion of which is consistent with the purposes of section 13 of the BHC Act.

(ii) A determination made under paragraph (c)(14)(i) of this section will be promptly made public.

(d) *Definition of other terms related to covered funds.* For purposes of this subpart:

(1) *Applicable accounting standards* means U.S. generally accepted accounting principles, or such other accounting standards applicable to a banking entity that the OCC determines are appropriate and that the banking entity uses in the ordinary course of its business in preparing its consolidated financial statements.

(2) *Asset-backed security* has the meaning specified in Section 3(a)(79) of the Exchange Act (15 U.S.C. 78c(a)(79)).

(3) *Director* has the same meaning as provided in section 215.2(d)(1) of the Board's Regulation O (12 CFR 215.2(d)(1)).

(4) *Issuer* has the same meaning as in section 2(a)(22) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(22)).

(5) *Issuing entity* means with respect to asset-backed securities the special purpose vehicle that owns or holds the pool assets underlying asset-backed securities and in whose name the asset-backed securities supported or serviced by the pool assets are issued.

(6) *Ownership interest*—(i) *Ownership interest* means any equity, partnership, or other similar interest. An ''other similar interest'' means an interest that:

(A) Has the right to participate in the selection or removal of a general partner, managing member, member of the board of directors or trustees, investment manager, investment adviser, or commodity trading advisor of the covered fund (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event);

(B) Has the right under the terms of the interest to receive a share of the income, gains or profits of the covered fund;

(C) Has the right to receive the underlying assets of the covered fund after all other interests have been redeemed and/or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event);

(D) Has the right to receive all or a portion of excess spread (the positive difference, if any, between the aggregate interest payments received from the underlying assets of the covered fund and the aggregate interest paid to the holders of other outstanding interests);

(E) Provides under the terms of the interest that the amounts payable by the covered fund with respect to the interest could be reduced based on losses arising from the underlying assets of the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the amount of interest due and payable on the interest;

(F) Receives income on a pass-through basis from the covered fund, or has a rate of return that is determined by reference to the performance of the underlying assets of the covered fund; or

(G) Any synthetic right to have, receive, or be allocated any of the rights in paragraphs (d)(6)(i)(A) through (F) of this section.

(ii) *Ownership interest* does not include: *Restricted profit interest.* An interest held by an entity (or an employee or former employee thereof) in a covered fund for which the entity (or employee thereof) serves as investment manager, investment adviser, commodity trading advisor, or other service provider so long as:

(A) The sole purpose and effect of the interest is to allow the entity (or employee or former employee thereof) to share in the profits of the covered fund as performance compensation for the investment management, investment advisory, commodity trading advisory, or other services provided to the covered fund by the entity (or employee or former employee thereof), provided that the entity (or employee or former employee thereof) may be obligated under the terms of such interest to return profits previously received;

(B) All such profit, once allocated, is distributed to the entity (or employee or former employee thereof) promptly after being earned or, if not so distributed, is retained by the covered fund for the sole purpose of establishing a reserve amount to satisfy contractual obligations with respect to subsequent losses of the covered fund and such undistributed profit of the entity (or employee or former employee thereof) does not share in the subsequent investment gains of the covered fund;

(C) Any amounts invested in the covered fund, including any amounts paid by the entity (or employee or former employee thereof) in connection with obtaining the restricted profit interest, are within the limits of § 44.12 of this subpart; and

(D) The interest is not transferable by the entity (or employee or former employee thereof) except to an affiliate thereof (or an employee of the banking entity or affiliate), to immediate family members, or through the intestacy, of the employee or former employee, or in connection with a sale of the business that gave rise to the restricted profit interest by the entity (or employee or former employee thereof) to an unaffiliated party that provides investment management, investment advisory, commodity trading advisory, or other services to the fund.

(7) *Prime brokerage transaction* means any transaction that would be a covered transaction, as defined in section 23A(b)(7) of the Federal Reserve Act (12 U.S.C. 371c(b)(7)), that is provided in connection with custody, clearance and settlement, securities borrowing or lending services, trade execution, financing, or data, operational, and administrative support.

(8) *Resident of the United States* means a person that is a ''U.S. person'' as defined in rule 902(k) of the SEC's Regulation S (17 CFR 230.902(k)).

(9) *Sponsor* means, with respect to a covered fund:

(i) To serve as a general partner, managing member, or trustee of a covered fund, or to serve as a commodity pool operator with respect to a covered fund as defined in (b)(1)(ii) of this section;

(ii) In any manner to select or to control (or to have employees, officers, or directors, or agents who constitute) a majority of the directors, trustees, or management of a covered fund; or

(iii) To share with a covered fund, for corporate, marketing, promotional, or other purposes, the same name or a variation of the same name, except as permitted under § 44.11(a)(6).

(10) *Trustee.* (i) For purposes of paragraph (d)(9) of this section and § 44.11 of subpart C, a trustee does not include:

(A) A trustee that does not exercise investment discretion with respect to a covered fund, including a trustee that is subject to the direction of an unaffiliated named fiduciary who is not a trustee pursuant to section 403(a)(1) of the Employee's Retirement Income Security Act (29 U.S.C. 1103(a)(1)); or

(B) A trustee that is subject to fiduciary standards imposed under foreign law that are substantially equivalent to those described in paragraph (d)(10)(i)(A) of this section;

(ii) Any entity that directs a person described in paragraph (d)(10)(i) of this section, or that possesses authority and discretion to manage and control the investment decisions of a covered fund for which such person serves as trustee, shall be considered to be a trustee of such covered fund.

§ 44.11 Permitted organizing and offering, underwriting, and market making with respect to a covered fund.

(a) *Organizing and offering a covered fund in general.* Notwithstanding § 44.10(a) of this subpart, a banking entity is not prohibited from acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund in connection with, directly or indirectly, organizing and offering a covered fund, including serving as a general partner, managing member, trustee, or commodity pool operator of the covered fund and in any manner selecting or controlling (or having employees, officers, directors, or agents who constitute) a majority of the directors, trustees, or management of the covered fund, including any necessary expenses for the foregoing, only if:

(1) The banking entity (or an affiliate thereof) provides *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services;

(2) The covered fund is organized and offered only in connection with the provision of *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services and only to persons that are customers of such

services of the banking entity (or an affiliate thereof), pursuant to a written plan or similar documentation outlining how the banking entity or such affiliate intends to provide advisory or similar services to its customers through organizing and offering such fund;

(3) The banking entity and its affiliates do not acquire or retain an ownership interest in the covered fund except as permitted under § 44.12 of this subpart;

(4) The banking entity and its affiliates comply with the requirements of § 44.14 of this subpart;

(5) The banking entity and its affiliates do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests;

(6) The covered fund, for corporate, marketing, promotional, or other purposes:

(i) Does not share the same name or a variation of the same name with the banking entity (or an affiliate thereof) except that a covered fund may share the same name or a variation of the same name with a banking entity that is an investment adviser to the covered fund if:

(A) The investment adviser is not an insured depository institution, a company that controls an insured depository institution, or a company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(B) The investment adviser does not share the same name or a variation of the same name as an insured depository institution, a company that controls an insured depository institution, or a company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(ii) Does not use the word ''bank'' in its name;

(7) No director or employee of the banking entity (or an affiliate thereof) takes or retains an ownership interest in the covered fund, except for any director or employee of the banking entity or such affiliate who is directly engaged in providing investment advisory, commodity trading advisory, or other services to the covered fund at the time the director or employee takes the ownership interest; and

(8) The banking entity:

(i) Clearly and conspicuously discloses, in writing, to any prospective and actual investor in the covered fund (such as through disclosure in the covered fund's offering documents):

(A) That ''any losses in [such covered fund] will be borne solely by investors in [the covered fund] and not by [the banking entity] or its affiliates; therefore, [the banking entity's] losses in [such covered fund] will be limited to losses attributable to the ownership interests in the covered fund held by [the banking entity] and any affiliate in its capacity as investor in the [covered fund] or as beneficiary of a restricted profit interest held by [the banking entity] or any affiliate'';

(B) That such investor should read the fund offering documents before investing in the covered fund;

(C) That the ''ownership interests in the covered fund are not insured by the FDIC, and are not deposits, obligations of, or endorsed or guaranteed in any way, by any banking entity'' (unless that happens to be the case); and

(D) The role of the banking entity and its affiliates and employees in sponsoring or providing any services to the covered fund; and

(ii) Complies with any additional rules of the appropriate Federal banking agencies, the SEC, or the CFTC, as provided in section 13(b)(2) of the BHC Act, designed to ensure that losses in such covered fund are borne solely by investors in the covered fund and not by the covered banking entity and its affiliates.

(b) *Organizing and offering an issuing entity of asset-backed securities.* (1) Notwithstanding § 44.10(a) of this subpart, a banking entity is not prohibited from acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund that is an issuing entity of asset-backed securities in connection with, directly or indirectly, organizing and offering that issuing entity, so long as the banking entity and its affiliates comply with all of the requirements of paragraph (a)(3) through (8) of this section.

(2) For purposes of this paragraph (b), organizing and offering a covered fund that is an issuing entity of asset-backed securities means acting as the securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78*o*–11(a)(3)) of the issuing entity, or acquiring or retaining an ownership interest in the issuing entity as required by section 15G of that Act (15 U.S.C. 78*o*–11) and the implementing regulations issued thereunder.

(c) *Underwriting and market making in ownership interests of a covered fund.* The prohibition contained in § 44.10(a) of this subpart does not apply to a banking entity's underwriting activities or market making-related activities involving a covered fund so long as:

(1) Those activities are conducted in accordance with the requirements of § 44.4(a) or § 44.4(b) of subpart B, respectively;

(2) With respect to any banking entity (or any affiliate thereof) that: Acts as a sponsor, investment adviser or commodity trading advisor to a particular covered fund or otherwise acquires and retains an ownership interest in such covered fund in reliance on paragraph (a) of this section; acquires and retains an ownership interest in such covered fund and is either a securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78o–11(a)(3)), or is acquiring and retaining an ownership interest in such covered fund in compliance with section 15G of that Act (15 U.S.C. 78o–11) and the implementing regulations issued thereunder each as permitted by paragraph (b) of this section; or, directly or indirectly, guarantees, assumes, or otherwise insures the obligations or performance of the covered fund or of any covered fund in which such fund invests, then in each such case any ownership interests acquired or retained by the banking entity and its affiliates in connection with underwriting and market making related activities for that particular covered fund are included in the calculation of ownership interests permitted to be held by the banking entity and its affiliates under the limitations of § 44.12(a)(2)(ii) and § 44.12(d) of this subpart; and

(3) With respect to any banking entity, the aggregate value of all ownership interests of the banking entity and its affiliates in all covered funds acquired and retained under § 44.11 of this subpart, including all covered funds in which the banking entity holds an ownership interest in connection with underwriting and market making related activities permitted under this paragraph (c), are included in the calculation of all ownership interests under § 44.12(a)(2)(iii) and § 44.12(d) of this subpart.

§ 44.12 Permitted investment in a covered fund.

(a) *Authority and limitations on permitted investments in covered funds.* (1) Notwithstanding the prohibition contained in § 44.10(a) of this subpart, a banking entity may acquire and retain an ownership interest in a covered fund that the banking entity or an affiliate thereof organizes and offers pursuant to § 44.11, for the purposes of:

(i) *Establishment.* Establishing the fund and providing the fund with sufficient initial equity for investment to permit the fund to attract unaffiliated investors, subject to the limits contained in paragraphs (a)(2)(i) and (iii) of this section; or

(ii) *De minimis investment.* Making and retaining an investment in the covered fund subject to the limits contained in paragraphs (a)(2)(ii) and (iii) of this section.

(2) *Investment limits*—(i) *Seeding period.* With respect to an investment in any covered fund made or held pursuant to paragraph (a)(1)(i) of this section, the banking entity and its affiliates:

(A) Must actively seek unaffiliated investors to reduce, through redemption, sale, dilution, or other methods, the aggregate amount of all ownership interests of the banking entity in the covered fund to the amount permitted in paragraph (a)(2)(i)(B) of this section; and

(B) Must, no later than 1 year after the date of establishment of the fund (or such longer period as may be provided by the Board pursuant to paragraph (e) of this section), conform its ownership interest in the covered fund to the limits in paragraph (a)(2)(ii) of this section;

(ii) *Per-fund limits.* (A) Except as provided in paragraph (a)(2)(ii)(B) of this section, an investment by a banking entity and its affiliates in any covered fund made or held pursuant to paragraph (a)(1)(ii) of this section may not exceed 3 percent of the total number or value of the outstanding ownership interests of the fund.

(B) An investment by a banking entity and its affiliates in a covered fund that is an issuing entity of asset-backed securities may not exceed 3 percent of the total fair market value of the ownership interests of the fund measured in accordance with paragraph (b)(3) of this section, unless a greater percentage is retained by the banking entity and its affiliates in compliance with the requirements of section 15G of the Exchange Act (15 U.S.C. 78*o*–11) and the implementing regulations issued thereunder, in which case the investment by the banking entity and its affiliates in the covered fund may not exceed the amount, number, or value of ownership interests of the fund required under section 15G of the Exchange Act and the implementing regulations issued thereunder.

(iii) *Aggregate limit.* The aggregate value of all ownership interests of the banking entity and its affiliates in all covered funds acquired or retained under this section may not exceed 3 percent of the tier 1 capital of the banking entity, as provided under paragraph (c) of this section, and shall be calculated as of the last day of each calendar quarter.

(iv) *Date of establishment.* For purposes of this section, the date of establishment of a covered fund shall be:

(A) *In general.* The date on which the investment adviser or similar entity to the covered fund begins making investments pursuant to the written investment strategy for the fund;

(B) *Issuing entities of asset-backed securities.* In the case of an issuing entity of asset-backed securities, the date on which the assets are initially transferred into the issuing entity of asset-backed securities.

(b) *Rules of construction*—(1) *Attribution of ownership interests to a covered banking entity.* (i) For purposes of paragraph (a)(2) of this section, the amount and value of a banking entity's permitted investment in any single covered fund shall include any ownership interest held under § 44.12 directly by the banking entity, including any affiliate of the banking entity.

(ii) *Treatment of registered investment companies, SEC-regulated business development companies and foreign public funds.* For purposes of paragraph (b)(1)(i) of this section, a registered investment company, SEC-regulated business development companies or foreign public fund as described in § 44.10(c)(1) of this subpart will not be considered to be an affiliate of the banking entity so long as the banking entity:

(A) Does not own, control, or hold with the power to vote 25 percent or more of the voting shares of the company or fund; and

(B) Provides investment advisory, commodity trading advisory, administrative, and other services to the company or fund in compliance with the limitations under applicable regulation, order, or other authority.

(iii) *Covered funds.* For purposes of paragraph (b)(1)(i) of this section, a covered fund will not be considered to be an affiliate of a banking entity so long as the covered fund is held in compliance with the requirements of this subpart.

(iv) *Treatment of employee and director investments financed by the banking entity.* For purposes of paragraph (b)(1)(i) of this section, an investment by a director or employee of a banking entity who acquires an ownership interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the ownership interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

(2) *Calculation of permitted ownership interests in a single covered fund.* Except as provided in paragraph (b)(3) or (4), for purposes of determining whether an investment in a single covered fund complies with the restrictions on ownership interests under paragraphs (a)(2)(i)(B) and (a)(2)(ii)(A) of this section:

(i) The aggregate number of the outstanding ownership interests held by the banking entity shall be the total number of ownership interests held under this section by the banking entity in a covered fund divided by the total number of ownership interests held by all entities in that covered fund, as of the last day of each calendar quarter (both measured without regard to committed funds not yet called for investment);

(ii) The aggregate value of the outstanding ownership interests held by the banking entity shall be the aggregate fair market value of all investments in and capital contributions made to the covered fund by the banking entity, divided by the value of all investments in and capital contributions made to that covered fund by all entities, as of the last day of each calendar quarter (all measured without regard to committed funds not yet called for investment). If fair market value cannot be determined, then the value shall be the historical cost basis of all investments in and contributions made by the banking entity to the covered fund;

(iii) For purposes of the calculation under paragraph (b)(2)(ii) of this section, once a valuation methodology is chosen, the banking entity must calculate the value of its investment and the investments of all others in the covered fund in the same manner and according to the same standards.

(3) *Issuing entities of asset-backed securities.* In the case of an ownership interest in an issuing entity of asset-backed securities, for purposes of determining whether an investment in a single covered fund complies with the restrictions on ownership interests under paragraphs (a)(2)(i)(B) and (a)(2)(ii)(B) of this section:

(i) For securitizations subject to the requirements of section 15G of the Exchange Act (15 U.S.C. 78o–11), the calculations shall be made as of the date and according to the valuation methodology applicable pursuant to the requirements of section 15G of the Exchange Act (15 U.S.C. 78o–11) and the implementing regulations issued thereunder; or

(ii) For securitization transactions completed prior to the compliance date of such implementing regulations (or as to which such implementing regulations do not apply), the calculations shall be made as of the date of establishment as defined in paragraph (a)(2)(iv)(B) of this section or such earlier date on which the transferred assets have been valued for purposes of transfer to the covered fund, and thereafter only upon the date on which additional securities of the issuing entity of asset-backed securities are priced for purposes of the sales of ownership interests to unaffiliated investors.

(iii) For securitization transactions completed prior to the compliance date of such implementing regulations (or as to which such implementing regulations do not apply), the aggregate value of the outstanding ownership interests in the covered fund shall be the fair market value of the assets transferred to the issuing entity of the securitization and any other assets otherwise held by the issuing entity at such time, determined in a manner that is consistent with its determination of the fair market value of those assets for financial statement purposes.

(iv) For purposes of the calculation under paragraph (b)(3)(iii) of this section, the valuation methodology used to calculate the fair market value of the ownership interests must be the same for both the ownership interests held by a banking entity and the ownership interests held by all others in the covered fund in the same manner and according to the same standards.

(4) *Multi-tier fund investments*—(i) *Master-feeder fund investments.* If the principal investment strategy of a covered fund (the ''feeder fund'') is to invest substantially all of its assets in another single covered fund (the ''master fund''), then for purposes of the investment limitations in paragraphs (a)(2)(i)(B) and (a)(2)(ii) of this section, the banking entity's permitted investment in such funds shall be measured only by reference to the value of the master fund. The banking entity's permitted investment in the master fund shall include any investment by the banking entity in the master fund, as well as the banking entity's pro-rata share of any ownership interest of the master fund that is held through the feeder fund; and

(ii) *Fund-of-funds investments.* If a banking entity organizes and offers a covered fund pursuant to § 44.11 of this subpart for the purpose of investing in other covered funds (a ''fund of funds'') and that fund of funds itself invests in another covered fund that the banking entity is permitted to own, then the banking entity's permitted investment in that other fund shall include any investment by the banking entity in that other fund, as well as the banking entity's pro-rata share of any ownership interest of the fund that is held through the fund of funds. The investment of the banking entity may not represent more than 3 percent of the amount or value of any single covered fund.

(c) *Aggregate permitted investments in all covered funds.* (1) For purposes of paragraph (a)(2)(iii) of this section, the aggregate value of all ownership interests held by a banking entity shall be the sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest in covered funds (together with any amounts paid by the entity (or employee thereof) in connection with obtaining a restricted profit interest under § 44.10(d)(6)(ii) of this subpart), on a historical cost basis.

(2) *Calculation of tier 1 capital.* For purposes of paragraph (a)(2)(iii) of this section:

(i) *Entities that are required to hold and report tier 1 capital.* If a banking entity is required to calculate and report tier 1 capital, the banking entity's tier 1 capital shall be equal to the amount of tier 1 capital of the banking entity as of the last day of the most recent calendar quarter, as reported to its primary financial regulatory agency; and

(ii) If a banking entity is not required to calculate and report tier 1 capital, the banking entity's tier 1 capital shall be determined to be equal to:

(A) In the case of a banking entity that is controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital, be equal to the amount of tier 1 capital reported by such controlling depository institution in the manner described in paragraph (c)(2)(i) of this section;

(B) In the case of a banking entity that is not controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital:

(*1*) *Bank holding company subsidiaries.* If the banking entity is a subsidiary of a bank holding company or company that is treated as a bank holding company, be equal to the amount of tier 1 capital reported by the top-tier affiliate of such covered banking entity that calculates and reports tier 1 capital in the manner described in paragraph (c)(2)(i) of this section; and

(*2*) *Other holding companies and any subsidiary or affiliate thereof.* If the banking entity is not a subsidiary of a bank holding company or a company that is treated as a bank holding company, be equal to the total amount of shareholders' equity of the top-tier affiliate within such organization as of the last day of the most recent calendar quarter that has ended, as determined under applicable accounting standards.

(iii) *Treatment of foreign banking entities*—(A) *Foreign banking entities.* Except as provided in paragraph (c)(2)(iii)(B) of this section, with respect to a banking entity that is not itself, and is not controlled directly or indirectly by, a banking entity that is located or organized under the laws of the United States or of any State, the tier 1 capital of the banking entity shall be the consolidated tier 1 capital of the entity as calculated under applicable home country standards.

(B) *U.S. affiliates of foreign banking entities.* With respect to a banking entity that is located or organized under the laws of the United States or of any State and is controlled by a foreign banking entity identified under paragraph (c)(2)(iii)(A) of this section, the banking entity's tier 1 capital shall be as calculated under paragraphs (c)(2)(i) or (ii) of this section.

(d) *Capital treatment for a permitted investment in a covered fund.* For purposes of calculating compliance with the applicable regulatory capital requirements, a banking entity shall deduct from the banking entity's tier 1 capital (as determined under paragraph (c)(2) of this section) the greater of:

(1) The sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest (together with any amounts paid by the entity (or employee thereof) in connection with obtaining a restricted profit interest under § 44.10(d)(6)(ii) of subpart C), on a historical cost basis, plus any earnings received; and

(2) The fair market value of the banking entity's ownership interests in the covered fund as determined under paragraph (b)(2)(ii) or (b)(3) of this section (together with any amounts paid by the entity (or employee thereof) in connection with obtaining a restricted profit interest under § 44.10(d)(6)(ii) of subpart C), if the banking entity accounts for the profits (or losses) of the fund investment in its financial statements.

(e) *Extension of time to divest an ownership interest.* (1) Upon application by a banking entity, the Board may extend the period under paragraph (a)(2)(i) of this section for up to 2 additional years if the Board finds that an extension would be consistent with safety and soundness and not detrimental to the public interest. An application for extension must:

(i) Be submitted to the Board at least 90 days prior to the expiration of the applicable time period;

(ii) Provide the reasons for application, including information that addresses the factors in paragraph (e)(2) of this section; and

(iii) Explain the banking entity's plan for reducing the permitted investment in a covered fund through redemption, sale, dilution or other methods as required in paragraph (a)(2) of this section.

(2) *Factors governing Board determinations.* In reviewing any application under paragraph (e)(1) of this section, the Board may consider all the facts and circumstances related to the permitted investment in a covered fund, including:

(i) Whether the investment would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies;

(ii) The contractual terms governing the banking entity's interest in the covered fund;

(iii) The date on which the covered fund is expected to have attracted sufficient investments from investors unaffiliated with the banking entity to enable the banking entity to comply with the limitations in paragraph (a)(2)(i) of this section;

(iv) The total exposure of the covered banking entity to the investment and the risks that disposing of, or maintaining, the investment in the covered fund may pose to the banking entity and the financial stability of the United States;

(v) The cost to the banking entity of divesting or disposing of the investment within the applicable period;

(vi) Whether the investment or the divestiture or conformance of the investment would involve or result in a material conflict of interest between the banking entity and unaffiliated parties, including clients, customers or counterparties to which it owes a duty;

(vi) The banking entity's prior efforts to reduce through redemption, sale, dilution, or other methods its ownership interests in the covered fund, including activities related to the marketing of interests in such covered fund;

(viii) Market conditions; and

(ix) Any other factor that the Board believes appropriate.

(3) *Authority to impose restrictions on activities or investment during any extension period.* The Board may impose such conditions on any extension approved under paragraph (e)(1) of this section as the Board determines are necessary or appropriate to protect the safety and soundness of the banking entity or the financial stability of the United States, address material conflicts of interest or other unsound banking practices, or otherwise further the purposes of section 13 of the BHC Act and this part.

(4) *Consultation.* In the case of a banking entity that is primarily regulated by another Federal banking agency, the SEC, or the CFTC, the Board will consult with such agency prior to acting on an application by the banking entity for an extension under paragraph (e)(1) of this section.

§ 44.13 Other permitted covered fund activities and investments.

(a) *Permitted risk-mitigating hedging activities.* (1) The prohibition contained in § 44.10(a) of this subpart does not apply with respect to an ownership interest in a covered fund acquired or retained by a banking entity that is designed to demonstrably reduce or otherwise significantly mitigate the specific, identifiable risks to the banking entity in connection with a compensation arrangement with an employee of the banking entity or an affiliate thereof that directly provides investment advisory, commodity trading advisory or other services to the covered fund.

(2) *Requirements.* The risk-mitigating hedging activities of a banking entity are permitted under this paragraph (a) only if:

(i) The banking entity has established and implements, maintains and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(A) Reasonably designed written policies and procedures; and

(B) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(ii) The acquisition or retention of the ownership interest:

(A) Is made in accordance with the written policies, procedures and internal controls required under this section;

(B) At the inception of the hedge, is designed to reduce or otherwise significantly mitigate and demonstrably reduces or otherwise significantly mitigates one or more specific, identifiable risks arising in connection with the compensation arrangement with the employee that directly provides investment advisory, commodity trading advisory, or other services to the covered fund;

(C) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section; and

(D) Is subject to continuing review, monitoring and management by the banking entity.

(iii) The compensation arrangement relates solely to the covered fund in which the banking entity or any affiliate has acquired an ownership interest pursuant to this paragraph and such compensation arrangement provides that any losses incurred by the banking entity on such ownership interest will be offset by corresponding decreases in amounts payable under such compensation arrangement.

(b) *Certain permitted covered fund activities and investments outside of the United States.* (1) The prohibition contained in § 44.10(a) of this subpart does not apply to the acquisition or retention of any ownership interest in, or the sponsorship of, a covered fund by a banking entity only if:

(i) The banking entity is not organized or directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States;

(ii) The activity or investment by the banking entity is pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act;

(iii) No ownership interest in the covered fund is offered for sale or sold to a resident of the United States; and

(iv) The activity or investment occurs solely outside of the United States.

(2) An activity or investment by the banking entity is pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act for purposes of paragraph (b)(1)(ii) of this section only if:

(i) The activity or investment is conducted in accordance with the requirements of this section; and

(ii)(A) With respect to a banking entity that is a foreign banking organization, the banking entity meets the qualifying foreign banking organization requirements of section 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c) or (e)), as applicable; or

(B) With respect to a banking entity that is not a foreign banking organization, the banking entity is not organized under the laws of the United States or of one or more States and the banking entity, on a fully-consolidated basis, meets at least two of the following requirements:

(*1*) Total assets of the banking entity held outside of the United States exceed total assets of the banking entity held in the United States;

(*2*) Total revenues derived from the business of the banking entity outside of the United States exceed total revenues derived from the business of the banking entity in the United States; or

(*3*) Total net income derived from the business of the banking entity outside of the United States exceeds total net income derived from the business of the banking entity in the United States.

(3) An ownership interest in a covered fund is not offered for sale or sold to a resident of the United States for purposes of paragraph (b)(1)(iii) of this section only if it is sold or has been sold pursuant to an offering that does not target residents of the United States.

(4) An activity or investment occurs solely outside of the United States for purposes of paragraph (b)(1)(iv) of this section only if:

(i) The banking entity acting as sponsor, or engaging as principal in the acquisition or retention of an ownership interest in the covered fund, is not itself, and is not controlled directly or indirectly by, a banking entity that is located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to acquire or retain the ownership interest or act as sponsor to the covered fund is not located in the United States or organized under the laws of the United States or of any State;

(iii) The investment or sponsorship, including any transaction arising from risk-mitigating hedging related to an ownership interest, is not accounted for as principal directly or indirectly on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State; and

(iv) No financing for the banking entity's ownership or sponsorship is provided, directly or indirectly, by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State.

(5) For purposes of this section, a U.S. branch, agency, or subsidiary of a foreign bank, or any subsidiary thereof, is located in the United States; however, a foreign bank of which that branch, agency, or subsidiary is a part is not considered to be located in the United States solely by virtue of operation of the U.S. branch, agency, or subsidiary.

(c) *Permitted covered fund interests and activities by a regulated insurance company.* The prohibition contained in § 44.10(a) of this subpart does not apply to the acquisition or retention by an insurance company, or an affiliate thereof, of any ownership interest in, or the sponsorship of, a covered fund only if:

(1) The insurance company or its affiliate acquires and retains the ownership interest solely for the general account of the insurance company or for one or more separate accounts established by the insurance company;

(2) The acquisition and retention of the ownership interest is conducted in compliance with, and subject to, the insurance company investment laws, regulations, and written guidance of the State or jurisdiction in which such insurance company is domiciled; and

(3) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and foreign jurisdictions, as appropriate, have not jointly determined, after notice and comment, that a particular law, regulation, or written guidance described in paragraph (c)(2) of this section is insufficient to protect the safety and soundness of the banking entity, or the financial stability of the United States.

§ 44.14 Limitations on relationships with a covered fund.

(a) *Relationships with a covered fund.* (1) Except as provided for in paragraph (a)(2) of this section, no banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, that organizes and offers a covered fund pursuant to § 44.11 of this subpart, or that continues to hold an ownership interest in accordance with § 44.11(b) of this subpart, and no affiliate of such entity, may enter into a transaction with the covered fund, or with any other covered fund that is controlled by such covered fund, that would be a covered transaction as defined in section 23A of the Federal Reserve Act (12 U.S.C. 371c(b)(7)), as if such banking entity and the affiliate thereof were a member bank and the covered fund were an affiliate thereof.

(2) Notwithstanding paragraph (a)(1) of this section, a banking entity may:

(i) Acquire and retain any ownership interest in a covered fund in accordance with the requirements of § 44.11, § 44.12, or § 44.13 of this subpart; and

(ii) Enter into any prime brokerage transaction with any covered fund in which a covered fund managed, sponsored, or advised by such banking entity (or an affiliate thereof) has taken an ownership interest, if:

(A) The banking entity is in compliance with each of the limitations set forth in § 44.11 of this subpart with respect to a covered fund organized and offered by such banking entity (or an affiliate thereof);

(B) The chief executive officer (or equivalent officer) of the banking entity certifies in writing annually to the OCC (with a duty to update the certification if the information in the certification materially changes) that the banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests; and

(C) The Board has not determined that such transaction is inconsistent with the safe and sound operation and condition of the banking entity.

(b) *Restrictions on transactions with covered funds.* A banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, or that organizes and offers a covered fund pursuant to § 44.11 of this subpart, or that continues to hold an ownership interest in accordance with § 44.11(b) of this subpart, shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1), as if such banking entity were a member bank and such covered fund were an affiliate thereof.

(c) *Restrictions on prime brokerage transactions.* A prime brokerage transaction permitted under paragraph (a)(2)(ii) of this section shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1) as if the counterparty were an affiliate of the banking entity.

§ 44.15 Other limitations on permitted covered fund activities and investments.

(a) No transaction, class of transactions, or activity may be deemed permissible under §§ 44.11 through 44.13 of this subpart if the transaction, class of transactions, or activity would:

(1) Involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties;

(2) Result, directly or indirectly, in a material exposure by the banking entity to a high-risk asset or a high-risk trading strategy; or

(3) Pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.

(b) *Definition of material conflict of interest.* (1) For purposes of this section, a material conflict of interest between a banking entity and its clients, customers, or counterparties exists if the banking entity engages in any transaction, class of transactions, or activity that would involve or result in the banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, and the banking entity has not taken at least one of the actions in paragraph (b)(2) of this section.

(2) Prior to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, the banking entity:

(i) *Timely and effective disclosure.* (A) Has made clear, timely, and effective disclosure of the conflict of interest, together with other necessary information, in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest; and

(B) Such disclosure is made in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty created by the conflict of interest; or

(ii) *Information barriers.* Has established, maintained, and enforced information barriers that are memorialized in written policies and procedures, such as physical separation of personnel, or functions, or limitations on types of activity, that are reasonably designed, taking into consideration the nature of the banking entity's business, to prevent the conflict of interest from involving or resulting in a materially adverse effect on a client, customer, or counterparty. A banking entity may not rely on such information barriers if, in the case of any specific transaction, class or type of transactions or activity, the banking entity knows or should reasonably know that, notwithstanding the banking entity's establishment of information barriers, the conflict of interest may involve or result in a materially adverse effect on a client, customer, or counterparty.

(c) *Definition of high-risk asset and high-risk trading strategy.* For purposes of this section:

(1) *High-risk asset* means an asset or group of related assets that would, if held by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

(2) *High-risk trading strategy* means a trading strategy that would, if engaged in by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

§ 44.16 Ownership of interests in and sponsorship of issuers of certain collateralized debt obligations backed by trust-preferred securities.

(a) The prohibition contained in § 44.10(a)(1) does not apply to the ownership by a banking entity of an interest in, or sponsorship of, any issuer if:

(1) The issuer was established, and the interest was issued, before May 19, 2010;

(2) The banking entity reasonably believes that the offering proceeds received by the issuer were invested primarily in Qualifying TruPS Collateral; and

(3) The banking entity acquired such interest on or before December 10, 2013 (or acquired such interest in connection with a merger with or acquisition of a banking entity that acquired the interest on or before December 10, 2013).

(b) For purposes of this § 44.16, *Qualifying TruPS Collateral* shall mean any trust preferred security or subordinated debt instrument issued prior to May 19, 2010 by a depository institution holding company that, as of the end of any reporting period within 12 months immediately preceding the issuance of such trust preferred security or subordinated debt instrument, had total consolidated assets of less than $15,000,000,000 or issued prior to May 19, 2010 by a mutual holding company.

(c) Notwithstanding paragraph (a)(3) of this section, a banking entity may act as a market maker with respect to the interests of an issuer described in paragraph (a) of this section in accordance with the applicable provisions of §§ 44.4 and 44.11.

(d) Without limiting the applicability of paragraph (a) of this section, the Board, the FDIC and the OCC will make public a non-exclusive list of issuers that meet the requirements of paragraph (a). A banking entity may rely on the list published by the Board, the FDIC and the OCC.

§§ 44.17–44.19 [Reserved]

Subpart D—Compliance Program Requirement; Violations

§ 44.20 Program for compliance; reporting.

(a) *Program requirement.* Each banking entity shall develop and provide for the continued administration of a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part. The terms, scope and detail of the compliance program shall be appropriate for the types, size, scope and complexity of activities and business structure of the banking entity.

(b) *Contents of compliance program.* Except as provided in paragraph (f) of this section, the compliance program required by paragraph (a) of this section, at a minimum, shall include:

(1) Written policies and procedures reasonably designed to document, describe, monitor and limit trading activities subject to subpart B (including those permitted under §§ 44.3 to 44.6 of subpart B), including setting, monitoring and managing required limits set out in §§ 44.4 and 44.5, and activities and investments with respect to a covered fund subject to subpart C (including those permitted under §§ 44.11 through 44.14 of subpart C) conducted by the banking entity to ensure that all activities and investments conducted by the banking entity that are subject to section 13 of the BHC Act and this part comply with section 13 of the BHC Act and this part;

(2) A system of internal controls reasonably designed to monitor compliance with section 13 of the BHC Act and this part and to prevent the occurrence of activities or investments that are prohibited by section 13 of the BHC Act and this part;

(3) A management framework that clearly delineates responsibility and accountability for compliance with section 13 of the BHC Act and this part and includes appropriate management review of trading limits, strategies, hedging activities, investments, incentive compensation and other matters identified in this part or by management as requiring attention;

(4) Independent testing and audit of the effectiveness of the compliance program conducted periodically by qualified personnel of the banking entity or by a qualified outside party;

(5) Training for trading personnel and managers, as well as other appropriate personnel, to effectively implement and enforce the compliance program; and

(6) Records sufficient to demonstrate compliance with section 13 of the BHC Act and this part, which a banking entity must promptly provide to the OCC upon request and retain for a period of no less than 5 years or such longer period as required by the OCC.

(c) *Additional standards.* In addition to the requirements in paragraph (b) of this section, the compliance program of a banking entity must satisfy the requirements and other standards contained in appendix B, if:

(1) The banking entity engages in proprietary trading permitted under subpart B and is required to comply

with the reporting requirements of paragraph (d) of this section;

(2) The banking entity has reported total consolidated assets as of the previous calendar year end of $50 billion or more or, in the case of a foreign banking entity, has total U.S. assets as of the previous calendar year end of $50 billion or more (including all subsidiaries, affiliates, branches and agencies of the foreign banking entity operating, located or organized in the United States); or

(3) The OCC notifies the banking entity in writing that it must satisfy the requirements and other standards contained in appendix B to this part.

(d) *Reporting requirements under appendix A to this part.* (1) A banking entity engaged in proprietary trading activity permitted under subpart B shall comply with the reporting requirements described in appendix A, if:

(i) The banking entity (other than a foreign banking entity as provided in paragraph (d)(1)(ii) of this section) has, together with its affiliates and subsidiaries, trading assets and liabilities (excluding trading assets and liabilities involving obligations of or guaranteed by the United States or any agency of the United States) the average gross sum of which (on a worldwide consolidated basis) over the previous consecutive four quarters, as measured as of the last day of each of the four prior calendar quarters, equals or exceeds the threshold established in paragraph (d)(2) of this section;

(ii) In the case of a foreign banking entity, the average gross sum of the trading assets and liabilities of the combined U.S. operations of the foreign banking entity (including all subsidiaries, affiliates, branches and agencies of the foreign banking entity operating, located or organized in the United States and excluding trading assets and liabilities involving obligations of or guaranteed by the United States or any agency of the United States) over the previous consecutive four quarters, as measured as of the last day of each of the four prior calendar quarters, equals or exceeds the threshold established in paragraph (d)(2) of this section; or

(iii) The OCC notifies the banking entity in writing that it must satisfy the reporting requirements contained in appendix A.

(2) The threshold for reporting under paragraph (d)(1) of this section shall be $50 billion beginning on June 30, 2014; $25 billion beginning on April 30, 2016; and $10 billion beginning on December 31, 2016.

(3) Frequency of reporting: Unless the OCC notifies the banking entity in writing that it must report on a different basis, a banking entity with $50 billion or more in trading assets and liabilities (as calculated in accordance with paragraph (d)(1) of this section) shall report the information required by appendix A for each calendar month within 30 days of the end of the relevant calendar month; beginning with information for the month of January 2015, such information shall be reported within 10 days of the end of each calendar month. Any other banking entity subject to appendix A shall report the information required by appendix A for each calendar quarter within 30 days of the end of that calendar quarter unless the OCC notifies the banking entity in writing that it must report on a different basis.

(e) *Additional documentation for covered funds.* Any banking entity that has more than $10 billion in total consolidated assets as reported on December 31 of the previous two calendar years shall maintain records that include:

(1) Documentation of the exclusions or exemptions other than sections 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940 relied on by each fund sponsored by the banking entity (including all subsidiaries and affiliates) in determining that such fund is not a covered fund;

(2) For each fund sponsored by the banking entity (including all subsidiaries and affiliates) for which the banking entity relies on one or more of the exclusions from the definition of covered fund provided by § 44.10(c)(1), § 44.10(c)(5), § 44.10(c)(8), § 44.10(c)(9), or § 44.10(c)(10) of subpart C, documentation supporting the banking entity's determination that the fund is not a covered fund pursuant to one or more of those exclusions;

(3) For each seeding vehicle described in § 44.10(c)(12)(i) or (iii) of subpart C that will become a registered investment company or SEC-regulated business development company, a written plan documenting the banking entity's determination that the seeding vehicle will become a registered investment company or SEC-regulated business development company; the period of time during which the vehicle will operate as a seeding vehicle; and the banking entity's plan to market the vehicle to third-party investors and convert it into a registered investment company or SEC-regulated business development company within the time period specified in § 44.12(a)(2)(i)(B) of subpart C;

(4) For any banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State, if the aggregate amount of ownership interests in foreign public funds that are described in § 44.10(c)(1) of subpart C owned by such banking entity (including ownership interests owned by any affiliate that is controlled directly or indirectly by a banking entity that is located in or organized under the laws of the United States or of any State) exceeds $50 million at the end of two or more consecutive calendar quarters, beginning with the next succeeding calendar quarter, documentation of the value of the ownership interests owned by the banking entity (and such affiliates) in each foreign public fund and each jurisdiction in which any such foreign public fund is organized, calculated as of the end of each calendar quarter, which documentation must continue until the banking entity's aggregate amount of ownership interests in foreign public funds is below $50 million for two consecutive calendar quarters; and

(5) For purposes of paragraph (e)(4) of this section, a U.S. branch, agency, or subsidiary of a foreign banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(f) *Simplified programs for less active banking entities*—(1) *Banking entities with no covered activities.* A banking entity that does not engage in activities or investments pursuant to subpart B or subpart C (other than trading activities permitted pursuant to § 44.6(a) of subpart B) may satisfy the requirements of this section by establishing the required compliance program prior to becoming engaged in such activities or making such investments (other than trading activities permitted pursuant to § 44.6(a) of subpart B).

(2) *Banking entities with modest activities.* A banking entity with total consolidated assets of $10 billion or less as reported on December 31 of the previous two calendar years that engages in activities or investments pursuant to subpart B or subpart C (other than trading activities permitted under § 44.6(a) of subpart B) may satisfy the requirements of this section by including in its existing compliance policies and procedures appropriate references to the requirements of section 13 of the BHC Act and this part and adjustments as appropriate given the activities, size, scope and complexity of the banking entity.

§ 44.21 Termination of activities or investments; penalties for violations.

(a) Any banking entity that engages in an activity or makes an investment in violation of section 13 of the BHC Act or this part, or acts in a manner that functions as an evasion of the requirements of section 13 of the BHC Act or this part, including through an abuse of any activity or investment permitted under subparts B or C, or otherwise violates the restrictions and requirements of section 13 of the BHC Act or this part, shall, upon discovery, promptly terminate the activity and, as relevant, dispose of the investment.

(b) Whenever the OCC finds reasonable cause to believe any banking entity has engaged in an activity or made an investment in violation of section 13 of the BHC Act or this part, or engaged in any activity or made any investment that functions as an evasion of the requirements of section 13 of the BHC Act or this part, the OCC may take any action permitted by law to enforce compliance with section 13 of the BHC Act and this part, including directing the banking entity to restrict, limit, or terminate any or all activities under this part and dispose of any investment.

Appendix A to Part 44—Reporting and Recordkeeping Requirements for Covered Trading Activities

I. Purpose

a. This appendix sets forth reporting and recordkeeping requirements that certain banking entities must satisfy in connection with the restrictions on proprietary trading set forth in subpart B (''proprietary trading restrictions''). Pursuant to § 44.20(d), this appendix generally applies to a banking entity that, together with its affiliates and subsidiaries, has significant trading assets and liabilities. These entities are required to (i) furnish periodic reports to the OCC regarding a variety of quantitative measurements of their covered trading activities, which vary depending on the scope and size of covered trading activities, and (ii) create and maintain records documenting the preparation and content of these reports. The requirements of this appendix must be incorporated into the banking entity's internal compliance program under § 44.20 and Appendix B.

b. The purpose of this appendix is to assist banking entities and the OCC in:

(i) Better understanding and evaluating the scope, type, and profile of the banking entity's covered trading activities;

(ii) Monitoring the banking entity's covered trading activities;

(iii) Identifying covered trading activities that warrant further review or examination by the banking entity to verify compliance with the proprietary trading restrictions;

(iv) Evaluating whether the covered trading activities of trading desks engaged in market making-related activities subject to § 44.4(b) are consistent with the requirements governing permitted market making-related activities;

(v) Evaluating whether the covered trading activities of trading desks that are engaged in permitted trading activity subject to §§ 44.4, 44.5, or 44.6(a)–(b) (*i.e.,* underwriting and market making-related related activity, risk-mitigating hedging, or trading in certain government obligations) are consistent with the requirement that such activity not result, directly or indirectly, in a material exposure to high-risk assets or high-risk trading strategies;

(vi) Identifying the profile of particular covered trading activities of the banking entity, and the individual trading desks of the banking entity, to help establish the appropriate frequency and scope of examination by the OCC of such activities; and

(vii) Assessing and addressing the risks associated with the banking entity's covered trading activities.

c. The quantitative measurements that must be furnished pursuant to this appendix are *not* intended to serve as a dispositive tool for the identification of permissible or impermissible activities.

d. In order to allow banking entities and the Agencies to evaluate the effectiveness of these metrics, banking entities must collect and report these metrics for all trading desks beginning on the dates established in § 44.20 of the final rule. The Agencies will review the data collected and revise this collection requirement as appropriate based on a review of the data collected prior to September 30, 2015.

e. In addition to the quantitative measurements required in this appendix, a banking entity may need to develop and implement other quantitative measurements in order to effectively monitor its covered trading activities for compliance with section 13 of the BHC Act and this part and to have an effective compliance program, as required by § 44.20 and Appendix B to this part. The effectiveness of particular quantitative measurements may differ based on the profile of the banking entity's businesses in general and, more specifically, of the particular trading desk, including types of instruments traded, trading activities and strategies, and history and experience (*e.g.,* whether the trading desk is an established, successful market maker or a new entrant to a competitive market). In all cases, banking entities must ensure that they have robust measures in place to identify and monitor the risks taken in their trading activities, to ensure that the activities are within risk tolerances established by the banking entity, and to monitor and examine for compliance with the proprietary trading restrictions in this part.

f. On an ongoing basis, banking entities must carefully monitor, review, and evaluate all furnished quantitative measurements, as well as any others that they choose to utilize in order to maintain compliance with section 13 of the BHC Act and this part. All measurement results that indicate a heightened risk of impermissible proprietary trading, including with respect to otherwise-permitted activities under §§ 44.4 through 44.6(a) and (b), or that result in a material exposure to high-risk assets or high-risk trading strategies, must be escalated within the banking entity for review, further analysis, explanation to the OCC, and remediation, where appropriate. The quantitative measurements discussed in this appendix should be helpful to banking entities in identifying and managing the risks related to their covered trading activities.

II. Definitions

The terms used in this appendix have the same meanings as set forth in §§ 44.2 and 44.3. In addition, for purposes of this appendix, the following definitions apply:

Calculation period means the period of time for which a particular quantitative measurement must be calculated.

Comprehensive profit and loss means the net profit or loss of a trading desk's material sources of trading revenue over a specific period of time, including, for example, any increase or decrease in the market value of a trading desk's holdings, dividend income, and interest income and expense.

Covered trading activity means trading conducted by a trading desk under §§ 44.4, 44.5, 44.6(a), or 44.6(b). A banking entity may include trading under §§ 44.3(d), 44.6(c), 44.6(d) or 44.6(e).

Measurement frequency means the frequency with which a particular quantitative metric must be calculated and recorded.

Trading desk means the smallest discrete unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof.

III. Reporting and Recordkeeping of Quantitative Measurements

a. Scope of Required Reporting

General scope. Each banking entity made subject to this part by § 44.20 must furnish the following quantitative measurements for each trading desk of the banking entity, calculated in accordance with this appendix:

- Risk and Position Limits and Usage;
- Risk Factor Sensitivities;
- Value-at-Risk and Stress VaR;
- Comprehensive Profit and Loss Attribution;
- Inventory Turnover;
- Inventory Aging; and
- Customer-Facing Trade Ratio.

b. Frequency of Required Calculation and Reporting

A banking entity must calculate any applicable quantitative measurement for each trading day. A banking entity must report each applicable quantitative measurement to the OCC on the reporting schedule established in § 44.20 unless otherwise requested by the OCC. All quantitative measurements for any calendar month must be reported within the time period required by § 44.20.

c. Recordkeeping

A banking entity must, for any quantitative measurement furnished to the OCC pursuant to this appendix and § 44.20(d), create and maintain records documenting the preparation and content of these reports, as well as such information as is necessary to permit the OCC to verify the accuracy of such reports, for a period of 5 years from the end of the calendar year for which the measurement was taken.

IV. Quantitative Measurements

a. Risk-Management Measurements

1. Risk and Position Limits and Usage

i. *Description:* For purposes of this appendix, Risk and Position Limits are the constraints that define the amount of risk that a trading desk is permitted to take at a point in time, as defined by the banking entity for a specific trading desk. Usage represents the portion of the trading desk's limits that are accounted for by the current activity of the desk. Risk and position limits and their usage are key risk management tools used to control and monitor risk taking and include, but are not limited, to the limits set out in § 44.4 and § 44.5. A number of the metrics that are described below, including ''Risk Factor Sensitivities'' and ''Value-at-Risk and Stress Value-at-Risk,'' relate to a trading desk's risk and position limits and are useful in evaluating and setting these limits in the broader context of the trading desk's overall activities, particularly for the market making activities under § 44.4(b) and hedging activity under § 44.5. Accordingly, the limits required under § 44.4(b)(2)(iii) and § 44.5(b)(1)(i) must meet the applicable requirements under § 44.4(b)(2)(iii) and § 44.5(b)(1)(i) and also must include appropriate metrics for the trading desk limits including, at a minimum, the ''Risk Factor Sensitivities'' and ''Value-at-Risk and Stress Value-at-Risk'' metrics except to the extent any of the ''Risk Factor Sensitivities'' or ''Value-at-Risk and Stress Value-at-Risk'' metrics are demonstrably ineffective for measuring and monitoring the risks of a trading desk based on the types of positions traded by, and risk exposures of, that desk.

ii. *General Calculation Guidance:* Risk and Position Limits must be reported in the format used by the banking entity for the purposes of risk management of each trading desk. Risk and Position Limits are often expressed in terms of risk measures, such as VaR and Risk Factor Sensitivities, but may also be expressed in terms of other observable criteria, such as net open positions. When criteria other than VaR or Risk Factor Sensitivities are used to define the Risk and Position Limits, both the value of the Risk and Position Limits and the value of the variables used to assess whether these limits have been reached must be reported.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

2. Risk Factor Sensitivities

i. *Description:* For purposes of this appendix, Risk Factor Sensitivities are changes in a trading desk's Comprehensive Profit and Loss that are expected to occur in the event of a change in one or more underlying variables that are significant sources of the trading desk's profitability and risk.

ii. *General Calculation Guidance:* A banking entity must report the Risk Factor Sensitivities that are monitored and managed as part of the trading desk's overall risk management policy. The underlying data and methods used to compute a trading desk's Risk Factor Sensitivities will depend on the specific function of the trading desk and the internal risk management models employed. The number and type of Risk Factor Sensitivities that are monitored and managed by a trading desk, and furnished to the OCC, will depend on the explicit risks assumed by the trading desk. In general, however, reported Risk Factor Sensitivities must be sufficiently granular to account for a preponderance of the expected price variation in the trading desk's holdings.

A. Trading desks must take into account any relevant factors in calculating Risk Factor Sensitivities, including, for example, the following with respect to particular asset classes:

- *Commodity derivative positions:* Risk factors with respect to the related commodities set out in 17 CFR 20.2, the maturity of the positions, volatility and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;
- *Credit positions:* Risk factors with respect to credit spreads that are sufficiently granular to account for specific credit sectors and market segments, the maturity profile of the positions, and risk factors with respect to interest rates of all relevant maturities;
- *Credit-related derivative positions:* Risk factor sensitivities, for example credit spreads, shifts (parallel and non-parallel) in credit spreads—volatility, and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;
- *Equity derivative positions:* Risk factor sensitivities such as equity positions, volatility, and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;
- *Equity positions:* Risk factors for equity prices and risk factors that differentiate between important equity market sectors and segments, such as a small capitalization equities and international equities;
- *Foreign exchange derivative positions:* Risk factors with respect to major currency pairs and maturities, exposure to interest rates at relevant maturities, volatility, and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), as well as the maturity profile of the positions; and
- *Interest rate positions, including interest rate derivative positions:* Risk factors with respect to major interest rate categories and maturities and volatility and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and shifts (parallel and non-parallel) in the interest rate curve, as well as the maturity profile of the positions.

B. The methods used by a banking entity to calculate sensitivities to a common factor shared by multiple trading desks, such as an equity price factor, must be applied consistently across its trading desks so that the sensitivities can be compared from one trading desk to another.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

3. Value-at-Risk and Stress Value-at-Risk

i. *Description:* For purposes of this appendix, Value-at-Risk (''VaR'') is the commonly used percentile measurement of the risk of future financial loss in the value of a given set of aggregated positions over a specified period of time, based on current market conditions. For purposes of this appendix, Stress Value-at-Risk (''Stress VaR'') is the percentile measurement of the risk of future financial loss in the value of a given set of aggregated positions over a specified period of time, based on market conditions during a period of significant financial stress.

ii. *General Calculation Guidance:* Banking entities must compute and report VaR and Stress VaR by employing generally accepted standards and methods of calculation. VaR should reflect a loss in a trading desk that is expected to be exceeded less than one percent of the time over a one-day period. For those banking entities that are subject to regulatory capital requirements imposed by a Federal banking agency, VaR and Stress VaR must be computed and reported in a manner that is consistent with such regulatory capital requirements. In cases where a trading desk does not have a standalone VaR or Stress VaR calculation but is part of a larger aggregation of positions for which a VaR or Stress VaR calculation is performed, a VaR or Stress VaR calculation that includes only the trading desk's holdings must be performed consistent with the VaR or Stress VaR model and methodology used for the larger aggregation of positions.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

b. Source-of-Revenue Measurements

1. Comprehensive Profit and Loss Attribution

i. *Description:* For purposes of this appendix, Comprehensive Profit and Loss Attribution is an analysis that attributes the daily fluctuation in the value of a trading desk's positions to various sources. First, the daily profit and loss of the aggregated positions is divided into three categories: (i) Profit and loss attributable to a trading desk's existing positions that were also positions held by the trading desk as of the end of the prior day (''existing positions''); (ii) profit and loss attributable to new positions resulting from the current day's trading activity (''new positions''); and (iii) residual profit and loss that cannot be specifically attributed to existing positions or new positions. The sum of (i), (ii), and (iii) must equal the trading desk's comprehensive profit and loss at each point in time. In addition, profit and loss measurements must calculate volatility of comprehensive profit and loss (*i.e.,* the standard deviation of the trading desk's one-day profit and loss, in dollar terms) for the reporting period for at least a 30-, 60- and 90-day lag period, from the end of the reporting period, and any other period that the banking entity deems necessary to meet the requirements of the rule.

A. The comprehensive profit and loss associated with existing positions must reflect changes in the value of these positions on the applicable day. The comprehensive profit and loss from existing positions must be further attributed, as applicable, to changes in (i) the specific Risk Factors and other factors that are monitored and managed as part of the trading desk's overall risk management policies and procedures; and (ii) any other applicable elements, such as cash flows, carry, changes in reserves, and the correction, cancellation, or exercise of a trade.

B. The comprehensive profit and loss attributed to new positions must reflect commissions and fee income or expense and market gains or losses associated with transactions executed on the applicable day. New positions include purchases and sales of financial instruments and other assets/liabilities and negotiated amendments to existing positions. The comprehensive profit and loss from new positions may be reported in the aggregate and does not need to be further attributed to specific sources.

C. The portion of comprehensive profit and loss that cannot be specifically attributed to known sources must be allocated to a residual category identified as an unexplained portion of the comprehensive profit and loss. Significant unexplained profit and loss must be escalated for further investigation and analysis.

ii. *General Calculation Guidance:* The specific categories used by a trading desk in the attribution analysis and amount of detail for the analysis should be tailored to the type and amount of trading activities undertaken by the trading desk. The new position attribution must be computed by calculating the difference between the prices at which instruments were bought and/or sold and the prices at which those instruments are marked to market at the close of business on that day multiplied by the notional or principal amount of each purchase or sale. Any fees, commissions, or other payments received (paid) that are associated with transactions executed on that day must be added (subtracted) from such difference. These factors must be measured consistently over time to facilitate historical comparisons.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

c. Customer-Facing Activity Measurements

1. Inventory Turnover

i. *Description:* For purposes of this appendix, Inventory Turnover is a ratio that measures the turnover of a trading desk's inventory. The numerator of the ratio is the absolute value of all transactions over the reporting period. The denominator of the ratio is the value of the trading desk's inventory at the beginning of the reporting period.

ii. *General Calculation Guidance:* For purposes of this appendix, for derivatives, other than options and interest rate derivatives, value means gross notional value, for options, value means delta adjusted notional value, and for interest rate derivatives, value means 10-year bond equivalent value.

iii. *Calculation Period:* 30 days, 60 days, and 90 days.

iv. *Measurement Frequency:* Daily.

2. Inventory Aging

i. *Description:* For purposes of this appendix, Inventory Aging generally describes a schedule of the trading desk's aggregate assets and liabilities and the amount of time that those assets and liabilities have been held. Inventory Aging should measure the age profile of the trading desk's assets and liabilities.

ii. *General Calculation Guidance:* In general, Inventory Aging must be computed using a trading desk's trading activity data and must identify the value of a trading desk's aggregate assets and liabilities. Inventory Aging must include two schedules, an asset-aging schedule and a liability-aging schedule. Each schedule must record the value of assets or liabilities held over all holding periods. For derivatives, other than options, and interest rate derivatives, value means gross notional value, for options, value means delta adjusted notional value and, for interest rate derivatives, value means 10-year bond equivalent value.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

3. Customer-Facing Trade Ratio—Trade Count Based and Value Based

i. *Description:* For purposes of this appendix, the Customer-Facing Trade Ratio is a ratio comparing (i) the transactions involving a counterparty that is a customer of the trading desk to (ii) the transactions involving a counterparty that is not a customer of the trading desk. A trade count based ratio must be computed that records the number of transactions involving a counterparty that is a customer of the trading desk and the number of transactions involving a counterparty that is not a customer of the trading desk. A value based ratio must be computed that records the value of transactions involving a counterparty that is a customer of the trading desk and the value of transactions involving a counterparty that is not a customer of the trading desk.

ii. *General Calculation Guidance:* For purposes of calculating the Customer-Facing Trade Ratio, a counterparty is considered to be a customer of the trading desk if the counterparty is a market participant that makes use of the banking entity's market making-related services by obtaining such services, responding to quotations, or entering into a continuing relationship with respect to such services. However, a trading desk or other organizational unit of another banking entity would not be a client, customer, or counterparty of the trading desk if the other entity has trading assets and liabilities of $50 billion or more as measured in accordance with § 44.20(d)(1) unless the trading desk documents how and why a particular trading desk or other organizational unit of the entity should be treated as a client, customer, or counterparty of the trading desk. Transactions conducted anonymously on an exchange or similar trading facility that permits trading on behalf of a broad range of market participants would be considered transactions with customers of the trading desk. For derivatives, other than options, and interest rate derivatives, value means gross notional value, for options, value means delta adjusted notional value, and for interest rate derivatives, value means 10-year bond equivalent value.

iii. *Calculation Period:* 30 days, 60 days, and 90 days.

iv. *Measurement Frequency:* Daily.

Appendix B to Part 44—Enhanced Minimum Standards for Compliance Programs

I. Overview

Section 44.20(c) requires certain banking entities to establish, maintain, and enforce an enhanced compliance program that includes the requirements and standards in this Appendix as well as the minimum written policies and procedures, internal controls, management framework, independent testing, training, and recordkeeping provisions outlined in § 44.20. This Appendix sets forth additional minimum standards with respect to the establishment, oversight, maintenance, and enforcement by these banking entities of an enhanced internal compliance program for ensuring and monitoring compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part.

a. This compliance program must:

1. Be reasonably designed to identify, document, monitor, and report the permitted trading and covered fund activities and investments of the banking entity; identify, monitor and promptly address the risks of these covered activities and investments and potential areas of noncompliance; and prevent activities or investments prohibited by, or that do not comply with, section 13 of the BHC Act and this part;

2. Establish and enforce appropriate limits on the covered activities and investments of the banking entity, including limits on the size, scope, complexity, and risks of the individual activities or investments consistent with the requirements of section 13 of the BHC Act and this part;

3. Subject the effectiveness of the compliance program to periodic independent review and testing, and ensure that the entity's internal audit, corporate compliance and internal control functions involved in review and testing are effective and independent;

4. Make senior management, and others as appropriate, accountable for the effective implementation of the compliance program, and ensure that the board of directors and chief executive officer (or equivalent) of the banking entity review the effectiveness of the compliance program; and

5. Facilitate supervision and examination by the Agencies of the banking entity's permitted trading and covered fund activities and investments.

II. Enhanced Compliance Program

a. *Proprietary Trading Activities.* A banking entity must establish, maintain and enforce a compliance program that includes written policies and procedures that are appropriate for the types, size, and complexity of, and risks associated with, its permitted trading activities. The compliance program may be tailored to the types of trading activities conducted by the banking entity, and must include a detailed description of controls established by the banking entity to reasonably ensure that its trading activities are conducted in accordance with the requirements and limitations applicable to those trading activities under section 13 of the BHC Act and this part, and provide for appropriate revision of the compliance program before expansion of the trading activities of the banking entity. A banking entity must devote adequate resources and use knowledgeable personnel in conducting, supervising and managing its trading activities, and promote consistency, independence and rigor in implementing its risk controls and compliance efforts. The compliance program must be updated with a frequency sufficient to account for changes in the activities of the banking entity, results of independent testing of the program, identification of weaknesses in the program, and changes in legal, regulatory or other requirements.

1. *Trading Desks:* The banking entity must have written policies and procedures governing each trading desk that include a description of:

i. The process for identifying, authorizing and documenting financial instruments each trading desk may purchase or sell, with separate documentation for market making-related activities conducted in reliance on § 44.4(b) and for hedging activity conducted in reliance on § 44.5;

ii. A mapping for each trading desk to the division, business line, or other organizational structure that is responsible for managing and overseeing the trading desk's activities;

iii. The mission (*i.e.,* the type of trading activity, such as market-making, trading in sovereign debt, etc.) and strategy (*i.e.,* methods for conducting authorized trading activities) of each trading desk;

iv. The activities that the trading desk is authorized to conduct, including (i) authorized instruments and products, and (ii) authorized hedging strategies, techniques and instruments;

v. The types and amount of risks allocated by the banking entity to each trading desk to implement the mission and strategy of the trading desk, including an enumeration of material risks resulting from the activities in which the trading desk is authorized to engage (including but not limited to price risks, such as basis, volatility and correlation risks, as well as counterparty credit risk). Risk assessments must take into account both the risks inherent in the trading activity and the strength and effectiveness of controls designed to mitigate those risks;

vi. How the risks allocated to each trading desk will be measured;

vii. Why the allocated risks levels are appropriate to the activities authorized for the trading desk;

viii. The limits on the holding period of, and the risk associated with, financial instruments under the responsibility of the trading desk;

ix. The process for setting new or revised limits, as well as escalation procedures for granting exceptions to any limits or to any policies or procedures governing the desk, the analysis that will be required to support revising limits or granting exceptions, and the process for independently reviewing and documenting those exceptions and the underlying analysis;

x. The process for identifying, documenting and approving new products, trading strategies, and hedging strategies;

xi. The types of clients, customers, and counterparties with whom the trading desk may trade; and

xii. The compensation arrangements, including incentive arrangements, for employees associated with the trading desk, which may not be designed to reward or incentivize prohibited proprietary trading or excessive or imprudent risk-taking.

2. *Description of risks and risk management processes:* The compliance program for the banking entity must include a comprehensive description of the risk management program for the trading activity of the banking entity. The compliance program must also include a description of the governance, approval, reporting, escalation, review and other processes the banking entity will use to reasonably ensure that trading activity is conducted in compliance with section 13 of the BHC Act and this part. Trading activity in similar financial instruments should be subject to similar governance, limits, testing, controls, and review, unless the banking entity specifically determines to establish different limits or processes and documents those differences. Descriptions must include, at a minimum, the following elements:

i. A description of the supervisory and risk management structure governing all trading activity, including a description of processes for initial and senior-level review of new products and new strategies;

ii. A description of the process for developing, documenting, testing, approving and reviewing all models used for valuing, identifying and monitoring the risks of trading activity and related positions, including the process for periodic independent testing of the reliability and accuracy of those models;

iii. A description of the process for developing, documenting, testing, approving and reviewing the limits established for each trading desk;

iv. A description of the process by which a security may be purchased or sold pursuant to the liquidity management plan, including the process for authorizing and monitoring such activity to ensure compliance with the banking entity's liquidity management plan and the restrictions on liquidity management activities in this part;

v. A description of the management review process, including escalation procedures, for approving any temporary exceptions or permanent adjustments to limits on the activities, positions, strategies, or risks associated with each trading desk; and

vi. The role of the audit, compliance, risk management and other relevant units for conducting independent testing of trading and hedging activities, techniques and strategies.

3. *Authorized risks, instruments, and products.* The banking entity must implement and enforce limits and internal controls for each trading desk that are reasonably designed to ensure that trading activity is conducted in conformance with section 13 of the BHC Act and this part and with the banking entity's written policies and procedures. The banking entity must establish and enforce risk limits appropriate for the activity of each trading desk. These limits should be based on probabilistic and non-probabilistic measures of potential loss (*e.g.,* Value-at-Risk and notional exposure, respectively), and measured under normal and stress market conditions. At a minimum, these internal controls must monitor, establish and enforce limits on:

i. The financial instruments (including, at a minimum, by type and exposure) that the trading desk may trade;

ii. The types and levels of risks that may be taken by each trading desk; and

iii. The types of hedging instruments used, hedging strategies employed, and the amount of risk effectively hedged.

4. *Hedging policies and procedures.* The banking entity must establish, maintain, and enforce written policies and procedures regarding the use of risk-mitigating hedging instruments and strategies that, at a minimum, describe:

i. The positions, techniques and strategies that each trading desk may use to hedge the risk of its positions;

ii. The manner in which the banking entity will identify the risks arising in connection with and related to the individual or aggregated positions, contracts or other holdings of the banking entity that are to be hedged and determine that those risks have been properly and effectively hedged;

iii. The level of the organization at which hedging activity and management will occur;

iv. The manner in which hedging strategies will be monitored and the personnel responsible for such monitoring;

v. The risk management processes used to control unhedged or residual risks; and

vi. The process for developing, documenting, testing, approving and reviewing all hedging positions, techniques and strategies permitted for each trading desk and for the banking entity in reliance on § 44.5.

5. *Analysis and quantitative measurements.* The banking entity must perform robust analysis and quantitative measurement of its trading activities that is reasonably designed to ensure that the trading activity of each trading desk is consistent with the banking entity's compliance program; monitor and assist in the identification of potential and actual prohibited proprietary trading activity; and prevent the occurrence of prohibited proprietary trading. Analysis and models used to determine, measure and limit risk must be rigorously tested and be reviewed by management responsible for trading activity to ensure that trading activities, limits, strategies, and hedging activities do not understate the risk and exposure to the banking entity or allow prohibited proprietary trading. This review should include periodic and independent back-testing and revision of activities, limits, strategies and hedging as appropriate to contain risk and ensure compliance. In addition to the quantitative measurements reported by any banking entity subject to Appendix A to this part, each banking entity

must develop and implement, to the extent appropriate to facilitate compliance with this part, additional quantitative measurements specifically tailored to the particular risks, practices, and strategies of its trading desks. The banking entity's analysis and quantitative measurements must incorporate the quantitative measurements reported by the banking entity pursuant to Appendix A (if applicable) and include, at a minimum, the following:

i. Internal controls and written policies and procedures reasonably designed to ensure the accuracy and integrity of quantitative measurements;

ii. Ongoing, timely monitoring and review of calculated quantitative measurements;

iii. The establishment of numerical thresholds and appropriate trading measures for each trading desk and heightened review of trading activity not consistent with those thresholds to ensure compliance with section 13 of the BHC Act and this part, including analysis of the measurement results or other information, appropriate escalation procedures, and documentation related to the review; and

iv. Immediate review and compliance investigation of the trading desk's activities, escalation to senior management with oversight responsibilities for the applicable trading desk, timely notification to the OCC, appropriate remedial action (*e.g.,* divesting of impermissible positions, cessation of impermissible activity, disciplinary actions), and documentation of the investigation findings and remedial action taken when quantitative measurements or other information, considered together with the facts and circumstances, or findings of internal audit, independent testing or other review suggest a reasonable likelihood that the trading desk has violated any part of section 13 of the BHC Act or this part.

6. *Other Compliance Matters.* In addition to the requirements specified above, the banking entity's compliance program must:

i. Identify activities of each trading desk that will be conducted in reliance on exemptions contained in §§ 44.4 through 44.6, including an explanation of:

A. How and where in the organization the activity occurs; and

B. Which exemption is being relied on and how the activity meets the specific requirements for reliance on the applicable exemption;

ii. Include an explanation of the process for documenting, approving and reviewing actions taken pursuant to the liquidity management plan, where in the organization this activity occurs, the securities permissible for liquidity management, the process for ensuring that liquidity management activities are not conducted for the purpose of prohibited proprietary trading, and the process for ensuring that securities purchased as part of the liquidity management plan are highly liquid and conform to the requirements of this part;

iii. Describe how the banking entity monitors for and prohibits potential or actual material exposure to high-risk assets or high-risk trading strategies presented by each trading desk that relies on the exemptions contained in §§ 44.3(d)(3), and 44.4 through 44.6, which must take into account potential or actual exposure to:

A. Assets whose values cannot be externally priced or, where valuation is reliant on pricing models, whose model inputs cannot be externally validated;

B. Assets whose changes in value cannot be adequately mitigated by effective hedging;

C. New products with rapid growth, including those that do not have a market history;

D. Assets or strategies that include significant embedded leverage;

E. Assets or strategies that have demonstrated significant historical volatility;

F. Assets or strategies for which the application of capital and liquidity standards would not adequately account for the risk; and

G. Assets or strategies that result in large and significant concentrations to sectors, risk factors, or counterparties;

iv. Establish responsibility for compliance with the reporting and recordkeeping requirements of subpart B and § 44.20; and

v. Establish policies for monitoring and prohibiting potential or actual material conflicts of interest between the banking entity and its clients, customers, or counterparties.

7. *Remediation of violations.* The banking entity's compliance program must be reasonably designed and established to effectively monitor and identify for further analysis any trading activity that may indicate potential violations of section 13 of the BHC Act and this part and to prevent actual violations of section 13 of the BHC Act and this part. The compliance program must describe procedures for identifying and remedying violations of section 13 of the BHC Act and this part, and must include, at a minimum, a requirement to promptly document, address and remedy any violation of section 13 of the BHC Act or this part, and document all proposed and actual remediation efforts. The compliance program must include specific written policies and procedures that are reasonably designed to assess the extent to which any activity indicates that modification to the banking entity's compliance program is warranted and to ensure that appropriate modifications are implemented. The written policies and procedures must provide for prompt notification to appropriate management, including senior management and the board of directors, of any material weakness or significant deficiencies in the design or implementation of the compliance program of the banking entity.

b. *Covered Fund Activities or Investments.* A banking entity must establish, maintain and enforce a compliance program that includes written policies and procedures that are appropriate for the types, size, complexity and risks of the covered fund and related activities conducted and investments made, by the banking entity.

1. *Identification of covered funds.* The banking entity's compliance program must provide a process, which must include appropriate management review and independent testing, for identifying and documenting covered funds that each unit within the banking entity's organization sponsors or organizes and offers, and covered funds in which each such unit invests. In addition to the documentation requirements for covered funds, as specified under § 44.20(e), the documentation must include information that identifies all pools that the banking entity sponsors or has an interest in and the type of exemption from the Commodity Exchange Act (whether or not the pool relies on section 4.7 of the regulations under the Commodity Exchange Act), and the amount of ownership interest the banking entity has in those pools.

2. *Identification of covered fund activities and investments.* The banking entity's compliance program must identify, document and map each unit within the organization that is permitted to acquire or hold an interest in any covered fund or sponsor any covered fund and map each unit to the division, business line, or other organizational structure that will be responsible for managing and overseeing that unit's activities and investments.

3. *Explanation of compliance.* The banking entity's compliance program must explain how:

i. The banking entity monitors for and prohibits potential or actual material conflicts of interest between the banking entity and its clients, customers, or counterparties related to its covered fund activities and investments;

ii. The banking entity monitors for and prohibits potential or actual transactions or activities that may threaten the safety and soundness of the banking entity related to its covered fund activities and investments; and

iii. The banking entity monitors for and prohibits potential or actual material exposure to high-risk assets or high-risk trading strategies presented by its covered fund activities and investments, taking into account potential or actual exposure to:

A. Assets whose values cannot be externally priced or, where valuation is reliant on pricing models, whose model inputs cannot be externally validated;

B. Assets whose changes in values cannot be adequately mitigated by effective hedging;

C. New products with rapid growth, including those that do not have a market history;

D. Assets or strategies that include significant embedded leverage;

E. Assets or strategies that have demonstrated significant historical volatility;

F. Assets or strategies for which the application of capital and liquidity standards would not adequately account for the risk; and

G. Assets or strategies that expose the banking entity to large and significant concentrations with respect to sectors, risk factors, or counterparties;

4. *Description and documentation of covered fund activities and investments.* For each organizational unit engaged in covered fund activities and investments, the banking entity's compliance program must document:

i. The covered fund activities and investments that the unit is authorized to conduct;

ii. The banking entity's plan for actively seeking unaffiliated investors to ensure that any investment by the banking entity conforms to the limits contained in § 44.12 or registered in compliance with the securities laws and thereby exempt from those limits within the time periods allotted in § 44.12; and

iii. How it complies with the requirements of subpart C.

5. *Internal Controls.* A banking entity must establish, maintain, and enforce internal controls that are reasonably designed to ensure that its covered fund activities or investments comply with the requirements of section 13 of the BHC Act and this part and are appropriate given the limits on risk established by the banking entity. These written internal controls must be reasonably designed and established to effectively monitor and identify for further analysis any covered fund activity or investment that may indicate potential violations of section 13 of the BHC Act or this part. The internal controls must, at a minimum require:

i. Monitoring and limiting the banking entity's individual and aggregate investments in covered funds;

ii. Monitoring the amount and timing of seed capital investments for compliance with the limitations under subpart C (including but not limited to the redemption, sale or disposition requirements) of § 44.12, and the effectiveness of efforts to seek unaffiliated investors to ensure compliance with those limits;

iii. Calculating the individual and aggregate levels of ownership interests in one or more covered fund required by § 44.12;

iv. Attributing the appropriate instruments to the individual and aggregate ownership interest calculations above;

v. Making disclosures to prospective and actual investors in any covered fund organized and offered or sponsored by the banking entity, as provided under § 44.11(a)(8);

vi. Monitoring for and preventing any relationship or transaction between the banking entity and a covered fund that is prohibited under § 44.14, including where the banking entity has been designated as the sponsor, investment manager, investment adviser, or commodity trading advisor to a covered fund by another banking entity; and

vii. Appropriate management review and supervision across legal entities of the banking entity to ensure that services and products provided by all affiliated entities comply with the limitation on services and products contained in § 44.14.

6. *Remediation of violations.* The banking entity's compliance program must be reasonably designed and established to effectively monitor and identify for further analysis any covered fund activity or investment that may indicate potential violations of section 13 of the BHC Act or this part and to prevent actual violations of section 13 of the BHC Act and this part. The banking entity's compliance program must describe procedures for identifying and remedying violations of section 13 of the BHC Act and this part, and must include, at a minimum, a requirement to promptly document, address and remedy any violation of section 13 of the BHC Act or this part, including § 44.21, and document all proposed and actual remediation efforts. The compliance program must include specific written policies and procedures that are reasonably designed to assess the extent to which any activity or investment indicates that modification to the banking entity's compliance program is warranted and to ensure that appropriate modifications are implemented. The written policies and procedures must provide for prompt notification to appropriate management, including senior management and the board of directors, of any material weakness or significant deficiencies in the design or implementation of the compliance program of the banking entity.

III. Responsibility and Accountability for the Compliance Program

a. A banking entity must establish, maintain, and enforce a governance and management framework to manage its business and employees with a view to preventing violations of section 13 of the BHC Act and this part. A banking entity must have an appropriate management framework reasonably designed to ensure that: Appropriate personnel are responsible and accountable for the effective implementation and enforcement of the compliance program; a clear reporting line with a chain of responsibility is delineated; and the compliance program is reviewed periodically by senior management. The board of directors (or equivalent governance body) and senior management should have the appropriate authority and access to personnel and information within the organizations as well as appropriate resources to conduct their oversight activities effectively.

1. *Corporate governance.* The banking entity must adopt a written compliance program approved by the board of directors, an appropriate committee of the board, or equivalent governance body, and senior management.

2. *Management procedures.* The banking entity must establish, maintain, and enforce a governance framework that is reasonably designed to achieve compliance with section 13 of the BHC Act and this part, which, at a minimum, provides for:

i. The designation of appropriate senior management or committee of senior management with authority to carry out the management responsibilities of the banking entity for each trading desk and for each organizational unit engaged in covered fund activities;

ii. Written procedures addressing the management of the activities of the banking entity that are reasonably designed to achieve compliance with section 13 of the BHC Act and this part, including:

A. A description of the management system, including the titles, qualifications, and locations of managers and the specific responsibilities of each person with respect to the banking entity's activities governed by section 13 of the BHC Act and this part; and

B. Procedures for determining compensation arrangements for traders engaged in underwriting or market making-related activities under § 44.4 or risk-mitigating hedging activities under § 44.5 so that such compensation arrangements are designed not to reward or incentivize prohibited proprietary trading and appropriately balance risk and financial results in a manner that does not encourage employees to expose the banking entity to excessive or imprudent risk.

3. *Business line managers.* Managers with responsibility for one or more trading desks of the banking entity are accountable for the effective implementation and enforcement of the compliance program with respect to the applicable trading desk(s).

4. *Board of directors, or similar corporate body, and senior management.* The board of directors, or similar corporate body, and senior management are responsible for setting and communicating an appropriate culture of compliance with section 13 of the BHC Act and this part and ensuring that appropriate policies regarding the management of trading activities and covered fund activities or investments are adopted to comply with section 13 of the BHC Act and this part. The board of directors or similar corporate body (such as a designated committee of the board or an equivalent governance body) must ensure that senior management is fully capable, qualified, and properly motivated to manage compliance with this part in light of the organization's business activities and the expectations of the board of directors. The board of directors or similar corporate body must also ensure that senior management has established appropriate incentives and adequate resources to support compliance with this part, including the implementation of a compliance program meeting the requirements of this appendix into management goals and compensation structures across the banking entity.

5. *Senior management.* Senior management is responsible for implementing and enforcing the approved compliance program. Senior management must also ensure that effective corrective action is taken when failures in compliance with section 13 of the BHC Act and this part are identified. Senior management and control personnel charged with overseeing compliance with section 13 of the BHC Act and this part should review the compliance program for the banking entity periodically and report to the board, or an appropriate committee thereof, on the effectiveness of the compliance program and compliance matters with a frequency appropriate to the size, scope, and risk profile of the banking entity's trading activities and covered fund activities or investments, which shall be at least annually.

6. *CEO attestation.* Based on a review by the CEO of the banking entity, the CEO of the banking entity must, annually, attest in writing to the OCC that the banking entity has in place processes to establish, maintain, enforce, review, test and modify the compliance program established under this Appendix and § 44.20 of this part in a manner reasonably designed to achieve compliance with section 13 of the BHC Act and this part. In the case of a U.S. branch or agency of a foreign banking entity, the attestation may be provided for the entire U.S. operations of the foreign banking entity by the senior management officer of the United States operations of the foreign banking entity who is located in the United States.

IV. Independent Testing

a. Independent testing must occur with a frequency appropriate to the size, scope, and risk profile of the banking entity's trading and covered fund activities or investments, which shall be at least annually. This independent testing must include an evaluation of:

1. The overall adequacy and effectiveness of the banking entity's compliance program, including an analysis of the extent to which the program contains all the required elements of this appendix;

2. The effectiveness of the banking entity's internal controls, including an analysis and documentation of instances in which such internal controls have been breached, and how such breaches were addressed and resolved; and

3. The effectiveness of the banking entity's management procedures.

b. A banking entity must ensure that independent testing regarding the effectiveness of the banking entity's compliance program is conducted by a qualified independent party, such as the banking entity's internal audit department, compliance personnel or risk managers independent of the organizational unit being tested, outside auditors, consultants, or other qualified independent parties. A banking entity must promptly take appropriate action to remedy any significant deficiencies or material weaknesses in its compliance program and to terminate any violations of section 13 of the BHC Act or this part.

V. Training

Banking entities must provide adequate training to personnel and managers of the banking entity engaged in activities or investments governed by section 13 of the BHC Act or this part, as well as other appropriate supervisory, risk, independent testing, and audit personnel, in order to effectively implement and enforce the compliance program. This training should occur with a frequency appropriate to the size and the risk profile of the banking entity's trading activities and covered fund activities or investments.

VI. Recordkeeping

Banking entities must create and retain records sufficient to demonstrate compliance and support the operations and effectiveness of the compliance program. A banking entity must retain these records for a period that is no less than 5 years or such longer period as required by the OCC in a form that allows it to promptly produce such records to the OCC on request.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE

12 CFR Chapter II

Authority and Issuance

For the reasons stated in the Common Preamble, the Board amends chapter I of Title 12, Code of Federal Regulations as follows:

PART 248—PROPRIETARY TRADING AND CERTAIN INTERESTS IN AND RELATIONSHIPS WITH COVERED FUNDS (Regulation VV)

■ 16. The authority citation for part 248 continues to read as follows:

Authority: 12 U.S.C. 1851, 12 U.S.C. 221 *et seq.,* 12 U.S.C. 1818, 12 U.S.C. 1841 *et seq.,* and 12 U.S.C. 3103 *et seq.*

Subpart A—Authority and Definitions

■ 17. Section 248.2 is revised to read as follows:

§ 248.2 Definitions.

Unless otherwise specified, for purposes of this part:

(a) *Affiliate* has the same meaning as in section 2(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(k)).

(b) *Bank holding company* has the same meaning as in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

(c) *Banking entity.* (1) Except as provided in paragraph (c)(2) of this section, *banking entity* means:

(i) Any insured depository institution;

(ii) Any company that controls an insured depository institution;

(iii) Any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(iv) Any affiliate or subsidiary of any entity described in paragraphs (c)(1)(i), (ii), or (iii) of this section.

(2) Banking entity does not include:

(i) A covered fund that is not itself a banking entity under paragraph (c)(1)(i), (ii), or (iii) of this section;

(ii) A portfolio company held under the authority contained in section 4(k)(4)(H) or (I) of the BHC Act (12 U.S.C. 1843(k)(4)(H), (I)), or any 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), so long as the portfolio company or portfolio concern is not itself a banking entity under paragraph (c)(1)(i), (ii), or (iii) of this section; or

(iii) The FDIC acting in its corporate capacity or as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(d) *Board* means the Board of Governors of the Federal Reserve System.

(e) *CFTC* means the Commodity Futures Trading Commission.

(f) *Dealer* has the same meaning as in section 3(a)(5) of the Exchange Act (15 U.S.C. 78c(a)(5)).

(g) *Depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(h) *Derivative.* (1) Except as provided in paragraph (h)(2) of this section, *derivative* means:

(i) Any swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68));

(ii) Any purchase or sale of a commodity, that is not an excluded commodity, for deferred shipment or delivery that is intended to be physically settled;

(iii) Any foreign exchange forward (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)) or foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25));

(iv) Any agreement, contract, or transaction in foreign currency described in section 2(c)(2)(C)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(C)(i));

(v) Any agreement, contract, or transaction in a commodity other than foreign currency described in section 2(c)(2)(D)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(D)(i)); and

(vi) Any transaction authorized under section 19 of the Commodity Exchange Act (7 U.S.C. 23(a) or (b));

(2) A derivative does not include:

(i) Any consumer, commercial, or other agreement, contract, or transaction that the CFTC and SEC have further defined by joint regulation, interpretation, or other action as not within the definition of swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)); or

(ii) Any identified banking product, as defined in section 402(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b)), that is subject to section 403(a) of that Act (7 U.S.C. 27a(a)).

(i) *Employee* includes a member of the immediate family of the employee.

(j) *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(k) *Excluded commodity* has the same meaning as in section 1a(19) of the Commodity Exchange Act (7 U.S.C. 1a(19)).

(l) *FDIC* means the Federal Deposit Insurance Corporation.

(m) *Federal banking agencies* means the Board, the Office of the Comptroller of the Currency, and the FDIC.

(n) *Foreign banking organization* has the same meaning as in § 211.21(o) of the Board's Regulation K (12 CFR 211.21(o)), but does not include a foreign bank, as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(7)), that is organized under the laws of the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, or the Commonwealth of the Northern Mariana Islands.

(o) *Foreign insurance regulator* means the insurance commissioner, or a similar official or agency, of any country other than the United States that is engaged in the supervision of insurance companies under foreign insurance law.

(p) *General account* means all of the assets of an insurance company except those allocated to one or more separate accounts.

(q) *Insurance company* means a company that is organized as an insurance company, primarily and predominantly engaged in writing insurance or reinsuring risks underwritten by insurance companies, subject to supervision as such by a state insurance regulator or a foreign insurance regulator, and not operated for the purpose of evading the provisions of section 13 of the BHC Act (12 U.S.C. 1851).

(r) *Insured depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)), but does not include:

(1) An insured depository institution that is described in section 2(c)(2)(D) of the BHC Act (12 U.S.C. 1841(c)(2)(D)); or

(2) An insured depository institution if it has, and if every company that controls it has, total consolidated assets of $10 billion or less and total trading assets and trading liabilities, on a consolidated basis, that are 5 percent or less of total consolidated assets.

(s) *Limited trading assets and liabilities* means with respect to a banking entity that:

(1)(i) The banking entity has, together with its affiliates and subsidiaries, trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 248.6(a)(1) and (2) of subpart B) the average gross sum of which over the previous consecutive four quarters, as measured as of the last day of each of the four previous calendar quarters, is less than $1 billion; and

(ii) The Board has not determined pursuant to § 248.20(g) or (h) of this part that the banking entity should not be treated as having limited trading assets and liabilities.

(2) With respect to a banking entity other than a banking entity described in paragraph (s)(3) of this section, trading assets and liabilities for purposes of this paragraph (s) means trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 248.6(a)(1) and (2) of subpart B) on a worldwide consolidated basis.

(3)(i) With respect to a banking entity that is a foreign banking organization or a subsidiary of a foreign banking organization, trading assets and liabilities for purposes of this paragraph (s) means the trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 248.6(a)(1) and (2) of subpart B) of the combined U.S. operations of the top-tier foreign banking organization (including all subsidiaries, affiliates, branches, and agencies of the foreign banking organization operating, located, or organized in the United States).

(ii) For purposes of paragraph (s)(3)(i) of this section, a U.S. branch, agency, or subsidiary of a banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary. For purposes of paragraph (s)(3)(i) of this section, all foreign operations of a U.S. agency, branch, or subsidiary of a foreign banking organization are considered to be located in the United States, including branches outside the United States that are managed or controlled by a U.S. branch or agency of the foreign banking organization, for purposes of calculating the banking entity's U.S. trading assets and liabilities.

(t) *Loan* means any loan, lease, extension of credit, or secured or unsecured receivable that is not a security or derivative.

(u) *Moderate trading assets and liabilities* means, with respect to a banking entity, that the banking entity does not have significant trading assets and liabilities or limited trading assets and liabilities.

(v) *Primary financial regulatory agency* has the same meaning as in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5301(12)).

(w) *Purchase* includes any contract to buy, purchase, or otherwise acquire. For security futures products, purchase includes any contract, agreement, or transaction for future delivery. With respect to a commodity future, purchase includes any contract, agreement, or transaction for future delivery. With respect to a derivative, purchase includes the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(x) *Qualifying foreign banking organization* means a foreign banking organization that qualifies as such under § 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c), or (e)).

(y) *SEC* means the Securities and Exchange Commission.

(z) *Sale* and *sell* each include any contract to sell or otherwise dispose of. For security futures products, such terms include any contract, agreement, or transaction for future delivery. With respect to a commodity future, such terms include any contract, agreement, or transaction for future delivery. With respect to a derivative, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(aa) *Security* has the meaning specified in section 3(a)(10) of the Exchange Act (15 U.S.C. 78c(a)(10)).

(bb) *Security-based swap dealer* has the same meaning as in section 3(a)(71) of the Exchange Act (15 U.S.C. 78c(a)(71)).

(cc) *Security future* has the meaning specified in section 3(a)(55) of the Exchange Act (15 U.S.C. 78c(a)(55)).

(dd) *Separate account* means an account established and maintained by an insurance company in connection with one or more insurance contracts to hold assets that are legally segregated from the insurance company's other assets, under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(ee) *Significant trading assets and liabilities* means with respect to a banking entity that:

(1)(i) The banking entity has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which over the previous consecutive four quarters, as measured as of the last day of each of the four previous calendar quarters, equals or exceeds $20 billion; or

(ii) The Board has determined pursuant to § 248.20(h) of this part that the banking entity should be treated as having significant trading assets and liabilities.

(2) With respect to a banking entity, other than a banking entity described in paragraph (ee)(3) of this section, trading assets and liabilities for purposes of this paragraph (ee) means trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 248.6(a)(1) and (2) of subpart B) on a worldwide consolidated basis.

(3)(i) With respect to a banking entity that is a foreign banking organization or a subsidiary of a foreign banking organization, trading assets and liabilities for purposes of this paragraph (ee) means the trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 248.6(a)(1) and (2) of subpart B) of the combined U.S. operations of the top-tier foreign banking organization (including all subsidiaries, affiliates, branches, and agencies of the foreign banking organization operating, located, or organized in the United States as well as branches outside the United States that are managed or controlled by a branch or agency of the foreign banking entity operating, located or organized in the United States).

(ii) For purposes of paragraph (ee)(3)(i) of this section, a U.S. branch, agency, or subsidiary of a banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary. For purposes of paragraph (ee)(3)(i) of this section, all foreign operations of a U.S. agency, branch, or subsidiary of a foreign banking organization are considered to be located in the United States for purposes of calculating the banking entity's U.S. trading assets and liabilities.

(ff) *State* means any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(gg) *Subsidiary* has the same meaning as in section 2(d) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(d)).

(hh) *State insurance regulator* means the insurance commissioner, or a similar official or agency, of a State that is engaged in the supervision of insurance companies under State insurance law.

(ii) *Swap dealer* has the same meaning as in section 1(a)(49) of the Commodity Exchange Act (7 U.S.C. 1a(49)).

Subpart B—Proprietary Trading

■ 18. Section 248.3 is amended by:
■ a. Revising paragraphs (b) and (d)(3), (8), and (9);
■ b. Adding paragraphs (d)(10) through (13);
■ c. Redesignating paragraphs (e)(5) through (13) as paragraphs (e)(6) through (14);
■ d. Adding new paragraph (e)(5); and
■ e. Revising newly redesignated paragraphs (e)(11), (12), and (14).

The revisions and additions read as follows:

§ 248.3 Prohibition on proprietary trading.

* * * * *

(b) *Definition of trading account.* (1) *Trading account.* Trading account means:

(i) Any account that is used by a banking entity to purchase or sell one or more financial instruments principally for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging one or more of the positions resulting from the purchases or sales of financial instruments described in this paragraph;

(ii) Any account that is used by a banking entity to purchase or sell one or more financial instruments that are both market risk capital rule covered positions and trading positions (or hedges of other market risk capital rule covered positions), if the banking entity, or any affiliate with which the banking entity is consolidated for regulatory reporting purposes, calculates risk-based capital ratios under the market risk capital rule; or

(iii) Any account that is used by a banking entity to purchase or sell one or more financial instruments, if the banking entity:

(A) Is licensed or registered, or is required to be licensed or registered, to engage in the business of a dealer, swap dealer, or security-based swap dealer, to the extent the instrument is purchased or sold in connection with the activities that require the banking entity to be licensed or registered as such; or

(B) Is engaged in the business of a dealer, swap dealer, or security-based swap dealer outside of the United States, to the extent the instrument is purchased or sold in connection with the activities of such business.

(2) *Trading account application for certain banking entities.* (i) A banking entity that is subject to paragraph (b)(1)(ii) of this section in determining the scope of its trading account is not subject to paragraph (b)(1)(i) of this section.

(ii) A banking entity that does not calculate risk-based capital ratios under the market risk capital rule and is not a consolidated affiliate for regulatory reporting purposes of a banking entity that calculates risk based capital ratios under the market risk capital rule may elect to apply paragraph (b)(1)(ii) of this section in determining the scope of its trading account as if it were subject to that paragraph. A banking entity that elects under this subsection to apply paragraph (b)(1)(ii) of this section in determining the scope of its trading account as if it were subject to that paragraph is not required to apply paragraph (b)(1)(i) of this section.

(3) *Consistency of account election for certain banking entities.* (i) Any election or change to an election under paragraph (b)(2)(ii) of this section must apply to the electing banking entity and all of its wholly owned subsidiaries. The primary financial regulatory agency of a banking entity that is affiliated with but is not a wholly owned subsidiary of such electing banking entity may require that the banking entity be subject to this uniform application requirement if the primary financial regulatory agency determines that it is necessary to prevent evasion of the requirements of this part after notice and opportunity for response as provided in subpart D of this part.

(ii) A banking entity that does not elect under paragraph (b)(2)(ii) of this section to be subject to the trading account definition in (b)(1)(ii) may continue to apply the trading account definition in paragraph (b)(1)(i) of this section for one year from the date on which it becomes, or becomes a consolidated affiliate for regulatory reporting purposes with, a banking entity that calculates risk-based capital ratios under the market risk capital rule.

(4) *Rebuttable presumption for certain purchases and sales.* The purchase (or sale) of a financial instrument by a banking entity shall be presumed not to be for the trading account of the banking entity under paragraph (b)(1)(i) of this section if the banking entity holds the financial instrument for sixty days or longer and does not transfer substantially all of the risk of the financial instrument within sixty days of the purchase (or sale).

* * * * *

(d) * * *

(3) Any purchase or sale of a security, foreign exchange forward (as that term

is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)), foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25)), or cross-currency swap by a banking entity for the purpose of liquidity management in accordance with a documented liquidity management plan of the banking entity that:

(i) Specifically contemplates and authorizes the particular financial instruments to be used for liquidity management purposes, the amount, types, and risks of these financial instruments that are consistent with liquidity management, and the liquidity circumstances in which the particular financial instruments may or must be used;

(ii) Requires that any purchase or sale of financial instruments contemplated and authorized by the plan be principally for the purpose of managing the liquidity of the banking entity, and not for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging a position taken for such short-term purposes;

(iii) Requires that any financial instruments purchased or sold for liquidity management purposes be highly liquid and limited to financial instruments the market, credit, and other risks of which the banking entity does not reasonably expect to give rise to appreciable profits or losses as a result of short-term price movements;

(iv) Limits any financial instruments purchased or sold for liquidity management purposes, together with any other financial instruments purchased or sold for such purposes, to an amount that is consistent with the banking entity's near-term funding needs, including deviations from normal operations of the banking entity or any affiliate thereof, as estimated and documented pursuant to methods specified in the plan;

(v) Includes written policies and procedures, internal controls, analysis, and independent testing to ensure that the purchase and sale of financial instruments that are not permitted under § 248.6(a) or (b) of this subpart are for the purpose of liquidity management and in accordance with the liquidity management plan described in this paragraph (d)(3); and

(vi) Is consistent with the Board's supervisory requirements regarding liquidity management;

* * * * *

(8) Any purchase or sale of one or more financial instruments by a banking entity through a deferred compensation, stock-bonus, profit-sharing, or pension plan of the banking entity that is established and administered in accordance with the law of the United States or a foreign sovereign, if the purchase or sale is made directly or indirectly by the banking entity as trustee for the benefit of persons who are or were employees of the banking entity;

(9) Any purchase or sale of one or more financial instruments by a banking entity in the ordinary course of collecting a debt previously contracted in good faith, provided that the banking entity divests the financial instrument as soon as practicable, and in no event may the banking entity retain such instrument for longer than such period permitted by the Board;

(10) Any purchase or sale of one or more financial instruments that was made in error by a banking entity in the course of conducting a permitted or excluded activity or is a subsequent transaction to correct such an error;

(11) Contemporaneously entering into a customer-driven swap or customer-driven security-based swap and a matched swap or security-based swap if:

(i) The banking entity retains no more than minimal price risk; and

(ii) The banking entity is not a registered dealer, swap dealer, or security-based swap dealer;

(12) Any purchase or sale of one or more financial instruments that the banking entity uses to hedge mortgage servicing rights or mortgage servicing assets in accordance with a documented hedging strategy; or

(13) Any purchase or sale of a financial instrument that does not meet the definition of trading asset or trading liability under the applicable reporting form for a banking entity as of January 1, 2020.

(e) * * *

(5) *Cross-currency swap* means a swap in which one party exchanges with another party principal and interest rate payments in one currency for principal and interest rate payments in another currency, and the exchange of principal occurs on the date the swap is entered into, with a reversal of the exchange of principal at a later date that is agreed upon when the swap is entered into.

* * * * *

(11) *Market risk capital rule covered position and trading position* means a financial instrument that meets the criteria to be a covered position and a trading position, as those terms are respectively defined, without regard to whether the financial instrument is reported as a covered position or trading position on any applicable regulatory reporting forms:

(i) In the case of a banking entity that is a bank holding company, savings and loan holding company, or insured depository institution, under the market risk capital rule that is applicable to the banking entity; and

(ii) In the case of a banking entity that is affiliated with a bank holding company or savings and loan holding company, other than a banking entity to which a market risk capital rule is applicable, under the market risk capital rule that is applicable to the affiliated bank holding company or savings and loan holding company.

(12) *Market risk capital rule* means the market risk capital rule that is contained in 12 CFR part 3 with respect to a banking entity for which the OCC is the primary financial regulatory agency, 12 CFR part 217 with respect to a banking entity for which the Board is the primary financial regulatory agency, or 12 CFR part 324 with respect to a banking entity for which the FDIC is the primary financial regulatory agency.

* * * * *

(14) *Trading desk* means a unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof that is:

(i)(A) Structured by the banking entity to implement a well-defined business strategy;

(B) Organized to ensure appropriate setting, monitoring, and management review of the desk's trading and hedging limits, current and potential future loss exposures, and strategies; and

(C) Characterized by a clearly defined unit that:

(*1*) Engages in coordinated trading activity with a unified approach to its key elements;

(*2*) Operates subject to a common and calibrated set of risk metrics, risk levels, and joint trading limits;

(*3*) Submits compliance reports and other information as a unit for monitoring by management; and

(*4*) Books its trades together; or

(ii) For a banking entity that calculates risk-based capital ratios under the market risk capital rule, or a consolidated affiliate for regulatory reporting purposes of a banking entity that calculates risk-based capital ratios under the market risk capital rule, established by the banking entity or its affiliate for purposes of market risk capital calculations under the market risk capital rule.

■ 19. Section 248.4 is revised to read as follows:

§ 248.4 Permitted underwriting and market making-related activities.

(a) *Underwriting activities*—(1) *Permitted underwriting activities.* The prohibition contained in § 248.3(a) does not apply to a banking entity's underwriting activities conducted in accordance with this paragraph (a).

(2) *Requirements.* The underwriting activities of a banking entity are permitted under paragraph (a)(1) of this section only if:

(i) The banking entity is acting as an underwriter for a distribution of securities and the trading desk's underwriting position is related to such distribution;

(ii)(A) The amount and type of the securities in the trading desk's underwriting position are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, taking into account the liquidity, maturity, and depth of the market for the relevant types of securities; and

(B) Reasonable efforts are made to sell or otherwise reduce the underwriting position within a reasonable period, taking into account the liquidity, maturity, and depth of the market for the relevant types of securities;

(iii) In the case of a banking entity with significant trading assets and liabilities, the banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of paragraph (a) of this section, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The products, instruments or exposures each trading desk may purchase, sell, or manage as part of its underwriting activities;

(B) Limits for each trading desk, in accordance with paragraph (a)(2)(ii)(A) of this section;

(C) Written authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval; and

(D) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits.

(iv) A banking entity with significant trading assets and liabilities may satisfy the requirements in paragraphs (a)(2)(iii)(B) and (C) of this section by complying with the requirements set forth in paragraph (c) of this section;

(v) The compensation arrangements of persons performing the activities described in this paragraph (a) are designed not to reward or incentivize prohibited proprietary trading; and

(vi) The banking entity is licensed or registered to engage in the activity described in this paragraph (a) in accordance with applicable law.

(3) *Definition of distribution.* For purposes of this paragraph (a), a distribution of securities means:

(i) An offering of securities, whether or not subject to registration under the Securities Act of 1933, that is distinguished from ordinary trading transactions by the presence of special selling efforts and selling methods; or

(ii) An offering of securities made pursuant to an effective registration statement under the Securities Act of 1933.

(4) *Definition of underwriter.* For purposes of this paragraph (a), *underwriter* means:

(i) A person who has agreed with an issuer or selling security holder to:

(A) Purchase securities from the issuer or selling security holder for distribution;

(B) Engage in a distribution of securities for or on behalf of the issuer or selling security holder; or

(C) Manage a distribution of securities for or on behalf of the issuer or selling security holder; or

(ii) A person who has agreed to participate or is participating in a distribution of such securities for or on behalf of the issuer or selling security holder.

(5) *Definition of selling security holder.* For purposes of this paragraph (a), *selling security holder* means any person, other than an issuer, on whose behalf a distribution is made.

(6) *Definition of underwriting position.* For purposes of this section, *underwriting position* means the long or short positions in one or more securities held by a banking entity or its affiliate, and managed by a particular trading desk, in connection with a particular distribution of securities for which such banking entity or affiliate is acting as an underwriter.

(7) *Definition of client, customer, and counterparty.* For purposes of this paragraph (a), the terms *client, customer, and counterparty,* on a collective or individual basis, refer to market participants that may transact with the banking entity in connection with a particular distribution for which the banking entity is acting as underwriter.

(b) *Market making-related activities*—(1) *Permitted market making-related activities.* The prohibition contained in § 248.3(a) does not apply to a banking entity's market making-related activities conducted in accordance with this paragraph (b).

(2) *Requirements.* The market making-related activities of a banking entity are permitted under paragraph (b)(1) of this section only if:

(i) The trading desk that establishes and manages the financial exposure, routinely stands ready to purchase and sell one or more types of financial instruments related to its financial exposure, and is willing and available to quote, purchase and sell, or otherwise enter into long and short positions in those types of financial instruments for its own account, in commercially reasonable amounts and throughout market cycles on a basis appropriate for the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(ii) The trading desk's market-making related activities are designed not to exceed, on an ongoing basis, the reasonably expected near term demands of clients, customers, or counterparties, taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(iii) In the case of a banking entity with significant trading assets and liabilities, the banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this paragraph (b), including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The financial instruments each trading desk stands ready to purchase and sell in accordance with paragraph (b)(2)(i) of this section;

(B) The actions the trading desk will take to demonstrably reduce or otherwise significantly mitigate promptly the risks of its financial exposure consistent with the limits required under paragraph (b)(2)(iii)(C) of this section; the products, instruments, and exposures each trading desk may use for risk management purposes; the techniques and strategies each trading desk may use to manage the risks of its market making-related activities and positions; and the process, strategies, and personnel responsible for ensuring that the actions taken by the trading desk to mitigate these risks are and continue to be effective;

(C) Limits for each trading desk, in accordance with paragraph (b)(2)(ii) of this section;

(D) Written authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval; and

(E) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits.

(iv) A banking entity with significant trading assets and liabilities may satisfy the requirements in paragraphs (b)(2)(iii)(C) and (D) of this section by complying with the requirements set forth in paragraph (c) of this section.

(v) The compensation arrangements of persons performing the activities described in this paragraph (b) are designed not to reward or incentivize prohibited proprietary trading; and

(vi) The banking entity is licensed or registered to engage in activity described in this paragraph (b) in accordance with applicable law.

(3) *Definition of client, customer, and counterparty.* For purposes of this paragraph (b), the terms *client, customer, and counterparty,* on a collective or individual basis refer to market participants that make use of the banking entity's market making-related services by obtaining such services, responding to quotations, or entering into a continuing relationship with respect to such services, provided that:

(i) A trading desk or other organizational unit of another banking entity is not a client, customer, or counterparty of the trading desk if that other entity has trading assets and liabilities of $50 billion or more as measured in accordance with the methodology described in § 248.2(ee) of this part, unless:

(A) The trading desk documents how and why a particular trading desk or other organizational unit of the entity should be treated as a client, customer, or counterparty of the trading desk for purposes of paragraph (b)(2) of this section; or

(B) The purchase or sale by the trading desk is conducted anonymously on an exchange or similar trading facility that permits trading on behalf of a broad range of market participants.

(ii) [Reserved]

(4) *Definition of financial exposure.* For purposes of this section, *financial exposure* means the aggregate risks of one or more financial instruments and any associated loans, commodities, or foreign exchange or currency, held by a banking entity or its affiliate and managed by a particular trading desk as part of the trading desk's market making-related activities.

(5) *Definition of market-maker positions.* For the purposes of this section, *market-maker positions* means all of the positions in the financial instruments for which the trading desk stands ready to make a market in accordance with paragraph (b)(2)(i) of this section, that are managed by the trading desk, including the trading desk's open positions or exposures arising from open transactions.

(c) *Rebuttable presumption of compliance*—(1) *Internal limits.* (i) A banking entity shall be presumed to meet the requirement in paragraph (a)(2)(ii)(A) or (b)(2)(ii) of this section with respect to the purchase or sale of a financial instrument if the banking entity has established and implements, maintains, and enforces the internal limits for the relevant trading desk as described in paragraph (c)(1)(ii) of this section.

(ii)(A) With respect to underwriting activities conducted pursuant to paragraph (a) of this section, the presumption described in paragraph (c)(1)(i) of this section shall be available to each trading desk that establishes, implements, maintains, and enforces internal limits that should take into account the liquidity, maturity, and depth of the market for the relevant types of securities and are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, based on the nature and amount of the trading desk's underwriting activities, on the:

(*1*) Amount, types, and risk of its underwriting position;

(*2*) Level of exposures to relevant risk factors arising from its underwriting position; and

(*3*) Period of time a security may be held.

(B) With respect to market making-related activities conducted pursuant to paragraph (b) of this section, the presumption described in paragraph (c)(1)(i) of this section shall be available to each trading desk that establishes, implements, maintains, and enforces internal limits that should take into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments and are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, based on the nature and amount of the trading desk's market-making related activities, that address the:

(*1*) Amount, types, and risks of its market-maker positions;

(*2*) Amount, types, and risks of the products, instruments, and exposures the trading desk may use for risk management purposes;

(*3*) Level of exposures to relevant risk factors arising from its financial exposure; and

(*4*) Period of time a financial instrument may be held.

(2) *Supervisory review and oversight.* The limits described in paragraph (c)(1) of this section shall be subject to supervisory review and oversight by the Board on an ongoing basis.

(3) *Limit breaches and increases.* (i) With respect to any limit set pursuant to paragraph (c)(1)(ii)(A) or (B) of this section, a banking entity shall maintain and make available to the Board upon request records regarding:

(A) Any limit that is exceeded; and

(B) Any temporary or permanent increase to any limit(s), in each case in the form and manner as directed by the Board.

(ii) In the event of a breach or increase of any limit set pursuant to paragraph (c)(1)(ii)(A) or (B) of this section, the presumption described in paragraph (c)(1)(i) of this section shall continue to be available only if the banking entity:

(A) Takes action as promptly as possible after a breach to bring the trading desk into compliance; and

(B) Follows established written authorization procedures, including escalation procedures that require review and approval of any trade that exceeds a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval.

(4) *Rebutting the presumption.* The presumption in paragraph (c)(1)(i) of this section may be rebutted by the Board if the Board determines, taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments and based on all relevant facts and circumstances, that a trading desk is engaging in activity that is not based on the reasonably expected near term demands of clients, customers, or counterparties. The Board's rebuttal of the presumption in paragraph (c)(1)(i) must be made in accordance with the notice and response procedures in subpart D of this part.

■ 20. Section 248.5 is amended by revising paragraphs (b) and (c)(1) introductory text and adding paragraph (c)(4) to read as follows:

§ 248.5 Permitted risk-mitigating hedging activities.

* * * * *

(b) *Requirements.* (1) The risk-mitigating hedging activities of a banking entity that has significant trading assets and liabilities are permitted under paragraph (a) of this section only if:

(i) The banking entity has established and implements, maintains and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(A) Reasonably designed written policies and procedures regarding the positions, techniques and strategies that may be used for hedging, including documentation indicating what positions, contracts or other holdings a particular trading desk may use in its risk-mitigating hedging activities, as well as position and aging limits with respect to such positions, contracts or other holdings;

(B) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(C) The conduct of analysis and independent testing designed to ensure that the positions, techniques and strategies that may be used for hedging may reasonably be expected to reduce or otherwise significantly mitigate the specific, identifiable risk(s) being hedged;

(ii) The risk-mitigating hedging activity:

(A) Is conducted in accordance with the written policies, procedures, and internal controls required under this section;

(B) At the inception of the hedging activity, including, without limitation, any adjustments to the hedging activity, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, commodity price risk, basis risk, or similar risks, arising in connection with and related to identified positions, contracts, or other holdings of the banking entity, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof;

(C) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section;

(D) Is subject to continuing review, monitoring and management by the banking entity that:

(*1*) Is consistent with the written hedging policies and procedures required under paragraph (b)(1)(i) of this section;

(*2*) Is designed to reduce or otherwise significantly mitigate the specific, identifiable risks that develop over time from the risk-mitigating hedging activities undertaken under this section and the underlying positions, contracts, and other holdings of the banking entity, based upon the facts and circumstances of the underlying and hedging positions, contracts and other holdings of the banking entity and the risks and liquidity thereof; and

(*3*) Requires ongoing recalibration of the hedging activity by the banking entity to ensure that the hedging activity satisfies the requirements set out in paragraph (b)(1)(ii) of this section and is not prohibited proprietary trading; and

(iii) The compensation arrangements of persons performing risk-mitigating hedging activities are designed not to reward or incentivize prohibited proprietary trading.

(2) The risk-mitigating hedging activities of a banking entity that does not have significant trading assets and liabilities are permitted under paragraph (a) of this section only if the risk-mitigating hedging activity:

(i) At the inception of the hedging activity, including, without limitation, any adjustments to the hedging activity, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, commodity price risk, basis risk, or similar risks, arising in connection with and related to identified positions, contracts, or other holdings of the banking entity, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof; and

(ii) Is subject, as appropriate, to ongoing recalibration by the banking entity to ensure that the hedging activity satisfies the requirements set out in paragraph (b)(2) of this section and is not prohibited proprietary trading.

(c) * * *

(1) A banking entity that has significant trading assets and liabilities must comply with the requirements of paragraphs (c)(2) and (3) of this section, unless the requirements of paragraph (c)(4) of this section are met, with respect to any purchase or sale of financial instruments made in reliance on this section for risk-mitigating hedging purposes that is:

* * * * *

(4) The requirements of paragraphs (c)(2) and (3) of this section do not apply to the purchase or sale of a financial instrument described in paragraph (c)(1) of this section if:

(i) The financial instrument purchased or sold is identified on a written list of pre-approved financial instruments that are commonly used by the trading desk for the specific type of hedging activity for which the financial instrument is being purchased or sold; and

(ii) At the time the financial instrument is purchased or sold, the hedging activity (including the purchase or sale of the financial instrument) complies with written, pre-approved limits for the trading desk purchasing or selling the financial instrument for hedging activities undertaken for one or more other trading desks. The limits shall be appropriate for the:

(A) Size, types, and risks of the hedging activities commonly undertaken by the trading desk;

(B) Financial instruments purchased and sold for hedging activities by the trading desk; and

(C) Levels and duration of the risk exposures being hedged.

■ 21. Section 248.6 is amended by revising paragraph (e)(3), removing paragraphs (e)(4) and (6), and redesignating paragraph (e)(5) as paragraph (e)(4).

The revision reads as follows:

§ 248.6 Other permitted proprietary trading activities.

* * * * *

(e) * * *

(3) A purchase or sale by a banking entity is permitted for purposes of this paragraph (e) if:

(i) The banking entity engaging as principal in the purchase or sale (including relevant personnel) is not located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to purchase or sell as principal is not located in the United States or organized under the laws of the United States or of any State; and

(iii) The purchase or sale, including any transaction arising from risk-mitigating hedging related to the instruments purchased or sold, is not accounted for as principal directly or on a consolidated basis by any branch or affiliate that is located in the United

States or organized under the laws of the United States or of any State.

* * * * *

Subpart C—Covered Funds Activities and Investments

■ 22. Section 248.10 is amended by revising paragraphs (c)(7)(ii) and (c)(8)(i)(A) to read as follows:

§ 248.10 Prohibition on Acquiring or Retaining an Ownership Interest in and Having Certain Relationships with a Covered Fund.

* * * * *

(c) * * *

(7) * * *

(ii) Participates in the profits and losses of the separate account other than in compliance with applicable requirements regarding bank owned life insurance.

(8) * * *

(i) * * *

(A) Loans as defined in § 248.2(t) of subpart A;

* * * * *

■ 23. Section 248.11 is amended by revising paragraph (c) to read as follows:

§ 248.11 Permitted organizing and offering, underwriting, and market making with respect to a covered fund.

* * * * *

(c) *Underwriting and market making in ownership interests of a covered fund.* The prohibition contained in § 248.10(a) does not apply to a banking entity's underwriting activities or market making-related activities involving a covered fund so long as:

(1) Those activities are conducted in accordance with the requirements of § 248.4(a) or (b), respectively; and

(2) With respect to any banking entity (or any affiliate thereof) that: Acts as a sponsor, investment adviser or commodity trading advisor to a particular covered fund or otherwise acquires and retains an ownership interest in such covered fund in reliance on paragraph (a) of this section; or acquires and retains an ownership interest in such covered fund and is either a securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78*o*–11(a)(3)), or is acquiring and retaining an ownership interest in such covered fund in compliance with section 15G of that Act (15 U.S.C.78*o*–11) and the implementing regulations issued thereunder each as permitted by paragraph (b) of this section, then in each such case any ownership interests acquired or retained by the banking entity and its affiliates in connection with underwriting and market making related activities for that particular covered fund are included in the calculation of ownership interests permitted to be held by the banking entity and its affiliates under the limitations of § 248.12(a)(2)(ii) and (iii) and (d).

§ 248.12 [Amended]

■ 24. Section 248.12 is amended by redesignating the second instance of paragraph (e)(2)(vi) as paragraph (e)(2)(vii).

■ 25. Section 248.13 is amended by revising paragraphs (a), (b)(3) and (4), and (c) to read as follows:

§ 248.13 Other permitted covered fund activities and investments.

(a) *Permitted risk-mitigating hedging activities.* (1) The prohibition contained in § 248.10(a) does not apply with respect to an ownership interest in a covered fund acquired or retained by a banking entity that is designed to reduce or otherwise significantly mitigate the specific, identifiable risks to the banking entity in connection with:

(i) A compensation arrangement with an employee of the banking entity or an affiliate thereof that directly provides investment advisory, commodity trading advisory or other services to the covered fund; or

(ii) A position taken by the banking entity when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund.

(2) *Requirements.* The risk-mitigating hedging activities of a banking entity are permitted under this paragraph (a) only if:

(i) The banking entity has established and implements, maintains and enforces an internal compliance program in accordance with subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(A) Reasonably designed written policies and procedures; and

(B) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(ii) The acquisition or retention of the ownership interest:

(A) Is made in accordance with the written policies, procedures, and internal controls required under this section;

(B) At the inception of the hedge, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks arising:

(*1*) Out of a transaction conducted solely to accommodate a specific customer request with respect to the covered fund; or

(*2*) In connection with the compensation arrangement with the employee that directly provides investment advisory, commodity trading advisory, or other services to the covered fund;

(C) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section; and

(D) Is subject to continuing review, monitoring and management by the banking entity.

(iii) With respect to risk-mitigating hedging activity conducted pursuant to paragraph (a)(1)(i), the compensation arrangement relates solely to the covered fund in which the banking entity or any affiliate has acquired an ownership interest pursuant to paragraph (a)(1)(i) and such compensation arrangement provides that any losses incurred by the banking entity on such ownership interest will be offset by corresponding decreases in amounts payable under such compensation arrangement.

(b) * * *

(3) An ownership interest in a covered fund is not offered for sale or sold to a resident of the United States for purposes of paragraph (b)(1)(iii) of this section only if it is not sold and has not been sold pursuant to an offering that targets residents of the United States in which the banking entity or any affiliate of the banking entity participates. If the banking entity or an affiliate sponsors or serves, directly or indirectly, as the investment manager, investment adviser, commodity pool operator or commodity trading advisor to a covered fund, then the banking entity or affiliate will be deemed for purposes of this paragraph (b)(3) to participate in any offer or sale by the covered fund of ownership interests in the covered fund.

(4) An activity or investment occurs solely outside of the United States for purposes of paragraph (b)(1)(iv) of this section only if:

(i) The banking entity acting as sponsor, or engaging as principal in the acquisition or retention of an ownership interest in the covered fund, is not itself, and is not controlled directly or indirectly by, a banking entity that is located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to acquire or retain the ownership interest or act as sponsor to the covered fund is not located in the United States or organized under the laws of the United States or of any State; and

(iii) The investment or sponsorship, including any transaction arising from risk-mitigating hedging related to an ownership interest, is not accounted for as principal directly or indirectly on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State.

* * * * *

(c) *Permitted covered fund interests and activities by a regulated insurance company.* The prohibition contained in § 248.10(a) of this subpart does not apply to the acquisition or retention by an insurance company, or an affiliate thereof, of any ownership interest in, or the sponsorship of, a covered fund only if:

(1) The insurance company or its affiliate acquires and retains the ownership interest solely for the general account of the insurance company or for one or more separate accounts established by the insurance company;

(2) The acquisition and retention of the ownership interest is conducted in compliance with, and subject to, the insurance company investment laws and regulations of the State or jurisdiction in which such insurance company is domiciled; and

(3) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and foreign jurisdictions, as appropriate, have not jointly determined, after notice and comment, that a particular law or regulation described in paragraph (c)(2) of this section is insufficient to protect the safety and soundness of the banking entity, or the financial stability of the United States.

■ 26. Section 248.14 is amended by revising paragraph (a)(2)(ii)(B) to read as follows:

§ 248.14 Limitations on relationships with a covered fund.

(a) * * *

(2) * * *

(ii) * * *

(B) The chief executive officer (or equivalent officer) of the banking entity certifies in writing annually no later than March 31 to the Board (with a duty to update the certification if the information in the certification materially changes) that the banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests; and

* * * * *

Subpart D—Compliance Program Requirement; Violations

■ 27. Section 248.20 is amended by revising paragraphs (a), (b) introductory text, (c), (d), (e) introductory text, and (f)(2) and adding paragraphs (g), (h), and (i) to read as follows:

§ 248.20 Program for compliance; reporting.

(a) *Program requirement.* Each banking entity (other than a banking entity with limited trading assets and liabilities) shall develop and provide for the continued administration of a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part. The terms, scope, and detail of the compliance program shall be appropriate for the types, size, scope, and complexity of activities and business structure of the banking entity.

(b) *Banking entities with significant trading assets and liabilities.* With respect to a banking entity with significant trading assets and liabilities, the compliance program required by paragraph (a) of this section, at a minimum, shall include:

* * * * *

(c) *CEO attestation.* The CEO of a banking entity that has significant trading assets and liabilities must, based on a review by the CEO of the banking entity, attest in writing to the Board, each year no later than March 31, that the banking entity has in place processes to establish, maintain, enforce, review, test and modify the compliance program required by paragraph (b) of this section in a manner reasonably designed to achieve compliance with section 13 of the BHC Act and this part. In the case of a U.S. branch or agency of a foreign banking entity, the attestation may be provided for the entire U.S. operations of the foreign banking entity by the senior management officer of the U.S. operations of the foreign banking entity who is located in the United States.

(d) *Reporting requirements under appendix A to this part.* (1) A banking entity engaged in proprietary trading activity permitted under subpart B shall comply with the reporting requirements described in appendix A to this part, if:

(i) The banking entity has significant trading assets and liabilities; or

(ii) The Board notifies the banking entity in writing that it must satisfy the reporting requirements contained in appendix A to this part.

(2) Frequency of reporting: Unless the Board notifies the banking entity in writing that it must report on a different basis, a banking entity subject to appendix A to this part shall report the information required by appendix A for each quarter within 30 days of the end of the quarter.

(e) *Additional documentation for covered funds.* A banking entity with significant trading assets and liabilities shall maintain records that include:

* * * * *

(f) * * *

(2) *Banking entities with moderate trading assets and liabilities.* A banking entity with moderate trading assets and liabilities may satisfy the requirements of this section by including in its existing compliance policies and procedures appropriate references to the requirements of section 13 of the BHC Act and this part and adjustments as appropriate given the activities, size, scope, and complexity of the banking entity.

(g) *Rebuttable presumption of compliance for banking entities with limited trading assets and liabilities*—(1) *Rebuttable presumption.* Except as otherwise provided in this paragraph, a banking entity with limited trading assets and liabilities shall be presumed to be compliant with subpart B and subpart C of this part and shall have no obligation to demonstrate compliance with this part on an ongoing basis.

(2) *Rebuttal of presumption.* If upon examination or audit, the Board determines that the banking entity has engaged in proprietary trading or covered fund activities that are otherwise prohibited under subpart B or subpart C of this part, the Board may require the banking entity to be treated under this part as if it did not have limited trading assets and liabilities. The Board's rebuttal of the presumption in this paragraph must be made in accordance with the notice and response procedures in paragraph (i) of this section.

(h) *Reservation of authority.* Notwithstanding any other provision of this part, the Board retains its authority to require a banking entity without significant trading assets and liabilities to apply any requirements of this part that would otherwise apply if the banking entity had significant or moderate trading assets and liabilities if the Board determines that the size or complexity of the banking entity's trading or investment activities, or the risk of evasion of subpart B or subpart C of this part, does not warrant a presumption of compliance under paragraph (g) of this section or treatment as a banking entity with moderate trading assets and liabilities, as applicable. The Board's exercise of this reservation of authority must be made in accordance with the notice and response procedures in paragraph (i) of this section.

(i) *Notice and response procedures*—(1) *Notice.* The Board will notify the banking entity in writing of any determination requiring notice under this part and will provide an explanation of the determination.

(2) *Response.* The banking entity may respond to any or all items in the notice described in paragraph (i)(1) of this section. The response should include any matters that the banking entity would have the Board consider in deciding whether to make the determination. The response must be in writing and delivered to the designated Board official within 30 days after the date on which the banking entity received the notice. The Board may shorten the time period when, in the opinion of the Board, the activities or condition of the banking entity so requires, provided that the banking entity is informed of the time period at the time of notice, or with the consent of the banking entity. In its discretion, the Board may extend the time period for good cause.

(3) *Waiver.* Failure to respond within 30 days or such other time period as may be specified by the Board shall constitute a waiver of any objections to the Board's determination.

(4) *Decision.* The Board will notify the banking entity of the decision in writing. The notice will include an explanation of the decision.

■ 28. Revise appendix A to part 248 to read as follows:

Appendix A to Part 248—Reporting and Recordkeeping Requirements for Covered Trading Activities

I. Purpose

a. This appendix sets forth reporting and recordkeeping requirements that certain banking entities must satisfy in connection with the restrictions on proprietary trading set forth in subpart B (''proprietary trading restrictions''). Pursuant to § 248.20(d), this appendix applies to a banking entity that, together with its affiliates and subsidiaries, has significant trading assets and liabilities. These entities are required to (i) furnish periodic reports to the Board regarding a variety of quantitative measurements of their covered trading activities, which vary depending on the scope and size of covered trading activities, and (ii) create and maintain records documenting the preparation and content of these reports. The requirements of this appendix must be incorporated into the banking entity's internal compliance program under § 248.20.

b. The purpose of this appendix is to assist banking entities and the Board in:

(1) Better understanding and evaluating the scope, type, and profile of the banking entity's covered trading activities;

(2) Monitoring the banking entity's covered trading activities;

(3) Identifying covered trading activities that warrant further review or examination by the banking entity to verify compliance with the proprietary trading restrictions;

(4) Evaluating whether the covered trading activities of trading desks engaged in market making-related activities subject to § 248.4(b) are consistent with the requirements governing permitted market making-related activities;

(5) Evaluating whether the covered trading activities of trading desks that are engaged in permitted trading activity subject to § 248.4, 248.5, or 248.6(a)–(b) (*i.e.,* underwriting and market making-related activity, risk-mitigating hedging, or trading in certain government obligations) are consistent with the requirement that such activity not result, directly or indirectly, in a material exposure to high-risk assets or high-risk trading strategies;

(6) Identifying the profile of particular covered trading activities of the banking entity, and the individual trading desks of the banking entity, to help establish the appropriate frequency and scope of examination by Board of such activities; and

(7) Assessing and addressing the risks associated with the banking entity's covered trading activities.

c. Information that must be furnished pursuant to this appendix is not intended to serve as a dispositive tool for the identification of permissible or impermissible activities.

d. In addition to the quantitative measurements required in this appendix, a banking entity may need to develop and implement other quantitative measurements in order to effectively monitor its covered trading activities for compliance with section 13 of the BHC Act and this part and to have an effective compliance program, as required by § 248.20. The effectiveness of particular quantitative measurements may differ based on the profile of the banking entity's businesses in general and, more specifically, of the particular trading desk, including types of instruments traded, trading activities and strategies, and history and experience (*e.g.,* whether the trading desk is an established, successful market maker or a new entrant to a competitive market). In all cases, banking entities must ensure that they have robust measures in place to identify and monitor the risks taken in their trading activities, to ensure that the activities are within risk tolerances established by the banking entity, and to monitor and examine for compliance with the proprietary trading restrictions in this part.

e. On an ongoing basis, banking entities must carefully monitor, review, and evaluate all furnished quantitative measurements, as well as any others that they choose to utilize in order to maintain compliance with section 13 of the BHC Act and this part. All measurement results that indicate a heightened risk of impermissible proprietary trading, including with respect to otherwise-permitted activities under § 248.4 through 248.6(a)–(b), or that result in a material exposure to high-risk assets or high-risk trading strategies, must be escalated within the banking entity for review, further analysis, explanation to Board, and remediation, where appropriate. The quantitative measurements discussed in this appendix should be helpful to banking entities in identifying and managing the risks related to their covered trading activities.

II. Definitions

The terms used in this appendix have the same meanings as set forth in § 248.2 and § 248.3. In addition, for purposes of this appendix, the following definitions apply:

Applicability identifies the trading desks for which a banking entity is required to calculate and report a particular quantitative measurement based on the type of covered trading activity conducted by the trading desk.

Calculation period means the period of time for which a particular quantitative measurement must be calculated.

Comprehensive profit and loss means the net profit or loss of a trading desk's material sources of trading revenue over a specific period of time, including, for example, any increase or decrease in the market value of a trading desk's holdings, dividend income, and interest income and expense.

Covered trading activity means trading conducted by a trading desk under § 248.4, § 248.5, § 248.6(a), or § 248.6(b). A banking entity may include in its covered trading activity trading conducted under § 248.3(d), § 248.6(c), § 248.6(d) or § 248.6(e).

Measurement frequency means the frequency with which a particular quantitative metric must be calculated and recorded.

Trading day means a calendar day on which a trading desk is open for trading.

III. Reporting and Recordkeeping

a. Scope of Required Reporting

1. Quantitative measurements. Each banking entity made subject to this appendix by § 248.20 must furnish the following quantitative measurements, as applicable, for each trading desk of the banking entity engaged in covered trading activities and calculate these quantitative measurements in accordance with this appendix:

i. Internal Limits and Usage;

ii. Value-at-Risk;

iii. Comprehensive Profit and Loss Attribution;

iv. Positions; and

v. Transaction Volumes.

2. Trading desk information. Each banking entity made subject to this appendix by § 248.20 must provide certain descriptive information, as further described in this appendix, regarding each trading desk engaged in covered trading activities.

3. Quantitative measurements identifying information. Each banking entity made subject to this appendix by § 248.20 must provide certain identifying and descriptive information, as further described in this appendix, regarding its quantitative measurements.

4. Narrative statement. Each banking entity made subject to this appendix by § 248.20 may provide an optional narrative statement, as further described in this appendix.

5. File identifying information. Each banking entity made subject to this appendix by § 248.20 must provide file identifying information in each submission to the Board pursuant to this appendix, including the name of the banking entity, the RSSD ID assigned to the top-tier banking entity by the Board, and identification of the reporting period and creation date and time.

b. Trading Desk Information

1. Each banking entity must provide descriptive information regarding each trading desk engaged in covered trading activities, including:

i. Name of the trading desk used internally by the banking entity and a unique identification label for the trading desk;

ii. Identification of each type of covered trading activity in which the trading desk is engaged;

iii. Brief description of the general strategy of the trading desk;

v. A list identifying each Agency receiving the submission of the trading desk;

2. Indication of whether each calendar date is a trading day or not a trading day for the trading desk; and

3. Currency reported and daily currency conversion rate.

c. Quantitative Measurements Identifying Information

Each banking entity must provide the following information regarding the quantitative measurements:

1. An Internal Limits Information Schedule that provides identifying and descriptive information for each limit reported pursuant to the Internal Limits and Usage quantitative measurement, including the name of the limit, a unique identification label for the limit, a description of the limit, the unit of measurement for the limit, the type of limit, and identification of the corresponding risk factor attribution in the particular case that the limit type is a limit on a risk factor sensitivity and profit and loss attribution to the same risk factor is reported; and

2. A Risk Factor Attribution Information Schedule that provides identifying and descriptive information for each risk factor attribution reported pursuant to the Comprehensive Profit and Loss Attribution quantitative measurement, including the name of the risk factor or other factor, a unique identification label for the risk factor or other factor, a description of the risk factor or other factor, and the risk factor or other factor's change unit.

d. Narrative Statement

Each banking entity made subject to this appendix by § 248.20 may submit in a separate electronic document a Narrative Statement to the Board with any information the banking entity views as relevant for assessing the information reported. The Narrative Statement may include further description of or changes to calculation methods, identification of material events, description of and reasons for changes in the banking entity's trading desk structure or trading desk strategies, and when any such changes occurred.

e. Frequency and Method of Required Calculation and Reporting

A banking entity must calculate any applicable quantitative measurement for each trading day. A banking entity must report the Trading Desk Information, the Quantitative Measurements Identifying Information, and each applicable quantitative measurement electronically to the Board on the reporting schedule established in § 248.20 unless otherwise requested by the Board. A banking entity must report the Trading Desk Information, the Quantitative Measurements Identifying Information, and each applicable quantitative measurement to the Board in accordance with the XML Schema specified and published on the Board's website.

f. Recordkeeping

A banking entity must, for any quantitative measurement furnished to the Board pursuant to this appendix and § 248.20(d), create and maintain records documenting the preparation and content of these reports, as well as such information as is necessary to permit the Board to verify the accuracy of such reports, for a period of five years from the end of the calendar year for which the measurement was taken. A banking entity must retain the Narrative Statement, the Trading Desk Information, and the Quantitative Measurements Identifying Information for a period of five years from the end of the calendar year for which the information was reported to the Board.

IV. Quantitative Measurements

a. Risk-Management Measurements

1. Internal Limits and Usage

i. *Description:* For purposes of this appendix, Internal Limits are the constraints that define the amount of risk and the positions that a trading desk is permitted to take at a point in time, as defined by the banking entity for a specific trading desk. Usage represents the value of the trading desk's risk or positions that are accounted for by the current activity of the desk. Internal limits and their usage are key compliance and risk management tools used to control and monitor risk taking and include, but are not limited to, the limits set out in §§ 248.4 and 248.5. A trading desk's risk limits, commonly including a limit on ''Value-at-Risk,'' are useful in the broader context of the trading desk's overall activities, particularly for the market making activities under § 248.4(b) and hedging activity under § 248.5. Accordingly, the limits required under §§ 248.4(b)(2)(iii)(C) and 248.5(b)(1)(i)(A) must meet the applicable requirements under §§ 248.4(b)(2)(iii)(C) and 248.5(b)(1)(i)(A) and also must include appropriate metrics for the trading desk limits including, at a minimum, ''Value-at-Risk'' except to the extent the ''Value-at-Risk'' metric is demonstrably ineffective for measuring and monitoring the risks of a trading desk based on the types of positions traded by, and risk exposures of, that desk.

A. A banking entity must provide the following information for each limit reported pursuant to this quantitative measurement: The unique identification label for the limit reported in the Internal Limits Information Schedule, the limit size (distinguishing between an upper and a lower limit), and the value of usage of the limit.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks engaged in covered trading activities.

2. Value-at-Risk

i. *Description:* For purposes of this appendix, Value-at-Risk (''VaR'') is the measurement of the risk of future financial loss in the value of a trading desk's aggregated positions at the ninety-nine percent confidence level over a one-day period, based on current market conditions.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks engaged in covered trading activities.

b. Source-of-Revenue Measurements

1. Comprehensive Profit and Loss Attribution

i. *Description:* For purposes of this appendix, Comprehensive Profit and Loss Attribution is an analysis that attributes the daily fluctuation in the value of a trading desk's positions to various sources. First, the daily profit and loss of the aggregated positions is divided into two categories: (i) Profit and loss attributable to a trading desk's existing positions that were also positions held by the trading desk as of the end of the prior day (''existing positions''); and (ii) profit and loss attributable to new positions resulting from the current day's trading activity (''new positions'').

A. The comprehensive profit and loss associated with existing positions must reflect changes in the value of these positions on the applicable day. The comprehensive profit and loss from existing positions must be further attributed, as applicable, to (i) changes in the specific risk factors and other factors that are monitored and managed as part of the trading desk's overall risk management policies and procedures; and (ii) any other applicable elements, such as cash flows, carry, changes in reserves, and the correction, cancellation, or exercise of a trade.

B. For the attribution of comprehensive profit and loss from existing positions to specific risk factors and other factors, a banking entity must provide the following information for the factors that explain the preponderance of the profit or loss changes due to risk factor changes: The unique identification label for the risk factor or other factor listed in the Risk Factor Attribution Information Schedule, and the profit or loss due to the risk factor or other factor change.

C. The comprehensive profit and loss attributed to new positions must reflect commissions and fee income or expense and market gains or losses associated with transactions executed on the applicable day. New positions include purchases and sales of financial instruments and other assets/liabilities and negotiated amendments to existing positions. The comprehensive profit and loss from new positions may be reported in the aggregate and does not need to be further attributed to specific sources.

D. The portion of comprehensive profit and loss from existing positions that is not attributed to changes in specific risk factors and other factors must be allocated to a residual category. Significant unexplained profit and loss must be escalated for further investigation and analysis.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks engaged in covered trading activities.

c. *Positions and Transaction Volumes Measurements*

1. Positions

i. *Description:* For purposes of this appendix, Positions is the value of securities and derivatives positions managed by the trading desk. For purposes of the Positions quantitative measurement, do not include in the Positions calculation for ''securities'' those securities that are also ''derivatives,'' as those terms are defined under subpart A; instead, report those securities that are also derivatives as ''derivatives.'' [1] A banking entity must separately report the trading desk's market value of long securities positions, short securities positions, derivatives receivables, and derivatives payables.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks that rely on § 248.4(a) or § 248.4(b) to conduct underwriting activity or market-making-related activity, respectively.

2. Transaction Volumes

i. *Description:* For purposes of this appendix, Transaction Volumes measures three exclusive categories of covered trading activity conducted by a trading desk. A banking entity is required to report the value and number of security and derivative transactions conducted by the trading desk with: (i) Customers, excluding internal transactions; (ii) non-customers, excluding internal transactions; and (iii) trading desks and other organizational units where the transaction is booked into either the same banking entity or an affiliated banking entity. For securities, value means gross market value. For derivatives, value means gross notional value. For purposes of calculating the Transaction Volumes quantitative measurement, do not include in the Transaction Volumes calculation for ''securities'' those securities that are also ''derivatives,'' as those terms are defined under subpart A; instead, report those securities that are also derivatives as ''derivatives.'' [2] Further, for purposes of the Transaction Volumes quantitative measurement, a customer of a trading desk that relies on § 248.4(a) to conduct underwriting activity is a market participant identified in § 248.4(a)(7), and a customer of a trading desk that relies on § 248.4(b) to conduct market making-related activity is a market participant identified in § 248.4(b)(3).

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks that rely on § 248.4(a) or § 248.4(b) to conduct underwriting activity or market-making-related activity, respectively.

Appendix B to Part 248 [Removed]

■ 29. Appendix B to part 248 is removed.

■ 30. Effective January 1, 2020, until December 31, 2020, appendix Z to part 248 is added to read as follows:

Appendix Z to Part 248—Proprietary Trading and Certain Interests in and Relationships With Covered Funds (Alternative Compliance)

Note: The content of this appendix reproduces the regulation implementing Section 13 of the Bank Holding Company Act as of November 13, 2019.

Subpart A—Authority and Definitions

§ 248.1 Authority, purpose, scope, and relationship to other authorities.

(a) *Authority.* This part (Regulation VV) is issued by the Board under section 13 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1851), as well as under the Federal Reserve Act, as amended (12 U.S.C. 221 *et seq.*); section 8 of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1818); the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841 *et seq.*); and the International Banking Act of 1978, as amended (12 U.S.C. 3101 *et seq.*).

(b) *Purpose.* Section 13 of the Bank Holding Company Act establishes prohibitions and restrictions on proprietary trading and on investments in or relationships with covered funds by certain banking entities, including state member banks, bank holding companies, savings and loan holding companies, other companies that control an insured depository institution, foreign banking organizations, and certain subsidiaries thereof. This part implements section 13 of the Bank Holding Company Act by defining terms used in the statute and related terms, establishing prohibitions and restrictions on proprietary trading and on investments in or relationships with covered funds, and explaining the statute's requirements.

(c) *Scope.* This part implements section 13 of the Bank Holding Company Act with respect to banking entities for which the Board is authorized to issue regulations under section 13(b)(2) of the Bank Holding Company Act (12 U.S.C. 1851(b)(2)) and take actions under section 13(e) of that Act (12 U.S.C. 1851(e)). These include any state bank that is a member of the Federal Reserve System, any company that controls an insured depository institution (including a bank holding company and savings and loan holding company), any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act (12 U.S.C. 3106), and any subsidiary of the foregoing other than a subsidiary for which the OCC, FDIC, CFTC, or SEC is the primary financial regulatory agency (as defined in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (12 U.S.C. 5301(12)), but do not include such entities to the extent they are not within the definition of banking entity in § 248.2(c).

(d) *Relationship to other authorities.* Except as otherwise provided under section 13 of the BHC Act or this part, and notwithstanding any other provision of law, the prohibitions and restrictions under section 13 of BHC Act and this part shall apply to the activities of a banking entity, even if such activities are authorized for the banking entity under other applicable provisions of law.

(e) *Preservation of authority.* Nothing in this part limits in any way the authority of the Board to impose on a banking entity identified in paragraph (c) of this section additional requirements or restrictions with respect to any activity, investment, or relationship covered under section 13 of the Bank Holding Company Act or this part, or additional penalties for violation of this part provided under any other applicable provision of law.

§ 248.2 Definitions.

Unless otherwise specified, for purposes of this part:

(a) *Affiliate* has the same meaning as in section 2(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(k)).

(b) *Bank holding company* has the same meaning as in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

(c) *Banking entity.* (1) Except as provided in paragraph (c)(2) of this section, *banking entity* means:

(i) Any insured depository institution;

(ii) Any company that controls an insured depository institution;

(iii) Any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(iv) Any affiliate or subsidiary of any entity described in paragraphs (c)(1)(i), (ii), or (iii) of this section.

(2) Banking entity does not include:

[1] *See* § 248.2(h), (aa). For example, under this part, a security-based swap is both a ''security'' and a ''derivative.'' For purposes of the Positions quantitative measurement, security-based swaps are reported as derivatives rather than securities.

[2] *See* § 248.2(h), (aa).

(i) A covered fund that is not itself a banking entity under paragraphs (c)(1)(i), (ii), or (iii) of this section;

(ii) A portfolio company held under the authority contained in section 4(k)(4)(H) or (I) of the BHC Act (12 U.S.C. 1843(k)(4)(H), (I)), or any 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), so long as the portfolio company or portfolio concern is not itself a banking entity under paragraphs (c)(1)(i), (ii), or (iii) of this section; or

(iii) The FDIC acting in its corporate capacity or as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(d) *Board* means the Board of Governors of the Federal Reserve System.

(e) *CFTC* means the Commodity Futures Trading Commission.

(f) *Dealer* has the same meaning as in section 3(a)(5) of the Exchange Act (15 U.S.C. 78c(a)(5)).

(g) *Depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(h) *Derivative.* (1) Except as provided in paragraph (h)(2) of this section, *derivative* means:

(i) Any swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68));

(ii) Any purchase or sale of a commodity, that is not an excluded commodity, for deferred shipment or delivery that is intended to be physically settled;

(iii) Any foreign exchange forward (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)) or foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25));

(iv) Any agreement, contract, or transaction in foreign currency described in section 2(c)(2)(C)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(C)(i));

(v) Any agreement, contract, or transaction in a commodity other than foreign currency described in section 2(c)(2)(D)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(D)(i)); and

(vi) Any transaction authorized under section 19 of the Commodity Exchange Act (7 U.S.C. 23(a) or (b));

(2) A derivative does not include:

(i) Any consumer, commercial, or other agreement, contract, or transaction that the CFTC and SEC have further defined by joint regulation, interpretation, guidance, or other action as not within the definition of swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)); or

(ii) Any identified banking product, as defined in section 402(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b)), that is subject to section 403(a) of that Act (7 U.S.C. 27a(a)).

(i) *Employee* includes a member of the immediate family of the employee.

(j) *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(k) *Excluded commodity* has the same meaning as in section 1a(19) of the Commodity Exchange Act (7 U.S.C. 1a(19)).

(l) *FDIC* means the Federal Deposit Insurance Corporation.

(m) *Federal banking agencies* means the Board, the Office of the Comptroller of the Currency, and the FDIC.

(n) *Foreign banking organization* has the same meaning as in section 211.21(o) of the Board's Regulation K (12 CFR 211.21(o)), but does not include a foreign bank, as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(7)), that is organized under the laws of the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, or the Commonwealth of the Northern Mariana Islands.

(o) *Foreign insurance regulator* means the insurance commissioner, or a similar official or agency, of any country other than the United States that is engaged in the supervision of insurance companies under foreign insurance law.

(p) *General account* means all of the assets of an insurance company except those allocated to one or more separate accounts.

(q) *Insurance company* means a company that is organized as an insurance company, primarily and predominantly engaged in writing insurance or reinsuring risks underwritten by insurance companies, subject to supervision as such by a state insurance regulator or a foreign insurance regulator, and not operated for the purpose of evading the provisions of section 13 of the BHC Act (12 U.S.C. 1851).

(r) *Insured depository institution,* unless otherwise indicated, has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)), but does not include:

(1) An insured depository institution that is described in section 2(c)(2)(D) of the BHC Act (12 U.S.C. 1841(c)(2)(D)); or

(2) An insured depository institution if it has, and if every company that controls it has, total consolidated assets of $10 billion or less and total trading assets and trading liabilities, on a consolidated basis, that are 5 percent or less of total consolidated assets.

(s) *Loan* means any loan, lease, extension of credit, or secured or unsecured receivable that is not a security or derivative.

(t) *Primary financial regulatory agency* has the same meaning as in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5301(12)).

(u) *Purchase* includes any contract to buy, purchase, or otherwise acquire. For security futures products, purchase includes any contract, agreement, or transaction for future delivery. With respect to a commodity future, purchase includes any contract, agreement, or transaction for future delivery. With respect to a derivative, purchase includes the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(v) *Qualifying foreign banking organization* means a foreign banking organization that qualifies as such under section 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c), or (e)).

(w) *SEC* means the Securities and Exchange Commission.

(x) *Sale* and *sell* each include any contract to sell or otherwise dispose of. For security futures products, such terms include any contract, agreement, or transaction for future delivery. With respect to a commodity future, such terms include any contract, agreement, or transaction for future delivery. With respect to a derivative, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(y) *Security* has the meaning specified in section 3(a)(10) of the Exchange Act (15 U.S.C. 78c(a)(10)).

(z) *Security-based swap dealer* has the same meaning as in section 3(a)(71) of the Exchange Act (15 U.S.C. 78c(a)(71)).

(aa) *Security future* has the meaning specified in section 3(a)(55) of the Exchange Act (15 U.S.C. 78c(a)(55)).

(bb) *Separate account* means an account established and maintained by an insurance company in connection with one or more insurance contracts to hold assets that are legally segregated from the insurance company's other assets, under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(cc) *State* means any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(dd) *Subsidiary* has the same meaning as in section 2(d) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(d)).

(ee) *State insurance regulator* means the insurance commissioner, or a similar official or agency, of a State that is engaged in the supervision of insurance companies under State insurance law.

(ff) *Swap dealer* has the same meaning as in section 1(a)(49) of the Commodity Exchange Act (7 U.S.C. 1a(49)).

Subpart B—Proprietary Trading

§ 248.3 Prohibition on proprietary trading.

(a) *Prohibition.* Except as otherwise provided in this subpart, a banking entity may not engage in proprietary trading. *Proprietary trading* means engaging as principal for the trading account of the banking entity in any purchase or sale of one or more financial instruments.

(b) *Definition of trading account.* (1) Trading account means any account that is used by a banking entity to:

(i) Purchase or sell one or more financial instruments principally for the purpose of:

(A) Short-term resale;

(B) Benefitting from actual or expected short-term price movements;

(C) Realizing short-term arbitrage profits; or

(D) Hedging one or more positions resulting from the purchases or sales of financial instruments described in paragraphs (b)(1)(i)(A), (B), or (C) of this section;

(ii) Purchase or sell one or more financial instruments that are both market risk capital rule covered positions and trading positions (or hedges of other market risk capital rule covered positions), if the banking entity, or any affiliate of the banking entity, is an insured depository institution, bank holding company, or savings and loan holding company, and calculates risk-based capital ratios under the market risk capital rule; or

(iii) Purchase or sell one or more financial instruments for any purpose, if the banking entity:

(A) Is licensed or registered, or is required to be licensed or registered, to engage in the business of a dealer, swap dealer, or security-based swap dealer, to the extent the instrument is purchased or sold in connection with the activities that require the banking entity to be licensed or registered as such; or

(B) Is engaged in the business of a dealer, swap dealer, or security-based swap dealer outside of the United States, to the extent the instrument is purchased or sold in connection with the activities of such business.

(2) *Rebuttable presumption for certain purchases and sales.* The purchase (or sale) of a financial instrument by a banking entity shall be presumed to be for the trading account of the banking entity under paragraph (b)(1)(i) of this section if the banking entity holds the financial instrument for fewer than sixty days or substantially transfers the risk of the financial instrument within sixty days of the purchase (or sale), unless the banking entity can demonstrate, based on all relevant facts and circumstances, that the banking entity did not purchase (or sell) the financial instrument principally for any of the purposes described in paragraph (b)(1)(i) of this section.

(c) *Financial instrument.* (1) *Financial instrument* means:

(i) A security, including an option on a security;

(ii) A derivative, including an option on a derivative; or

(iii) A contract of sale of a commodity for future delivery, or option on a contract of sale of a commodity for future delivery.

(2) A financial instrument does not include:

(i) A loan;

(ii) A commodity that is not:

(A) An excluded commodity (other than foreign exchange or currency);

(B) A derivative;

(C) A contract of sale of a commodity for future delivery; or

(D) An option on a contract of sale of a commodity for future delivery; or

(iii) Foreign exchange or currency.

(d) *Proprietary trading.* Proprietary trading does not include:

(1) Any purchase or sale of one or more financial instruments by a banking entity that arises under a repurchase or reverse repurchase agreement pursuant to which the banking entity has simultaneously agreed, in writing, to both purchase and sell a stated asset, at stated prices, and on stated dates or on demand with the same counterparty;

(2) Any purchase or sale of one or more financial instruments by a banking entity that arises under a transaction in which the banking entity lends or borrows a security temporarily to or from another party pursuant to a written securities lending agreement under which the lender retains the economic interests of an owner of such security, and has the right to terminate the transaction and to recall the loaned security on terms agreed by the parties;

(3) Any purchase or sale of a security by a banking entity for the purpose of liquidity management in accordance with a documented liquidity management plan of the banking entity that:

(i) Specifically contemplates and authorizes the particular securities to be used for liquidity management purposes, the amount, types, and risks of these securities that are consistent with liquidity management, and the liquidity circumstances in which the particular securities may or must be used;

(ii) Requires that any purchase or sale of securities contemplated and authorized by the plan be principally for the purpose of managing the liquidity of the banking entity, and not for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging a position taken for such short-term purposes;

(iii) Requires that any securities purchased or sold for liquidity management purposes be highly liquid and limited to securities the market, credit, and other risks of which the banking entity does not reasonably expect to give rise to appreciable profits or losses as a result of short-term price movements;

(iv) Limits any securities purchased or sold for liquidity management purposes, together with any other instruments purchased or sold for such purposes, to an amount that is consistent with the banking entity's near-term funding needs, including deviations from normal operations of the banking entity or any affiliate thereof, as estimated and documented pursuant to methods specified in the plan;

(v) Includes written policies and procedures, internal controls, analysis, and independent testing to ensure that the purchase and sale of securities that are not permitted under §§ 248.6(a) or (b) of this subpart are for the purpose of liquidity management and in accordance with the liquidity management plan described in paragraph (d)(3) of this section; and

(vi) Is consistent with The Board's supervisory requirements, guidance, and expectations regarding liquidity management;

(4) Any purchase or sale of one or more financial instruments by a banking entity that is a derivatives clearing organization or a clearing agency in connection with clearing financial instruments;

(5) Any excluded clearing activities by a banking entity that is a member of a clearing agency, a member of a derivatives clearing organization, or a member of a designated financial market utility;

(6) Any purchase or sale of one or more financial instruments by a banking entity, so long as:

(i) The purchase (or sale) satisfies an existing delivery obligation of the banking entity or its customers, including to prevent or close out a failure to deliver, in connection with delivery, clearing, or settlement activity; or

(ii) The purchase (or sale) satisfies an obligation of the banking entity in connection with a judicial, administrative, self-regulatory organization, or arbitration proceeding;

(7) Any purchase or sale of one or more financial instruments by a banking entity that is acting solely as agent, broker, or custodian;

(8) Any purchase or sale of one or more financial instruments by a banking entity through a deferred compensation, stock-bonus, profit-sharing, or pension plan of the banking entity that is established and administered in accordance with the law of the United States or a foreign sovereign, if the purchase or sale is made directly or indirectly by the banking entity as trustee for the benefit of persons who are or were employees of the banking entity; or

(9) Any purchase or sale of one or more financial instruments by a banking entity in the ordinary course of collecting a debt previously contracted in good faith, provided that the banking entity divests the financial instrument as soon as practicable, and in no event may the banking entity retain such instrument for longer than such period permitted by the Board.

(e) *Definition of other terms related to proprietary trading.* For purposes of this subpart:

(1) *Anonymous* means that each party to a purchase or sale is unaware of the identity of the other party(ies) to the purchase or sale.

(2) *Clearing agency* has the same meaning as in section 3(a)(23) of the Exchange Act (15 U.S.C. 78c(a)(23)).

(3) *Commodity* has the same meaning as in section 1a(9) of the Commodity Exchange Act (7 U.S.C. 1a(9)), except that a commodity does not include any security;

(4) *Contract of sale of a commodity for future delivery* means a contract of sale (as that term is defined in section 1a(13) of the Commodity Exchange Act (7 U.S.C. 1a(13)) for future delivery (as that term is defined in section 1a(27) of the Commodity Exchange Act (7 U.S.C. 1a(27))).

(5) *Derivatives clearing organization* means:

(i) A derivatives clearing organization registered under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1);

(ii) A derivatives clearing organization that, pursuant to CFTC regulation, is exempt from the registration requirements under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1); or

(iii) A foreign derivatives clearing organization that, pursuant to CFTC regulation, is permitted to clear for a foreign board of trade that is registered with the CFTC.

(6) *Exchange,* unless the context otherwise requires, means any designated contract market, swap execution facility, or foreign board of trade registered with the CFTC, or, for purposes of securities or security-based swaps, an exchange, as defined under section 3(a)(1) of the Exchange Act (15 U.S.C. 78c(a)(1)), or security-based swap execution facility, as defined under section 3(a)(77) of the Exchange Act (15 U.S.C. 78c(a)(77)).

(7) *Excluded clearing activities* means:

(i) With respect to customer transactions cleared on a derivatives clearing organization, a clearing agency, or a designated financial market utility, any purchase or sale necessary to correct trading errors made by or on behalf of a customer provided that such purchase or sale is conducted in accordance with, for transactions cleared on a derivatives clearing organization, the Commodity Exchange Act, CFTC regulations, and the rules or procedures of the derivatives clearing organization, or, for transactions cleared on a clearing agency, the rules or procedures of the clearing agency, or, for transactions cleared on a designated financial market utility that is neither a derivatives clearing organization nor a clearing agency, the rules or procedures of the designated financial market utility;

(ii) Any purchase or sale in connection with and related to the management of a default or threatened imminent default of a customer provided that such purchase or sale is conducted in accordance with, for transactions cleared on a derivatives clearing organization, the Commodity Exchange Act, CFTC regulations, and the rules or procedures of the derivatives clearing organization, or, for transactions cleared on a clearing agency, the rules or procedures of the clearing agency, or, for transactions cleared on a designated financial market utility that is neither a derivatives clearing organization nor a clearing agency, the rules or procedures of the designated financial market utility;

(iii) Any purchase or sale in connection with and related to the management of a default or threatened imminent default of a member of a clearing agency, a member of a derivatives clearing organization, or a member of a designated financial market utility;

(iv) Any purchase or sale in connection with and related to the management of the default or threatened default of a clearing agency, a derivatives clearing organization, or a designated financial market utility; and

(v) Any purchase or sale that is required by the rules or procedures of a clearing agency, a derivatives clearing organization, or a designated financial market utility to mitigate the risk to the clearing agency, derivatives clearing organization, or designated financial market utility that would result from the clearing by a member of security-based swaps that reference the member or an affiliate of the member.

(8) *Designated financial market utility* has the same meaning as in section 803(4) of the Dodd-Frank Act (12 U.S.C. 5462(4)).

(9) *Issuer* has the same meaning as in section 2(a)(4) of the Securities Act of 1933 (15 U.S.C. 77b(a)(4)).

(10) *Market risk capital rule covered position and trading position* means a financial instrument that is both a covered position and a trading position, as those terms are respectively defined:

(i) In the case of a banking entity that is a bank holding company, savings and loan holding company, or insured depository institution, under the market risk capital rule that is applicable to the banking entity; and

(ii) In the case of a banking entity that is affiliated with a bank holding company or savings and loan holding company, other than a banking entity to which a market risk capital rule is applicable, under the market risk capital rule that is applicable to the affiliated bank holding company or savings and loan holding company.

(11) *Market risk capital rule* means the market risk capital rule that is contained in subpart F of 12 CFR part 3, 12 CFR parts 208 and 225, or 12 CFR part 324, as applicable.

(12) *Municipal security* means a security that is a direct obligation of or issued by, or an obligation guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, or any municipal corporate instrumentality of one or more States or political subdivisions thereof.

(13) *Trading desk* means the smallest discrete unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof.

§ 248.4 Permitted underwriting and market making-related activities.

(a) *Underwriting activities*—(1) *Permitted underwriting activities.* The prohibition contained in § 248.3(a) does not apply to a banking entity's underwriting activities conducted in accordance with this paragraph (a).

(2) *Requirements.* The underwriting activities of a banking entity are permitted under paragraph (a)(1) of this section only if:

(i) The banking entity is acting as an underwriter for a distribution of securities and the trading desk's underwriting position is related to such distribution;

(ii) The amount and type of the securities in the trading desk's underwriting position are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, and reasonable efforts are made to sell or otherwise reduce the underwriting position within a reasonable period, taking into account the liquidity, maturity, and depth of the market for the relevant type of security;

(iii) The banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of paragraph (a) of this section, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The products, instruments or exposures each trading desk may purchase, sell, or manage as part of its underwriting activities;

(B) Limits for each trading desk, based on the nature and amount of the trading desk's underwriting activities, including the reasonably expected near term demands of clients, customers, or counterparties, on the:

(*1*) Amount, types, and risk of its underwriting position;

(*2*) Level of exposures to relevant risk factors arising from its underwriting position; and

(*3*) Period of time a security may be held;

(C) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits; and

(D) Authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval;

(iv) The compensation arrangements of persons performing the activities described in this paragraph (a) are designed not to reward or incentivize prohibited proprietary trading; and

(v) The banking entity is licensed or registered to engage in the activity described in this paragraph (a) in accordance with applicable law.

(3) *Definition of distribution.* For purposes of this paragraph (a), a *distribution* of securities means:

(i) An offering of securities, whether or not subject to registration under the Securities Act of 1933, that is distinguished from ordinary trading transactions by the presence of special selling efforts and selling methods; or

(ii) An offering of securities made pursuant to an effective registration statement under the Securities Act of 1933.

(4) *Definition of underwriter.* For purposes of this paragraph (a), *underwriter* means:

(i) A person who has agreed with an issuer or selling security holder to:

(A) Purchase securities from the issuer or selling security holder for distribution;

(B) Engage in a distribution of securities for or on behalf of the issuer or selling security holder; or

(C) Manage a distribution of securities for or on behalf of the issuer or selling security holder; or

(ii) A person who has agreed to participate or is participating in a distribution of such securities for or on behalf of the issuer or selling security holder.

(5) *Definition of selling security holder.* For purposes of this paragraph (a), *selling security holder* means any person, other than an issuer, on whose behalf a distribution is made.

(6) *Definition of underwriting position.* For purposes of this paragraph (a), *underwriting position* means the long or short positions in one or more securities held by a banking entity or its affiliate, and managed by a particular trading desk, in connection with a particular distribution of securities for which such banking entity or affiliate is acting as an underwriter.

(7) *Definition of client, customer, and counterparty.* For purposes of this paragraph (a), the terms *client, customer, and counterparty,* on a collective or individual basis, refer to market participants that may transact with the banking entity in connection with a particular distribution for which the banking entity is acting as underwriter.

(b) *Market making-related activities*—(1) *Permitted market making-related activities.* The prohibition contained in § 248.3(a) does not apply to a banking entity's market making-related activities conducted in accordance with this paragraph (b).

(2) *Requirements.* The market making-related activities of a banking entity are permitted under paragraph (b)(1) of this section only if:

(i) The trading desk that establishes and manages the financial exposure routinely stands ready to purchase and sell one or more types of financial instruments related to its financial exposure and is willing and available to quote, purchase and sell, or otherwise enter into long and short positions in those types of financial instruments for its own account, in commercially reasonable amounts and throughout market cycles on a basis appropriate for the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(ii) The amount, types, and risks of the financial instruments in the trading desk's market-maker inventory are designed not to exceed, on an ongoing basis, the reasonably expected near term demands of clients, customers, or counterparties, based on:

(A) The liquidity, maturity, and depth of the market for the relevant types of financial instrument(s); and

(B) Demonstrable analysis of historical customer demand, current inventory of financial instruments, and market and other factors regarding the amount, types, and risks, of or associated with financial instruments in which the trading desk makes a market, including through block trades;

(iii) The banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of paragraph (b) of this section, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The financial instruments each trading desk stands ready to purchase and sell in accordance with paragraph (b)(2)(i) of this section;

(B) The actions the trading desk will take to demonstrably reduce or otherwise significantly mitigate promptly the risks of its financial exposure consistent with the limits required under paragraph (b)(2)(iii)(C) of this section; the products, instruments, and exposures each trading desk may use for risk management purposes; the techniques and strategies each trading desk may use to manage the risks of its market making-related activities and inventory; and the process, strategies, and personnel responsible for ensuring that the actions taken by the trading desk to mitigate these risks are and continue to be effective;

(C) Limits for each trading desk, based on the nature and amount of the trading desk's market making-related activities, that address the factors prescribed by paragraph (b)(2)(ii) of this section, on:

(*1*) The amount, types, and risks of its market-maker inventory;

(*2*) The amount, types, and risks of the products, instruments, and exposures the trading desk may use for risk management purposes;

(*3*) The level of exposures to relevant risk factors arising from its financial exposure; and

(*4*) The period of time a financial instrument may be held;

(D) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits; and

(E) Authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis that the basis for any temporary or permanent increase to a trading desk's limit(s) is consistent with the requirements of this paragraph (b), and independent review of such demonstrable analysis and approval;

(iv) To the extent that any limit identified pursuant to paragraph (b)(2)(iii)(C) of this section is exceeded, the trading desk takes action to bring the trading desk into compliance with the limits as promptly as possible after the limit is exceeded;

(v) The compensation arrangements of persons performing the activities described in this paragraph (b) are designed not to reward or incentivize prohibited proprietary trading; and

(vi) The banking entity is licensed or registered to engage in activity described in this paragraph (b) in accordance with applicable law.

(3) *Definition of client, customer, and counterparty.* For purposes of paragraph (b) of this section, the terms *client, customer, and counterparty,* on a collective or individual basis refer to market participants that make use of the banking entity's market making-related services by obtaining such services, responding to quotations, or entering into a continuing relationship with respect to such services, provided that:

(i) A trading desk or other organizational unit of another banking entity is not a client, customer, or counterparty of the trading desk if that other entity has trading assets and liabilities of $50 billion or more as measured in accordance with § 248.20(d)(1) of subpart D, unless:

(A) The trading desk documents how and why a particular trading desk or other organizational unit of the entity should be treated as a client, customer, or counterparty of the trading desk for purposes of paragraph (b)(2) of this section; or

(B) The purchase or sale by the trading desk is conducted anonymously on an exchange or similar trading facility that permits trading on behalf of a broad range of market participants.

(4) *Definition of financial exposure.* For purposes of this paragraph (b), *financial exposure* means the aggregate risks of one or more financial instruments and any associated loans, commodities, or foreign exchange or currency, held by a banking entity or its affiliate and managed by a particular trading desk as part of the trading desk's market making-related activities.

(5) *Definition of market-maker inventory.* For the purposes of this paragraph (b), *market-maker inventory* means all of the positions in the financial instruments for which the trading desk stands ready to make a market in accordance with paragraph (b)(2)(i) of this section, that are managed by the trading desk, including the trading desk's open positions or exposures arising from open transactions.

§ 248.5 Permitted risk-mitigating hedging activities.

(a) *Permitted risk-mitigating hedging activities.* The prohibition contained in § 248.3(a) does not apply to the risk-mitigating hedging activities of a banking entity in connection with and related to individual or aggregated positions, contracts, or other holdings of the banking entity and designed to reduce the specific risks to the banking entity in connection with and related to such positions, contracts, or other holdings.

(b) *Requirements.* The risk-mitigating hedging activities of a banking entity are permitted under paragraph (a) of this section only if:

(1) The banking entity has established and implements, maintains and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(i) Reasonably designed written policies and procedures regarding the positions, techniques and strategies that may be used for hedging, including documentation indicating what positions, contracts or other holdings a particular trading desk may use in its risk-mitigating hedging activities, as well as position and aging limits with respect to such positions, contracts or other holdings;

(ii) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(iii) The conduct of analysis, including correlation analysis, and independent testing designed to ensure that the positions, techniques and strategies that may be used for hedging may reasonably be expected to demonstrably reduce or otherwise significantly mitigate the specific, identifiable risk(s) being hedged, and such correlation analysis demonstrates that the hedging activity demonstrably reduces or otherwise significantly mitigates the specific, identifiable risk(s) being hedged;

(2) The risk-mitigating hedging activity:

(i) Is conducted in accordance with the written policies, procedures, and internal controls required under this section;

(ii) At the inception of the hedging activity, including, without limitation, any adjustments to the hedging activity, is designed to reduce or otherwise significantly mitigate and demonstrably reduces or otherwise significantly mitigates one or more specific, identifiable risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, commodity price risk, basis risk, or similar risks, arising in connection with and related to identified positions, contracts, or other holdings of the banking entity, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof;

(iii) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section;

(iv) Is subject to continuing review, monitoring and management by the banking entity that:

(A) Is consistent with the written hedging policies and procedures required under paragraph (b)(1) of this section;

(B) Is designed to reduce or otherwise significantly mitigate and demonstrably reduces or otherwise significantly mitigates the specific, identifiable risks that develop over time from the risk-mitigating hedging activities undertaken under this section and the underlying positions, contracts, and other holdings of the banking entity, based upon the facts and circumstances of the underlying and hedging positions, contracts and other holdings of the banking entity and the risks and liquidity thereof; and

(C) Requires ongoing recalibration of the hedging activity by the banking entity to ensure that the hedging activity satisfies the requirements set out in paragraph (b)(2) of this section and is not prohibited proprietary trading; and

(3) The compensation arrangements of persons performing risk-mitigating hedging activities are designed not to reward or incentivize prohibited proprietary trading.

(c) *Documentation requirement.* (1) A banking entity must comply with the requirements of paragraphs (c)(2) and (3) of this section with respect to any purchase or sale of financial instruments made in reliance on this section for risk-mitigating hedging purposes that is:

(i) Not established by the specific trading desk establishing or responsible for the underlying positions, contracts, or other holdings the risks of which the hedging activity is designed to reduce;

(ii) Established by the specific trading desk establishing or responsible for the underlying positions, contracts, or other holdings the risks of which the purchases or sales are designed to reduce, but that is effected through a financial instrument, exposure, technique, or strategy that is not specifically identified in the trading desk's written policies and procedures established under paragraph (b)(1) of this section or under § 248.4(b)(2)(iii)(B) of this subpart as a product, instrument, exposure, technique, or strategy such trading desk may use for hedging; or

(iii) Established to hedge aggregated positions across two or more trading desks.

(2) In connection with any purchase or sale identified in paragraph (c)(1) of this section, a banking entity must, at a minimum, and contemporaneously with the purchase or sale, document:

(i) The specific, identifiable risk(s) of the identified positions, contracts, or other holdings of the banking entity that the purchase or sale is designed to reduce;

(ii) The specific risk-mitigating strategy that the purchase or sale is designed to fulfill; and

(iii) The trading desk or other business unit that is establishing and responsible for the hedge.

(3) A banking entity must create and retain records sufficient to demonstrate compliance with the requirements of this paragraph (c) for a period that is no less than five years in a form that allows the banking entity to promptly produce such records to the Board on request, or such longer period as required under other law or this part.

§ 248.6 Other permitted proprietary trading activities.

(a) *Permitted trading in domestic government obligations.* The prohibition contained in § 248.3(a) does not apply to the purchase or sale by a banking entity of a financial instrument that is:

(1) An obligation of, or issued or guaranteed by, the United States;

(2) An obligation, participation, or other instrument of, or issued or guaranteed by, an agency of the United States, the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, a Federal Home Loan Bank, the Federal Agricultural Mortgage Corporation or a Farm Credit System institution chartered under and subject to the provisions of the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*);

(3) An obligation of any State or any political subdivision thereof, including any municipal security; or

(4) An obligation of the FDIC, or any entity formed by or on behalf of the FDIC for purpose of facilitating the disposal of assets acquired or held by the FDIC in its corporate capacity or as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(b) *Permitted trading in foreign government obligations*—(1) *Affiliates of foreign banking entities in the United States.* The prohibition contained in § 248.3(a) does not apply to the purchase or sale of a financial instrument that is an obligation of, or issued or guaranteed by, a foreign sovereign (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of such foreign sovereign, by a banking entity, so long as:

(i) The banking entity is organized under or is directly or indirectly controlled by a banking entity that is organized under the laws of a foreign sovereign and is not directly or indirectly controlled by a top-tier banking entity that is organized under the laws of the United States;

(ii) The financial instrument is an obligation of, or issued or guaranteed by, the foreign sovereign under the laws of which the foreign banking entity referred to in paragraph (b)(1)(i) of this section is organized (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of that foreign sovereign; and

(iii) The purchase or sale as principal is not made by an insured depository institution.

(2) *Foreign affiliates of a U.S. banking entity.* The prohibition contained in § 248.3(a) does not apply to the purchase or sale of a financial instrument that is an obligation of, or issued or guaranteed by, a foreign sovereign (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of that foreign sovereign, by a foreign entity that is owned or controlled by a banking entity organized or established under the laws of the United States or any State, so long as:

(i) The foreign entity is a foreign bank, as defined in section 211.2(j) of the Board's Regulation K (12 CFR 211.2(j)), or is regulated by the foreign sovereign as a securities dealer;

(ii) The financial instrument is an obligation of, or issued or guaranteed by, the foreign sovereign under the laws of which the foreign entity is organized (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of that foreign sovereign; and

(iii) The financial instrument is owned by the foreign entity and is not financed by an affiliate that is located in the United States or organized under the laws of the United States or of any State.

(c) *Permitted trading on behalf of customers*—(1) *Fiduciary transactions.* The prohibition contained in § 248.3(a) does not apply to the purchase or sale of financial instruments by a banking entity acting as trustee or in a similar fiduciary capacity, so long as:

(i) The transaction is conducted for the account of, or on behalf of, a customer; and

(ii) The banking entity does not have or retain beneficial ownership of the financial instruments.

(2) *Riskless principal transactions.* The prohibition contained in § 248.3(a) does not apply to the purchase or sale of financial instruments by a banking entity acting as riskless principal in a transaction in which the banking entity, after receiving an order to purchase (or sell) a financial instrument from a customer, purchases (or sells) the financial instrument for its own account to offset a contemporaneous sale to (or purchase from) the customer.

(d) *Permitted trading by a regulated insurance company.* The prohibition contained in § 248.3(a) does not apply to the purchase or sale of financial instruments by a banking entity that is an insurance company or an affiliate of an insurance company if:

(1) The insurance company or its affiliate purchases or sells the financial instruments solely for:

(i) The general account of the insurance company; or

(ii) A separate account established by the insurance company;

(2) The purchase or sale is conducted in compliance with, and subject to, the insurance company investment laws, regulations, and written guidance of the State or jurisdiction in which such insurance company is domiciled; and

(3) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and foreign jurisdictions, as appropriate, have not jointly determined, after notice and comment, that a particular law, regulation, or written guidance described in paragraph (d)(2) of this section is insufficient to protect the safety and soundness of the covered banking entity, or the financial stability of the United States.

(e) *Permitted trading activities of foreign banking entities.* (1) The prohibition contained in § 248.3(a) does not apply to the purchase or sale of financial instruments by a banking entity if:

(i) The banking entity is not organized or directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of any State;

(ii) The purchase or sale by the banking entity is made pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act; and

(iii) The purchase or sale meets the requirements of paragraph (e)(3) of this section.

(2) A purchase or sale of financial instruments by a banking entity is made pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act for purposes of paragraph (e)(1)(ii) of this section only if:

(i) The purchase or sale is conducted in accordance with the requirements of paragraph (e) of this section; and

(ii)(A) With respect to a banking entity that is a foreign banking organization, the banking entity meets the qualifying foreign banking organization requirements of section 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c) or (e)), as applicable; or

(B) With respect to a banking entity that is not a foreign banking organization, the banking entity is not organized under the laws of the United States or of any State and the banking entity, on a fully-consolidated basis, meets at least two of the following requirements:

(*1*) Total assets of the banking entity held outside of the United States exceed total assets of the banking entity held in the United States;

(*2*) Total revenues derived from the business of the banking entity outside of the United States exceed total revenues derived from the business of the banking entity in the United States; or

(*3*) Total net income derived from the business of the banking entity outside of the United States exceeds total net income derived from the business of the banking entity in the United States.

(3) A purchase or sale by a banking entity is permitted for purposes of this paragraph (e) if:

(i) The banking entity engaging as principal in the purchase or sale (including any personnel of the banking entity or its affiliate that arrange, negotiate or execute such purchase or sale) is not located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to purchase or sell as principal is not located in the United States or organized under the laws of the United States or of any State;

(iii) The purchase or sale, including any transaction arising from risk-mitigating hedging related to the instruments purchased or sold, is not accounted for as principal directly or on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State;

(iv) No financing for the banking entity's purchases or sales is provided, directly or indirectly, by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State; and

(v) The purchase or sale is not conducted with or through any U.S. entity, other than:

(A) A purchase or sale with the foreign operations of a U.S. entity if no personnel of such U.S. entity that are located in the United States are involved in the arrangement, negotiation, or execution of such purchase or sale;

(B) A purchase or sale with an unaffiliated market intermediary acting as principal, provided the purchase or sale is promptly cleared and settled through a clearing agency or derivatives clearing organization acting as a central counterparty; or

(C) A purchase or sale through an unaffiliated market intermediary acting as agent, provided the purchase or sale is conducted anonymously on an exchange or similar trading facility and is promptly cleared and settled through a clearing agency or derivatives clearing organization acting as a central counterparty.

(4) For purposes of this paragraph (e), a U.S. entity is any entity that is, or is controlled by, or is acting on behalf of, or at the direction of, any other entity that is, located in the United States or organized under the laws of the United States or of any State.

(5) For purposes of this paragraph (e), a U.S. branch, agency, or subsidiary of a foreign banking entity is considered to be located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(6) For purposes of this paragraph (e), *unaffiliated market intermediary* means an unaffiliated entity, acting as an intermediary, that is:

(i) A broker or dealer registered with the SEC under section 15 of the Exchange Act or exempt from registration or excluded from regulation as such;

(ii) A swap dealer registered with the CFTC under section 4s of the Commodity Exchange Act or exempt from registration or excluded from regulation as such;

(iii) A security-based swap dealer registered with the SEC under section 15F of the Exchange Act or exempt from registration or excluded from regulation as such; or

(iv) A futures commission merchant registered with the CFTC under section 4f of the Commodity Exchange Act or exempt from registration or excluded from regulation as such.

§ 248.7 Limitations on permitted proprietary trading activities.

(a) No transaction, class of transactions, or activity may be deemed permissible under §§ 248.4 through 248.6 if the transaction, class of transactions, or activity would:

(1) Involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties;

(2) Result, directly or indirectly, in a material exposure by the banking entity to a high-risk asset or a high-risk trading strategy; or

(3) Pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.

(b) *Definition of material conflict of interest.* (1) For purposes of this section, a material conflict of interest between a banking entity and its clients, customers, or counterparties exists if the banking entity engages in any transaction, class of transactions, or activity that would involve or result in the banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, and the banking entity has not taken at least one of the actions in paragraph (b)(2) of this section.

(2) Prior to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, the banking entity:

(i) *Timely and effective disclosure.* (A) Has made clear, timely, and effective disclosure of the conflict of interest, together with other necessary information, in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest; and

(B) Such disclosure is made in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty created by the conflict of interest; or

(ii) *Information barriers.* Has established, maintained, and enforced information barriers that are memorialized in written policies and procedures, such as physical separation of personnel, or functions, or limitations on types of activity, that are reasonably designed, taking into consideration the nature of the banking entity's business, to prevent the conflict of interest from involving or resulting in a materially adverse effect on a client, customer, or counterparty. A banking entity may not rely on such information barriers if, in the case of any specific transaction, class or type of transactions or activity, the banking entity knows or should reasonably know that, notwithstanding the banking entity's establishment of information barriers, the conflict of interest may involve or result in a materially adverse effect on a client, customer, or counterparty.

(c) *Definition of high-risk asset and high-risk trading strategy.* For purposes of this section:

(1) *High-risk asset* means an asset or group of related assets that would, if held by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

(2) *High-risk trading strategy* means a trading strategy that would, if engaged in by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

§§ 248.8–248.9 [Reserved]

Subpart C—Covered Funds Activities and Investments

§ 248.10 Prohibition on acquiring or retaining an ownership interest in and having certain relationships with a covered fund.

(a) *Prohibition.* (1) Except as otherwise provided in this subpart, a banking entity may not, as principal, directly or indirectly, acquire or retain any ownership interest in or sponsor a covered fund.

(2) Paragraph (a)(1) of this section does not include acquiring or retaining an ownership interest in a covered fund by a banking entity:

(i) Acting solely as agent, broker, or custodian, so long as;

(A) The activity is conducted for the account of, or on behalf of, a customer; and

(B) The banking entity and its affiliates do not have or retain beneficial ownership of such ownership interest;

(ii) Through a deferred compensation, stock-bonus, profit-sharing, or pension plan of the banking entity (or an affiliate thereof) that is established and administered in accordance with the law of the United States or a foreign sovereign, if the ownership interest is held or controlled directly or indirectly by the banking entity as trustee for the benefit of persons who are or were employees of the banking entity (or an affiliate thereof);

(iii) In the ordinary course of collecting a debt previously contracted in good faith, provided that the banking entity divests the ownership interest as soon as practicable, and in no event may the banking entity retain such ownership interest for longer than such period permitted by the Board; or

(iv) On behalf of customers as trustee or in a similar fiduciary capacity for a customer that is not a covered fund, so long as:

(A) The activity is conducted for the account of, or on behalf of, the customer; and

(B) The banking entity and its affiliates do not have or retain beneficial ownership of such ownership interest.

(b) *Definition of covered fund.* (1) Except as provided in paragraph (c) of this section, covered fund means:

(i) An issuer that would be an investment company, as defined in the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), *but for* section 3(c)(1) or 3(c)(7) of that Act (15 U.S.C. 80a–3(c)(1) or (7));

(ii) Any commodity pool under section 1a(10) of the Commodity Exchange Act (7 U.S.C. 1a(10)) for which:

(A) The commodity pool operator has claimed an exemption under 17 CFR 4.7; or

(B)(*1*) A commodity pool operator is registered with the CFTC as a commodity pool operator in connection with the operation of the commodity pool;

(*2*) Substantially all participation units of the commodity pool are owned by qualified eligible persons under 17 CFR 4.7(a)(2) and (3); and

(*3*) Participation units of the commodity pool have not been publicly offered to persons who are not qualified eligible persons under 17 CFR 4.7(a)(2) and (3); or

(iii) For any banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State, an entity that:

(A) Is organized or established outside the United States and the ownership interests of which are offered and sold solely outside the United States;

(B) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities; and

(C)(*1*) Has as its sponsor that banking entity (or an affiliate thereof); or

(*2*) Has issued an ownership interest that is owned directly or indirectly by that banking entity (or an affiliate thereof).

(2) An issuer shall not be deemed to be a covered fund under paragraph (b)(1)(iii) of this section if, were the issuer subject to U.S. securities laws, the issuer could rely on an exclusion or exemption from the definition of ''investment company'' under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) other than the exclusions contained in section 3(c)(1) and 3(c)(7) of that Act.

(3) For purposes of paragraph (b)(1)(iii) of this section, a U.S. branch, agency, or subsidiary of a foreign banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(c) Notwithstanding paragraph (b) of this section, unless the appropriate Federal banking agencies, the SEC, and the CFTC jointly determine otherwise, a covered fund does not include:

(1) *Foreign public funds.* (i) Subject to paragraphs (ii) and (iii) below, an issuer that:

(A) Is organized or established outside of the United States;

(B) Is authorized to offer and sell ownership interests to retail investors in the issuer's home jurisdiction; and

(C) Sells ownership interests predominantly through one or more public offerings outside of the United States.

(ii) With respect to a banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State and any issuer for which such banking entity acts as sponsor, the sponsoring banking entity may not rely on the exemption in paragraph (c)(1)(i) of this section for such issuer unless ownership interests in the issuer are sold predominantly to persons other than:

(A) Such sponsoring banking entity;

(B) Such issuer;

(C) Affiliates of such sponsoring banking entity or such issuer; and

(D) Directors and employees of such entities.

(iii) For purposes of paragraph (c)(1)(i)(C) of this section, the term ''public offering'' means a distribution (as defined in § 248.4(a)(3) of subpart B) of securities in any jurisdiction outside the United States to investors, including retail investors, provided that:

(A) The distribution complies with all applicable requirements in the jurisdiction in which such distribution is being made;

(B) The distribution does not restrict availability to investors having a minimum level of net worth or net investment assets; and

(C) The issuer has filed or submitted, with the appropriate regulatory authority in such jurisdiction, offering disclosure documents that are publicly available.

(2) *Wholly-owned subsidiaries.* An entity, all of the outstanding ownership interests of which are owned directly or indirectly by the banking entity (or an affiliate thereof), except that:

(i) Up to five percent of the entity's outstanding ownership interests, less any amounts outstanding under paragraph (c)(2)(ii) of this section, may be held by employees or directors of the banking entity or such affiliate (including former employees or directors if their ownership interest was acquired while employed by or in the service of the banking entity); and

(ii) Up to 0.5 percent of the entity's outstanding ownership interests may be held by a third party if the ownership interest is acquired or retained by the third party for the purpose of establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.

(3) *Joint ventures.* A joint venture between a banking entity or any of its affiliates and one or more unaffiliated persons, provided that the joint venture:

(i) Is comprised of no more than 10 unaffiliated co-venturers;

(ii) Is in the business of engaging in activities that are permissible for the banking entity or affiliate, other than investing in securities for resale or other disposition; and

(iii) Is not, and does not hold itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities.

(4) *Acquisition vehicles.* An issuer:

(i) Formed solely for the purpose of engaging in a *bona fide* merger or acquisition transaction; and

(ii) That exists only for such period as necessary to effectuate the transaction.

(5) *Foreign pension or retirement funds.* A plan, fund, or program providing pension, retirement, or similar benefits that is:

(i) Organized and administered outside the United States;

(ii) A broad-based plan for employees or citizens that is subject to regulation as a pension, retirement, or similar plan under the laws of the jurisdiction in which the plan, fund, or program is organized and administered; and

(iii) Established for the benefit of citizens or residents of one or more foreign sovereigns or any political subdivision thereof.

(6) *Insurance company separate accounts.* A separate account, provided that no banking entity other than the insurance company participates in the account's profits and losses.

(7) *Bank owned life insurance.* A separate account that is used solely for the purpose of allowing one or more banking entities to purchase a life insurance policy for which the banking entity or entities is beneficiary, provided that no banking entity that purchases the policy:

(i) Controls the investment decisions regarding the underlying assets or holdings of the separate account; or

(ii) Participates in the profits and losses of the separate account other than in compliance with applicable supervisory guidance regarding bank owned life insurance.

(8) *Loan securitizations*—(i) *Scope.* An issuing entity for asset-backed securities that satisfies all the conditions of this paragraph (c)(8) and the assets or holdings of which are comprised solely of:

(A) Loans as defined in § 248.2(s) of subpart A;

(B) Rights or other assets designed to assure the servicing or timely distribution of proceeds to holders of such securities and rights or other assets that are related or incidental to purchasing or otherwise acquiring and holding the loans, provided that each asset meets the requirements of paragraph (c)(8)(iii) of this section;

(C) Interest rate or foreign exchange derivatives that meet the requirements of paragraph (c)(8)(iv) of this section; and

(D) Special units of beneficial interest and collateral certificates that meet the requirements of paragraph (c)(8)(v) of this section.

(ii) *Impermissible assets.* For purposes of this paragraph (c)(8), the assets or holdings of the issuing entity shall not include any of the following:

(A) A security, including an asset-backed security, or an interest in an equity or debt security other than as permitted in paragraph (c)(8)(iii) of this section;

(B) A derivative, other than a derivative that meets the requirements of paragraph (c)(8)(iv) of this section; or

(C) A commodity forward contract.

(iii) *Permitted securities.* Notwithstanding paragraph (c)(8)(ii)(A) of this section, the issuing entity may hold securities if those securities are:

(A) Cash equivalents for purposes of the rights and assets in paragraph (c)(8)(i)(B) of this section; or

(B) Securities received in lieu of debts previously contracted with respect to the loans supporting the asset-backed securities.

(iv) *Derivatives.* The holdings of derivatives by the issuing entity shall be limited to interest rate or foreign exchange derivatives that satisfy all of the following conditions:

(A) The written terms of the derivative directly relate to the loans, the asset-backed securities, or the contractual rights of other assets described in paragraph (c)(8)(i)(B) of this section; and

(B) The derivatives reduce the interest rate and/or foreign exchange risks related to the loans, the asset-backed securities, or the contractual rights or other assets described in paragraph (c)(8)(i)(B) of this section.

(v) *Special units of beneficial interest and collateral certificates.* The assets or holdings of the issuing entity may include collateral certificates and special units of beneficial interest issued by a special purpose vehicle, provided that:

(A) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate meets the requirements in this paragraph (c)(8);

(B) The special unit of beneficial interest or collateral certificate is used for the sole purpose of transferring to the issuing entity for the loan securitization the economic risks and benefits of the assets that are permissible for loan securitizations under this paragraph (c)(8) and does not directly or indirectly transfer any interest in any other economic or financial exposure;

(C) The special unit of beneficial interest or collateral certificate is created solely to satisfy legal requirements or otherwise facilitate the structuring of the loan securitization; and

(D) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate and the issuing entity are established under the direction of the same entity that initiated the loan securitization.

(9) *Qualifying asset-backed commercial paper conduits.* (i) An issuing entity for asset-backed commercial paper that satisfies all of the following requirements:

(A) The asset-backed commercial paper conduit holds only:

(*1*) Loans and other assets permissible for a loan securitization under paragraph (c)(8)(i) of this section; and

(*2*) Asset-backed securities supported solely by assets that are permissible for loan securitizations under paragraph (c)(8)(i) of this section and acquired by the asset-backed commercial paper conduit as part of an initial issuance either directly from the issuing entity of the asset-backed securities or directly from an underwriter in the distribution of the asset-backed securities;

(B) The asset-backed commercial paper conduit issues only asset-backed securities, comprised of a residual interest and securities with a legal maturity of 397 days or less; and

(C) A regulated liquidity provider has entered into a legally binding commitment to provide full and unconditional liquidity coverage with respect to all of the outstanding asset-backed securities issued by the asset-backed commercial paper conduit (other than any residual interest) in the event that funds are required to redeem maturing asset-backed securities.

(ii) For purposes of this paragraph (c)(9), a regulated liquidity provider means:

(A) A depository institution, as defined in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c));

(B) A bank holding company, as defined in section 2(a) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(a)), or a subsidiary thereof;

(C) A savings and loan holding company, as defined in section 10a of the Home Owners' Loan Act (12 U.S.C. 1467a), provided all or substantially all of the holding company's activities are permissible for a financial holding company under section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)), or a subsidiary thereof;

(D) A foreign bank whose home country supervisor, as defined in § 211.21(q) of the Board's Regulation K (12 CFR 211.21(q)), has adopted capital standards consistent with the Capital Accord for the Basel Committee on banking Supervision, as amended, and that is subject to such standards, or a subsidiary thereof; or

(E) The United States or a foreign sovereign.

(10) *Qualifying covered bonds*—(i) *Scope.* An entity owning or holding a dynamic or fixed pool of loans or other assets as provided in paragraph (c)(8) of this section for the benefit of the holders of covered bonds, provided that the assets in the pool are comprised solely of assets that meet the conditions in paragraph (c)(8)(i) of this section.

(ii) *Covered bond.* For purposes of this paragraph (c)(10), a covered bond means:

(A) A debt obligation issued by an entity that meets the definition of foreign banking organization, the payment obligations of which are fully and unconditionally guaranteed by an entity that meets the conditions set forth in paragraph (c)(10)(i) of this section; or

(B) A debt obligation of an entity that meets the conditions set forth in paragraph (c)(10)(i) of this section, provided that the payment obligations are fully and unconditionally guaranteed by an entity that meets the definition of foreign banking organization and the entity is a wholly-owned subsidiary, as defined in paragraph (c)(2) of this section, of such foreign banking organization.

(11) *SBICs and public welfare investment funds.* An issuer:

(i) That is a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662), or that has received from the Small Business Administration notice to proceed to qualify for a license as a small business investment company, which notice or license has not been revoked; or

(ii) The business of which is to make investments that are:

(A) Designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs); or

(B) Qualified rehabilitation expenditures with respect to a qualified rehabilitated building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program.

(12) *Registered investment companies and excluded entities.* An issuer:

(i) That is registered as an investment company under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8), or that is formed and operated pursuant to a written plan to become a registered investment company as described in § 248.20(e)(3) of subpart D and that complies with the requirements of section 18 of the Investment Company Act of 1940 (15 U.S.C. 80a–18);

(ii) That may rely on an exclusion or exemption from the definition of ''investment company'' under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) other than the exclusions contained in section 3(c)(1) and 3(c)(7) of that Act; or

(iii) That has elected to be regulated as a business development company pursuant to section 54(a) of that Act (15

U.S.C. 80a–53) and has not withdrawn its election, or that is formed and operated pursuant to a written plan to become a business development company as described in § 248.20(e)(3) of subpart D and that complies with the requirements of section 61 of the Investment Company Act of 1940 (15 U.S.C. 80a–60).

(13) *Issuers in conjunction with the FDIC's receivership or conservatorship operations.* An issuer that is an entity formed by or on behalf of the FDIC for the purpose of facilitating the disposal of assets acquired in the FDIC's capacity as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(14) *Other excluded issuers.* (i) Any issuer that the appropriate Federal banking agencies, the SEC, and the CFTC jointly determine the exclusion of which is consistent with the purposes of section 13 of the BHC Act.

(ii) A determination made under paragraph (c)(14)(i) of this section will be promptly made public.

(d) *Definition of other terms related to covered funds.* For purposes of this subpart:

(1) *Applicable accounting standards* means U.S. generally accepted accounting principles, or such other accounting standards applicable to a banking entity that the Board determines are appropriate and that the banking entity uses in the ordinary course of its business in preparing its consolidated financial statements.

(2) *Asset-backed security* has the meaning specified in Section 3(a)(79) of the Exchange Act (15 U.S.C. 78c(a)(79)).

(3) *Director* has the same meaning as provided in section 215.2(d)(1) of the Board's Regulation O (12 CFR 215.2(d)(1)).

(4) *Issuer* has the same meaning as in section 2(a)(22) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(22)).

(5) *Issuing entity* means with respect to asset-backed securities the special purpose vehicle that owns or holds the pool assets underlying asset-backed securities and in whose name the asset-backed securities supported or serviced by the pool assets are issued.

(6) *Ownership interest*—(i) *Ownership interest* means any equity, partnership, or other similar interest. An ''other similar interest'' means an interest that:

(A) Has the right to participate in the selection or removal of a general partner, managing member, member of the board of directors or trustees, investment manager, investment adviser, or commodity trading advisor of the covered fund (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event);

(B) Has the right under the terms of the interest to receive a share of the income, gains or profits of the covered fund;

(C) Has the right to receive the underlying assets of the covered fund after all other interests have been redeemed and/or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event);

(D) Has the right to receive all or a portion of excess spread (the positive difference, if any, between the aggregate interest payments received from the underlying assets of the covered fund and the aggregate interest paid to the holders of other outstanding interests);

(E) Provides under the terms of the interest that the amounts payable by the covered fund with respect to the interest could be reduced based on losses arising from the underlying assets of the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the amount of interest due and payable on the interest;

(F) Receives income on a pass-through basis from the covered fund, or has a rate of return that is determined by reference to the performance of the underlying assets of the covered fund; or

(G) Any synthetic right to have, receive, or be allocated any of the rights in paragraphs (d)(6)(i)(A) through (F) of this section.

(ii) *Ownership interest* does not include: *Restricted profit interest.* An interest held by an entity (or an employee or former employee thereof) in a covered fund for which the entity (or employee thereof) serves as investment manager, investment adviser, commodity trading advisor, or other service provider so long as:

(A) The sole purpose and effect of the interest is to allow the entity (or employee or former employee thereof) to share in the profits of the covered fund as performance compensation for the investment management, investment advisory, commodity trading advisory, or other services provided to the covered fund by the entity (or employee or former employee thereof), provided that the entity (or employee or former employee thereof) may be obligated under the terms of such interest to return profits previously received;

(B) All such profit, once allocated, is distributed to the entity (or employee or former employee thereof) promptly after being earned or, if not so distributed, is retained by the covered fund for the sole purpose of establishing a reserve amount to satisfy contractual obligations with respect to subsequent losses of the covered fund and such undistributed profit of the entity (or employee or former employee thereof) does not share in the subsequent investment gains of the covered fund;

(C) Any amounts invested in the covered fund, including any amounts paid by the entity (or employee or former employee thereof) in connection with obtaining the restricted profit interest, are within the limits of § 248.12 of this subpart; and

(D) The interest is not transferable by the entity (or employee or former employee thereof) except to an affiliate thereof (or an employee of the banking entity or affiliate), to immediate family members, or through the intestacy, of the employee or former employee, or in connection with a sale of the business that gave rise to the restricted profit interest by the entity (or employee or former employee thereof) to an unaffiliated party that provides investment management, investment advisory, commodity trading advisory, or other services to the fund.

(7) *Prime brokerage transaction* means any transaction that would be a covered transaction, as defined in section 23A(b)(7) of the Federal Reserve Act (12 U.S.C. 371c(b)(7)), that is provided in connection with custody, clearance and settlement, securities borrowing or lending services, trade execution, financing, or data, operational, and administrative support.

(8) *Resident of the United States* means a person that is a ''U.S. person'' as defined in rule 902(k) of the SEC's Regulation S (17 CFR 230.902(k)).

(9) *Sponsor* means, with respect to a covered fund:

(i) To serve as a general partner, managing member, or trustee of a covered fund, or to serve as a commodity pool operator with respect to a covered fund as defined in (b)(1)(ii) of this section;

(ii) In any manner to select or to control (or to have employees, officers, or directors, or agents who constitute) a majority of the directors, trustees, or management of a covered fund; or

(iii) To share with a covered fund, for corporate, marketing, promotional, or other purposes, the same name or a variation of the same name, except as permitted under § 248.11(a)(6).

(10) *Trustee.* (i) For purposes of paragraph (d)(9) of this section and § 248.11 of subpart C, a trustee does not include:

(A) A trustee that does not exercise investment discretion with respect to a covered fund, including a trustee that is subject to the direction of an unaffiliated named fiduciary who is not a trustee pursuant to section 403(a)(1) of the Employee's Retirement Income Security Act (29 U.S.C. 1103(a)(1)); or

(B) A trustee that is subject to fiduciary standards imposed under foreign law that are substantially equivalent to those described in paragraph (d)(10)(i)(A) of this section;

(ii) Any entity that directs a person described in paragraph (d)(10)(i) of this section, or that possesses authority and discretion to manage and control the investment decisions of a covered fund for which such person serves as trustee, shall be considered to be a trustee of such covered fund.

§ 248.11 Permitted organizing and offering, underwriting, and market making with respect to a covered fund.

(a) *Organizing and offering a covered fund in general.* Notwithstanding § 248.10(a) of this subpart, a banking entity is not prohibited from acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund in connection with, directly or indirectly, organizing and offering a covered fund, including serving as a general partner, managing member, trustee, or commodity pool operator of the covered fund and in any manner selecting or controlling (or having employees, officers, directors, or agents who constitute) a majority of the directors, trustees, or management of the covered fund, including any necessary expenses for the foregoing, only if:

(1) The banking entity (or an affiliate thereof) provides *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services;

(2) The covered fund is organized and offered only in connection with the provision of *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services and only to persons that are customers of such services of the banking entity (or an affiliate thereof), pursuant to a written plan or similar documentation outlining how the banking entity or such affiliate intends to provide advisory or similar services to its customers through organizing and offering such fund;

(3) The banking entity and its affiliates do not acquire or retain an ownership interest in the covered fund except as permitted under § 248.12 of this subpart;

(4) The banking entity and its affiliates comply with the requirements of § 248.14 of this subpart;

(5) The banking entity and its affiliates do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests;

(6) The covered fund, for corporate, marketing, promotional, or other purposes:

(i) Does not share the same name or a variation of the same name with the banking entity (or an affiliate thereof) except that a covered fund may share the same name or a variation of the same name with a banking entity that is an investment adviser to the covered fund if:

(A) The investment adviser is not an insured depository institution, a company that controls an insured depository institution, or a company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(B) The investment adviser does not share the same name or a variation of the same name as an insured depository institution, a company that controls an insured depository institution, or a company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(ii) Does not use the word ''bank'' in its name;

(7) No director or employee of the banking entity (or an affiliate thereof) takes or retains an ownership interest in the covered fund, except for any director or employee of the banking entity or such affiliate who is directly engaged in providing investment advisory, commodity trading advisory, or other services to the covered fund at the time the director or employee takes the ownership interest; and

(8) The banking entity:

(i) Clearly and conspicuously discloses, in writing, to any prospective and actual investor in the covered fund (such as through disclosure in the covered fund's offering documents):

(A) That ''any losses in [such covered fund] will be borne solely by investors in [the covered fund] and not by [the banking entity] or its affiliates; therefore, [the banking entity's] losses in [such covered fund] will be limited to losses attributable to the ownership interests in the covered fund held by [the banking entity] and any affiliate in its capacity as investor in the [covered fund] or as beneficiary of a restricted profit interest held by [the banking entity] or any affiliate'';

(B) That such investor should read the fund offering documents before investing in the covered fund;

(C) That the ''ownership interests in the covered fund are not insured by the FDIC, and are not deposits, obligations of, or endorsed or guaranteed in any way, by any banking entity'' (unless that happens to be the case); and

(D) The role of the banking entity and its affiliates and employees in sponsoring or providing any services to the covered fund; and

(ii) Complies with any additional rules of the appropriate Federal banking agencies, the SEC, or the CFTC, as provided in section 13(b)(2) of the BHC Act, designed to ensure that losses in such covered fund are borne solely by investors in the covered fund and not by the covered banking entity and its affiliates.

(b) *Organizing and offering an issuing entity of asset-backed securities.* (1) Notwithstanding § 248.10(a) of this subpart, a banking entity is not prohibited from acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund that is an issuing entity of asset-backed securities in connection with, directly or indirectly, organizing and offering that issuing entity, so long as the banking entity and its affiliates comply with all of the requirements of paragraph (a)(3) through (8) of this section.

(2) For purposes of this paragraph (b), organizing and offering a covered fund that is an issuing entity of asset-backed securities means acting as the securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78*o*–11(a)(3)) of the issuing entity, or acquiring or retaining an ownership interest in the issuing entity as required by section 15G of that Act (15 U.S.C. 78*o*–11) and the implementing regulations issued thereunder.

(c) *Underwriting and market making in ownership interests of a covered fund.* The prohibition contained in § 248.10(a) of this subpart does not apply to a banking entity's underwriting activities or market making-related activities involving a covered fund so long as:

(1) Those activities are conducted in accordance with the requirements of § 248.4(a) or § 248.4(b) of subpart B, respectively;

(2) With respect to any banking entity (or any affiliate thereof) that: Acts as a sponsor, investment adviser or commodity trading advisor to a particular covered fund or otherwise acquires and retains an ownership interest in such covered fund in reliance on paragraph (a) of this section; acquires and retains an ownership interest in such covered fund and is either a securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78o–11(a)(3)), or is acquiring and retaining an ownership interest in

such covered fund in compliance with section 15G of that Act (15 U.S.C. 78o–11) and the implementing regulations issued thereunder each as permitted by paragraph (b) of this section; or, directly or indirectly, guarantees, assumes, or otherwise insures the obligations or performance of the covered fund or of any covered fund in which such fund invests, then in each such case any ownership interests acquired or retained by the banking entity and its affiliates in connection with underwriting and market making related activities for that particular covered fund are included in the calculation of ownership interests permitted to be held by the banking entity and its affiliates under the limitations of § 248.12(a)(2)(ii) and § 248.12(d) of this subpart; and

(3) With respect to any banking entity, the aggregate value of all ownership interests of the banking entity and its affiliates in all covered funds acquired and retained under § 248.11 of this subpart, including all covered funds in which the banking entity holds an ownership interest in connection with underwriting and market making related activities permitted under this paragraph (c), are included in the calculation of all ownership interests under § 248.12(a)(2)(iii) and § 248.12(d) of this subpart.

§ 248.12 Permitted investment in a covered fund.

(a) *Authority and limitations on permitted investments in covered funds.* (1) Notwithstanding the prohibition contained in § 248.10(a) of this subpart, a banking entity may acquire and retain an ownership interest in a covered fund that the banking entity or an affiliate thereof organizes and offers pursuant to § 248.11, for the purposes of:

(i) *Establishment.* Establishing the fund and providing the fund with sufficient initial equity for investment to permit the fund to attract unaffiliated investors, subject to the limits contained in paragraphs (a)(2)(i) and (iii) of this section; or

(ii) *De minimis investment.* Making and retaining an investment in the covered fund subject to the limits contained in paragraphs (a)(2)(ii) and (iii) of this section.

(2) *Investment limits*—(i) *Seeding period.* With respect to an investment in any covered fund made or held pursuant to paragraph (a)(1)(i) of this section, the banking entity and its affiliates:

(A) Must actively seek unaffiliated investors to reduce, through redemption, sale, dilution, or other methods, the aggregate amount of all ownership interests of the banking entity in the covered fund to the amount permitted in paragraph (a)(2)(i)(B) of this section; and

(B) Must, no later than 1 year after the date of establishment of the fund (or such longer period as may be provided by the Board pursuant to paragraph (e) of this section), conform its ownership interest in the covered fund to the limits in paragraph (a)(2)(ii) of this section;

(ii) *Per-fund limits.* (A) Except as provided in paragraph (a)(2)(ii)(B) of this section, an investment by a banking entity and its affiliates in any covered fund made or held pursuant to paragraph (a)(1)(ii) of this section may not exceed 3 percent of the total number or value of the outstanding ownership interests of the fund.

(B) An investment by a banking entity and its affiliates in a covered fund that is an issuing entity of asset-backed securities may not exceed 3 percent of the total fair market value of the ownership interests of the fund measured in accordance with paragraph (b)(3) of this section, unless a greater percentage is retained by the banking entity and its affiliates in compliance with the requirements of section 15G of the Exchange Act (15 U.S.C. 78*o*–11) and the implementing regulations issued thereunder, in which case the investment by the banking entity and its affiliates in the covered fund may not exceed the amount, number, or value of ownership interests of the fund required under section 15G of the Exchange Act and the implementing regulations issued thereunder.

(iii) *Aggregate limit.* The aggregate value of all ownership interests of the banking entity and its affiliates in all covered funds acquired or retained under this section may not exceed 3 percent of the tier 1 capital of the banking entity, as provided under paragraph (c) of this section, and shall be calculated as of the last day of each calendar quarter.

(iv) *Date of establishment.* For purposes of this section, the date of establishment of a covered fund shall be:

(A) *In general.* The date on which the investment adviser or similar entity to the covered fund begins making investments pursuant to the written investment strategy for the fund;

(B) *Issuing entities of asset-backed securities.* In the case of an issuing entity of asset-backed securities, the date on which the assets are initially transferred into the issuing entity of asset-backed securities.

(b) *Rules of construction*—(1) *Attribution of ownership interests to a covered banking entity.* (i) For purposes of paragraph (a)(2) of this section, the amount and value of a banking entity's permitted investment in any single covered fund shall include any ownership interest held under § 248.12 directly by the banking entity, including any affiliate of the banking entity.

(ii) *Treatment of registered investment companies, SEC-regulated business development companies and foreign public funds.* For purposes of paragraph (b)(1)(i) of this section, a registered investment company, SEC-regulated business development companies or foreign public fund as described in § 248.10(c)(1) of this subpart will not be considered to be an affiliate of the banking entity so long as the banking entity:

(A) Does not own, control, or hold with the power to vote 25 percent or more of the voting shares of the company or fund; and

(B) Provides investment advisory, commodity trading advisory, administrative, and other services to the company or fund in compliance with the limitations under applicable regulation, order, or other authority.

(iii) *Covered funds.* For purposes of paragraph (b)(1)(i) of this section, a covered fund will not be considered to be an affiliate of a banking entity so long as the covered fund is held in compliance with the requirements of this subpart.

(iv) *Treatment of employee and director investments financed by the banking entity.* For purposes of paragraph (b)(1)(i) of this section, an investment by a director or employee of a banking entity who acquires an ownership interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the ownership interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

(2) *Calculation of permitted ownership interests in a single covered fund.* Except as provided in paragraph (b)(3) or (4), for purposes of determining whether an investment in a single covered fund complies with the restrictions on ownership interests under paragraphs (a)(2)(i)(B) and (a)(2)(ii)(A) of this section:

(i) The aggregate number of the outstanding ownership interests held by the banking entity shall be the total number of ownership interests held under this section by the banking entity in a covered fund divided by the total number of ownership interests held by all entities in that covered fund, as of the last day of each calendar quarter (both measured without regard to committed funds not yet called for investment);

(ii) The aggregate value of the outstanding ownership interests held by the banking entity shall be the aggregate fair market value of all investments in and capital contributions made to the covered fund by the banking entity, divided by the value of all investments in and capital contributions made to that covered fund by all entities, as of the last day of each calendar quarter (all measured without regard to committed funds not yet called for investment). If fair market value cannot be determined, then the value shall be the historical cost basis of all investments in and contributions made by the banking entity to the covered fund;

(iii) For purposes of the calculation under paragraph (b)(2)(ii) of this section, once a valuation methodology is chosen, the banking entity must calculate the value of its investment and the investments of all others in the covered fund in the same manner and according to the same standards.

(3) *Issuing entities of asset-backed securities.* In the case of an ownership interest in an issuing entity of asset-backed securities, for purposes of determining whether an investment in a single covered fund complies with the restrictions on ownership interests under paragraphs (a)(2)(i)(B) and (a)(2)(ii)(B) of this section:

(i) For securitizations subject to the requirements of section 15G of the Exchange Act (15 U.S.C. 78o–11), the calculations shall be made as of the date and according to the valuation methodology applicable pursuant to the requirements of section 15G of the Exchange Act (15 U.S.C. 78o–11) and the implementing regulations issued thereunder; or

(ii) For securitization transactions completed prior to the compliance date of such implementing regulations (or as to which such implementing regulations do not apply), the calculations shall be made as of the date of establishment as defined in paragraph (a)(2)(iv)(B) of this section or such earlier date on which the transferred assets have been valued for purposes of transfer to the covered fund, and thereafter only upon the date on which additional securities of the issuing entity of asset-backed securities are priced for purposes of the sales of ownership interests to unaffiliated investors.

(iii) For securitization transactions completed prior to the compliance date of such implementing regulations (or as to which such implementing regulations do not apply), the aggregate value of the outstanding ownership interests in the covered fund shall be the fair market value of the assets transferred to the issuing entity of the securitization and any other assets otherwise held by the issuing entity at such time, determined in a manner that is consistent with its determination of the fair market value of those assets for financial statement purposes.

(iv) For purposes of the calculation under paragraph (b)(3)(iii) of this section, the valuation methodology used to calculate the fair market value of the ownership interests must be the same for both the ownership interests held by a banking entity and the ownership interests held by all others in the covered fund in the same manner and according to the same standards.

(4) *Multi-tier fund investments*—(i) *Master-feeder fund investments.* If the principal investment strategy of a covered fund (the ‘‘feeder fund’’) is to invest substantially all of its assets in another single covered fund (the ‘‘master fund’’), then for purposes of the investment limitations in paragraphs (a)(2)(i)(B) and (a)(2)(ii) of this section, the banking entity's permitted investment in such funds shall be measured only by reference to the value of the master fund. The banking entity's permitted investment in the master fund shall include any investment by the banking entity in the master fund, as well as the banking entity's pro-rata share of any ownership interest of the master fund that is held through the feeder fund; and

(ii) *Fund-of-funds investments.* If a banking entity organizes and offers a covered fund pursuant to § 248.11 of this subpart for the purpose of investing in other covered funds (a ‘‘fund of funds’’) and that fund of funds itself invests in another covered fund that the banking entity is permitted to own, then the banking entity's permitted investment in that other fund shall include any investment by the banking entity in that other fund, as well as the banking entity's pro-rata share of any ownership interest of the fund that is held through the fund of funds. The investment of the banking entity may not represent more than 3 percent of the amount or value of any single covered fund.

(c) *Aggregate permitted investments in all covered funds.* (1) For purposes of paragraph (a)(2)(iii) of this section, the aggregate value of all ownership interests held by a banking entity shall be the sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest in covered funds (together with any amounts paid by the entity (or employee thereof) in connection with obtaining a restricted profit interest under § 248.10(d)(6)(ii) of this subpart), on a historical cost basis.

(2) *Calculation of tier 1 capital.* For purposes of paragraph (a)(2)(iii) of this section:

(i) *Entities that are required to hold and report tier 1 capital.* If a banking entity is required to calculate and report tier 1 capital, the banking entity's tier 1 capital shall be equal to the amount of tier 1 capital of the banking entity as of the last day of the most recent calendar quarter, as reported to its primary financial regulatory agency; and

(ii) If a banking entity is not required to calculate and report tier 1 capital, the banking entity's tier 1 capital shall be determined to be equal to:

(A) In the case of a banking entity that is controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital, be equal to the amount of tier 1 capital reported by such controlling depository institution in the manner described in paragraph (c)(2)(i) of this section;

(B) In the case of a banking entity that is not controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital:

(*1*) *Bank holding company subsidiaries.* If the banking entity is a subsidiary of a bank holding company or company that is treated as a bank holding company, be equal to the amount of tier 1 capital reported by the top-tier affiliate of such covered banking entity that calculates and reports tier 1 capital in the manner described in paragraph (c)(2)(i) of this section; and

(*2*) *Other holding companies and any subsidiary or affiliate thereof.* If the banking entity is not a subsidiary of a bank holding company or a company that is treated as a bank holding company, be equal to the total amount of shareholders' equity of the top-tier affiliate within such organization as of the last day of the most recent calendar quarter that has ended, as determined under applicable accounting standards.

(iii) *Treatment of foreign banking entities*—(A) *Foreign banking entities.* Except as provided in paragraph (c)(2)(iii)(B) of this section, with respect to a banking entity that is not itself, and is not controlled directly or indirectly by, a banking entity that is located or organized under the laws of the United States or of any State, the tier 1 capital of the banking entity shall be the consolidated tier 1 capital of the entity as calculated under applicable home country standards.

(B) *U.S. affiliates of foreign banking entities.* With respect to a banking entity that is located or organized under the laws of the United States or of any State and is controlled by a foreign banking entity identified under paragraph (c)(2)(iii)(A) of this section, the banking entity's tier 1 capital shall be as calculated under paragraphs (c)(2)(i) or (ii) of this section.

(d) *Capital treatment for a permitted investment in a covered fund.* For purposes of calculating compliance with the applicable regulatory capital requirements, a banking entity shall deduct from the banking entity's tier 1 capital (as determined under paragraph (c)(2) of this section) the greater of:

(1) The sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest (together with any amounts paid by the entity (or employee thereof) in connection with obtaining a restricted profit interest under § 248.10(d)(6)(ii) of subpart C), on a historical cost basis, plus any earnings received; and

(2) The fair market value of the banking entity's ownership interests in the covered fund as determined under paragraph (b)(2)(ii) or (b)(3) of this section (together with any amounts paid by the entity (or employee thereof) in connection with obtaining a restricted profit interest under § 248.10(d)(6)(ii) of subpart C), if the banking entity accounts for the profits (or losses) of the fund investment in its financial statements.

(e) *Extension of time to divest an ownership interest.* (1) Upon application by a banking entity, the Board may extend the period under paragraph (a)(2)(i) of this section for up to 2 additional years if the Board finds that an extension would be consistent with safety and soundness and not detrimental to the public interest. An application for extension must:

(i) Be submitted to the Board at least 90 days prior to the expiration of the applicable time period;

(ii) Provide the reasons for application, including information that addresses the factors in paragraph (e)(2) of this section; and

(iii) Explain the banking entity's plan for reducing the permitted investment in a covered fund through redemption, sale, dilution or other methods as required in paragraph (a)(2) of this section.

(2) *Factors governing the Board determinations.* In reviewing any application under paragraph (e)(1) of this section, the Board may consider all the facts and circumstances related to the permitted investment in a covered fund, including:

(i) Whether the investment would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies;

(ii) The contractual terms governing the banking entity's interest in the covered fund;

(iii) The date on which the covered fund is expected to have attracted sufficient investments from investors unaffiliated with the banking entity to enable the banking entity to comply with the limitations in paragraph (a)(2)(i) of this section;

(iv) The total exposure of the covered banking entity to the investment and the risks that disposing of, or maintaining, the investment in the covered fund may pose to the banking entity and the financial stability of the United States;

(v) The cost to the banking entity of divesting or disposing of the investment within the applicable period;

(vi) Whether the investment or the divestiture or conformance of the investment would involve or result in a material conflict of interest between the banking entity and unaffiliated parties, including clients, customers or counterparties to which it owes a duty;

(vi) The banking entity's prior efforts to reduce through redemption, sale, dilution, or other methods its ownership interests in the covered fund, including activities related to the marketing of interests in such covered fund;

(vii) [Reserved]

(viii) Market conditions; and

(ix) Any other factor that the Board believes appropriate.

(3) *Authority to impose restrictions on activities or investment during any extension period.* The Board may impose such conditions on any extension approved under paragraph (e)(1) of this section as the Board determines are necessary or appropriate to protect the safety and soundness of the banking entity or the financial stability of the United States, address material conflicts of interest or other unsound banking practices, or otherwise further the purposes of section 13 of the BHC Act and this part.

(4) *Consultation.* In the case of a banking entity that is primarily regulated by another Federal banking agency, the SEC, or the CFTC, the Board will consult with such agency prior to acting on an application by the banking entity for an extension under paragraph (e)(1) of this section.

§ 248.13 Other permitted covered fund activities and investments.

(a) *Permitted risk-mitigating hedging activities.* (1) The prohibition contained in § 248.10(a) of this subpart does not apply with respect to an ownership interest in a covered fund acquired or retained by a banking entity that is designed to demonstrably reduce or otherwise significantly mitigate the specific, identifiable risks to the banking entity in connection with a compensation arrangement with an employee of the banking entity or an affiliate thereof that directly provides investment advisory, commodity trading advisory or other services to the covered fund.

(2) *Requirements.* The risk-mitigating hedging activities of a banking entity are permitted under this paragraph (a) only if:

(i) The banking entity has established and implements, maintains and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(A) Reasonably designed written policies and procedures; and

(B) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(ii) The acquisition or retention of the ownership interest:

(A) Is made in accordance with the written policies, procedures and internal controls required under this section;

(B) At the inception of the hedge, is designed to reduce or otherwise significantly mitigate and demonstrably reduces or otherwise significantly mitigates one or more specific, identifiable risks arising in connection with the compensation arrangement with the employee that directly provides investment advisory, commodity trading advisory, or other services to the covered fund;

(C) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section; and

(D) Is subject to continuing review, monitoring and management by the banking entity.

(iii) The compensation arrangement relates solely to the covered fund in which the banking entity or any affiliate has acquired an ownership interest pursuant to this paragraph and such compensation arrangement provides that any losses incurred by the banking entity on such ownership interest will be offset by corresponding decreases in amounts payable under such compensation arrangement.

(b) *Certain permitted covered fund activities and investments outside of the United States.* (1) The prohibition contained in § 248.10(a) of this subpart does not apply to the acquisition or retention of any ownership interest in, or the sponsorship of, a covered fund by a banking entity only if:

(i) The banking entity is not organized or directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States;

(ii) The activity or investment by the banking entity is pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act;

(iii) No ownership interest in the covered fund is offered for sale or sold to a resident of the United States; and

(iv) The activity or investment occurs solely outside of the United States.

(2) An activity or investment by the banking entity is pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act for purposes of paragraph (b)(1)(ii) of this section only if:

(i) The activity or investment is conducted in accordance with the requirements of this section; and

(ii)(A) With respect to a banking entity that is a foreign banking organization, the banking entity meets the qualifying foreign banking organization requirements of section 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c) or (e)), as applicable; or

(B) With respect to a banking entity that is not a foreign banking organization, the banking entity is not organized under the laws of the United States or of one or more States and the banking entity, on a fully-consolidated basis, meets at least two of the following requirements:

(*1*) Total assets of the banking entity held outside of the United States exceed total assets of the banking entity held in the United States;

(*2*) Total revenues derived from the business of the banking entity outside of the United States exceed total revenues derived from the business of the banking entity in the United States; or

(*3*) Total net income derived from the business of the banking entity outside of the United States exceeds total net income derived from the business of the banking entity in the United States.

(3) An ownership interest in a covered fund is not offered for sale or sold to a resident of the United States for purposes of paragraph (b)(1)(iii) of this section only if it is sold or has been sold pursuant to an offering that does not target residents of the United States.

(4) An activity or investment occurs solely outside of the United States for purposes of paragraph (b)(1)(iv) of this section only if:

(i) The banking entity acting as sponsor, or engaging as principal in the acquisition or retention of an ownership interest in the covered fund, is not itself, and is not controlled directly or indirectly by, a banking entity that is located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to acquire or retain the ownership interest or act as sponsor to the covered fund is not located in the United States or organized under the laws of the United States or of any State;

(iii) The investment or sponsorship, including any transaction arising from risk-mitigating hedging related to an ownership interest, is not accounted for as principal directly or indirectly on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State; and

(iv) No financing for the banking entity's ownership or sponsorship is provided, directly or indirectly, by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State.

(5) For purposes of this section, a U.S. branch, agency, or subsidiary of a foreign bank, or any subsidiary thereof, is located in the United States; however, a foreign bank of which that branch, agency, or subsidiary is a part is not considered to be located in the United States solely by virtue of operation of the U.S. branch, agency, or subsidiary.

(c) *Permitted covered fund interests and activities by a regulated insurance company.* The prohibition contained in § 248.10(a) of this subpart does not apply to the acquisition or retention by an insurance company, or an affiliate thereof, of any ownership interest in, or the sponsorship of, a covered fund only if:

(1) The insurance company or its affiliate acquires and retains the ownership interest solely for the general account of the insurance company or for one or more separate accounts established by the insurance company;

(2) The acquisition and retention of the ownership interest is conducted in compliance with, and subject to, the insurance company investment laws, regulations, and written guidance of the State or jurisdiction in which such insurance company is domiciled; and

(3) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and foreign jurisdictions, as appropriate, have not jointly determined, after notice and comment, that a particular law, regulation, or written guidance described in paragraph (c)(2) of this section is insufficient to protect the safety and soundness of the banking entity, or the financial stability of the United States.

§ 248.14 Limitations on relationships with a covered fund.

(a) *Relationships with a covered fund.* (1) Except as provided for in paragraph (a)(2) of this section, no banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, that organizes and offers a covered fund pursuant to § 248.11 of this subpart, or that continues to hold an ownership interest in accordance with § 248.11(b) of this subpart, and no affiliate of such entity, may enter into a transaction with the covered fund, or with any other covered fund that is controlled by such covered fund, that would be a covered transaction as defined in section 23A of the Federal Reserve Act (12 U.S.C. 371c(b)(7)), as if such banking entity and the affiliate thereof were a member bank and the covered fund were an affiliate thereof.

(2) Notwithstanding paragraph (a)(1) of this section, a banking entity may:

(i) Acquire and retain any ownership interest in a covered fund in accordance with the requirements of § 248.11, § 248.12, or § 248.13 of this subpart; and

(ii) Enter into any prime brokerage transaction with any covered fund in which a covered fund managed, sponsored, or advised by such banking entity (or an affiliate thereof) has taken an ownership interest, if:

(A) The banking entity is in compliance with each of the limitations set forth in § 248.11 of this subpart with respect to a covered fund organized and offered by such banking entity (or an affiliate thereof);

(B) The chief executive officer (or equivalent officer) of the banking entity certifies in writing annually to the Board (with a duty to update the certification if the information in the certification materially changes) that the banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests; and

(C) The Board has not determined that such transaction is inconsistent with the safe and sound operation and condition of the banking entity.

(b) *Restrictions on transactions with covered funds.* A banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, or that organizes and offers a covered fund pursuant to § 248.11 of this subpart, or that continues to hold an ownership interest in accordance with § 248.11(b) of this subpart, shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1), as if such banking entity were a member bank and such covered fund were an affiliate thereof.

(c) *Restrictions on prime brokerage transactions.* A prime brokerage transaction permitted under paragraph (a)(2)(ii) of this section shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1) as if the counterparty were an affiliate of the banking entity.

§ 248.15 Other limitations on permitted covered fund activities.

(a) No transaction, class of transactions, or activity may be deemed permissible under §§ 248.11 through 248.13 of this subpart if the transaction, class of transactions, or activity would:

(1) Involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties;

(2) Result, directly or indirectly, in a material exposure by the banking entity to a high-risk asset or a high-risk trading strategy; or

(3) Pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.

(b) *Definition of material conflict of interest.* (1) For purposes of this section, a material conflict of interest between a banking entity and its clients, customers, or counterparties exists if the banking entity engages in any transaction, class of transactions, or activity that would involve or result in the banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, and the banking entity has not taken at least one of the actions in paragraph (b)(2) of this section.

(2) Prior to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, the banking entity:

(i) *Timely and effective disclosure.* (A) Has made clear, timely, and effective disclosure of the conflict of interest, together with other necessary information, in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest; and

(B) Such disclosure is made in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty created by the conflict of interest; or

(ii) *Information barriers.* Has established, maintained, and enforced information barriers that are memorialized in written policies and procedures, such as physical separation of personnel, or functions, or limitations on types of activity, that are reasonably designed, taking into consideration the nature of the banking entity's business, to prevent the conflict of interest from involving or resulting in a materially adverse effect on a client, customer, or counterparty. A banking entity may not rely on such information barriers if, in the case of any specific transaction, class or type of transactions or activity, the banking entity knows or should reasonably know that, notwithstanding the banking entity's establishment of information barriers, the conflict of interest may involve or result in a materially adverse effect on a client, customer, or counterparty.

(c) *Definition of high-risk asset and high-risk trading strategy.* For purposes of this section:

(1) *High-risk asset* means an asset or group of related assets that would, if held by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

(2) *High-risk trading strategy* means a trading strategy that would, if engaged in by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

§ 248.16 Ownership of interests in and sponsorship of issuers of certain collateralized debt obligations backed by trust-preferred securities.

(a) The prohibition contained in § 248.10(a)(1) does not apply to the ownership by a banking entity of an interest in, or sponsorship of, any issuer if:

(1) The issuer was established, and the interest was issued, before May 19, 2010;

(2) The banking entity reasonably believes that the offering proceeds received by the issuer were invested primarily in Qualifying TruPS Collateral; and

(3) The banking entity acquired such interest on or before December 10, 2013 (or acquired such interest in connection with a merger with or acquisition of a banking entity that acquired the interest on or before December 10, 2013).

(b) For purposes of this § 248.16, *Qualifying TruPS Collateral* shall mean any trust preferred security or subordinated debt instrument issued prior to May 19, 2010 by a depository institution holding company that, as of the end of any reporting period within 12 months immediately preceding the issuance of such trust preferred security or subordinated debt instrument, had total consolidated assets of less than $15,000,000,000 or issued prior to May 19, 2010 by a mutual holding company.

(c) Notwithstanding paragraph (a)(3) of this section, a banking entity may act as a market maker with respect to the interests of an issuer described in paragraph (a) of this section in accordance with the applicable provisions of §§ 248.4 and 248.11.

(d) Without limiting the applicability of paragraph (a) of this section, the Board, the FDIC and the OCC will make public a non-exclusive list of issuers that meet the requirements of paragraph (a). A banking entity may rely on the list published by the Board, the FDIC and the OCC.

§§ 248.17–248.19 [Reserved]

Subpart D—Compliance Program Requirement; Violations

§ 248.20 Program for compliance; reporting.

(a) *Program requirement.* Each banking entity shall develop and provide for the continued administration of a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part. The terms, scope and detail of the compliance program shall be appropriate for the types, size, scope and complexity of activities and business structure of the banking entity.

(b) *Contents of compliance program.* Except as provided in paragraph (f) of this section, the compliance program required by paragraph (a) of this section, at a minimum, shall include:

(1) Written policies and procedures reasonably designed to document, describe, monitor and limit trading activities subject to subpart B (including those permitted under §§ 248.3 to 248.6 of subpart B), including setting, monitoring and managing required limits set out in §§ 248.4 and 248.5, and activities and investments with respect to a covered fund subject to subpart C (including those permitted under §§ 248.11 through 248.14 of subpart C) conducted by the banking entity to ensure that all activities and

investments conducted by the banking entity that are subject to section 13 of the BHC Act and this part comply with section 13 of the BHC Act and this part;

(2) A system of internal controls reasonably designed to monitor compliance with section 13 of the BHC Act and this part and to prevent the occurrence of activities or investments that are prohibited by section 13 of the BHC Act and this part;

(3) A management framework that clearly delineates responsibility and accountability for compliance with section 13 of the BHC Act and this part and includes appropriate management review of trading limits, strategies, hedging activities, investments, incentive compensation and other matters identified in this part or by management as requiring attention;

(4) Independent testing and audit of the effectiveness of the compliance program conducted periodically by qualified personnel of the banking entity or by a qualified outside party;

(5) Training for trading personnel and managers, as well as other appropriate personnel, to effectively implement and enforce the compliance program; and

(6) Records sufficient to demonstrate compliance with section 13 of the BHC Act and this part, which a banking entity must promptly provide to the Board upon request and retain for a period of no less than 5 years or such longer period as required by the Board.

(c) *Additional standards.* In addition to the requirements in paragraph (b) of this section, the compliance program of a banking entity must satisfy the requirements and other standards contained in appendix B, if:

(1) The banking entity engages in proprietary trading permitted under subpart B and is required to comply with the reporting requirements of paragraph (d) of this section;

(2) The banking entity has reported total consolidated assets as of the previous calendar year end of $50 billion or more or, in the case of a foreign banking entity, has total U.S. assets as of the previous calendar year end of $50 billion or more (including all subsidiaries, affiliates, branches and agencies of the foreign banking entity operating, located or organized in the United States); or

(3) The Board notifies the banking entity in writing that it must satisfy the requirements and other standards contained in appendix B to this part.

(d) *Reporting requirements under appendix A to this part.* (1) A banking entity engaged in proprietary trading activity permitted under subpart B shall comply with the reporting requirements described in appendix A, if:

(i) The banking entity (other than a foreign banking entity as provided in paragraph (d)(1)(ii) of this section) has, together with its affiliates and subsidiaries, trading assets and liabilities (excluding trading assets and liabilities involving obligations of or guaranteed by the United States or any agency of the United States) the average gross sum of which (on a worldwide consolidated basis) over the previous consecutive four quarters, as measured as of the last day of each of the four prior calendar quarters, equals or exceeds the threshold established in paragraph (d)(2) of this section;

(ii) In the case of a foreign banking entity, the average gross sum of the trading assets and liabilities of the combined U.S. operations of the foreign banking entity (including all subsidiaries, affiliates, branches and agencies of the foreign banking entity operating, located or organized in the United States and excluding trading assets and liabilities involving obligations of or guaranteed by the United States or any agency of the United States) over the previous consecutive four quarters, as measured as of the last day of each of the four prior calendar quarters, equals or exceeds the threshold established in paragraph (d)(2) of this section; or

(iii) The Board notifies the banking entity in writing that it must satisfy the reporting requirements contained in appendix A.

(2) The threshold for reporting under paragraph (d)(1) of this section shall be $50 billion beginning on June 30, 2014; $25 billion beginning on April 30, 2016; and $10 billion beginning on December 31, 2016.

(3) Frequency of reporting: Unless the Board notifies the banking entity in writing that it must report on a different basis, a banking entity with $50 billion or more in trading assets and liabilities (as calculated in accordance with paragraph (d)(1) of this section) shall report the information required by appendix A for each calendar month within 30 days of the end of the relevant calendar month; beginning with information for the month of January 2015, such information shall be reported within 10 days of the end of each calendar month. Any other banking entity subject to appendix A shall report the information required by appendix A for each calendar quarter within 30 days of the end of that calendar quarter unless the Board notifies the banking entity in writing that it must report on a different basis.

(e) *Additional documentation for covered funds.* Any banking entity that has more than $10 billion in total consolidated assets as reported on December 31 of the previous two calendar years shall maintain records that include:

(1) Documentation of the exclusions or exemptions other than sections 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940 relied on by each fund sponsored by the banking entity (including all subsidiaries and affiliates) in determining that such fund is not a covered fund;

(2) For each fund sponsored by the banking entity (including all subsidiaries and affiliates) for which the banking entity relies on one or more of the exclusions from the definition of covered fund provided by §§ 248.10(c)(1), 248.10(c)(5), 248.10(c)(8), 248.10(c)(9), or 248.10(c)(10) of subpart C, documentation supporting the banking entity's determination that the fund is not a covered fund pursuant to one or more of those exclusions;

(3) For each seeding vehicle described in § 248.10(c)(12)(i) or (iii) of subpart C that will become a registered investment company or SEC-regulated business development company, a written plan documenting the banking entity's determination that the seeding vehicle will become a registered investment company or SEC-regulated business development company; the period of time during which the vehicle will operate as a seeding vehicle; and the banking entity's plan to market the vehicle to third-party investors and convert it into a registered investment company or SEC-regulated business development company within the time period specified in § 248.12(a)(2)(i)(B) of subpart C;

(4) For any banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State, if the aggregate amount of ownership interests in foreign public funds that are described in § 248.10(c)(1) of subpart C owned by such banking entity (including ownership interests owned by any affiliate that is controlled directly or indirectly by a banking entity that is located in or organized under the laws of the United States or of any State) exceeds $50 million at the end of two or more consecutive calendar quarters, beginning with the next succeeding calendar quarter, documentation of the value of the ownership interests owned by the banking entity (and such affiliates) in each foreign public fund and each jurisdiction in which any such foreign public fund is organized, calculated as of the end of each calendar quarter, which documentation must

continue until the banking entity's aggregate amount of ownership interests in foreign public funds is below $50 million for two consecutive calendar quarters; and

(5) For purposes of paragraph (e)(4) of this section, a U.S. branch, agency, or subsidiary of a foreign banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(f) *Simplified programs for less active banking entities*—(1) *Banking entities with no covered activities.* A banking entity that does not engage in activities or investments pursuant to subpart B or subpart C (other than trading activities permitted pursuant to § 248.6(a) of subpart B) may satisfy the requirements of this section by establishing the required compliance program prior to becoming engaged in such activities or making such investments (other than trading activities permitted pursuant to § 248.6(a) of subpart B).

(2) *Banking entities with modest activities.* A banking entity with total consolidated assets of $10 billion or less as reported on December 31 of the previous two calendar years that engages in activities or investments pursuant to subpart B or subpart C (other than trading activities permitted under § 248.6(a) of subpart B) may satisfy the requirements of this section by including in its existing compliance policies and procedures appropriate references to the requirements of section 13 of the BHC Act and this part and adjustments as appropriate given the activities, size, scope and complexity of the banking entity.

§ 248.21 Termination of activities or investments; penalties for violations.

(a) Any banking entity that engages in an activity or makes an investment in violation of section 13 of the BHC Act or this part, or acts in a manner that functions as an evasion of the requirements of section 13 of the BHC Act or this part, including through an abuse of any activity or investment permitted under subparts B or C, or otherwise violates the restrictions and requirements of section 13 of the BHC Act or this part, shall, upon discovery, promptly terminate the activity and, as relevant, dispose of the investment.

(b) Whenever the Board finds reasonable cause to believe any banking entity has engaged in an activity or made an investment in violation of section 13 of the BHC Act or this part, or engaged in any activity or made any investment that functions as an evasion of the requirements of section 13 of the BHC Act or this part, the Board may take any action permitted by law to enforce compliance with section 13 of the BHC Act and this part, including directing the banking entity to restrict, limit, or terminate any or all activities under this part and dispose of any investment.

Appendix A to Part 248—Reporting and Recordkeeping Requirements for Covered Trading Activities

I. Purpose

a. This appendix sets forth reporting and recordkeeping requirements that certain banking entities must satisfy in connection with the restrictions on proprietary trading set forth in subpart B (''proprietary trading restrictions''). Pursuant to § 248.20(d), this appendix generally applies to a banking entity that, together with its affiliates and subsidiaries, has significant trading assets and liabilities. These entities are required to (i) furnish periodic reports to the Board regarding a variety of quantitative measurements of their covered trading activities, which vary depending on the scope and size of covered trading activities, and (ii) create and maintain records documenting the preparation and content of these reports. The requirements of this appendix must be incorporated into the banking entity's internal compliance program under § 248.20 and Appendix B.

b. The purpose of this appendix is to assist banking entities and the Board in:

(i) Better understanding and evaluating the scope, type, and profile of the banking entity's covered trading activities;

(ii) Monitoring the banking entity's covered trading activities;

(iii) Identifying covered trading activities that warrant further review or examination by the banking entity to verify compliance with the proprietary trading restrictions;

(iv) Evaluating whether the covered trading activities of trading desks engaged in market making-related activities subject to § 248.4(b) are consistent with the requirements governing permitted market making-related activities;

(v) Evaluating whether the covered trading activities of trading desks that are engaged in permitted trading activity subject to §§ 248.4, 248.5, or 248.6(a)–(b) (*i.e.,* underwriting and market making-related related activity, risk-mitigating hedging, or trading in certain government obligations) are consistent with the requirement that such activity not result, directly or indirectly, in a material exposure to high-risk assets or high-risk trading strategies;

(vi) Identifying the profile of particular covered trading activities of the banking entity, and the individual trading desks of the banking entity, to help establish the appropriate frequency and scope of examination by the Board of such activities; and

(vii) Assessing and addressing the risks associated with the banking entity's covered trading activities.

c. The quantitative measurements that must be furnished pursuant to this appendix are *not* intended to serve as a dispositive tool for the identification of permissible or impermissible activities.

d. In order to allow banking entities and the Agencies to evaluate the effectiveness of these metrics, banking entities must collect and report these metrics for all trading desks beginning on the dates established in § 248.20 of the final rule. The Agencies will review the data collected and revise this collection requirement as appropriate based on a review of the data collected prior to September 30, 2015.

e. In addition to the quantitative measurements required in this appendix, a banking entity may need to develop and implement other quantitative measurements in order to effectively monitor its covered trading activities for compliance with section 13 of the BHC Act and this part and to have an effective compliance program, as required by § 248.20 and Appendix B to this part. The effectiveness of particular quantitative measurements may differ based on the profile of the banking entity's businesses in general and, more specifically, of the particular trading desk, including types of instruments traded, trading activities and strategies, and history and experience (*e.g.,* whether the trading desk is an established, successful market maker or a new entrant to a competitive market). In all cases, banking entities must ensure that they have robust measures in place to identify and monitor the risks taken in their trading activities, to ensure that the activities are within risk tolerances established by the banking entity, and to monitor and examine for compliance with the proprietary trading restrictions in this part.

f. On an ongoing basis, banking entities must carefully monitor, review, and evaluate all furnished quantitative measurements, as well as any others that they choose to utilize in order to maintain compliance with section 13 of the BHC Act and this part. All measurement results that indicate a heightened risk of impermissible proprietary trading, including with respect to otherwise-permitted activities under §§ 248.4 through 248.6(a) and (b), or that result in a material exposure to high-risk assets or high-risk trading strategies, must be escalated within the banking entity for review, further analysis, explanation to the Board, and remediation, where appropriate. The quantitative measurements discussed in this appendix should be helpful to banking entities in identifying and managing the risks related to their covered trading activities.

II. Definitions

The terms used in this appendix have the same meanings as set forth in §§ 248.2 and 248.3. In addition, for purposes of this appendix, the following definitions apply:

Calculation period means the period of time for which a particular quantitative measurement must be calculated.

Comprehensive profit and loss means the net profit or loss of a trading desk's material sources of trading revenue over a specific period of time, including, for example, any increase or decrease in the market value of a trading desk's holdings, dividend income, and interest income and expense.

Covered trading activity means trading conducted by a trading desk under §§ 248.4, 248.5, 248.6(a), or 248.6(b). A banking entity may include trading under §§ 248.3(d), 248.6(c), 248.6(d) or 248.6(e).

Measurement frequency means the frequency with which a particular quantitative metric must be calculated and recorded.

Trading desk means the smallest discrete unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof.

III. Reporting and Recordkeeping of Quantitative Measurements

a. Scope of Required Reporting

General scope. Each banking entity made subject to this part by § 248.20 must furnish the following quantitative measurements for each trading desk of the banking entity, calculated in accordance with this appendix:

- Risk and Position Limits and Usage;
- Risk Factor Sensitivities;
- Value-at-Risk and Stress VaR;
- Comprehensive Profit and Loss Attribution;
- Inventory Turnover;
- Inventory Aging; and
- Customer-Facing Trade Ratio

b. Frequency of Required Calculation and Reporting

A banking entity must calculate any applicable quantitative measurement for each trading day. A banking entity must report each applicable quantitative measurement to the Board on the reporting schedule established in § 248.20 unless otherwise requested by the Board. All quantitative measurements for any calendar month must be reported within the time period required by § 248.20.

c. Recordkeeping

A banking entity must, for any quantitative measurement furnished to the Board pursuant to this appendix and § 248.20(d), create and maintain records documenting the preparation and content of these reports, as well as such information as is necessary to permit the Board to verify the accuracy of such reports, for a period of 5 years from the end of the calendar year for which the measurement was taken.

IV. Quantitative Measurements

a. Risk-Management Measurements

1. Risk and Position Limits and Usage

i. *Description:* For purposes of this appendix, Risk and Position Limits are the constraints that define the amount of risk that a trading desk is permitted to take at a point in time, as defined by the banking entity for a specific trading desk. Usage represents the portion of the trading desk's limits that are accounted for by the current activity of the desk. Risk and position limits and their usage are key risk management tools used to control and monitor risk taking and include, but are not limited, to the limits set out in § 248.4 and § 248.5. A number of the metrics that are described below, including ''Risk Factor Sensitivities'' and ''Value-at-Risk and Stress Value-at-Risk,'' relate to a trading desk's risk and position limits and are useful in evaluating and setting these limits in the broader context of the trading desk's overall activities, particularly for the market making activities under § 248.4(b) and hedging activity under § 248.5. Accordingly, the limits required under § 248.4(b)(2)(iii) and § 248.5(b)(1)(i) must meet the applicable requirements under § 248.4(b)(2)(iii) and § 248.5(b)(1)(i) and also must include appropriate metrics for the trading desk limits including, at a minimum, the ''Risk Factor Sensitivities'' and ''Value-at-Risk and Stress Value-at-Risk'' metrics except to the extent any of the ''Risk Factor Sensitivities'' or ''Value-at-Risk and Stress Value-at-Risk'' metrics are demonstrably ineffective for measuring and monitoring the risks of a trading desk based on the types of positions traded by, and risk exposures of, that desk.

ii. *General Calculation Guidance:* Risk and Position Limits must be reported in the format used by the banking entity for the purposes of risk management of each trading desk. Risk and Position Limits are often expressed in terms of risk measures, such as VaR and Risk Factor Sensitivities, but may also be expressed in terms of other observable criteria, such as net open positions. When criteria other than VaR or Risk Factor Sensitivities are used to define the Risk and Position Limits, both the value of the Risk and Position Limits and the value of the variables used to assess whether these limits have been reached must be reported.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

2. Risk Factor Sensitivities

i. *Description:* For purposes of this appendix, Risk Factor Sensitivities are changes in a trading desk's Comprehensive Profit and Loss that are expected to occur in the event of a change in one or more underlying variables that are significant sources of the trading desk's profitability and risk.

ii. *General Calculation Guidance:* A banking entity must report the Risk Factor Sensitivities that are monitored and managed as part of the trading desk's overall risk management policy. The underlying data and methods used to compute a trading desk's Risk Factor Sensitivities will depend on the specific function of the trading desk and the internal risk management models employed. The number and type of Risk Factor Sensitivities that are monitored and managed by a trading desk, and furnished to the Board, will depend on the explicit risks assumed by the trading desk. In general, however, reported Risk Factor Sensitivities must be sufficiently granular to account for a preponderance of the expected price variation in the trading desk's holdings.

A. Trading desks must take into account any relevant factors in calculating Risk Factor Sensitivities, including, for example, the following with respect to particular asset classes:

- *Commodity derivative positions:* Risk factors with respect to the related commodities set out in 17 CFR 20.2, the maturity of the positions, volatility and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;
- *Credit positions:* Risk factors with respect to credit spreads that are sufficiently granular to account for specific credit sectors and market segments, the maturity profile of the positions, and risk factors with respect to interest rates of all relevant maturities;
- *Credit-related derivative positions:* Risk factor sensitivities, for example credit spreads, shifts (parallel and non-parallel) in credit spreads—volatility, and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;
- *Equity derivative positions:* Risk factor sensitivities such as equity positions, volatility, and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;
- *Equity positions:* Risk factors for equity prices and risk factors that differentiate between important equity market sectors and segments, such as a small capitalization equities and international equities;
- *Foreign exchange derivative positions:* Risk factors with respect to major currency pairs and maturities, exposure to interest rates at relevant maturities, volatility, and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), as well as the maturity profile of the positions; and
- *Interest rate positions, including interest rate derivative positions:* Risk factors with respect to major interest rate categories and maturities and volatility and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and shifts (parallel and non-parallel) in the interest rate curve, as well as the maturity profile of the positions.

B. The methods used by a banking entity to calculate sensitivities to a common factor shared by multiple trading desks, such as an equity price factor, must be applied consistently across its trading desks so that the sensitivities can be compared from one trading desk to another.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

3. Value-at-Risk and Stress Value-at-Risk

i. *Description:* For purposes of this appendix, Value-at-Risk (''VaR'') is the commonly used percentile measurement of the risk of future financial loss in the value of a given set of aggregated positions over a specified period of time, based on current market conditions. For purposes of this appendix, Stress Value-at-Risk (''Stress VaR'') is the percentile measurement of the risk of future financial loss in the value of a given set of aggregated positions over a specified period of time, based on market conditions during a period of significant financial stress.

ii. *General Calculation Guidance:* Banking entities must compute and report VaR and Stress VaR by employing generally accepted standards and methods of calculation. VaR should reflect a loss in a trading desk that is expected to be exceeded less than one percent of the time over a one-day period. For those banking entities that are subject to regulatory capital requirements imposed by a Federal banking agency, VaR and Stress VaR must be computed and reported in a manner that is consistent with such regulatory capital requirements. In cases where a trading desk does not have a standalone VaR or Stress VaR calculation but is part of a larger aggregation of positions for which a VaR or Stress VaR calculation is performed, a VaR or Stress VaR calculation that includes only the trading desk's holdings must be performed consistent with the VaR or Stress VaR model and methodology used for the larger aggregation of positions.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

b. Source-of-Revenue Measurements

1. Comprehensive Profit and Loss Attribution

i. *Description:* For purposes of this appendix, Comprehensive Profit and Loss Attribution is an analysis that attributes the daily fluctuation in the value of a trading desk's positions to various sources. First, the daily profit and loss of the aggregated positions is divided into three categories: (i) Profit and loss attributable to a trading desk's existing positions that were also positions held by the trading desk as of the end of the prior day (''existing positions''); (ii) profit and loss attributable to new positions resulting from the current day's trading activity (''new positions''); and (iii) residual profit and loss that cannot be specifically attributed to existing positions or new positions. The sum of (i), (ii), and (iii) must equal the trading desk's comprehensive profit and loss at each point in time. In addition, profit and loss measurements must calculate volatility of comprehensive profit and loss (*i.e.,* the standard deviation of the trading desk's one-day profit and loss, in dollar terms) for the reporting period for at least a 30-, 60- and 90-day lag period, from the end of the reporting period, and any other period that the banking entity deems necessary to meet the requirements of the rule.

A. The comprehensive profit and loss associated with existing positions must reflect changes in the value of these positions on the applicable day. The comprehensive profit and loss from existing positions must be further attributed, as applicable, to changes in (i) the specific Risk Factors and other factors that are monitored and managed as part of the trading desk's overall risk management policies and procedures; and (ii) any other applicable elements, such as cash flows, carry, changes in reserves, and the correction, cancellation, or exercise of a trade.

B. The comprehensive profit and loss attributed to new positions must reflect commissions and fee income or expense and market gains or losses associated with transactions executed on the applicable day. New positions include purchases and sales of financial instruments and other assets/liabilities and negotiated amendments to existing positions. The comprehensive profit and loss from new positions may be reported in the aggregate and does not need to be further attributed to specific sources.

C. The portion of comprehensive profit and loss that cannot be specifically attributed to known sources must be allocated to a residual category identified as an unexplained portion of the comprehensive profit and loss. Significant unexplained profit and loss must be escalated for further investigation and analysis.

ii. *General Calculation Guidance:* The specific categories used by a trading desk in the attribution analysis and amount of detail for the analysis should be tailored to the type and amount of trading activities undertaken by the trading desk. The new position attribution must be computed by calculating the difference between the prices at which instruments were bought and/or sold and the prices at which those instruments are marked to market at the close of business on that day multiplied by the notional or principal amount of each purchase or sale. Any fees, commissions, or other payments received (paid) that are associated with transactions executed on that day must be added (subtracted) from such difference. These factors must be measured consistently over time to facilitate historical comparisons.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

c. Customer-Facing Activity Measurements

1. Inventory Turnover

i. *Description:* For purposes of this appendix, Inventory Turnover is a ratio that measures the turnover of a trading desk's inventory. The numerator of the ratio is the absolute value of all transactions over the reporting period. The denominator of the ratio is the value of the trading desk's inventory at the beginning of the reporting period.

ii. *General Calculation Guidance:* For purposes of this appendix, for derivatives, other than options and interest rate derivatives, value means gross notional value, for options, value means delta adjusted notional value, and for interest rate derivatives, value means 10-year bond equivalent value.

iii. *Calculation Period:* 30 days, 60 days, and 90 days.

iv. *Measurement Frequency:* Daily.

2. Inventory Aging

i. *Description:* For purposes of this appendix, Inventory Aging generally describes a schedule of the trading desk's aggregate assets and liabilities and the amount of time that those assets and liabilities have been held. Inventory Aging should measure the age profile of the trading desk's assets and liabilities.

ii. *General Calculation Guidance:* In general, Inventory Aging must be computed using a trading desk's trading activity data and must identify the value of a trading desk's aggregate assets and liabilities. Inventory Aging must include two schedules, an asset-aging schedule and a liability-aging schedule. Each schedule must record the value of assets or liabilities held over all holding periods. For derivatives, other than options, and interest rate derivatives, value means gross notional value, for options, value means delta adjusted notional value and, for interest rate derivatives, value means 10-year bond equivalent value.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

3. Customer-Facing Trade Ratio—Trade Count Based and Value Based

i. *Description:* For purposes of this appendix, the Customer-Facing Trade Ratio is a ratio comparing (i) the transactions involving a counterparty that is a customer of the trading desk to (ii) the transactions involving a counterparty that is not a customer of the trading desk. A trade count based ratio must be computed that records the number of transactions involving a counterparty that is a customer of the trading desk and the number of transactions involving a counterparty that is not a customer of the trading desk. A value based ratio must be computed that records the value of transactions involving a counterparty that is a customer of the trading desk and the value of transactions involving a counterparty that is not a customer of the trading desk.

ii. *General Calculation Guidance:* For purposes of calculating the Customer-Facing Trade Ratio, a counterparty is considered to be a customer of the trading desk if the counterparty is a market participant that makes use of the banking entity's market making-related services by obtaining such services, responding to quotations, or entering into a continuing relationship with respect to such services. However, a trading desk or other organizational unit of another banking entity would not be a client, customer, or counterparty of the trading desk if the other entity has trading assets and liabilities of $50 billion or more as measured in accordance with § 248.20(d)(1) unless the trading desk documents how and why a particular trading desk or other organizational unit of the entity should be treated as a client, customer, or counterparty of the trading desk. Transactions conducted anonymously on an exchange or similar trading facility that permits trading on behalf of a broad range of market participants would be considered transactions with customers of the trading desk. For derivatives, other than options, and interest rate derivatives, value means gross notional value, for options, value means delta adjusted notional value, and for interest rate derivatives, value means 10-year bond equivalent value.

iii. *Calculation Period:* 30 days, 60 days, and 90 days.

iv. *Measurement Frequency:* Daily.

Appendix B to Part 248—Enhanced Minimum Standards for Compliance Programs

I. Overview

Section 248.20(c) requires certain banking entities to establish, maintain, and enforce an enhanced compliance program that includes the requirements and standards in this Appendix as well as the minimum written policies and procedures, internal controls, management framework, independent testing, training, and recordkeeping provisions outlined in § 248.20. This Appendix sets forth additional minimum standards with respect to the establishment, oversight, maintenance, and enforcement by these banking entities of an enhanced internal compliance program for ensuring and monitoring compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part.

a. This compliance program must:

1. Be reasonably designed to identify, document, monitor, and report the permitted trading and covered fund activities and investments of the banking entity; identify, monitor and promptly address the risks of these covered activities and investments and potential areas of noncompliance; and prevent activities or investments prohibited by, or that do not comply with, section 13 of the BHC Act and this part;

2. Establish and enforce appropriate limits on the covered activities and investments of the banking entity, including limits on the size, scope, complexity, and risks of the individual activities or investments consistent with the requirements of section 13 of the BHC Act and this part;

3. Subject the effectiveness of the compliance program to periodic independent review and testing, and ensure that the entity's internal audit, corporate compliance and internal control functions involved in review and testing are effective and independent;

4. Make senior management, and others as appropriate, accountable for the effective implementation of the compliance program, and ensure that the board of directors and chief executive officer (or equivalent) of the banking entity review the effectiveness of the compliance program; and

5. Facilitate supervision and examination by the Agencies of the banking entity's permitted trading and covered fund activities and investments.

II. Enhanced Compliance Program

a. *Proprietary Trading Activities.* A banking entity must establish, maintain and enforce a compliance program that includes written policies and procedures that are appropriate for the types, size, and complexity of, and risks associated with, its permitted trading activities. The compliance program may be tailored to the types of trading activities conducted by the banking entity, and must include a detailed description of controls established by the banking entity to reasonably ensure that its trading activities are conducted in accordance with the requirements and limitations applicable to those trading activities under section 13 of the BHC Act and this part, and provide for appropriate revision of the compliance program before expansion of the trading activities of the banking entity. A banking entity must devote adequate resources and use knowledgeable personnel in conducting, supervising and managing its trading activities, and promote consistency, independence and rigor in implementing its risk controls and compliance efforts. The compliance program must be updated with a frequency sufficient to account for changes in the activities of the banking entity, results of independent testing of the program, identification of weaknesses in the program, and changes in legal, regulatory or other requirements.

1. *Trading Desks:* The banking entity must have written policies and procedures governing each trading desk that include a description of:

i. The process for identifying, authorizing and documenting financial instruments each trading desk may purchase or sell, with separate documentation for market making-related activities conducted in reliance on § 248.4(b) and for hedging activity conducted in reliance on § 248.5;

ii. A mapping for each trading desk to the division, business line, or other organizational structure that is responsible for managing and overseeing the trading desk's activities;

iii. The mission (*i.e.,* the type of trading activity, such as market-making, trading in sovereign debt, etc.) and strategy (*i.e.,* methods for conducting authorized trading activities) of each trading desk;

iv. The activities that the trading desk is authorized to conduct, including (i) authorized instruments and products, and (ii) authorized hedging strategies, techniques and instruments;

v. The types and amount of risks allocated by the banking entity to each trading desk to implement the mission and strategy of the trading desk, including an enumeration of material risks resulting from the activities in which the trading desk is authorized to engage (including but not limited to price risks, such as basis, volatility and correlation risks, as well as counterparty credit risk). Risk assessments must take into account both the risks inherent in the trading activity and the strength and effectiveness of controls designed to mitigate those risks;

vi. How the risks allocated to each trading desk will be measured;

vii. Why the allocated risks levels are appropriate to the activities authorized for the trading desk;

viii. The limits on the holding period of, and the risk associated with, financial instruments under the responsibility of the trading desk;

ix. The process for setting new or revised limits, as well as escalation procedures for granting exceptions to any limits or to any policies or procedures governing the desk, the analysis that will be required to support revising limits or granting exceptions, and the process for independently reviewing and documenting those exceptions and the underlying analysis;

x. The process for identifying, documenting and approving new products, trading strategies, and hedging strategies;

xi. The types of clients, customers, and counterparties with whom the trading desk may trade; and

xii. The compensation arrangements, including incentive arrangements, for employees associated with the trading desk, which may not be designed to reward or incentivize prohibited proprietary trading or excessive or imprudent risk-taking.

2. *Description of risks and risk management processes:* The compliance program for the banking entity must include a comprehensive description of the risk management program for the trading activity of the banking entity. The compliance program must also include a description of the governance, approval, reporting, escalation, review and other processes the banking entity will use to reasonably ensure that trading activity is conducted in compliance with section 13 of the BHC Act and this part. Trading activity in similar financial instruments should be subject to similar governance, limits, testing, controls, and review, unless the banking entity specifically determines to establish different limits or processes and documents those differences. Descriptions must include, at a minimum, the following elements:

i. A description of the supervisory and risk management structure governing all trading activity, including a description of processes for initial and senior-level review of new products and new strategies;

ii. A description of the process for developing, documenting, testing, approving and reviewing all models used for valuing, identifying and monitoring the risks of trading activity and related positions, including the process for periodic independent testing of the reliability and accuracy of those models;

iii. A description of the process for developing, documenting, testing, approving and reviewing the limits established for each trading desk;

iv. A description of the process by which a security may be purchased or sold pursuant to the liquidity management plan, including the process for authorizing and monitoring such activity to ensure compliance with the banking entity's liquidity management plan and the restrictions on liquidity management activities in this part;

v. A description of the management review process, including escalation procedures, for approving any temporary exceptions or permanent adjustments to limits on the activities, positions, strategies, or risks associated with each trading desk; and

vi. The role of the audit, compliance, risk management and other relevant units for conducting independent testing of trading and hedging activities, techniques and strategies.

3. *Authorized risks, instruments, and products.* The banking entity must implement and enforce limits and internal controls for each trading desk that are reasonably designed to ensure that trading activity is conducted in conformance with section 13 of the BHC Act and this part and with the banking entity's written policies and procedures. The banking entity must establish and enforce risk limits appropriate for the activity of each trading desk. These limits should be based on probabilistic and non-probabilistic measures of potential loss (*e.g.,* Value-at-Risk and notional exposure, respectively), and measured under normal and stress market conditions. At a minimum, these internal controls must monitor, establish and enforce limits on:

i. The financial instruments (including, at a minimum, by type and exposure) that the trading desk may trade;

ii. The types and levels of risks that may be taken by each trading desk; and

iii. The types of hedging instruments used, hedging strategies employed, and the amount of risk effectively hedged.

4. *Hedging policies and procedures.* The banking entity must establish, maintain, and enforce written policies and procedures

regarding the use of risk-mitigating hedging instruments and strategies that, at a minimum, describe:

i. The positions, techniques and strategies that each trading desk may use to hedge the risk of its positions;

ii. The manner in which the banking entity will identify the risks arising in connection with and related to the individual or aggregated positions, contracts or other holdings of the banking entity that are to be hedged and determine that those risks have been properly and effectively hedged;

iii. The level of the organization at which hedging activity and management will occur;

iv. The manner in which hedging strategies will be monitored and the personnel responsible for such monitoring;

v. The risk management processes used to control unhedged or residual risks; and

vi. The process for developing, documenting, testing, approving and reviewing all hedging positions, techniques and strategies permitted for each trading desk and for the banking entity in reliance on § 248.5.

5. *Analysis and quantitative measurements.* The banking entity must perform robust analysis and quantitative measurement of its trading activities that is reasonably designed to ensure that the trading activity of each trading desk is consistent with the banking entity's compliance program; monitor and assist in the identification of potential and actual prohibited proprietary trading activity; and prevent the occurrence of prohibited proprietary trading. Analysis and models used to determine, measure and limit risk must be rigorously tested and be reviewed by management responsible for trading activity to ensure that trading activities, limits, strategies, and hedging activities do not understate the risk and exposure to the banking entity or allow prohibited proprietary trading. This review should include periodic and independent back-testing and revision of activities, limits, strategies and hedging as appropriate to contain risk and ensure compliance. In addition to the quantitative measurements reported by any banking entity subject to Appendix A to this part, each banking entity must develop and implement, to the extent appropriate to facilitate compliance with this part, additional quantitative measurements specifically tailored to the particular risks, practices, and strategies of its trading desks. The banking entity's analysis and quantitative measurements must incorporate the quantitative measurements reported by the banking entity pursuant to Appendix A (if applicable) and include, at a minimum, the following:

i. Internal controls and written policies and procedures reasonably designed to ensure the accuracy and integrity of quantitative measurements;

ii. Ongoing, timely monitoring and review of calculated quantitative measurements;

iii. The establishment of numerical thresholds and appropriate trading measures for each trading desk and heightened review of trading activity not consistent with those thresholds to ensure compliance with section 13 of the BHC Act and this part, including analysis of the measurement results or other information, appropriate escalation procedures, and documentation related to the review; and

iv. Immediate review and compliance investigation of the trading desk's activities, escalation to senior management with oversight responsibilities for the applicable trading desk, timely notification to the Board, appropriate remedial action (*e.g.,* divesting of impermissible positions, cessation of impermissible activity, disciplinary actions), and documentation of the investigation findings and remedial action taken when quantitative measurements or other information, considered together with the facts and circumstances, or findings of internal audit, independent testing or other review suggest a reasonable likelihood that the trading desk has violated any part of section 13 of the BHC Act or this part.

6. *Other Compliance Matters.* In addition to the requirements specified above, the banking entity's compliance program must:

i. Identify activities of each trading desk that will be conducted in reliance on exemptions contained in §§ 248.4 through 248.6, including an explanation of:

A. How and where in the organization the activity occurs; and

B. Which exemption is being relied on and how the activity meets the specific requirements for reliance on the applicable exemption;

ii. Include an explanation of the process for documenting, approving and reviewing actions taken pursuant to the liquidity management plan, where in the organization this activity occurs, the securities permissible for liquidity management, the process for ensuring that liquidity management activities are not conducted for the purpose of prohibited proprietary trading, and the process for ensuring that securities purchased as part of the liquidity management plan are highly liquid and conform to the requirements of this part;

iii. Describe how the banking entity monitors for and prohibits potential or actual material exposure to high-risk assets or high-risk trading strategies presented by each trading desk that relies on the exemptions contained in §§ 248.3(d)(3), and 248.4 through 248.6, which must take into account potential or actual exposure to:

A. Assets whose values cannot be externally priced or, where valuation is reliant on pricing models, whose model inputs cannot be externally validated;

B. Assets whose changes in value cannot be adequately mitigated by effective hedging;

C. New products with rapid growth, including those that do not have a market history;

D. Assets or strategies that include significant embedded leverage;

E. Assets or strategies that have demonstrated significant historical volatility;

F. Assets or strategies for which the application of capital and liquidity standards would not adequately account for the risk; and

G. Assets or strategies that result in large and significant concentrations to sectors, risk factors, or counterparties;

iv. Establish responsibility for compliance with the reporting and recordkeeping requirements of subpart B and § 248.20; and

v. Establish policies for monitoring and prohibiting potential or actual material conflicts of interest between the banking entity and its clients, customers, or counterparties.

7. *Remediation of violations.* The banking entity's compliance program must be reasonably designed and established to effectively monitor and identify for further analysis any trading activity that may indicate potential violations of section 13 of the BHC Act and this part and to prevent actual violations of section 13 of the BHC Act and this part. The compliance program must describe procedures for identifying and remedying violations of section 13 of the BHC Act and this part, and must include, at a minimum, a requirement to promptly document, address and remedy any violation of section 13 of the BHC Act or this part, and document all proposed and actual remediation efforts. The compliance program must include specific written policies and procedures that are reasonably designed to assess the extent to which any activity indicates that modification to the banking entity's compliance program is warranted and to ensure that appropriate modifications are implemented. The written policies and procedures must provide for prompt notification to appropriate management, including senior management and the board of directors, of any material weakness or significant deficiencies in the design or implementation of the compliance program of the banking entity.

b. *Covered Fund Activities or Investments.* A banking entity must establish, maintain and enforce a compliance program that includes written policies and procedures that are appropriate for the types, size, complexity and risks of the covered fund and related activities conducted and investments made, by the banking entity.

1. *Identification of covered funds.* The banking entity's compliance program must provide a process, which must include appropriate management review and independent testing, for identifying and documenting covered funds that each unit within the banking entity's organization sponsors or organizes and offers, and covered funds in which each such unit invests. In addition to the documentation requirements for covered funds, as specified under § 248.20(e), the documentation must include information that identifies all pools that the banking entity sponsors or has an interest in and the type of exemption from the Commodity Exchange Act (whether or not the pool relies on section 4.7 of the regulations under the Commodity Exchange Act), and the amount of ownership interest the banking entity has in those pools.

2. *Identification of covered fund activities and investments.* The banking entity's compliance program must identify, document and map each unit within the organization that is permitted to acquire or hold an interest in any covered fund or sponsor any covered fund and map each unit to the division, business line, or other organizational structure that will be

responsible for managing and overseeing that unit's activities and investments.

3. *Explanation of compliance.* The banking entity's compliance program must explain how:

i. The banking entity monitors for and prohibits potential or actual material conflicts of interest between the banking entity and its clients, customers, or counterparties related to its covered fund activities and investments;

ii. The banking entity monitors for and prohibits potential or actual transactions or activities that may threaten the safety and soundness of the banking entity related to its covered fund activities and investments; and

iii. The banking entity monitors for and prohibits potential or actual material exposure to high-risk assets or high-risk trading strategies presented by its covered fund activities and investments, taking into account potential or actual exposure to:

A. Assets whose values cannot be externally priced or, where valuation is reliant on pricing models, whose model inputs cannot be externally validated;

B. Assets whose changes in values cannot be adequately mitigated by effective hedging;

C. New products with rapid growth, including those that do not have a market history;

D. Assets or strategies that include significant embedded leverage;

E. Assets or strategies that have demonstrated significant historical volatility;

F. Assets or strategies for which the application of capital and liquidity standards would not adequately account for the risk; and

G. Assets or strategies that expose the banking entity to large and significant concentrations with respect to sectors, risk factors, or counterparties;

4. *Description and documentation of covered fund activities and investments.* For each organizational unit engaged in covered fund activities and investments, the banking entity's compliance program must document:

i. The covered fund activities and investments that the unit is authorized to conduct;

ii. The banking entity's plan for actively seeking unaffiliated investors to ensure that any investment by the banking entity conforms to the limits contained in § 248.12 or registered in compliance with the securities laws and thereby exempt from those limits within the time periods allotted in§ 248.12; and

iii. How it complies with the requirements of subpart C.

5. *Internal Controls.* A banking entity must establish, maintain, and enforce internal controls that are reasonably designed to ensure that its covered fund activities or investments comply with the requirements of section 13 of the BHC Act and this part and are appropriate given the limits on risk established by the banking entity. These written internal controls must be reasonably designed and established to effectively monitor and identify for further analysis any covered fund activity or investment that may indicate potential violations of section 13 of the BHC Act or this part. The internal controls must, at a minimum require:

i. Monitoring and limiting the banking entity's individual and aggregate investments in covered funds;

ii. Monitoring the amount and timing of seed capital investments for compliance with the limitations under subpart C (including but not limited to the redemption, sale or disposition requirements) of § 248.12, and the effectiveness of efforts to seek unaffiliated investors to ensure compliance with those limits;

iii. Calculating the individual and aggregate levels of ownership interests in one or more covered fund required by § 248.12;

iv. Attributing the appropriate instruments to the individual and aggregate ownership interest calculations above;

v. Making disclosures to prospective and actual investors in any covered fund organized and offered or sponsored by the banking entity, as provided under § 248.11(a)(8);

vi. Monitoring for and preventing any relationship or transaction between the banking entity and a covered fund that is prohibited under § 248.14, including where the banking entity has been designated as the sponsor, investment manager, investment adviser, or commodity trading advisor to a covered fund by another banking entity; and

vii. Appropriate management review and supervision across legal entities of the banking entity to ensure that services and products provided by all affiliated entities comply with the limitation on services and products contained in § 248.14.

6. *Remediation of violations.* The banking entity's compliance program must be reasonably designed and established to effectively monitor and identify for further analysis any covered fund activity or investment that may indicate potential violations of section 13 of the BHC Act or this part and to prevent actual violations of section 13 of the BHC Act and this part. The banking entity's compliance program must describe procedures for identifying and remedying violations of section 13 of the BHC Act and this part, and must include, at a minimum, a requirement to promptly document, address and remedy any violation of section 13 of the BHC Act or this part, including § 248.21, and document all proposed and actual remediation efforts. The compliance program must include specific written policies and procedures that are reasonably designed to assess the extent to which any activity or investment indicates that modification to the banking entity's compliance program is warranted and to ensure that appropriate modifications are implemented. The written policies and procedures must provide for prompt notification to appropriate management, including senior management and the board of directors, of any material weakness or significant deficiencies in the design or implementation of the compliance program of the banking entity.

III. Responsibility and Accountability for the Compliance Program

a. A banking entity must establish, maintain, and enforce a governance and management framework to manage its business and employees with a view to preventing violations of section 13 of the BHC Act and this part. A banking entity must have an appropriate management framework reasonably designed to ensure that: Appropriate personnel are responsible and accountable for the effective implementation and enforcement of the compliance program; a clear reporting line with a chain of responsibility is delineated; and the compliance program is reviewed periodically by senior management. The board of directors (or equivalent governance body) and senior management should have the appropriate authority and access to personnel and information within the organizations as well as appropriate resources to conduct their oversight activities effectively.

1. *Corporate governance.* The banking entity must adopt a written compliance program approved by the board of directors, an appropriate committee of the board, or equivalent governance body, and senior management.

2. *Management procedures.* The banking entity must establish, maintain, and enforce a governance framework that is reasonably designed to achieve compliance with section 13 of the BHC Act and this part, which, at a minimum, provides for:

i. The designation of appropriate senior management or committee of senior management with authority to carry out the management responsibilities of the banking entity for each trading desk and for each organizational unit engaged in covered fund activities;

ii. Written procedures addressing the management of the activities of the banking entity that are reasonably designed to achieve compliance with section 13 of the BHC Act and this part, including:

A. A description of the management system, including the titles, qualifications, and locations of managers and the specific responsibilities of each person with respect to the banking entity's activities governed by section 13 of the BHC Act and this part; and

B. Procedures for determining compensation arrangements for traders engaged in underwriting or market making-related activities under § 248.4 or risk-mitigating hedging activities under § 248.5 so that such compensation arrangements are designed not to reward or incentivize prohibited proprietary trading and appropriately balance risk and financial results in a manner that does not encourage employees to expose the banking entity to excessive or imprudent risk.

3. *Business line managers.* Managers with responsibility for one or more trading desks of the banking entity are accountable for the effective implementation and enforcement of the compliance program with respect to the applicable trading desk(s).

4. *The Board of directors, or similar corporate body, and senior management.* The board of directors, or similar corporate body, and senior management are responsible for setting and communicating an appropriate culture of compliance with section 13 of the BHC Act and this part and ensuring that appropriate policies regarding the management of trading activities and covered fund activities or investments are adopted to comply with section 13 of the BHC Act and

this part. The board of directors or similar corporate body (such as a designated committee of the board or an equivalent governance body) must ensure that senior management is fully capable, qualified, and properly motivated to manage compliance with this part in light of the organization's business activities and the expectations of the board of directors. The board of directors or similar corporate body must also ensure that senior management has established appropriate incentives and adequate resources to support compliance with this part, including the implementation of a compliance program meeting the requirements of this appendix into management goals and compensation structures across the banking entity.

5. *Senior management.* Senior management is responsible for implementing and enforcing the approved compliance program. Senior management must also ensure that effective corrective action is taken when failures in compliance with section 13 of the BHC Act and this part are identified. Senior management and control personnel charged with overseeing compliance with section 13 of the BHC Act and this part should review the compliance program for the banking entity periodically and report to the board, or an appropriate committee thereof, on the effectiveness of the compliance program and compliance matters with a frequency appropriate to the size, scope, and risk profile of the banking entity's trading activities and covered fund activities or investments, which shall be at least annually.

6. *CEO attestation.* Based on a review by the CEO of the banking entity, the CEO of the banking entity must, annually, attest in writing to the Board that the banking entity has in place processes to establish, maintain, enforce, review, test and modify the compliance program established under this Appendix and § 248.20 of this part in a manner reasonably designed to achieve compliance with section 13 of the BHC Act and this part. In the case of a U.S. branch or agency of a foreign banking entity, the attestation may be provided for the entire U.S. operations of the foreign banking entity by the senior management officer of the United States operations of the foreign banking entity who is located in the United States.

IV. Independent Testing

a. Independent testing must occur with a frequency appropriate to the size, scope, and risk profile of the banking entity's trading and covered fund activities or investments, which shall be at least annually. This independent testing must include an evaluation of:

1. The overall adequacy and effectiveness of the banking entity's compliance program, including an analysis of the extent to which the program contains all the required elements of this appendix;

2. The effectiveness of the banking entity's internal controls, including an analysis and documentation of instances in which such internal controls have been breached, and how such breaches were addressed and resolved; and

3. The effectiveness of the banking entity's management procedures.

b. A banking entity must ensure that independent testing regarding the effectiveness of the banking entity's compliance program is conducted by a qualified independent party, such as the banking entity's internal audit department, compliance personnel or risk managers independent of the organizational unit being tested, outside auditors, consultants, or other qualified independent parties. A banking entity must promptly take appropriate action to remedy any significant deficiencies or material weaknesses in its compliance program and to terminate any violations of section 13 of the BHC Act or this part.

V. Training

Banking entities must provide adequate training to personnel and managers of the banking entity engaged in activities or investments governed by section 13 of the BHC Act or this part, as well as other appropriate supervisory, risk, independent testing, and audit personnel, in order to effectively implement and enforce the compliance program. This training should occur with a frequency appropriate to the size and the risk profile of the banking entity's trading activities and covered fund activities or investments.

VI. Recordkeeping

Banking entities must create and retain records sufficient to demonstrate compliance and support the operations and effectiveness of the compliance program. A banking entity must retain these records for a period that is no less than 5 years or such longer period as required by the Board in a form that allows it to promptly produce such records to the Board on request.

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Chapter I

Authority and Issuance

For the reasons stated in the Common Preamble, the Federal Deposit Insurance Corporation amends chapter III of Title 12, Code of Federal Regulations as follows:

PART 351—PROPRIETARY TRADING AND CERTAIN INTERESTS IN AND RELATIONSHIPS WITH COVERED FUNDS

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

Authority: 12 U.S.C. 1851; 1811 *et seq.;* 3101 *et seq.;* and 5412.

Subpart A—Authority and Definitions

■ 32. Section 351.2 is revised to read as follows:

§ 351.2 Definitions.

Unless otherwise specified, for purposes of this part:

(a) *Affiliate* has the same meaning as in section 2(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(k)).

(b) *Bank holding company* has the same meaning as in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

(c) *Banking entity.* (1) Except as provided in paragraph (c)(2) of this section, *banking entity* means:

(i) Any insured depository institution;

(ii) Any company that controls an insured depository institution;

(iii) Any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(iv) Any affiliate or subsidiary of any entity described in paragraph (c)(1)(i), (ii), or (iii) of this section.

(2) Banking entity does not include:

(vii) A covered fund that is not itself a banking entity under paragraph (c)(1)(i), (ii), or (iii) of this section;

(viii) A portfolio company held under the authority contained in section 4(k)(4)(H) or (I) of the BHC Act (12 U.S.C. 1843(k)(4)(H), (I)), or any 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), so long as the portfolio company or portfolio concern is not itself a banking entity under paragraph (c)(1)(i), (ii), or (iii) of this section; or

(ix) The FDIC acting in its corporate capacity or as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(d) *Board* means the Board of Governors of the Federal Reserve System.

(e) *CFTC* means the Commodity Futures Trading Commission.

(f) *Dealer* has the same meaning as in section 3(a)(5) of the Exchange Act (15 U.S.C. 78c(a)(5)).

(g) *Depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(h) *Derivative.* (1) Except as provided in paragraph (h)(2) of this section, *derivative* means:

(i) Any swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68));

(ii) Any purchase or sale of a commodity, that is not an excluded commodity, for deferred shipment or delivery that is intended to be physically settled;

(iii) Any foreign exchange forward (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)) or foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25));

(iv) Any agreement, contract, or transaction in foreign currency described in section 2(c)(2)(C)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(C)(i));

(v) Any agreement, contract, or transaction in a commodity other than foreign currency described in section 2(c)(2)(D)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(D)(i)); and

(vi) Any transaction authorized under section 19 of the Commodity Exchange Act (7 U.S.C. 23(a) or (b));

(2) A derivative does not include:

(i) Any consumer, commercial, or other agreement, contract, or transaction that the CFTC and SEC have further defined by joint regulation, interpretation, or other action as not within the definition of swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)); or

(ii) Any identified banking product, as defined in section 402(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b)), that is subject to section 403(a) of that Act (7 U.S.C. 27a(a)).

(i) *Employee* includes a member of the immediate family of the employee.

(j) *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(k) *Excluded commodity* has the same meaning as in section 1a(19) of the Commodity Exchange Act (7 U.S.C. 1a(19)).

(l) *FDIC* means the Federal Deposit Insurance Corporation.

(m) *Federal banking agencies* means the Board, the Office of the Comptroller of the Currency, and the FDIC.

(n) *Foreign banking organization* has the same meaning as in § 211.21(o) of the Board's Regulation K (12 CFR 211.21(o)), but does not include a foreign bank, as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(7)), that is organized under the laws of the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, or the Commonwealth of the Northern Mariana Islands.

(o) *Foreign insurance regulator* means the insurance commissioner, or a similar official or agency, of any country other than the United States that is engaged in the supervision of insurance companies under foreign insurance law.

(p) *General account* means all of the assets of an insurance company except those allocated to one or more separate accounts.

(q) *Insurance company* means a company that is organized as an insurance company, primarily and predominantly engaged in writing insurance or reinsuring risks underwritten by insurance companies, subject to supervision as such by a state insurance regulator or a foreign insurance regulator, and not operated for the purpose of evading the provisions of section 13 of the BHC Act (12 U.S.C. 1851).

(r) *Insured depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)), but does not include:

(1) An insured depository institution that is described in section 2(c)(2)(D) of the BHC Act (12 U.S.C. 1841(c)(2)(D)); or

(2) An insured depository institution if it has, and if every company that controls it has, total consolidated assets of $10 billion or less and total trading assets and trading liabilities, on a consolidated basis, that are 5 percent or less of total consolidated assets.

(s) *Limited trading assets and liabilities* means with respect to a banking entity that:

(1)(i) The banking entity has, together with its affiliates and subsidiaries, trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 351.6(a)(1) and (2) of subpart B) the average gross sum of which over the previous consecutive four quarters, as measured as of the last day of each of the four previous calendar quarters, is less than $1 billion; and

(ii) The FDIC has not determined pursuant to § 351.20(g) or (h) of this part that the banking entity should not be treated as having limited trading assets and liabilities.

(2) With respect to a banking entity other than a banking entity described in paragraph (s)(3) of this section, trading assets and liabilities for purposes of this paragraph (s) means trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 351.6(a)(1) and (2) of subpart B) on a worldwide consolidated basis.

(3)(i) With respect to a banking entity that is a foreign banking organization or a subsidiary of a foreign banking organization, trading assets and liabilities for purposes of this paragraph (s) means the trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 351.6(a)(1) and (2) of subpart B) of the combined U.S. operations of the top-tier foreign banking organization (including all subsidiaries, affiliates, branches, and agencies of the foreign banking organization operating, located, or organized in the United States).

(ii) For purposes of paragraph (s)(3)(i) of this section, a U.S. branch, agency, or subsidiary of a banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary. For purposes of paragraph (s)(3)(i) of this section, all foreign operations of a U.S. agency, branch, or subsidiary of a foreign banking organization are considered to be located in the United States, including branches outside the United States that are managed or controlled by a U.S. branch or agency of the foreign banking organization, for purposes of calculating the banking entity's U.S. trading assets and liabilities.

(t) *Loan* means any loan, lease, extension of credit, or secured or unsecured receivable that is not a security or derivative.

(u) *Moderate trading assets and liabilities* means, with respect to a banking entity, that the banking entity does not have significant trading assets and liabilities or limited trading assets and liabilities.

(v) *Primary financial regulatory agency* has the same meaning as in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5301(12)).

(w) *Purchase* includes any contract to buy, purchase, or otherwise acquire. For security futures products, purchase includes any contract, agreement, or transaction for future delivery. With respect to a commodity future, purchase includes any contract, agreement, or transaction for future delivery. With respect to a derivative, purchase includes the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(x) *Qualifying foreign banking organization* means a foreign banking organization that qualifies as such under § 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c), or (e)).

(y) *SEC* means the Securities and Exchange Commission.

(z) *Sale* and *sell* each include any contract to sell or otherwise dispose of. For security futures products, such terms include any contract, agreement, or transaction for future delivery. With respect to a commodity future, such terms include any contract, agreement, or transaction for future delivery. With respect to a derivative, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(aa) *Security* has the meaning specified in section 3(a)(10) of the Exchange Act (15 U.S.C. 78c(a)(10)).

(bb) *Security-based swap dealer* has the same meaning as in section 3(a)(71) of the Exchange Act (15 U.S.C. 78c(a)(71)).

(cc) *Security future* has the meaning specified in section 3(a)(55) of the Exchange Act (15 U.S.C. 78c(a)(55)).

(dd) *Separate account* means an account established and maintained by an insurance company in connection with one or more insurance contracts to hold assets that are legally segregated from the insurance company's other assets, under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(ee) *Significant trading assets and liabilities* means with respect to a banking entity that:

(1)(i) The banking entity has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which over the previous consecutive four quarters, as measured as of the last day of each of the four previous calendar quarters, equals or exceeds $20 billion; or

(ii) The FDIC has determined pursuant to § 351.20(h) of this part that the banking entity should be treated as having significant trading assets and liabilities.

(2) With respect to a banking entity, other than a banking entity described in paragraph (ee)(3) of this section, trading assets and liabilities for purposes of this paragraph (ee) means trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 351.6(a)(1) and (2) of subpart B) on a worldwide consolidated basis.

(3)(i) With respect to a banking entity that is a foreign banking organization or a subsidiary of a foreign banking organization, trading assets and liabilities for purposes of this paragraph (ee) means the trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 351.6(a)(1) and (2) of subpart B) of the combined U.S. operations of the top-tier foreign banking organization (including all subsidiaries, affiliates, branches, and agencies of the foreign banking organization operating, located, or organized in the United States as well as branches outside the United States that are managed or controlled by a branch or agency of the foreign banking entity operating, located or organized in the United States).

(ii) For purposes of paragraph (ee)(3)(i) of this section, a U.S. branch, agency, or subsidiary of a banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary. For purposes of paragraph (ee)(3)(i) of this section, all foreign operations of a U.S. agency, branch, or subsidiary of a foreign banking organization are considered to be located in the United States for purposes of calculating the banking entity's U.S. trading assets and liabilities.

(ff) *State* means any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(gg) *Subsidiary* has the same meaning as in section 2(d) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(d)).

(hh) *State insurance regulator* means the insurance commissioner, or a similar official or agency, of a State that is engaged in the supervision of insurance companies under State insurance law.

(ii) *Swap dealer* has the same meaning as in section 1(a)(49) of the Commodity Exchange Act (7 U.S.C. 1a(49)).

Subpart B—Proprietary Trading

■ 33. Section 351.3 is amended by:

■ a. Revising paragraphs (b) and (d)(3), (8), and (9);

■ b. Adding paragraphs (d)(10) through (13);

■ c. Redesignating paragraphs (e)(5) through (13) as paragraphs (e)(6) through (14);

■ d. Adding new paragraph (e)(5); and

■ e. Revising redesignated paragraphs (e)(11), (12), and (14).

The revisions and additions read as follows:

§ 351.3 Prohibition on proprietary trading.

* * * * *

(b) *Definition of trading account.* (1) *Trading account.* Trading account means:

(i) Any account that is used by a banking entity to purchase or sell one or more financial instruments principally for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging one or more of the positions resulting from the purchases or sales of financial instruments described in this paragraph;

(ii) Any account that is used by a banking entity to purchase or sell one or more financial instruments that are both market risk capital rule covered positions and trading positions (or hedges of other market risk capital rule covered positions), if the banking entity, or any affiliate with which the banking entity is consolidated for regulatory reporting purposes, calculates risk-based capital ratios under the market risk capital rule; or

(iii) Any account that is used by a banking entity to purchase or sell one or more financial instruments, if the banking entity:

(A) Is licensed or registered, or is required to be licensed or registered, to engage in the business of a dealer, swap dealer, or security-based swap dealer, to the extent the instrument is purchased or sold in connection with the activities that require the banking entity to be licensed or registered as such; or

(B) Is engaged in the business of a dealer, swap dealer, or security-based swap dealer outside of the United States, to the extent the instrument is purchased or sold in connection with the activities of such business.

(2) *Trading account application for certain banking entities.* (i) A banking entity that is subject to paragraph (b)(1)(ii) of this section in determining the scope of its trading account is not subject to paragraph (b)(1)(i) of this section.

(ii) A banking entity that does not calculate risk-based capital ratios under the market risk capital rule and is not a consolidated affiliate for regulatory reporting purposes of a banking entity that calculates risk based capital ratios under the market risk capital rule may elect to apply paragraph (b)(1)(ii) of this section in determining the scope of its trading account as if it were subject to that paragraph. A banking entity that elects under this subsection to apply paragraph (b)(1)(ii) of this section in determining the scope of its trading account as if it were subject to that paragraph is not required to apply paragraph (b)(1)(i) of this section.

(3) *Consistency of account election for certain banking entities.* (i) Any election

or change to an election under paragraph (b)(2)(ii) of this section must apply to the electing banking entity and all of its wholly owned subsidiaries. The primary financial regulatory agency of a banking entity that is affiliated with but is not a wholly owned subsidiary of such electing banking entity may require that the banking entity be subject to this uniform application requirement if the primary financial regulatory agency determines that it is necessary to prevent evasion of the requirements of this part after notice and opportunity for response as provided in subpart D of this part.

(ii) A banking entity that does not elect under paragraph (b)(2)(ii) of this section to be subject to the trading account definition in (b)(1)(ii) of this section may continue to apply the trading account definition in paragraph (b)(1)(i) of this section for one year from the date on which it becomes, or becomes a consolidated affiliate for regulatory reporting purposes with, a banking entity that calculates risk-based capital ratios under the market risk capital rule.

(4) *Rebuttable presumption for certain purchases and sales.* The purchase (or sale) of a financial instrument by a banking entity shall be presumed not to be for the trading account of the banking entity under paragraph (b)(1)(i) of this section if the banking entity holds the financial instrument for sixty days or longer and does not transfer substantially all of the risk of the financial instrument within sixty days of the purchase (or sale).

* * * * *

(d) * * *

(3) Any purchase or sale of a security, foreign exchange forward (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)), foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25)), or cross-currency swap by a banking entity for the purpose of liquidity management in accordance with a documented liquidity management plan of the banking entity that:

(i) Specifically contemplates and authorizes the particular financial instruments to be used for liquidity management purposes, the amount, types, and risks of these financial instruments that are consistent with liquidity management, and the liquidity circumstances in which the particular financial instruments may or must be used;

(ii) Requires that any purchase or sale of financial instruments contemplated and authorized by the plan be principally for the purpose of managing the liquidity of the banking entity, and not for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging a position taken for such short-term purposes;

(iii) Requires that any financial instruments purchased or sold for liquidity management purposes be highly liquid and limited to financial instruments the market, credit, and other risks of which the banking entity does not reasonably expect to give rise to appreciable profits or losses as a result of short-term price movements;

(iv) Limits any financial instruments purchased or sold for liquidity management purposes, together with any other financial instruments purchased or sold for such purposes, to an amount that is consistent with the banking entity's near-term funding needs, including deviations from normal operations of the banking entity or any affiliate thereof, as estimated and documented pursuant to methods specified in the plan;

(v) Includes written policies and procedures, internal controls, analysis, and independent testing to ensure that the purchase and sale of financial instruments that are not permitted under § 351.6(a) or (b) of this subpart are for the purpose of liquidity management and in accordance with the liquidity management plan described in this paragraph (d)(3); and

(vi) Is consistent with the FDIC's regulatory requirements regarding liquidity management;

* * * * *

(8) Any purchase or sale of one or more financial instruments by a banking entity through a deferred compensation, stock-bonus, profit-sharing, or pension plan of the banking entity that is established and administered in accordance with the law of the United States or a foreign sovereign, if the purchase or sale is made directly or indirectly by the banking entity as trustee for the benefit of persons who are or were employees of the banking entity;

(9) Any purchase or sale of one or more financial instruments by a banking entity in the ordinary course of collecting a debt previously contracted in good faith, provided that the banking entity divests the financial instrument as soon as practicable, and in no event may the banking entity retain such instrument for longer than such period permitted by the FDIC;

(10) Any purchase or sale of one or more financial instruments that was made in error by a banking entity in the course of conducting a permitted or excluded activity or is a subsequent transaction to correct such an error;

(11) Contemporaneously entering into a customer-driven swap or customer-driven security-based swap and a matched swap or security-based swap if:

(i) The banking entity retains no more than minimal price risk; and

(ii) The banking entity is not a registered dealer, swap dealer, or security-based swap dealer;

(12) Any purchase or sale of one or more financial instruments that the banking entity uses to hedge mortgage servicing rights or mortgage servicing assets in accordance with a documented hedging strategy; or

(13) Any purchase or sale of a financial instrument that does not meet the definition of trading asset or trading liability under the applicable reporting form for a banking entity as of January 1, 2020.

(e) * * *

(5) *Cross-currency swap* means a swap in which one party exchanges with another party principal and interest rate payments in one currency for principal and interest rate payments in another currency, and the exchange of principal occurs on the date the swap is entered into, with a reversal of the exchange of principal at a later date that is agreed upon when the swap is entered into.

* * * * *

(11) *Market risk capital rule covered position and trading position* means a financial instrument that meets the criteria to be a covered position and a trading position, as those terms are respectively defined, without regard to whether the financial instrument is reported as a covered position or trading position on any applicable regulatory reporting forms:

(i) In the case of a banking entity that is a bank holding company, savings and loan holding company, or insured depository institution, under the market risk capital rule that is applicable to the banking entity; and

(ii) In the case of a banking entity that is affiliated with a bank holding company or savings and loan holding company, other than a banking entity to which a market risk capital rule is applicable, under the market risk capital rule that is applicable to the affiliated bank holding company or savings and loan holding company.

(12) *Market risk capital rule* means the market risk capital rule that is contained in 12 CFR part 3, subpart F, with respect to a banking entity for which the OCC is the primary financial regulatory agency, 12 CFR part 217 with

respect to a banking entity for which the Board is the primary financial regulatory agency, or 12 CFR part 324 with respect to a banking entity for which the FDIC is the primary financial regulatory agency.

* * * * *

(14) *Trading desk* means a unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof that is:

(i)(A) Structured by the banking entity to implement a well-defined business strategy;

(B) Organized to ensure appropriate setting, monitoring, and management review of the desk's trading and hedging limits, current and potential future loss exposures, and strategies; and

(C) Characterized by a clearly defined unit that:

(*1*) Engages in coordinated trading activity with a unified approach to its key elements;

(*2*) Operates subject to a common and calibrated set of risk metrics, risk levels, and joint trading limits;

(*3*) Submits compliance reports and other information as a unit for monitoring by management; and

(*4*) Books its trades together; or

(ii) For a banking entity that calculates risk-based capital ratios under the market risk capital rule, or a consolidated affiliate for regulatory reporting purposes of a banking entity that calculates risk-based capital ratios under the market risk capital rule, established by the banking entity or its affiliate for purposes of market risk capital calculations under the market risk capital rule.

■ 34. Section 351.4 is revised to read as follows:

§ 351.4 Permitted underwriting and market making-related activities.

(a) *Underwriting activities*—(1) *Permitted underwriting activities.* The prohibition contained in § 351.3(a) does not apply to a banking entity's underwriting activities conducted in accordance with this paragraph (a).

(2) *Requirements.* The underwriting activities of a banking entity are permitted under paragraph (a)(1) of this section only if:

(i) The banking entity is acting as an underwriter for a distribution of securities and the trading desk's underwriting position is related to such distribution;

(ii)(A) The amount and type of the securities in the trading desk's underwriting position are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, taking into account the liquidity, maturity, and depth of the market for the relevant types of securities; and

(B) Reasonable efforts are made to sell or otherwise reduce the underwriting position within a reasonable period, taking into account the liquidity, maturity, and depth of the market for the relevant types of securities;

(iii) In the case of a banking entity with significant trading assets and liabilities, the banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this paragraph (a), including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The products, instruments or exposures each trading desk may purchase, sell, or manage as part of its underwriting activities;

(B) Limits for each trading desk, in accordance with paragraph (a)(2)(ii)(A) of this section;

(C) Written authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval; and

(D) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits.

(iv) A banking entity with significant trading assets and liabilities may satisfy the requirements in paragraphs (a)(2)(iii)(B) and (C) of this section by complying with the requirements set forth in paragraph (c) of this section;

(v) The compensation arrangements of persons performing the activities described in this paragraph (a) are designed not to reward or incentivize prohibited proprietary trading; and

(vi) The banking entity is licensed or registered to engage in the activity described in this paragraph (a) in accordance with applicable law.

(3) *Definition of distribution.* For purposes of this paragraph (a), a *distribution* of securities means:

(i) An offering of securities, whether or not subject to registration under the Securities Act of 1933, that is distinguished from ordinary trading transactions by the presence of special selling efforts and selling methods; or

(ii) An offering of securities made pursuant to an effective registration statement under the Securities Act of 1933.

(4) *Definition of underwriter.* For purposes of this paragraph (a), *underwriter* means:

(i) A person who has agreed with an issuer or selling security holder to:

(A) Purchase securities from the issuer or selling security holder for distribution;

(B) Engage in a distribution of securities for or on behalf of the issuer or selling security holder; or

(C) Manage a distribution of securities for or on behalf of the issuer or selling security holder; or

(ii) A person who has agreed to participate or is participating in a distribution of such securities for or on behalf of the issuer or selling security holder.

(5) *Definition of selling security holder.* For purposes of this paragraph (a), *selling security holder* means any person, other than an issuer, on whose behalf a distribution is made.

(6) *Definition of underwriting position.* For purposes of this section, *underwriting position* means the long or short positions in one or more securities held by a banking entity or its affiliate, and managed by a particular trading desk, in connection with a particular distribution of securities for which such banking entity or affiliate is acting as an underwriter.

(7) *Definition of client, customer, and counterparty.* For purposes of this paragraph (a), the terms *client, customer, and counterparty,* on a collective or individual basis, refer to market participants that may transact with the banking entity in connection with a particular distribution for which the banking entity is acting as underwriter.

(b) *Market making-related activities*—(1) *Permitted market making-related activities.* The prohibition contained in § 351.3(a) does not apply to a banking entity's market making-related activities conducted in accordance with this paragraph (b).

(2) *Requirements.* The market making-related activities of a banking entity are permitted under paragraph (b)(1) of this section only if:

(i) The trading desk that establishes and manages the financial exposure, routinely stands ready to purchase and sell one or more types of financial instruments related to its financial exposure, and is willing and available to quote, purchase and sell, or otherwise enter into long and short positions in those types of financial instruments for its own account, in commercially reasonable amounts and throughout market cycles on a basis appropriate for the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(ii) The trading desk's market-making related activities are designed not to exceed, on an ongoing basis, the reasonably expected near term demands of clients, customers, or counterparties, taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(iii) In the case of a banking entity with significant trading assets and liabilities, the banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of paragraph (b) of this section, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The financial instruments each trading desk stands ready to purchase and sell in accordance with paragraph (b)(2)(i) of this section;

(B) The actions the trading desk will take to demonstrably reduce or otherwise significantly mitigate promptly the risks of its financial exposure consistent with the limits required under paragraph (b)(2)(iii)(C) of this section; the products, instruments, and exposures each trading desk may use for risk management purposes; the techniques and strategies each trading desk may use to manage the risks of its market making-related activities and positions; and the process, strategies, and personnel responsible for ensuring that the actions taken by the trading desk to mitigate these risks are and continue to be effective;

(C) Limits for each trading desk, in accordance with paragraph (b)(2)(ii) of this section;

(D) Written authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval; and

(E) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits; and

(iv) A banking entity with significant trading assets and liabilities may satisfy the requirements in paragraphs (b)(2)(iii)(C) and (D) of this section by complying with the requirements set forth in paragraph (c) of this section;

(v) The compensation arrangements of persons performing the activities described in this paragraph (b) are designed not to reward or incentivize prohibited proprietary trading; and

(vi) The banking entity is licensed or registered to engage in activity described in this paragraph (b) in accordance with applicable law.

(3) *Definition of client, customer, and counterparty.* For purposes of paragraph (b) of this section, the terms *client, customer, and counterparty,* on a collective or individual basis refer to market participants that make use of the banking entity's market making-related services by obtaining such services, responding to quotations, or entering into a continuing relationship with respect to such services, provided that:

(i) A trading desk or other organizational unit of another banking entity is not a client, customer, or counterparty of the trading desk if that other entity has trading assets and liabilities of $50 billion or more as measured in accordance with the methodology described in § 351.2(ee) of this part, unless:

(A) The trading desk documents how and why a particular trading desk or other organizational unit of the entity should be treated as a client, customer, or counterparty of the trading desk for purposes of paragraph (b)(2) of this section; or

(B) The purchase or sale by the trading desk is conducted anonymously on an exchange or similar trading facility that permits trading on behalf of a broad range of market participants.

(ii) [Reserved]

(4) *Definition of financial exposure.* For purposes of this section, *financial exposure* means the aggregate risks of one or more financial instruments and any associated loans, commodities, or foreign exchange or currency, held by a banking entity or its affiliate and managed by a particular trading desk as part of the trading desk's market making-related activities.

(5) *Definition of market-maker positions.* For the purposes of this section, *market-maker positions* means all of the positions in the financial instruments for which the trading desk stands ready to make a market in accordance with paragraph (b)(2)(i) of this section, that are managed by the trading desk, including the trading desk's open positions or exposures arising from open transactions.

(c) *Rebuttable presumption of compliance*—(1) *Internal limits.* (i) A banking entity shall be presumed to meet the requirement in paragraph (a)(2)(ii)(A) or (b)(2)(ii) of this section with respect to the purchase or sale of a financial instrument if the banking entity has established and implements, maintains, and enforces the internal limits for the relevant trading desk as described in paragraph (c)(1)(ii) of this section.

(ii)(A) With respect to underwriting activities conducted pursuant to paragraph (a) of this section, the presumption described in paragraph (c)(1)(i) of this section shall be available to each trading desk that establishes, implements, maintains, and enforces internal limits that should take into account the liquidity, maturity, and depth of the market for the relevant types of securities and are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, based on the nature and amount of the trading desk's underwriting activities, on the:

(*1*) Amount, types, and risk of its underwriting position;

(*2*) Level of exposures to relevant risk factors arising from its underwriting position; and

(*3*) Period of time a security may be held.

(B) With respect to market making-related activities conducted pursuant to paragraph (b) of this section, the presumption described in paragraph (c)(1)(i) of this section shall be available to each trading desk that establishes, implements, maintains, and enforces internal limits that should take into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments and are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, based on the nature and amount of the trading desk's market-making related activities, that address the:

(*1*) Amount, types, and risks of its market-maker positions;

(*2*) Amount, types, and risks of the products, instruments, and exposures the trading desk may use for risk management purposes;

(*3*) Level of exposures to relevant risk factors arising from its financial exposure; and

(*4*) Period of time a financial instrument may be held.

(2) *Supervisory review and oversight.* The limits described in paragraph (c)(1) of this section shall be subject to supervisory review and oversight by the FDIC on an ongoing basis.

(3) *Limit Breaches and Increases.* (i) With respect to any limit set pursuant to paragraph (c)(1)(ii)(A) or (B) of this section, a banking entity shall maintain and make available to the FDIC upon request records regarding:

(A) Any limit that is exceeded; and

(B) Any temporary or permanent increase to any limit(s), in each case in the form and manner as directed by the FDIC.

(ii) In the event of a breach or increase of any limit set pursuant to paragraph (c)(1)(ii)(A) or (B) of this section, the presumption described in paragraph (c)(1)(i) of this section shall continue to be available only if the banking entity:

(A) Takes action as promptly as possible after a breach to bring the trading desk into compliance; and

(B) Follows established written authorization procedures, including escalation procedures that require review and approval of any trade that exceeds a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval.

(4) *Rebutting the presumption.* The presumption in paragraph (c)(1)(i) of this section may be rebutted by the FDIC if the FDIC determines, taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments and based on all relevant facts and circumstances, that a trading desk is engaging in activity that is not based on the reasonably expected near term demands of clients, customers, or counterparties. The FDIC's rebuttal of the presumption in paragraph (c)(1)(i) must be made in accordance with the notice and response procedures in subpart D of this part.

■ 35. Section 351.5 is amended by revising paragraphs (b) and (c)(1) and adding paragraph (c)(4) to read as follows:

§ 351.5 Permitted risk-mitigating hedging activities.

* * * * *

(b) * * *

(1) The risk-mitigating hedging activities of a banking entity that has significant trading assets and liabilities are permitted under paragraph (a) of this section only if:

(i) The banking entity has established and implements, maintains and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(A) Reasonably designed written policies and procedures regarding the positions, techniques and strategies that may be used for hedging, including documentation indicating what positions, contracts or other holdings a particular trading desk may use in its risk-mitigating hedging activities, as well as position and aging limits with respect to such positions, contracts or other holdings;

(B) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(C) The conduct of analysis and independent testing designed to ensure that the positions, techniques and strategies that may be used for hedging may reasonably be expected to reduce or otherwise significantly mitigate the specific, identifiable risk(s) being hedged;

(ii) The risk-mitigating hedging activity:

(A) Is conducted in accordance with the written policies, procedures, and internal controls required under this section;

(B) At the inception of the hedging activity, including, without limitation, any adjustments to the hedging activity, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, commodity price risk, basis risk, or similar risks, arising in connection with and related to identified positions, contracts, or other holdings of the banking entity, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof;

(C) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section;

(D) Is subject to continuing review, monitoring and management by the banking entity that:

(*1*) Is consistent with the written hedging policies and procedures required under paragraph (b)(1)(i) of this section;

(*2*) Is designed to reduce or otherwise significantly mitigate the specific, identifiable risks that develop over time from the risk-mitigating hedging activities undertaken under this section and the underlying positions, contracts, and other holdings of the banking entity, based upon the facts and circumstances of the underlying and hedging positions, contracts and other holdings of the banking entity and the risks and liquidity thereof; and

(*3*) Requires ongoing recalibration of the hedging activity by the banking entity to ensure that the hedging activity satisfies the requirements set out in paragraph (b)(1)(ii) of this section and is not prohibited proprietary trading; and

(iii) The compensation arrangements of persons performing risk-mitigating hedging activities are designed not to reward or incentivize prohibited proprietary trading.

(2) The risk-mitigating hedging activities of a banking entity that does not have significant trading assets and liabilities are permitted under paragraph (a) of this section only if the risk-mitigating hedging activity:

(i) At the inception of the hedging activity, including, without limitation, any adjustments to the hedging activity, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, commodity price risk, basis risk, or similar risks, arising in connection with and related to identified positions, contracts, or other holdings of the banking entity, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof; and

(ii) Is subject, as appropriate, to ongoing recalibration by the banking entity to ensure that the hedging activity satisfies the requirements set out in paragraph (b)(2) of this section and is not prohibited proprietary trading.

(c) * * *

(1) A banking entity that has significant trading assets and liabilities must comply with the requirements of paragraphs (c)(2) and (3) of this section, unless the requirements of paragraph (c)(4) of this section are met, with respect to any purchase or sale of financial instruments made in reliance on this section for risk-mitigating hedging purposes that is:

* * * * *

(4) The requirements of paragraphs (c)(2) and (3) of this section do not apply to the purchase or sale of a financial instrument described in paragraph (c)(1) of this section if:

(i) The financial instrument purchased or sold is identified on a written list of pre-approved financial instruments that are commonly used by the trading desk for the specific type of hedging activity for which the financial instrument is being purchased or sold; and

(ii) At the time the financial instrument is purchased or sold, the hedging activity (including the purchase or sale of the financial instrument) complies with written, pre-approved limits for the trading desk purchasing or selling the financial instrument for hedging activities undertaken for one or more other trading desks. The limits shall be appropriate for the:

(A) Size, types, and risks of the hedging activities commonly undertaken by the trading desk;

(B) Financial instruments purchased and sold for hedging activities by the trading desk; and

(C) Levels and duration of the risk exposures being hedged.

■ 36. Section 351.6 is amended by revising paragraph (e)(3); removing paragraphs (e)(4) and (6); and redesignating paragraph (e)(5) as paragraph (e)(4).

The revisions reads as follows:

§ 351.6 Other permitted proprietary trading activities.

* * * * *

(e) * * *

(3) A purchase or sale by a banking entity is permitted for purposes of this paragraph (e) if:

(i) The banking entity engaging as principal in the purchase or sale (including relevant personnel) is not located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to purchase or sell as principal is not located in the United States or organized under the laws of the United States or of any State; and

(iii) The purchase or sale, including any transaction arising from risk-mitigating hedging related to the instruments purchased or sold, is not accounted for as principal directly or on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State.

* * * * *

Subpart C—Covered Funds Activities and Investments

■ 37. Section 351.10 is amended by revising paragraphs (c)(7)(ii) and (c)(8)(i)(A) to read as follows:

§ 351.10 Prohibition on Acquiring or Retaining an Ownership Interest in and Having Certain Relationships with a Covered Fund.

* * * * *

(c) * * *

(7) * * *

(ii) Participates in the profits and losses of the separate account other than in compliance with applicable requirements regarding bank owned life insurance.

(8) * * *

(i) * * *

(A) Loans as defined in § 351.2(t) of subpart A;

* * * * *

■ 38. Section 351.11 is amended by revising paragraph (c) to read as follows:

§ 351.11 Permitted organizing and offering, underwriting, and market making with respect to a covered fund.

* * * * *

(c) *Underwriting and market making in ownership interests of a covered fund.* The prohibition contained in § 351.10(a) of this subpart does not apply to a banking entity's underwriting activities or market making-related activities involving a covered fund so long as:

(1) Those activities are conducted in accordance with the requirements of § 351.4(a) or (b) of subpart B, respectively; and

(2) With respect to any banking entity (or any affiliate thereof) that: Acts as a sponsor, investment adviser or commodity trading advisor to a particular covered fund or otherwise acquires and retains an ownership interest in such covered fund in reliance on paragraph (a) of this section; or acquires and retains an ownership interest in such covered fund and is either a securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78*o*–11(a)(3)), or is acquiring and retaining an ownership interest in such covered fund in compliance with section 15G of that Act (15 U.S.C.78*o*–11) and the implementing regulations issued thereunder each as permitted by paragraph (b) of this section, then in each such case any ownership interests acquired or retained by the banking entity and its affiliates in connection with underwriting and market making related activities for that particular covered fund are included in the calculation of ownership interests permitted to be held by the banking entity and its affiliates under the limitations of § 351.12(a)(2)(ii) and (iii) and (d) of this subpart.

§ 351.12 [Amended]

■ 39. Section 351.12 is amended by redesignating the second instance of paragraph (e)(2)(vi) as paragraph (e)(2)(vii).

■ 40. Section 351.13 is amended by revising paragraphs (a), (b)(3) and (4), and (c) to read as follows:

§ 351.13 Other permitted covered fund activities and investments.

(a) *Permitted risk-mitigating hedging activities.* (1) The prohibition contained in § 351.10(a) of this subpart does not apply with respect to an ownership interest in a covered fund acquired or retained by a banking entity that is designed to reduce or otherwise significantly mitigate the specific, identifiable risks to the banking entity in connection with:

(i) A compensation arrangement with an employee of the banking entity or an affiliate thereof that directly provides investment advisory, commodity trading advisory or other services to the covered fund; or

(ii) A position taken by the banking entity when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund.

(2) The risk-mitigating hedging activities of a banking entity are permitted under this paragraph (a) only if:

(i) The banking entity has established and implements, maintains and enforces an internal compliance program in accordance with subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(A) Reasonably designed written policies and procedures; and

(B) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(ii) The acquisition or retention of the ownership interest:

(A) Is made in accordance with the written policies, procedures, and internal controls required under this section;

(B) At the inception of the hedge, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks arising:

(*1*) Out of a transaction conducted solely to accommodate a specific customer request with respect to the covered fund; or

(*2*) In connection with the compensation arrangement with the employee that directly provides investment advisory, commodity trading advisory, or other services to the covered fund;

(C) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section; and

(D) Is subject to continuing review, monitoring and management by the banking entity.

(iii) With respect to risk-mitigating hedging activity conducted pursuant to paragraph (a)(1)(i) of this section, the compensation arrangement relates solely to the covered fund in which the banking entity or any affiliate has acquired an ownership interest pursuant to paragraph (a)(1)(i) and such compensation arrangement provides that any losses incurred by the banking entity on such ownership interest will be offset by corresponding decreases in amounts payable under such compensation arrangement.

(b) * * *

(3) An ownership interest in a covered fund is not offered for sale or sold to a resident of the United States for purposes of paragraph (b)(1)(iii) of this section only if it is not sold and has not been sold pursuant to an offering that targets residents of the United States in which the banking entity or any affiliate of the banking entity participates. If the banking entity or an affiliate sponsors or serves, directly or indirectly, as the investment manager, investment adviser, commodity pool operator or commodity trading advisor to a covered fund, then the banking entity or affiliate will be deemed for purposes of this paragraph (b)(3) to participate in any offer or sale by the covered fund of ownership interests in the covered fund.

(4) An activity or investment occurs solely outside of the United States for purposes of paragraph (b)(1)(iv) of this section only if:

(i) The banking entity acting as sponsor, or engaging as principal in the acquisition or retention of an ownership interest in the covered fund, is not itself, and is not controlled directly or indirectly by, a banking entity that is located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to acquire or retain the ownership interest or act as sponsor to the covered fund is not located in the United States or organized under the laws of the United States or of any State; and

(iii) The investment or sponsorship, including any transaction arising from risk-mitigating hedging related to an ownership interest, is not accounted for as principal directly or indirectly on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State.

* * * * *

(c) *Permitted covered fund interests and activities by a regulated insurance company.* The prohibition contained in § 351.10(a) of this subpart does not apply to the acquisition or retention by an insurance company, or an affiliate thereof, of any ownership interest in, or the sponsorship of, a covered fund only if:

(1) The insurance company or its affiliate acquires and retains the ownership interest solely for the general account of the insurance company or for one or more separate accounts established by the insurance company;

(2) The acquisition and retention of the ownership interest is conducted in compliance with, and subject to, the insurance company investment laws and regulations of the State or jurisdiction in which such insurance company is domiciled; and

(3) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and foreign jurisdictions, as appropriate, have not jointly determined, after notice and comment, that a particular law or regulation described in paragraph (c)(2) of this section is insufficient to protect the safety and soundness of the banking entity, or the financial stability of the United States.

■ 41. Section 351.14 is amended by revising paragraph (a)(2)(ii)(B) to read as follows:

§ 351.14 Limitations on relationships with a covered fund.

(a) * * *

(2) * * *

(ii) * * *

(B) The chief executive officer (or equivalent officer) of the banking entity certifies in writing annually no later than March 31 to the FDIC (with a duty to update the certification if the information in the certification materially changes) that the banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests; and

* * * * *

Subpart D—Compliance Program Requirement; Violations

■ 42. Section 351.20 is amended by revising paragraphs (a), (b) introductory text, (c), (d), (e) introductory text, and (f)(2) and adding paragraphs (g), (h), and (i) to read as follows:

§ 351.20 Program for compliance; reporting.

(a) *Program requirement.* Each banking entity (other than a banking entity with limited trading assets and liabilities) shall develop and provide for the continued administration of a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part. The terms, scope, and detail of the compliance program shall be appropriate for the types, size, scope, and complexity of activities and business structure of the banking entity.

(b) *Banking entities with significant trading assets and liabilities.* With respect to a banking entity with significant trading assets and liabilities, the compliance program required by paragraph (a) of this section, at a minimum, shall include:

* * * * *

(c) *CEO attestation.* The CEO of a banking entity that has significant trading assets and liabilities must, based on a review by the CEO of the banking entity, attest in writing to the FDIC, each year no later than March 31, that the banking entity has in place processes to establish, maintain, enforce, review, test and modify the compliance program required by paragraph (b) of this section in a manner reasonably designed to achieve compliance with section 13 of the BHC Act and this part. In the case of a U.S. branch or agency of a foreign banking entity, the attestation may be provided for the entire U.S. operations of the foreign banking entity by the senior management officer of the U.S. operations of the foreign banking entity who is located in the United States.

(d) *Reporting requirements under appendix A to this part.* (1) A banking entity engaged in proprietary trading activity permitted under subpart B shall comply with the reporting requirements described in appendix A to this part, if:

(i) The banking entity has significant trading assets and liabilities; or

(ii) The FDIC notifies the banking entity in writing that it must satisfy the reporting requirements contained in appendix A to this part.

(2) Frequency of reporting: Unless the FDIC notifies the banking entity in writing that it must report on a different basis, a banking entity subject to appendix A to this part shall report the information required by appendix A for each quarter within 30 days of the end of the quarter.

(e) *Additional documentation for covered funds.* A banking entity with significant trading assets and liabilities shall maintain records that include:

* * * * *

(f) * * *

(2) *Banking entities with moderate trading assets and liabilities.* A banking entity with moderate trading assets and liabilities may satisfy the requirements of this section by including in its existing compliance policies and procedures appropriate references to the requirements of section 13 of the BHC Act and this part and adjustments as appropriate given the activities, size, scope, and complexity of the banking entity.

(g) *Rebuttable presumption of compliance for banking entities with limited trading assets and liabilities*—(1) *Rebuttable presumption.* Except as otherwise provided in this paragraph, a banking entity with limited trading assets and liabilities shall be presumed to be compliant with subpart B and subpart C of this part and shall have no obligation to demonstrate compliance with this part on an ongoing basis.

(2) *Rebuttal of presumption.* If upon examination or audit, the FDIC determines that the banking entity has engaged in proprietary trading or covered fund activities that are otherwise prohibited under subpart B or subpart C of this part, the FDIC may require the banking entity to be treated under this part as if it did not have limited trading assets and liabilities. The FDIC's rebuttal of the presumption in this paragraph must be made in accordance with the notice and response procedures in paragraph (i) of this section.

(h) *Reservation of authority.* Notwithstanding any other provision of this part, the FDIC retains its authority to require a banking entity without significant trading assets and liabilities to apply any requirements of this part that would otherwise apply if the banking entity had significant or moderate trading assets and liabilities if the FDIC determines that the size or complexity of the banking entity's trading or investment activities, or the risk of evasion of subpart B or subpart C of this part, does not warrant a presumption of compliance under paragraph (g) of this section or treatment as a banking entity with moderate trading assets and liabilities, as applicable. The FDIC's exercise of this reservation of authority must be made in accordance with the notice and response procedures in paragraph (i) of this section.

(i) *Notice and response procedures*—(1) *Notice.* The FDIC will notify the banking entity in writing of any determination requiring notice under this part and will provide an explanation of the determination.

(2) *Response.* The banking entity may respond to any or all items in the notice described in paragraph (i)(1) of this section. The response should include any matters that the banking entity would have the FDIC consider in deciding whether to make the determination. The response must be in writing and delivered to the designated FDIC official within 30 days after the date on which the banking entity received the notice. The FDIC may shorten the time period when, in the opinion of the FDIC, the activities or condition of the banking entity so requires, provided that the banking entity is informed of the time period at the time of notice, or with the consent of the banking entity. In its discretion, the FDIC may extend the time period for good cause.

(3) *Waiver.* Failure to respond within 30 days or such other time period as may be specified by the FDIC shall constitute a waiver of any objections to the FDIC determination.

(4) *Decision.* The FDIC will notify the banking entity of the decision in writing. The notice will include an explanation of the decision.

■ 43. Revise appendix A to part 351 to read as follows:

Appendix A to Part 351—Reporting and Recordkeeping Requirements for Covered Trading Activities

I. Purpose

a. This appendix sets forth reporting and recordkeeping requirements that certain banking entities must satisfy in connection with the restrictions on proprietary trading set forth in subpart B (''proprietary trading restrictions''). Pursuant to § 351.20(d), this appendix applies to a banking entity that, together with its affiliates and subsidiaries, has significant trading assets and liabilities. These entities are required to (i) furnish periodic reports to the FDIC regarding a variety of quantitative measurements of their covered trading activities, which vary depending on the scope and size of covered trading activities, and (ii) create and maintain records documenting the preparation and content of these reports. The requirements of this appendix must be incorporated into the banking entity's internal compliance program under § 351.20.

b. The purpose of this appendix is to assist banking entities and the FDIC in:

(1) Better understanding and evaluating the scope, type, and profile of the banking entity's covered trading activities;

(2) Monitoring the banking entity's covered trading activities;

(3) Identifying covered trading activities that warrant further review or examination by the banking entity to verify compliance with the proprietary trading restrictions;

(4) Evaluating whether the covered trading activities of trading desks engaged in market making-related activities subject to § 351.4(b) are consistent with the requirements governing permitted market making-related activities;

(5) Evaluating whether the covered trading activities of trading desks that are engaged in permitted trading activity subject to § 351.4, § 351.5, or § 351.6(a) and (b) (*i.e.,* underwriting and market making-related activity, risk-mitigating hedging, or trading in certain government obligations) are consistent with the requirement that such activity not result, directly or indirectly, in a material exposure to high-risk assets or high-risk trading strategies;

(6) Identifying the profile of particular covered trading activities of the banking entity, and the individual trading desks of the banking entity, to help establish the appropriate frequency and scope of examination by the FDIC of such activities; and

(7) Assessing and addressing the risks associated with the banking entity's covered trading activities.

c. Information that must be furnished pursuant to this appendix is not intended to serve as a dispositive tool for the identification of permissible or impermissible activities.

d. In addition to the quantitative measurements required in this appendix, a banking entity may need to develop and implement other quantitative measurements in order to effectively monitor its covered trading activities for compliance with section 13 of the BHC Act and this part and to have an effective compliance program, as required by § 351.20. The effectiveness of particular quantitative measurements may differ based on the profile of the banking entity's businesses in general and, more specifically, of the particular trading desk, including types of instruments traded, trading activities and strategies, and history and experience (*e.g.,* whether the trading desk is an established, successful market maker or a new entrant to a competitive market). In all cases, banking entities must ensure that they have robust measures in place to identify and monitor the risks taken in their trading activities, to ensure that the activities are within risk tolerances established by the banking entity, and to monitor and examine for compliance with the proprietary trading restrictions in this part.

e. On an ongoing basis, banking entities must carefully monitor, review, and evaluate all furnished quantitative measurements, as well as any others that they choose to utilize in order to maintain compliance with section 13 of the BHC Act and this part. All measurement results that indicate a heightened risk of impermissible proprietary trading, including with respect to otherwise-permitted activities under §§ 351.4 through 351.6(a) and (b), or that result in a material exposure to high-risk assets or high-risk trading strategies, must be escalated within the banking entity for review, further analysis, explanation to the FDIC, and remediation, where appropriate. The quantitative measurements discussed in this appendix should be helpful to banking entities in identifying and managing the risks related to their covered trading activities.

II. Definitions

The terms used in this appendix have the same meanings as set forth in §§ 351.2 and 351.3. In addition, for purposes of this appendix, the following definitions apply:

Applicability identifies the trading desks for which a banking entity is required to calculate and report a particular quantitative measurement based on the type of covered trading activity conducted by the trading desk.

Calculation period means the period of time for which a particular quantitative measurement must be calculated.

Comprehensive profit and loss means the net profit or loss of a trading desk's material sources of trading revenue over a specific period of time, including, for example, any increase or decrease in the market value of a trading desk's holdings, dividend income, and interest income and expense.

Covered trading activity means trading conducted by a trading desk under § 351.4, § 351.5, § 351.6(a), or § 351.6(b). A banking entity may include in its covered trading activity trading conducted under § 351.3(d), § 351.6(c), § 351.6(d) or § 351.6(e).

Measurement frequency means the frequency with which a particular quantitative metric must be calculated and recorded.

Trading day means a calendar day on which a trading desk is open for trading.

III. Reporting and Recordkeeping

a. Scope of Required Reporting

1. Quantitative measurements. Each banking entity made subject to this appendix by § 351.20 must furnish the following quantitative measurements, as applicable, for each trading desk of the banking entity engaged in covered trading activities and calculate these quantitative measurements in accordance with this appendix:

i. Internal Limits and Usage;

ii. Value-at-Risk;

iii. Comprehensive Profit and Loss Attribution;

iv. Positions; and

v. Transaction Volumes.

2. Trading desk information. Each banking entity made subject to this appendix by § 351.20 must provide certain descriptive information, as further described in this appendix, regarding each trading desk engaged in covered trading activities.

3. Quantitative measurements identifying information. Each banking entity made subject to this appendix by § 351.20 must provide certain identifying and descriptive information, as further described in this appendix, regarding its quantitative measurements.

4. Narrative statement. Each banking entity made subject to this appendix by § 351.20 may provide an optional narrative statement, as further described in this appendix.

5. File identifying information. Each banking entity made subject to this appendix by § 351.20 must provide file identifying information in each submission to the FDIC pursuant to this appendix, including the name of the banking entity, the RSSD ID assigned to the top-tier banking entity by the Board, and identification of the reporting period and creation date and time.

b. Trading Desk Information

1. Each banking entity must provide descriptive information regarding each trading desk engaged in covered trading activities, including:

i. Name of the trading desk used internally by the banking entity and a unique identification label for the trading desk;

ii. Identification of each type of covered trading activity in which the trading desk is engaged;

iii. Brief description of the general strategy of the trading desk;

v. A list identifying each Agency receiving the submission of the trading desk;

2. Indication of whether each calendar date is a trading day or not a trading day for the trading desk; and

3. Currency reported and daily currency conversion rate.

c. Quantitative Measurements Identifying Information

Each banking entity must provide the following information regarding the quantitative measurements:

1. An Internal Limits Information Schedule that provides identifying and descriptive information for each limit reported pursuant to the Internal Limits and Usage quantitative measurement, including the name of the limit, a unique identification label for the limit, a description of the limit, the unit of measurement for the limit, the type of limit, and identification of the corresponding risk factor attribution in the particular case that the limit type is a limit on a risk factor sensitivity and profit and loss attribution to the same risk factor is reported; and

2. A Risk Factor Attribution Information Schedule that provides identifying and descriptive information for each risk factor attribution reported pursuant to the Comprehensive Profit and Loss Attribution quantitative measurement, including the name of the risk factor or other factor, a unique identification label for the risk factor or other factor, a description of the risk factor or other factor, and the risk factor or other factor's change unit.

d. Narrative Statement

Each banking entity made subject to this appendix by § 351.20 may submit in a separate electronic document a Narrative Statement to the FDIC with any information the banking entity views as relevant for assessing the information reported. The Narrative Statement may include further description of or changes to calculation methods, identification of material events, description of and reasons for changes in the banking entity's trading desk structure or trading desk strategies, and when any such changes occurred.

e. Frequency and Method of Required Calculation and Reporting

A banking entity must calculate any applicable quantitative measurement for each trading day. A banking entity must report the Trading Desk Information, the Quantitative Measurements Identifying Information, and each applicable quantitative measurement electronically to the FDIC on the reporting schedule established in § 351.20 unless otherwise requested by the FDIC. A banking entity must report the Trading Desk Information, the Quantitative Measurements Identifying Information, and each applicable quantitative measurement to the FDIC in accordance with the XML Schema specified and published on the FDIC's website.

f. Recordkeeping

A banking entity must, for any quantitative measurement furnished to the FDIC pursuant to this appendix and § 351.20(d), create and maintain records documenting the preparation and content of these reports, as well as such information as is necessary to permit the FDIC to verify the accuracy of such reports, for a period of five years from the end of the calendar year for which the measurement was taken. A banking entity must retain the Narrative Statement, the Trading Desk Information, and the Quantitative Measurements Identifying Information for a period of five years from the end of the calendar year for which the information was reported to the FDIC.

IV. Quantitative Measurements

a. Risk-Management Measurements

1. Internal Limits and Usage

i. *Description:* For purposes of this appendix, Internal Limits are the constraints that define the amount of risk and the positions that a trading desk is permitted to take at a point in time, as defined by the banking entity for a specific trading desk. Usage represents the value of the trading desk's risk or positions that are accounted for by the current activity of the desk. Internal limits and their usage are key compliance and risk management tools used to control and monitor risk taking and include, but are not limited to, the limits set out in §§ 351.4 and 351.5. A trading desk's risk limits, commonly including a limit on ''Value-at-Risk,'' are useful in the broader context of the trading desk's overall activities, particularly for the market making activities under § 351.4(b) and hedging activity under § 351.5. Accordingly, the limits required under §§ 351.4(b)(2)(iii)(C) and 351.5(b)(1)(i)(A) must meet the applicable requirements under §§ 351.4(b)(2)(iii)(C) and 351.5(b)(1)(i)(A) and also must include appropriate metrics for the trading desk limits including, at a minimum, ''Value-at-Risk'' except to the extent the ''Value-at-Risk'' metric is demonstrably ineffective for measuring and monitoring the risks of a trading desk based on the types of positions traded by, and risk exposures of, that desk.

A. A banking entity must provide the following information for each limit reported pursuant to this quantitative measurement: The unique identification label for the limit reported in the Internal Limits Information Schedule, the limit size (distinguishing between an upper and a lower limit), and the value of usage of the limit.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks engaged in covered trading activities.

2. Value-at-Risk

i. *Description:* For purposes of this appendix, Value-at-Risk (''VaR'') is the measurement of the risk of future financial loss in the value of a trading desk's aggregated positions at the ninety-nine percent confidence level over a one-day period, based on current market conditions.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks engaged in covered trading activities.

b. Source-of-Revenue Measurements

1. Comprehensive Profit and Loss Attribution

i. *Description:* For purposes of this appendix, Comprehensive Profit and Loss Attribution is an analysis that attributes the daily fluctuation in the value of a trading desk's positions to various sources. First, the daily profit and loss of the aggregated positions is divided into two categories: (i) Profit and loss attributable to a trading desk's existing positions that were also positions held by the trading desk as of the end of the prior day (''existing positions''); and (ii) profit and loss attributable to new positions resulting from the current day's trading activity (''new positions'').

A. The comprehensive profit and loss associated with existing positions must reflect changes in the value of these positions on the applicable day. The comprehensive profit and loss from existing positions must be further attributed, as applicable, to (i) changes in the specific risk factors and other factors that are monitored and managed as part of the trading desk's overall risk management policies and procedures; and (ii) any other applicable elements, such as cash flows, carry, changes in reserves, and the correction, cancellation, or exercise of a trade.

B. For the attribution of comprehensive profit and loss from existing positions to specific risk factors and other factors, a banking entity must provide the following information for the factors that explain the preponderance of the profit or loss changes due to risk factor changes: The unique identification label for the risk factor or other factor listed in the Risk Factor Attribution Information Schedule, and the profit or loss due to the risk factor or other factor change.

C. The comprehensive profit and loss attributed to new positions must reflect commissions and fee income or expense and market gains or losses associated with transactions executed on the applicable day. New positions include purchases and sales of financial instruments and other assets/liabilities and negotiated amendments to existing positions. The comprehensive profit and loss from new positions may be reported in the aggregate and does not need to be further attributed to specific sources.

D. The portion of comprehensive profit and loss from existing positions that is not attributed to changes in specific risk factors and other factors must be allocated to a residual category. Significant unexplained profit and loss must be escalated for further investigation and analysis.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks engaged in covered trading activities.

c. Positions and Transaction Volumes Measurements

1. Positions

i. *Description:* For purposes of this appendix, Positions is the value of securities and derivatives positions managed by the trading desk. For purposes of the Positions quantitative measurement, do not include in the Positions calculation for ''securities'' those securities that are also ''derivatives,'' as those terms are defined under subpart A; instead, report those securities that are also derivatives as ''derivatives.'' [1225] A banking entity must separately report the trading desk's market value of long securities positions, short securities positions, derivatives receivables, and derivatives payables.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks that rely on § 351.4(a) or § 351.4(b) to conduct underwriting activity or market-making-related activity, respectively.

2. Transaction Volumes

i. *Description:* For purposes of this appendix, Transaction Volumes measures three exclusive categories of covered trading activity conducted by a trading desk. A banking entity is required to report the value and number of security and derivative transactions conducted by the trading desk with: (i) Customers, excluding internal transactions; (ii) non-customers, excluding internal transactions; and (iii) trading desks and other organizational units where the transaction is booked into either the same banking entity or an affiliated banking entity. For securities, value means gross market value. For derivatives, value means gross notional value. For purposes of calculating the Transaction Volumes quantitative measurement, do not include in the Transaction Volumes calculation for ''securities'' those securities that are also ''derivatives,'' as those terms are defined under subpart A; instead, report those securities that are also derivatives as ''derivatives.'' [1226] Further, for purposes of the Transaction Volumes quantitative measurement, a customer of a trading desk that relies on § 351.4(a) to conduct underwriting activity is a market participant identified in § 351.4(a)(7), and a customer of a trading desk that relies on § 351.4(b) to conduct market making-related activity is a market participant identified in § 351.4(b)(3).

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks that rely on § 351.4(a) or § 351.4(b) to conduct underwriting activity or market-making-related activity, respectively.

Appendix B to Part 351 [Removed]

■ 44. Appendix B to part 351 is removed.

■ 45. Effective January 1, 2020 until December 31, 2020, appendix Z to part 351 is added to read as follows:

Appendix Z to Part 351—Proprietary Trading and Certain Interests in and Relationships With Covered Funds (Alternative Compliance)

Note: The content of this appendix reproduces the regulation implementing Section 13 of the Bank Holding Company Act as of November 13, 2019.

Subpart A—Authority and Definitions

§ 351.1 Authority, purpose, scope, and relationship to other authorities.

(a) *Authority.* This part is issued by the FDIC under section 13 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1851).

(b) *Purpose.* Section 13 of the Bank Holding Company Act establishes prohibitions and restrictions on proprietary trading and investments in or relationships with covered funds by certain banking entities, including any insured depository institution as defined in section 3(c)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)(2)) and certain subsidiaries thereof for which the FDIC is the appropriate Federal banking agency as defined in section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)). This part implements section 13 of the Bank Holding Company Act by defining terms used in the statute and related terms, establishing prohibitions and restrictions on proprietary trading and investments in or relationships with covered funds, and explaining the statute's requirements.

(c) *Scope.* This part implements section 13 of the Bank Holding Company Act with respect to insured depository institutions for which the FDIC is the appropriate Federal banking agency, as defined in section 3(q) of the Federal Deposit Insurance Act, and certain subsidiaries of the foregoing, but does not include such entities to the extent they are not within the definition of banking entity in § 351.2(c).

(d) *Relationship to other authorities.* Except as otherwise provided in under section 13 of the Bank Holding Company Act, and notwithstanding any other provision of law, the prohibitions and restrictions under section 13 of Bank Holding Company Act shall apply to the activities and investments of a banking entity, even if such activities and investments are authorized for a banking entity under other applicable provisions of law.

(e) *Preservation of authority.* Nothing in this part limits in any way the authority of the FDIC to impose on a banking entity identified in paragraph (c) of this section additional requirements or restrictions with respect to any activity, investment, or relationship covered under section 13 of the Bank Holding Company Act or this part, or additional penalties for violation of this part provided under any other applicable provision of law.

§ 351.2 Definitions.

Unless otherwise specified, for purposes of this part:

[1225] *See* § 351.2(h), (aa). For example, under this part, a security-based swap is both a ''security'' and a ''derivative.'' For purposes of the Positions quantitative measurement, security-based swaps are reported as derivatives rather than securities.

[1226] *See* § 351.2(h), (aa).

(a) *Affiliate* has the same meaning as in section 2(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(k)).

(b) *Bank holding company* has the same meaning as in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

(c) *Banking entity.* (1) Except as provided in paragraph (c)(2) of this section, *banking entity* means:

(i) Any insured depository institution;

(ii) Any company that controls an insured depository institution;

(iii) Any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(iv) Any affiliate or subsidiary of any entity described in paragraphs (c)(1)(i), (ii), or (iii) of this section.

(2) Banking entity does not include:

(i) A covered fund that is not itself a banking entity under paragraphs (c)(1)(i), (ii), or (iii) of this section;

(ii) A portfolio company held under the authority contained in section 4(k)(4)(H) or (I) of the BHC Act (12 U.S.C. 1843(k)(4)(H), (I)), or any 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), so long as the portfolio company or portfolio concern is not itself a banking entity under paragraphs (c)(1)(i), (ii), or (iii) of this section; or

(iii) The FDIC acting in its corporate capacity or as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(d) *Board* means the Board of Governors of the Federal Reserve System.

(e) *CFTC* means the Commodity Futures Trading Commission.

(f) *Dealer* has the same meaning as in section 3(a)(5) of the Exchange Act (15 U.S.C. 78c(a)(5)).

(g) *Depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(h) *Derivative.* (1) Except as provided in paragraph (h)(2) of this section, *derivative* means:

(i) Any swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68));

(ii) Any purchase or sale of a commodity, that is not an excluded commodity, for deferred shipment or delivery that is intended to be physically settled;

(iii) Any foreign exchange forward (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)) or foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25));

(iv) Any agreement, contract, or transaction in foreign currency described in section 2(c)(2)(C)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(C)(i));

(v) Any agreement, contract, or transaction in a commodity other than foreign currency described in section 2(c)(2)(D)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(D)(i)); and

(vi) Any transaction authorized under section 19 of the Commodity Exchange Act (7 U.S.C. 23(a) or (b));

(2) A derivative does not include:

(i) Any consumer, commercial, or other agreement, contract, or transaction that the CFTC and SEC have further defined by joint regulation, interpretation, guidance, or other action as not within the definition of swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)); or

(ii) Any identified banking product, as defined in section 402(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b)), that is subject to section 403(a) of that Act (7 U.S.C. 27a(a)).

(i) *Employee* includes a member of the immediate family of the employee.

(j) *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(k) *Excluded commodity* has the same meaning as in section 1a(19) of the Commodity Exchange Act (7 U.S.C. 1a(19)).

(l) *FDIC* means the Federal Deposit Insurance Corporation.

(m) *Federal banking agencies* means the Board, the Office of the Comptroller of the Currency, and the FDIC.

(n) *Foreign banking organization* has the same meaning as in section 211.21(o) of the Board's Regulation K (12 CFR 211.21(o)), but does not include a foreign bank, as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(7)), that is organized under the laws of the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, or the Commonwealth of the Northern Mariana Islands.

(o) *Foreign insurance regulator* means the insurance commissioner, or a similar official or agency, of any country other than the United States that is engaged in the supervision of insurance companies under foreign insurance law.

(p) *General account* means all of the assets of an insurance company except those allocated to one or more separate accounts.

(q) *Insurance company* means a company that is organized as an insurance company, primarily and predominantly engaged in writing insurance or reinsuring risks underwritten by insurance companies, subject to supervision as such by a state insurance regulator or a foreign insurance regulator, and not operated for the purpose of evading the provisions of section 13 of the BHC Act (12 U.S.C. 1851).

(r) *Insured depository institution,* unless otherwise indicated, has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)), but does not include:

(1) An insured depository institution that is described in section 2(c)(2)(D) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)(2)(D)); or

(2) An insured depository institution if it has, and if every company that controls it has, total consolidated assets of $10 billion or less and total trading assets and trading liabilities, on a consolidated basis, that are 5 percent or less of total consolidated assets.

(s) *Loan* means any loan, lease, extension of credit, or secured or unsecured receivable that is not a security or derivative.

(t) *Primary financial regulatory agency* has the same meaning as in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5301(12)).

(u) *Purchase* includes any contract to buy, purchase, or otherwise acquire. For security futures products, purchase includes any contract, agreement, or transaction for future delivery. With respect to a commodity future, purchase includes any contract, agreement, or transaction for future delivery. With respect to a derivative, purchase includes the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(v) *Qualifying foreign banking organization* means a foreign banking organization that qualifies as such under section 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c), or (e)).

(w) *SEC* means the Securities and Exchange Commission.

(x) *Sale* and *sell* each include any contract to sell or otherwise dispose of. For security futures products, such terms include any contract, agreement, or transaction for future delivery. With respect to a commodity future, such terms include any contract, agreement, or transaction for future delivery. With respect to a derivative, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(y) *Security* has the meaning specified in section 3(a)(10) of the Exchange Act (15 U.S.C. 78c(a)(10)).

(z) *Security-based swap dealer* has the same meaning as in section 3(a)(71) of the Exchange Act (15 U.S.C. 78c(a)(71)).

(aa) *Security future* has the meaning specified in section 3(a)(55) of the Exchange Act (15 U.S.C. 78c(a)(55)).

(bb) *Separate account* means an account established and maintained by an insurance company in connection with one or more insurance contracts to hold assets that are legally segregated from the insurance company's other assets, under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(cc) *State* means any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(dd) *Subsidiary* has the same meaning as in section 2(d) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(d)).

(ee) *State insurance regulator* means the insurance commissioner, or a similar official or agency, of a State that is engaged in the supervision of insurance companies under State insurance law.

(ff) *Swap dealer* has the same meaning as in section 1(a)(49) of the Commodity Exchange Act (7 U.S.C. 1a(49)).

Subpart B—Proprietary Trading

§ 351.3 Prohibition on proprietary trading.

(a) *Prohibition.* Except as otherwise provided in this subpart, a banking entity may not engage in proprietary trading. *Proprietary trading* means engaging as principal for the trading account of the banking entity in any purchase or sale of one or more financial instruments.

(b) *Definition of trading account.* (1) Trading account means any account that is used by a banking entity to:

(i) Purchase or sell one or more financial instruments principally for the purpose of:

(A) Short-term resale;

(B) Benefitting from actual or expected short-term price movements;

(C) Realizing short-term arbitrage profits; or

(D) Hedging one or more positions resulting from the purchases or sales of financial instruments described in paragraphs (b)(1)(i)(A), (B), or (C) of this section;

(ii) Purchase or sell one or more financial instruments that are both market risk capital rule covered positions and trading positions (or hedges of other market risk capital rule covered positions), if the banking entity, or any affiliate of the banking entity, is an insured depository institution, bank holding company, or savings and loan holding company, and calculates risk-based capital ratios under the market risk capital rule; or

(iii) Purchase or sell one or more financial instruments for any purpose, if the banking entity:

(A) Is licensed or registered, or is required to be licensed or registered, to engage in the business of a dealer, swap dealer, or security-based swap dealer, to the extent the instrument is purchased or sold in connection with the activities that require the banking entity to be licensed or registered as such; or

(B) Is engaged in the business of a dealer, swap dealer, or security-based swap dealer outside of the United States, to the extent the instrument is purchased or sold in connection with the activities of such business.

(2) *Rebuttable presumption for certain purchases and sales.* The purchase (or sale) of a financial instrument by a banking entity shall be presumed to be for the trading account of the banking entity under paragraph (b)(1)(i) of this section if the banking entity holds the financial instrument for fewer than sixty days or substantially transfers the risk of the financial instrument within sixty days of the purchase (or sale), unless the banking entity can demonstrate, based on all relevant facts and circumstances, that the banking entity did not purchase (or sell) the financial instrument principally for any of the purposes described in paragraph (b)(1)(i) of this section.

(c) *Financial instrument.* (1) *Financial instrument* means:

(i) A security, including an option on a security;

(ii) A derivative, including an option on a derivative; or

(iii) A contract of sale of a commodity for future delivery, or option on a contract of sale of a commodity for future delivery.

(2) A financial instrument does not include:

(i) A loan;

(ii) A commodity that is not:

(A) An excluded commodity (other than foreign exchange or currency);

(B) A derivative;

(C) A contract of sale of a commodity for future delivery; or

(D) An option on a contract of sale of a commodity for future delivery; or

(iii) Foreign exchange or currency.

(d) *Proprietary trading.* Proprietary trading does not include:

(1) Any purchase or sale of one or more financial instruments by a banking entity that arises under a repurchase or reverse repurchase agreement pursuant to which the banking entity has simultaneously agreed, in writing, to both purchase and sell a stated asset, at stated prices, and on stated dates or on demand with the same counterparty;

(2) Any purchase or sale of one or more financial instruments by a banking entity that arises under a transaction in which the banking entity lends or borrows a security temporarily to or from another party pursuant to a written securities lending agreement under which the lender retains the economic interests of an owner of such security, and has the right to terminate the transaction and to recall the loaned security on terms agreed by the parties;

(3) Any purchase or sale of a security by a banking entity for the purpose of liquidity management in accordance with a documented liquidity management plan of the banking entity that:

(i) Specifically contemplates and authorizes the particular securities to be used for liquidity management purposes, the amount, types, and risks of these securities that are consistent with liquidity management, and the liquidity circumstances in which the particular securities may or must be used;

(ii) Requires that any purchase or sale of securities contemplated and authorized by the plan be principally for the purpose of managing the liquidity of the banking entity, and not for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging a position taken for such short-term purposes;

(iii) Requires that any securities purchased or sold for liquidity management purposes be highly liquid and limited to securities the market, credit, and other risks of which the banking entity does not reasonably expect to give rise to appreciable profits or losses as a result of short-term price movements;

(iv) Limits any securities purchased or sold for liquidity management purposes, together with any other instruments purchased or sold for such purposes, to an amount that is consistent with the banking entity's near-term funding needs, including deviations from normal operations of the banking entity or any affiliate thereof, as estimated and documented pursuant to methods specified in the plan;

(v) Includes written policies and procedures, internal controls, analysis, and independent testing to ensure that the purchase and sale of securities that are not permitted under §§ 351.6(a) or (b) of this subpart are for the purpose of liquidity management and in accordance with the liquidity management plan described in paragraph (d)(3) of this section; and

(vi) Is consistent with the FDIC's supervisory requirements, guidance, and expectations regarding liquidity management;

(4) Any purchase or sale of one or more financial instruments by a banking entity that is a derivatives clearing organization or a clearing agency in connection with clearing financial instruments;

(5) Any excluded clearing activities by a banking entity that is a member of a clearing agency, a member of a derivatives clearing organization, or a member of a designated financial market utility;

(6) Any purchase or sale of one or more financial instruments by a banking entity, so long as:

(i) The purchase (or sale) satisfies an existing delivery obligation of the banking entity or its customers, including to prevent or close out a failure to deliver, in connection with delivery, clearing, or settlement activity; or

(ii) The purchase (or sale) satisfies an obligation of the banking entity in connection with a judicial, administrative, self-regulatory organization, or arbitration proceeding;

(7) Any purchase or sale of one or more financial instruments by a banking entity that is acting solely as agent, broker, or custodian;

(8) Any purchase or sale of one or more financial instruments by a banking entity through a deferred compensation, stock-bonus, profit-sharing, or pension plan of the banking entity that is established and administered in accordance with the law of the United States or a foreign sovereign, if the purchase or sale is made directly or indirectly by the banking entity as trustee for the benefit of persons who are or were employees of the banking entity; or

(9) Any purchase or sale of one or more financial instruments by a banking entity in the ordinary course of collecting a debt previously contracted in good faith, provided that the banking entity divests the financial instrument as soon as practicable, and in no event may the banking entity retain such instrument for longer than such period permitted by the FDIC.

(e) *Definition of other terms related to proprietary trading.* For purposes of this subpart:

(1) *Anonymous* means that each party to a purchase or sale is unaware of the identity of the other party(ies) to the purchase or sale.

(2) *Clearing agency* has the same meaning as in section 3(a)(23) of the Exchange Act (15 U.S.C. 78c(a)(23)).

(3) *Commodity* has the same meaning as in section 1a(9) of the Commodity Exchange Act (7 U.S.C. 1a(9)), except that a commodity does not include any security;

(4) *Contract of sale of a commodity for future delivery* means a contract of sale (as that term is defined in section 1a(13) of the Commodity Exchange Act (7 U.S.C. 1a(13)) for future delivery (as that term is defined in section 1a(27) of the Commodity Exchange Act (7 U.S.C. 1a(27))).

(5) *Derivatives clearing organization* means:

(i) A derivatives clearing organization registered under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1);

(ii) A derivatives clearing organization that, pursuant to CFTC regulation, is exempt from the registration requirements under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1); or

(iii) A foreign derivatives clearing organization that, pursuant to CFTC regulation, is permitted to clear for a foreign board of trade that is registered with the CFTC.

(6) *Exchange,* unless the context otherwise requires, means any designated contract market, swap execution facility, or foreign board of trade registered with the CFTC, or, for purposes of securities or security-based swaps, an exchange, as defined under section 3(a)(1) of the Exchange Act (15 U.S.C. 78c(a)(1)), or security-based swap execution facility, as defined under section 3(a)(77) of the Exchange Act (15 U.S.C. 78c(a)(77)).

(7) *Excluded clearing activities* means:

(i) With respect to customer transactions cleared on a derivatives clearing organization, a clearing agency, or a designated financial market utility, any purchase or sale necessary to correct trading errors made by or on behalf of a customer provided that such purchase or sale is conducted in accordance with, for transactions cleared on a derivatives clearing organization, the Commodity Exchange Act, CFTC regulations, and the rules or procedures of the derivatives clearing organization, or, for transactions cleared on a clearing agency, the rules or procedures of the clearing agency, or, for transactions cleared on a designated financial market utility that is neither a derivatives clearing organization nor a clearing agency, the rules or procedures of the designated financial market utility;

(ii) Any purchase or sale in connection with and related to the management of a default or threatened imminent default of a customer provided that such purchase or sale is conducted in accordance with, for transactions cleared on a derivatives clearing organization, the Commodity Exchange Act, CFTC regulations, and the rules or procedures of the derivatives clearing organization, or, for transactions cleared on a clearing agency, the rules or procedures of the clearing agency, or, for transactions cleared on a designated financial market utility that is neither a derivatives clearing organization nor a clearing agency, the rules or procedures of the designated financial market utility;

(iii) Any purchase or sale in connection with and related to the management of a default or threatened imminent default of a member of a clearing agency, a member of a derivatives clearing organization, or a member of a designated financial market utility;

(iv) Any purchase or sale in connection with and related to the management of the default or threatened default of a clearing agency, a derivatives clearing organization, or a designated financial market utility; and

(v) Any purchase or sale that is required by the rules or procedures of a clearing agency, a derivatives clearing organization, or a designated financial market utility to mitigate the risk to the clearing agency, derivatives clearing organization, or designated financial market utility that would result from the clearing by a member of security-based swaps that reference the member or an affiliate of the member.

(8) *Designated financial market utility* has the same meaning as in section 803(4) of the Dodd-Frank Act (12 U.S.C. 5462(4)).

(9) *Issuer* has the same meaning as in section 2(a)(4) of the Securities Act of 1933 (15 U.S.C. 77b(a)(4)).

(10) *Market risk capital rule covered position and trading position* means a financial instrument that is both a covered position and a trading position, as those terms are respectively defined:

(i) In the case of a banking entity that is a bank holding company, savings and loan holding company, or insured depository institution, under the market risk capital rule that is applicable to the banking entity; and

(ii) In the case of a banking entity that is affiliated with a bank holding company or savings and loan holding company, other than a banking entity to which a market risk capital rule is applicable, under the market risk capital rule that is applicable to the affiliated bank holding company or savings and loan holding company.

(11) *Market risk capital rule* means the market risk capital rule that is contained in subpart F of 12 CFR part 3, 12 CFR parts 208 and 225, or 12 CFR part 324, as applicable.

(12) *Municipal security* means a security that is a direct obligation of or issued by, or an obligation guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, or any municipal corporate instrumentality of one or more States or political subdivisions thereof.

(13) *Trading desk* means the smallest discrete unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof.

§ 351.4 Permitted underwriting and market making-related activities.

(a) *Underwriting activities*—(1) *Permitted underwriting activities.* The prohibition contained in § 351.3(a) does not apply to a banking entity's underwriting activities conducted in accordance with this paragraph (a).

(2) *Requirements.* The underwriting activities of a banking entity are permitted under paragraph (a)(1) of this section only if:

(i) The banking entity is acting as an underwriter for a distribution of securities and the trading desk's underwriting position is related to such distribution;

(ii) The amount and type of the securities in the trading desk's underwriting position are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, and reasonable efforts are made to sell or otherwise reduce the underwriting position within a reasonable period, taking into account the liquidity, maturity, and depth of the market for the relevant type of security;

(iii) The banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of paragraph (a) of this section, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The products, instruments or exposures each trading desk may purchase, sell, or manage as part of its underwriting activities;

(B) Limits for each trading desk, based on the nature and amount of the trading desk's underwriting activities, including the reasonably expected near term demands of clients, customers, or counterparties, on the:

(*1*) Amount, types, and risk of its underwriting position;

(*2*) Level of exposures to relevant risk factors arising from its underwriting position; and

(*3*) Period of time a security may be held;

(C) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits; and

(D) Authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval;

(iv) The compensation arrangements of persons performing the activities described in this paragraph (a) are designed not to reward or incentivize prohibited proprietary trading; and

(v) The banking entity is licensed or registered to engage in the activity described in this paragraph (a) in accordance with applicable law.

(3) *Definition of distribution.* For purposes of this paragraph (a), a *distribution* of securities means:

(i) An offering of securities, whether or not subject to registration under the Securities Act of 1933, that is distinguished from ordinary trading transactions by the presence of special selling efforts and selling methods; or

(ii) An offering of securities made pursuant to an effective registration statement under the Securities Act of 1933.

(4) *Definition of underwriter.* For purposes of this paragraph (a), *underwriter* means:

(i) A person who has agreed with an issuer or selling security holder to:

(A) Purchase securities from the issuer or selling security holder for distribution;

(B) Engage in a distribution of securities for or on behalf of the issuer or selling security holder; or

(C) Manage a distribution of securities for or on behalf of the issuer or selling security holder; or

(ii) A person who has agreed to participate or is participating in a distribution of such securities for or on behalf of the issuer or selling security holder.

(5) *Definition of selling security holder.* For purposes of this paragraph (a), *selling security holder* means any person, other than an issuer, on whose behalf a distribution is made.

(6) *Definition of underwriting position.* For purposes of this paragraph (a), *underwriting position* means the long or short positions in one or more securities held by a banking entity or its affiliate, and managed by a particular trading desk, in connection with a particular distribution of securities for which such banking entity or affiliate is acting as an underwriter.

(7) *Definition of client, customer, and counterparty.* For purposes of this paragraph (a), the terms *client, customer, and counterparty,* on a collective or individual basis, refer to market participants that may transact with the banking entity in connection with a particular distribution for which the banking entity is acting as underwriter.

(b) *Market making-related activities*—(1) *Permitted market making-related activities.* The prohibition contained in § 351.3(a) does not apply to a banking entity's market making-related activities conducted in accordance with this paragraph (b).

(2) *Requirements.* The market making-related activities of a banking entity are permitted under paragraph (b)(1) of this section only if:

(i) The trading desk that establishes and manages the financial exposure routinely stands ready to purchase and sell one or more types of financial instruments related to its financial exposure and is willing and available to quote, purchase and sell, or otherwise enter into long and short positions in those types of financial instruments for its own account, in commercially reasonable amounts and throughout market cycles on a basis appropriate for the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(ii) The amount, types, and risks of the financial instruments in the trading desk's market-maker inventory are designed not to exceed, on an ongoing basis, the reasonably expected near term demands of clients, customers, or counterparties, based on:

(A) The liquidity, maturity, and depth of the market for the relevant types of financial instrument(s); and

(B) Demonstrable analysis of historical customer demand, current inventory of financial instruments, and market and other factors regarding the amount, types, and risks, of or associated with financial instruments in which the trading desk makes a market, including through block trades;

(iii) The banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of paragraph (b) of this section, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The financial instruments each trading desk stands ready to purchase and sell in accordance with paragraph (b)(2)(i) of this section;

(B) The actions the trading desk will take to demonstrably reduce or otherwise significantly mitigate promptly the risks of its financial exposure consistent with the limits required under paragraph (b)(2)(iii)(C) of this section; the products, instruments, and exposures each trading desk may use for risk management purposes; the techniques and strategies each trading desk may use to manage the risks of its market making-related activities and inventory; and the process, strategies, and personnel responsible for ensuring that the actions taken by the trading desk to mitigate these risks are and continue to be effective;

(C) Limits for each trading desk, based on the nature and amount of the trading desk's market making-related activities, that address the factors prescribed by paragraph (b)(2)(ii) of this section, on:

(*1*) The amount, types, and risks of its market-maker inventory;

(*2*) The amount, types, and risks of the products, instruments, and exposures the trading desk may use for risk management purposes;

(*3*) The level of exposures to relevant risk factors arising from its financial exposure; and

(*4*) The period of time a financial instrument may be held;

(D) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits; and

(E) Authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis that the basis for any temporary or permanent increase to a trading desk's limit(s) is consistent with the requirements of this paragraph (b), and independent review of such demonstrable analysis and approval;

(iv) To the extent that any limit identified pursuant to paragraph (b)(2)(iii)(C) of this section is exceeded, the trading desk takes action to bring the trading desk into compliance with the limits as promptly as possible after the limit is exceeded;

(v) The compensation arrangements of persons performing the activities described in this paragraph (b) are designed not to reward or incentivize prohibited proprietary trading; and

(vi) The banking entity is licensed or registered to engage in activity described in this paragraph (b) in accordance with applicable law.

(3) *Definition of client, customer, and counterparty.* For purposes of paragraph (b) of this section, the terms *client, customer, and counterparty,* on a collective or individual basis refer to market participants that make use of the banking entity's market making-related services by obtaining such services, responding to quotations, or entering into a continuing relationship with respect to such services, provided that:

(i) A trading desk or other organizational unit of another banking entity is not a client, customer, or counterparty of the trading desk if that other entity has trading assets and liabilities of $50 billion or more as measured in accordance with § 351.20(d)(1) of subpart D, unless:

(A) The trading desk documents how and why a particular trading desk or other organizational unit of the entity should be treated as a client, customer, or counterparty of the trading desk for purposes of paragraph (b)(2) of this section; or

(B) The purchase or sale by the trading desk is conducted anonymously on an exchange or similar trading facility that permits trading on behalf of a broad range of market participants.

(4) *Definition of financial exposure.* For purposes of this paragraph (b), *financial exposure* means the aggregate risks of one or more financial instruments and any associated loans, commodities, or foreign exchange or currency, held by a banking entity or its affiliate and managed by a particular trading desk as part of the trading desk's market making-related activities.

(5) *Definition of market-maker inventory.* For the purposes of this paragraph (b), *market-maker inventory* means all of the positions in the financial instruments for which the trading desk stands ready to make a market in accordance with paragraph (b)(2)(i) of this section, that are managed by the trading desk, including the trading desk's open positions or exposures arising from open transactions.

§ 351.5 Permitted risk-mitigating hedging activities.

(a) *Permitted risk-mitigating hedging activities.* The prohibition contained in § 351.3(a) does not apply to the risk-mitigating hedging activities of a banking entity in connection with and related to individual or aggregated positions, contracts, or other holdings of the banking entity and designed to reduce the specific risks to the banking entity in connection with and related to such positions, contracts, or other holdings.

(b) *Requirements.* The risk-mitigating hedging activities of a banking entity are permitted under paragraph (a) of this section only if:

(1) The banking entity has established and implements, maintains and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(i) Reasonably designed written policies and procedures regarding the positions, techniques and strategies that may be used for hedging, including documentation indicating what positions, contracts or other holdings a particular trading desk may use in its risk-mitigating hedging activities, as well as position and aging limits with respect to such positions, contracts or other holdings;

(ii) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(iii) The conduct of analysis, including correlation analysis, and independent testing designed to ensure that the positions, techniques and strategies that may be used for hedging may reasonably be expected to demonstrably reduce or otherwise significantly mitigate the specific, identifiable risk(s) being hedged, and such correlation analysis demonstrates that the hedging activity demonstrably reduces or otherwise significantly mitigates the specific, identifiable risk(s) being hedged;

(2) The risk-mitigating hedging activity:

(i) Is conducted in accordance with the written policies, procedures, and internal controls required under this section;

(ii) At the inception of the hedging activity, including, without limitation, any adjustments to the hedging activity, is designed to reduce or otherwise significantly mitigate and demonstrably reduces or otherwise significantly mitigates one or more specific, identifiable risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, commodity price risk, basis risk, or similar risks, arising in connection with and related to identified positions, contracts, or other holdings of the banking entity, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof;

(iii) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section;

(iv) Is subject to continuing review, monitoring and management by the banking entity that:

(A) Is consistent with the written hedging policies and procedures required under paragraph (b)(1) of this section;

(B) Is designed to reduce or otherwise significantly mitigate and demonstrably reduces or otherwise significantly mitigates the specific, identifiable risks that develop over time from the risk-mitigating hedging activities undertaken under this section and the underlying positions, contracts, and other holdings of the banking entity, based upon the facts and circumstances of the underlying and hedging positions, contracts and other holdings of the banking entity and the risks and liquidity thereof; and

(C) Requires ongoing recalibration of the hedging activity by the banking entity to ensure that the hedging activity satisfies the requirements set out in paragraph (b)(2) of this section and is not prohibited proprietary trading; and

(3) The compensation arrangements of persons performing risk-mitigating hedging activities are designed not to reward or incentivize prohibited proprietary trading.

(c) *Documentation requirement*—(1) A banking entity must comply with the requirements of paragraphs (c)(2) and (3) of this section with respect to any purchase or sale of financial instruments made in reliance on this section for risk-mitigating hedging purposes that is:

(i) Not established by the specific trading desk establishing or responsible for the underlying positions, contracts, or other holdings the risks of which the hedging activity is designed to reduce;

(ii) Established by the specific trading desk establishing or responsible for the underlying positions, contracts, or other holdings the risks of which the purchases or sales are designed to reduce, but that is effected through a financial instrument, exposure, technique, or strategy that is not specifically identified in the trading desk's written policies and procedures established under paragraph (b)(1) of this section or under § 351.4(b)(2)(iii)(B) of this subpart as a product, instrument, exposure, technique, or strategy such trading desk may use for hedging; or

(iii) Established to hedge aggregated positions across two or more trading desks.

(2) In connection with any purchase or sale identified in paragraph (c)(1) of this section, a banking entity must, at a minimum, and contemporaneously with the purchase or sale, document:

(i) The specific, identifiable risk(s) of the identified positions, contracts, or other holdings of the banking entity that the purchase or sale is designed to reduce;

(ii) The specific risk-mitigating strategy that the purchase or sale is designed to fulfill; and

(iii) The trading desk or other business unit that is establishing and responsible for the hedge.

(3) A banking entity must create and retain records sufficient to demonstrate compliance with the requirements of this paragraph (c) for a period that is no less than five years in a form that allows the banking entity to promptly produce such records to the FDIC on request, or such longer period as required under other law or this part.

§ 351.6 Other permitted proprietary trading activities.

(a) *Permitted trading in domestic government obligations.* The prohibition contained in § 351.3(a) does not apply to the purchase or sale by a banking entity of a financial instrument that is:

(1) An obligation of, or issued or guaranteed by, the United States;

(2) An obligation, participation, or other instrument of, or issued or guaranteed by, an agency of the United States, the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, a Federal Home Loan Bank, the Federal Agricultural Mortgage Corporation or a Farm Credit System institution chartered under and subject to the provisions of the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*);

(3) An obligation of any State or any political subdivision thereof, including any municipal security; or

(4) An obligation of the FDIC, or any entity formed by or on behalf of the FDIC for purpose of facilitating the disposal of assets acquired or held by the FDIC in its corporate capacity or as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(b) *Permitted trading in foreign government obligations*—(1) *Affiliates of foreign banking entities in the United States.* The prohibition contained in § 351.3(a) does not apply to the purchase or sale of a financial instrument that is an obligation of, or issued or guaranteed by, a foreign sovereign (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of such foreign sovereign, by a banking entity, so long as:

(i) The banking entity is organized under or is directly or indirectly controlled by a banking entity that is organized under the laws of a foreign sovereign and is not directly or indirectly controlled by a top-tier banking entity that is organized under the laws of the United States;

(ii) The financial instrument is an obligation of, or issued or guaranteed by, the foreign sovereign under the laws of which the foreign banking entity referred to in paragraph (b)(1)(i) of this section is organized (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of that foreign sovereign; and

(iii) The purchase or sale as principal is not made by an insured depository institution.

(2) *Foreign affiliates of a U.S. banking entity.* The prohibition contained in § 351.3(a) does not apply to the purchase or sale of a financial instrument that is an obligation of, or issued or guaranteed by, a foreign sovereign (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of that foreign sovereign, by a foreign entity that is owned or controlled by a banking entity organized or established under the laws of the United States or any State, so long as:

(i) The foreign entity is a foreign bank, as defined in section 211.2(j) of the Board's Regulation K (12 CFR 211.2(j)), or is regulated by the foreign sovereign as a securities dealer;

(ii) The financial instrument is an obligation of, or issued or guaranteed by, the foreign sovereign under the laws of which the foreign entity is organized (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of that foreign sovereign; and

(iii) The financial instrument is owned by the foreign entity and is not financed by an affiliate that is located in the United States or organized under the laws of the United States or of any State.

(c) *Permitted trading on behalf of customers*—(1) *Fiduciary transactions.* The prohibition contained in § 351.3(a) does not apply to the purchase or sale of financial instruments by a banking entity acting as trustee or in a similar fiduciary capacity, so long as:

(i) The transaction is conducted for the account of, or on behalf of, a customer; and

(ii) The banking entity does not have or retain beneficial ownership of the financial instruments.

(2) *Riskless principal transactions.* The prohibition contained in § 351.3(a) does not apply to the purchase or sale of financial instruments by a banking entity acting as riskless principal in a transaction in which the banking entity, after receiving an order to purchase (or sell) a financial instrument from a customer, purchases (or sells) the financial instrument for its own account to offset a contemporaneous sale to (or purchase from) the customer.

(d) *Permitted trading by a regulated insurance company.* The prohibition contained in § 351.3(a) does not apply to the purchase or sale of financial instruments by a banking entity that is an insurance company or an affiliate of an insurance company if:

(1) The insurance company or its affiliate purchases or sells the financial instruments solely for:

(i) The general account of the insurance company; or

(ii) A separate account established by the insurance company;

(2) The purchase or sale is conducted in compliance with, and subject to, the insurance company investment laws, regulations, and written guidance of the State or jurisdiction in which such insurance company is domiciled; and

(3) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and foreign jurisdictions, as appropriate, have not jointly determined, after notice and comment, that a particular law, regulation, or written guidance described in paragraph (d)(2) of this section is insufficient to protect the safety and soundness of the covered banking entity, or the financial stability of the United States.

(e) *Permitted trading activities of foreign banking entities.* (1) The prohibition contained in § 351.3(a) does not apply to the purchase or sale of financial instruments by a banking entity if:

(i) The banking entity is not organized or directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of any State;

(ii) The purchase or sale by the banking entity is made pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act; and

(iii) The purchase or sale meets the requirements of paragraph (e)(3) of this section.

(2) A purchase or sale of financial instruments by a banking entity is made pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act for purposes of paragraph (e)(1)(ii) of this section only if:

(i) The purchase or sale is conducted in accordance with the requirements of paragraph (e) of this section; and

(ii)(A) With respect to a banking entity that is a foreign banking organization, the banking entity meets the qualifying foreign banking organization requirements of section 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c) or (e)), as applicable; or

(B) With respect to a banking entity that is not a foreign banking organization, the banking entity is not organized under the laws of the United States or of any State and the banking entity, on a fully-consolidated basis, meets at least two of the following requirements:

(*1*) Total assets of the banking entity held outside of the United States exceed total assets of the banking entity held in the United States;

(*2*) Total revenues derived from the business of the banking entity outside of the United States exceed total revenues derived from the business of the banking entity in the United States; or

(*3*) Total net income derived from the business of the banking entity outside of the United States exceeds total net income derived from the business of the banking entity in the United States.

(3) A purchase or sale by a banking entity is permitted for purposes of this paragraph (e) if:

(i) The banking entity engaging as principal in the purchase or sale (including any personnel of the banking entity or its affiliate that arrange, negotiate or execute such purchase or sale) is not located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to purchase or sell as principal is not located in the United States or organized under the laws of the United States or of any State;

(iii) The purchase or sale, including any transaction arising from risk-mitigating hedging related to the instruments purchased or sold, is not accounted for as principal directly or on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State;

(iv) No financing for the banking entity's purchases or sales is provided, directly or indirectly, by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State; and

(v) The purchase or sale is not conducted with or through any U.S. entity, other than:

(A) A purchase or sale with the foreign operations of a U.S. entity if no personnel of such U.S. entity that are located in the United States are involved in the arrangement, negotiation, or execution of such purchase or sale;

(B) A purchase or sale with an unaffiliated market intermediary acting as principal, provided the purchase or sale is promptly cleared and settled through a clearing agency or derivatives clearing organization acting as a central counterparty; or

(C) A purchase or sale through an unaffiliated market intermediary acting as agent, provided the purchase or sale is conducted anonymously on an exchange or similar trading facility and is promptly cleared and settled through a clearing agency or derivatives clearing organization acting as a central counterparty.

(4) For purposes of this paragraph (e), a U.S. entity is any entity that is, or is controlled by, or is acting on behalf of, or at the direction of, any other entity that is, located in the United States or organized under the laws of the United States or of any State.

(5) For purposes of this paragraph (e), a U.S. branch, agency, or subsidiary of a foreign banking entity is considered to be located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(6) For purposes of this paragraph (e), *unaffiliated market intermediary* means

an unaffiliated entity, acting as an intermediary, that is:

(i) A broker or dealer registered with the SEC under section 15 of the Exchange Act or exempt from registration or excluded from regulation as such;

(ii) A swap dealer registered with the CFTC under section 4s of the Commodity Exchange Act or exempt from registration or excluded from regulation as such;

(iii) A security-based swap dealer registered with the SEC under section 15F of the Exchange Act or exempt from registration or excluded from regulation as such; or

(iv) A futures commission merchant registered with the CFTC under section 4f of the Commodity Exchange Act or exempt from registration or excluded from regulation as such.

§ 351.7 Limitations on permitted proprietary trading activities.

(a) No transaction, class of transactions, or activity may be deemed permissible under §§ 351.4 through 351.6 if the transaction, class of transactions, or activity would:

(1) Involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties;

(2) Result, directly or indirectly, in a material exposure by the banking entity to a high-risk asset or a high-risk trading strategy; or

(3) Pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.

(b) *Definition of material conflict of interest.* (1) For purposes of this section, a material conflict of interest between a banking entity and its clients, customers, or counterparties exists if the banking entity engages in any transaction, class of transactions, or activity that would involve or result in the banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, and the banking entity has not taken at least one of the actions in paragraph (b)(2) of this section.

(2) Prior to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, the banking entity:

(i) *Timely and effective disclosure.* (A) Has made clear, timely, and effective disclosure of the conflict of interest, together with other necessary information, in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest; and

(B) Such disclosure is made in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty created by the conflict of interest; or

(ii) *Information barriers.* Has established, maintained, and enforced information barriers that are memorialized in written policies and procedures, such as physical separation of personnel, or functions, or limitations on types of activity, that are reasonably designed, taking into consideration the nature of the banking entity's business, to prevent the conflict of interest from involving or resulting in a materially adverse effect on a client, customer, or counterparty. A banking entity may not rely on such information barriers if, in the case of any specific transaction, class or type of transactions or activity, the banking entity knows or should reasonably know that, notwithstanding the banking entity's establishment of information barriers, the conflict of interest may involve or result in a materially adverse effect on a client, customer, or counterparty.

(c) *Definition of high-risk asset and high-risk trading strategy.* For purposes of this section:

(1) *High-risk asset* means an asset or group of related assets that would, if held by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

(2) *High-risk trading strategy* means a trading strategy that would, if engaged in by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

§§ 351.8–351.9 [Reserved]

Subpart C—Covered Funds Activities and Investments

§ 351.10 Prohibition on acquiring or retaining an ownership interest in and having certain relationships with a covered fund.

(a) *Prohibition.* (1) Except as otherwise provided in this subpart, a banking entity may not, as principal, directly or indirectly, acquire or retain any ownership interest in or sponsor a covered fund.

(2) Paragraph (a)(1) of this section does not include acquiring or retaining an ownership interest in a covered fund by a banking entity:

(i) Acting solely as agent, broker, or custodian, so long as;

(A) The activity is conducted for the account of, or on behalf of, a customer; and

(B) The banking entity and its affiliates do not have or retain beneficial ownership of such ownership interest;

(ii) Through a deferred compensation, stock-bonus, profit-sharing, or pension plan of the banking entity (or an affiliate thereof) that is established and administered in accordance with the law of the United States or a foreign sovereign, if the ownership interest is held or controlled directly or indirectly by the banking entity as trustee for the benefit of persons who are or were employees of the banking entity (or an affiliate thereof);

(iii) In the ordinary course of collecting a debt previously contracted in good faith, provided that the banking entity divests the ownership interest as soon as practicable, and in no event may the banking entity retain such ownership interest for longer than such period permitted by the FDIC; or

(iv) On behalf of customers as trustee or in a similar fiduciary capacity for a customer that is not a covered fund, so long as:

(A) The activity is conducted for the account of, or on behalf of, the customer; and

(B) The banking entity and its affiliates do not have or retain beneficial ownership of such ownership interest.

(b) *Definition of covered fund.* (1) Except as provided in paragraph (c) of this section, covered fund means:

(i) An issuer that would be an investment company, as defined in the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), *but for* section 3(c)(1) or 3(c)(7) of that Act (15 U.S.C. 80a–3(c)(1) or (7));

(ii) Any commodity pool under section 1a(10) of the Commodity Exchange Act (7 U.S.C. 1a(10)) for which:

(A) The commodity pool operator has claimed an exemption under 17 CFR 4.7; or

(B)(*1*) A commodity pool operator is registered with the CFTC as a commodity pool operator in connection with the operation of the commodity pool;

(*2*) Substantially all participation units of the commodity pool are owned by qualified eligible persons under 17 CFR 4.7(a)(2) and (3); and

(*3*) Participation units of the commodity pool have not been publicly offered to persons who are not qualified eligible persons under 17 CFR 4.7(a)(2) and (3); or

(iii) For any banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State, an entity that:

(A) Is organized or established outside the United States and the ownership interests of which are offered and sold solely outside the United States;

(B) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities; and

(C)(*1*) Has as its sponsor that banking entity (or an affiliate thereof); or

(*2*) Has issued an ownership interest that is owned directly or indirectly by that banking entity (or an affiliate thereof).

(2) An issuer shall not be deemed to be a covered fund under paragraph (b)(1)(iii) of this section if, were the issuer subject to U.S. securities laws, the issuer could rely on an exclusion or exemption from the definition of ''investment company'' under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) other than the exclusions contained in section 3(c)(1) and 3(c)(7) of that Act.

(3) For purposes of paragraph (b)(1)(iii) of this section, a U.S. branch, agency, or subsidiary of a foreign banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(c) Notwithstanding paragraph (b) of this section, unless the appropriate Federal banking agencies, the SEC, and the CFTC jointly determine otherwise, a covered fund does not include:

(1) *Foreign public funds.* (i) Subject to paragraphs (ii) and (iii) below, an issuer that:

(A) Is organized or established outside of the United States;

(B) Is authorized to offer and sell ownership interests to retail investors in the issuer's home jurisdiction; and

(C) Sells ownership interests predominantly through one or more public offerings outside of the United States.

(ii) With respect to a banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State and any issuer for which such banking entity acts as sponsor, the sponsoring banking entity may not rely on the exemption in paragraph (c)(1)(i) of this section for such issuer unless ownership interests in the issuer are sold predominantly to persons other than:

(A) Such sponsoring banking entity;

(B) Such issuer;

(C) Affiliates of such sponsoring banking entity or such issuer; and

(D) Directors and employees of such entities.

(iii) For purposes of paragraph (c)(1)(i)(C) of this section, the term ''public offering'' means a distribution (as defined in § 351.4(a)(3) of subpart B) of securities in any jurisdiction outside the United States to investors, including retail investors, provided that:

(A) The distribution complies with all applicable requirements in the jurisdiction in which such distribution is being made;

(B) The distribution does not restrict availability to investors having a minimum level of net worth or net investment assets; and

(C) The issuer has filed or submitted, with the appropriate regulatory authority in such jurisdiction, offering disclosure documents that are publicly available.

(2) *Wholly-owned subsidiaries.* An entity, all of the outstanding ownership interests of which are owned directly or indirectly by the banking entity (or an affiliate thereof), except that:

(i) Up to five percent of the entity's outstanding ownership interests, less any amounts outstanding under paragraph (c)(2)(ii) of this section, may be held by employees or directors of the banking entity or such affiliate (including former employees or directors if their ownership interest was acquired while employed by or in the service of the banking entity); and

(ii) Up to 0.5 percent of the entity's outstanding ownership interests may be held by a third party if the ownership interest is acquired or retained by the third party for the purpose of establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.

(3) *Joint ventures.* A joint venture between a banking entity or any of its affiliates and one or more unaffiliated persons, provided that the joint venture:

(i) Is comprised of no more than 10 unaffiliated co-venturers;

(ii) Is in the business of engaging in activities that are permissible for the banking entity or affiliate, other than investing in securities for resale or other disposition; and

(iii) Is not, and does not hold itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities.

(4) *Acquisition vehicles.* An issuer:

(i) Formed solely for the purpose of engaging in a *bona fide* merger or acquisition transaction; and

(ii) That exists only for such period as necessary to effectuate the transaction.

(5) *Foreign pension or retirement funds.* A plan, fund, or program providing pension, retirement, or similar benefits that is:

(i) Organized and administered outside the United States;

(ii) A broad-based plan for employees or citizens that is subject to regulation as a pension, retirement, or similar plan under the laws of the jurisdiction in which the plan, fund, or program is organized and administered; and

(iii) Established for the benefit of citizens or residents of one or more foreign sovereigns or any political subdivision thereof.

(6) *Insurance company separate accounts.* A separate account, provided that no banking entity other than the insurance company participates in the account's profits and losses.

(7) *Bank owned life insurance.* A separate account that is used solely for the purpose of allowing one or more banking entities to purchase a life insurance policy for which the banking entity or entities is beneficiary, provided that no banking entity that purchases the policy:

(i) Controls the investment decisions regarding the underlying assets or holdings of the separate account; or

(ii) Participates in the profits and losses of the separate account other than in compliance with applicable supervisory guidance regarding bank owned life insurance.

(8) *Loan securitizations.* (i) *Scope.* An issuing entity for asset-backed securities that satisfies all the conditions of this paragraph (c)(8) and the assets or holdings of which are comprised solely of:

(A) Loans as defined in § 351.2(s) of subpart A;

(B) Rights or other assets designed to assure the servicing or timely distribution of proceeds to holders of such securities and rights or other assets that are related or incidental to purchasing or otherwise acquiring and holding the loans, provided that each asset meets the requirements of paragraph (c)(8)(iii) of this section;

(C) Interest rate or foreign exchange derivatives that meet the requirements of paragraph (c)(8)(iv) of this section; and

(D) Special units of beneficial interest and collateral certificates that meet the requirements of paragraph (c)(8)(v) of this section.

(ii) *Impermissible assets.* For purposes of this paragraph (c)(8), the assets or holdings of the issuing entity shall not include any of the following:

(A) A security, including an asset-backed security, or an interest in an equity or debt security other than as permitted in paragraph (c)(8)(iii) of this section;

(B) A derivative, other than a derivative that meets the requirements of paragraph (c)(8)(iv) of this section; or

(C) A commodity forward contract.

(iii) *Permitted securities.* Notwithstanding paragraph (c)(8)(ii)(A) of this section, the issuing entity may hold securities if those securities are:

(A) Cash equivalents for purposes of the rights and assets in paragraph (c)(8)(i)(B) of this section; or

(B) Securities received in lieu of debts previously contracted with respect to the loans supporting the asset-backed securities.

(iv) *Derivatives.* The holdings of derivatives by the issuing entity shall be limited to interest rate or foreign exchange derivatives that satisfy all of the following conditions:

(A) The written terms of the derivative directly relate to the loans, the asset-backed securities, or the contractual rights of other assets described in paragraph (c)(8)(i)(B) of this section; and

(B) The derivatives reduce the interest rate and/or foreign exchange risks related to the loans, the asset-backed securities, or the contractual rights or other assets described in paragraph (c)(8)(i)(B) of this section.

(v) *Special units of beneficial interest and collateral certificates.* The assets or holdings of the issuing entity may include collateral certificates and special units of beneficial interest issued by a special purpose vehicle, provided that:

(A) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate meets the requirements in this paragraph (c)(8);

(B) The special unit of beneficial interest or collateral certificate is used for the sole purpose of transferring to the issuing entity for the loan securitization the economic risks and benefits of the assets that are permissible for loan securitizations under this paragraph (c)(8) and does not directly or indirectly transfer any interest in any other economic or financial exposure;

(C) The special unit of beneficial interest or collateral certificate is created solely to satisfy legal requirements or otherwise facilitate the structuring of the loan securitization; and

(D) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate and the issuing entity are established under the direction of the same entity that initiated the loan securitization.

(9) *Qualifying asset-backed commercial paper conduits.* (i) An issuing entity for asset-backed commercial paper that satisfies all of the following requirements:

(A) The asset-backed commercial paper conduit holds only:

(*1*) Loans and other assets permissible for a loan securitization under paragraph (c)(8)(i) of this section; and

(*2*) Asset-backed securities supported solely by assets that are permissible for loan securitizations under paragraph (c)(8)(i) of this section and acquired by the asset-backed commercial paper conduit as part of an initial issuance either directly from the issuing entity of the asset-backed securities or directly from an underwriter in the distribution of the asset-backed securities;

(B) The asset-backed commercial paper conduit issues only asset-backed securities, comprised of a residual interest and securities with a legal maturity of 397 days or less; and

(C) A regulated liquidity provider has entered into a legally binding commitment to provide full and unconditional liquidity coverage with respect to all of the outstanding asset-backed securities issued by the asset-backed commercial paper conduit (other than any residual interest) in the event that funds are required to redeem maturing asset-backed securities.

(ii) For purposes of this paragraph (c)(9), a regulated liquidity provider means:

(A) A depository institution, as defined in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c));

(B) A bank holding company, as defined in section 2(a) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(a)), or a subsidiary thereof;

(C) A savings and loan holding company, as defined in section 10a of the Home Owners' Loan Act (12 U.S.C. 1467a), provided all or substantially all of the holding company's activities are permissible for a financial holding company under section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)), or a subsidiary thereof;

(D) A foreign bank whose home country supervisor, as defined in § 211.21(q) of the Board's Regulation K (12 CFR 211.21(q)), has adopted capital standards consistent with the Capital Accord for the Basel Committee on banking Supervision, as amended, and that is subject to such standards, or a subsidiary thereof; or

(E) The United States or a foreign sovereign.

(10) *Qualifying covered bonds*—(i) *Scope.* An entity owning or holding a dynamic or fixed pool of loans or other assets as provided in paragraph (c)(8) of this section for the benefit of the holders of covered bonds, provided that the assets in the pool are comprised solely of assets that meet the conditions in paragraph (c)(8)(i) of this section.

(ii) *Covered bond.* For purposes of this paragraph (c)(10), a covered bond means:

(A) A debt obligation issued by an entity that meets the definition of foreign banking organization, the payment obligations of which are fully and unconditionally guaranteed by an entity that meets the conditions set forth in paragraph (c)(10)(i) of this section; or

(B) A debt obligation of an entity that meets the conditions set forth in paragraph (c)(10)(i) of this section, provided that the payment obligations are fully and unconditionally guaranteed by an entity that meets the definition of foreign banking organization and the entity is a wholly-owned subsidiary, as defined in paragraph (c)(2) of this section, of such foreign banking organization.

(11) *SBICs and public welfare investment funds.* An issuer:

(i) That is a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662), or that has received from the Small Business Administration notice to proceed to qualify for a license as a small business investment company, which notice or license has not been revoked; or

(ii) The business of which is to make investments that are:

(A) Designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs); or

(B) Qualified rehabilitation expenditures with respect to a qualified rehabilitated building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program.

(12) *Registered investment companies and excluded entities.* An issuer:

(i) That is registered as an investment company under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8), or that is formed and operated pursuant to a written plan to become a registered investment company as described in § 351.20(e)(3) of subpart D and that complies with the requirements of section 18 of the Investment Company Act of 1940 (15 U.S.C. 80a–18);

(ii) That may rely on an exclusion or exemption from the definition of ''investment company'' under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) other than the exclusions contained in section 3(c)(1) and 3(c)(7) of that Act; or

(iii) That has elected to be regulated as a business development company pursuant to section 54(a) of that Act (15 U.S.C. 80a–53) and has not withdrawn its election, or that is formed and operated pursuant to a written plan to become a business development company as described in § 351.20(e)(3) of subpart D and that complies with the requirements of section 61 of the Investment Company Act of 1940 (15 U.S.C. 80a–60).

(13) *Issuers in conjunction with the FDIC's receivership or conservatorship operations.* An issuer that is an entity formed by or on behalf of the FDIC for the purpose of facilitating the disposal of assets acquired in the FDIC's capacity as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(14) *Other excluded issuers.* (i) Any issuer that the appropriate Federal banking agencies, the SEC, and the CFTC jointly determine the exclusion of which is consistent with the purposes of section 13 of the BHC Act.

(ii) A determination made under paragraph (c)(14)(i) of this section will be promptly made public.

(d) *Definition of other terms related to covered funds.* For purposes of this subpart:

(1) *Applicable accounting standards* means U.S. generally accepted accounting principles, or such other accounting standards applicable to a banking entity that the FDIC determines are appropriate and that the banking entity uses in the ordinary course of its business in preparing its consolidated financial statements.

(2) *Asset-backed security* has the meaning specified in Section 3(a)(79) of the Exchange Act (15 U.S.C. 78c(a)(79)).

(3) *Director* has the same meaning as provided in section 215.2(d)(1) of the Board's Regulation O (12 CFR 215.2(d)(1)).

(4) *Issuer* has the same meaning as in section 2(a)(22) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(22)).

(5) *Issuing entity* means with respect to asset-backed securities the special purpose vehicle that owns or holds the pool assets underlying asset-backed securities and in whose name the asset-backed securities supported or serviced by the pool assets are issued.

(6) *Ownership interest*—(i) *Ownership interest* means any equity, partnership, or other similar interest. An ''other similar interest'' means an interest that:

(A) Has the right to participate in the selection or removal of a general partner, managing member, member of the board of directors or trustees, investment manager, investment adviser, or commodity trading advisor of the covered fund (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event);

(B) Has the right under the terms of the interest to receive a share of the income, gains or profits of the covered fund;

(C) Has the right to receive the underlying assets of the covered fund after all other interests have been redeemed and/or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event);

(D) Has the right to receive all or a portion of excess spread (the positive difference, if any, between the aggregate interest payments received from the underlying assets of the covered fund and the aggregate interest paid to the holders of other outstanding interests);

(E) Provides under the terms of the interest that the amounts payable by the covered fund with respect to the interest could be reduced based on losses arising from the underlying assets of the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the amount of interest due and payable on the interest;

(F) Receives income on a pass-through basis from the covered fund, or has a rate of return that is determined by reference to the performance of the underlying assets of the covered fund; or

(G) Any synthetic right to have, receive, or be allocated any of the rights in paragraphs (d)(6)(i)(A) through (F) of this section.

(ii) *Ownership interest* does not include: *Restricted profit interest.* An interest held by an entity (or an employee or former employee thereof) in a covered fund for which the entity (or employee thereof) serves as investment manager, investment adviser, commodity trading advisor, or other service provider so long as:

(A) The sole purpose and effect of the interest is to allow the entity (or employee or former employee thereof) to share in the profits of the covered fund as performance compensation for the investment management, investment advisory, commodity trading advisory, or other services provided to the covered fund by the entity (or employee or former employee thereof), provided that the entity (or employee or former employee thereof) may be obligated under the terms of such interest to return profits previously received;

(B) All such profit, once allocated, is distributed to the entity (or employee or former employee thereof) promptly after being earned or, if not so distributed, is retained by the covered fund for the sole purpose of establishing a reserve amount to satisfy contractual obligations with respect to subsequent losses of the covered fund and such undistributed profit of the entity (or employee or former employee thereof) does not share in the subsequent investment gains of the covered fund;

(C) Any amounts invested in the covered fund, including any amounts paid by the entity (or employee or former employee thereof) in connection with obtaining the restricted profit interest, are within the limits of § 351.12 of this subpart; and

(D) The interest is not transferable by the entity (or employee or former employee thereof) except to an affiliate thereof (or an employee of the banking entity or affiliate), to immediate family members, or through the intestacy, of the employee or former employee, or in connection with a sale of the business that gave rise to the restricted profit interest by the entity (or employee or former employee thereof) to an unaffiliated party that provides investment management, investment advisory, commodity trading advisory, or other services to the fund.

(7) *Prime brokerage transaction* means any transaction that would be a covered transaction, as defined in section 23A(b)(7) of the Federal Reserve Act (12 U.S.C. 371c(b)(7)), that is provided in connection with custody, clearance and settlement, securities borrowing or lending services, trade execution, financing, or data, operational, and administrative support.

(8) *Resident of the United States* means a person that is a ''U.S. person'' as defined in rule 902(k) of the SEC's Regulation S (17 CFR 230.902(k)).

(9) *Sponsor* means, with respect to a covered fund:

(i) To serve as a general partner, managing member, or trustee of a covered fund, or to serve as a commodity pool operator with respect to a covered fund as defined in (b)(1)(ii) of this section;

(ii) In any manner to select or to control (or to have employees, officers, or directors, or agents who constitute) a majority of the directors, trustees, or management of a covered fund; or

(iii) To share with a covered fund, for corporate, marketing, promotional, or other purposes, the same name or a variation of the same name, except as permitted under § 351.11(a)(6).

(10) *Trustee.* (i) For purposes of paragraph (d)(9) of this section and § 351.11 of subpart C, a trustee does not include:

(A) A trustee that does not exercise investment discretion with respect to a covered fund, including a trustee that is subject to the direction of an unaffiliated named fiduciary who is not a trustee pursuant to section 403(a)(1) of the Employee's Retirement Income Security Act (29 U.S.C. 1103(a)(1)); or

(B) A trustee that is subject to fiduciary standards imposed under foreign law that are substantially equivalent to those described in paragraph (d)(10)(i)(A) of this section;

(ii) Any entity that directs a person described in paragraph (d)(10)(i) of this section, or that possesses authority and discretion to manage and control the investment decisions of a covered fund for which such person serves as trustee, shall be considered to be a trustee of such covered fund.

§ 351.11 Permitted organizing and offering, underwriting, and market making with respect to a covered fund.

(a) *Organizing and offering a covered fund in general.* Notwithstanding § 351.10(a) of this subpart, a banking entity is not prohibited from acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund in connection with, directly or indirectly, organizing and offering a covered fund, including serving as a general partner, managing member, trustee, or commodity pool operator of the covered fund and in any manner selecting or controlling (or having employees, officers, directors, or agents who constitute) a majority of the directors, trustees, or management of the covered fund, including any necessary expenses for the foregoing, only if:

(1) The banking entity (or an affiliate thereof) provides *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services;

(2) The covered fund is organized and offered only in connection with the provision of *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services and only to persons that are customers of such services of the banking entity (or an affiliate thereof), pursuant to a written plan or similar documentation outlining how the banking entity or such affiliate intends to provide advisory or similar services to its customers through organizing and offering such fund;

(3) The banking entity and its affiliates do not acquire or retain an ownership interest in the covered fund except as permitted under § 351.12 of this subpart;

(4) The banking entity and its affiliates comply with the requirements of § 351.14 of this subpart;

(5) The banking entity and its affiliates do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests;

(6) The covered fund, for corporate, marketing, promotional, or other purposes:

(i) Does not share the same name or a variation of the same name with the banking entity (or an affiliate thereof), except that a covered fund may share the same name or a variation of the same name with a banking entity that is an investment adviser to the covered fund if:

(A) The investment adviser is not an insured depository institution, a company that controls an insured depository institution, or a company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(B) The investment adviser does not share the same name or a variation of the same name as an insured depository institution, a company that controls an insured depository institution, or a company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(ii) Does not use the word ''bank'' in its name;

(7) No director or employee of the banking entity (or an affiliate thereof) takes or retains an ownership interest in the covered fund, except for any director or employee of the banking entity or such affiliate who is directly engaged in providing investment advisory, commodity trading advisory, or other services to the covered fund at the time the director or employee takes the ownership interest; and

(8) The banking entity:

(i) Clearly and conspicuously discloses, in writing, to any prospective and actual investor in the covered fund (such as through disclosure in the covered fund's offering documents):

(A) That ''any losses in [such covered fund] will be borne solely by investors in [the covered fund] and not by [the banking entity] or its affiliates; therefore, [the banking entity's] losses in [such covered fund] will be limited to losses attributable to the ownership interests in the covered fund held by [the banking entity] and any affiliate in its capacity as investor in the [covered fund] or as beneficiary of a restricted profit interest held by [the banking entity] or any affiliate'';

(B) That such investor should read the fund offering documents before investing in the covered fund;

(C) That the ''ownership interests in the covered fund are not insured by the FDIC, and are not deposits, obligations of, or endorsed or guaranteed in any way, by any banking entity'' (unless that happens to be the case); and

(D) The role of the banking entity and its affiliates and employees in sponsoring or providing any services to the covered fund; and

(ii) Complies with any additional rules of the appropriate Federal banking agencies, the SEC, or the CFTC, as provided in section 13(b)(2) of the BHC Act, designed to ensure that losses in such covered fund are borne solely by investors in the covered fund and not by the covered banking entity and its affiliates.

(b) *Organizing and offering an issuing entity of asset-backed securities.* (1) Notwithstanding § 351.10(a) of this subpart, a banking entity is not prohibited from acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund that is an issuing entity of asset-backed securities in connection with, directly or indirectly, organizing and offering that issuing entity, so long as the banking entity and its affiliates comply with all of the requirements of paragraph (a)(3) through (8) of this section.

(2) For purposes of this paragraph (b), organizing and offering a covered fund that is an issuing entity of asset-backed securities means acting as the securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78*o*–11(a)(3)) of the issuing entity, or acquiring or retaining an ownership interest in the issuing entity as required by section 15G of that Act (15 U.S.C. 78*o*–11) and the implementing regulations issued thereunder.

(c) *Underwriting and market making in ownership interests of a covered fund.* The prohibition contained in § 351.10(a) of this subpart does not apply to a banking entity's underwriting activities or market making-related activities involving a covered fund so long as:

(1) Those activities are conducted in accordance with the requirements of § 351.4(a) or § 351.4(b) of subpart B, respectively;

(2) With respect to any banking entity (or any affiliate thereof) that: Acts as a sponsor, investment adviser or commodity trading advisor to a particular covered fund or otherwise acquires and retains an ownership interest in such covered fund in reliance on paragraph (a) of this section; acquires and retains an ownership interest in such covered fund and is either a securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78o–11(a)(3)), or is acquiring and retaining an ownership interest in such covered fund in compliance with section 15G of that Act (15 U.S.C. 78o–11) and the implementing regulations issued thereunder each as permitted by paragraph (b) of this section; or, directly or indirectly, guarantees, assumes, or otherwise insures the obligations or performance of the covered fund or of any covered fund in which such fund invests, then in each such case any ownership interests acquired or retained by the banking entity and its affiliates in connection with underwriting and market making related activities for that particular covered fund are included in the calculation of ownership interests permitted to be held by the banking entity and its affiliates under the limitations of § 351.12(a)(2)(ii) and § 351.12(d) of this subpart; and

(3) With respect to any banking entity, the aggregate value of all ownership interests of the banking entity and its affiliates in all covered funds acquired and retained under § 351.11 of this subpart, including all covered funds in which the banking entity holds an ownership interest in connection with underwriting and market making related activities permitted under this paragraph (c), are included in the calculation of all ownership interests under § 351.12(a)(2)(iii) and § 351.12(d) of this subpart.

§ 351.12 Permitted investment in a covered fund.

(a) *Authority and limitations on permitted investments in covered funds.* (1) Notwithstanding the prohibition contained in § 351.10(a) of this subpart, a banking entity may acquire and retain an ownership interest in a covered fund that the banking entity or an affiliate thereof organizes and offers pursuant to § 351.11, for the purposes of:

(i) *Establishment.* Establishing the fund and providing the fund with sufficient initial equity for investment to permit the fund to attract unaffiliated investors, subject to the limits contained in paragraphs (a)(2)(i) and (iii) of this section; or

(ii) *De minimis investment.* Making and retaining an investment in the covered fund subject to the limits contained in paragraphs (a)(2)(ii) and (iii) of this section.

(2) *Investment limits*—(i) *Seeding period.* With respect to an investment in any covered fund made or held pursuant to paragraph (a)(1)(i) of this section, the banking entity and its affiliates:

(A) Must actively seek unaffiliated investors to reduce, through redemption, sale, dilution, or other methods, the aggregate amount of all ownership interests of the banking entity in the covered fund to the amount permitted in paragraph (a)(2)(i)(B) of this section; and

(B) Must, no later than 1 year after the date of establishment of the fund (or such longer period as may be provided by the Board pursuant to paragraph (e) of this section), conform its ownership interest in the covered fund to the limits in paragraph (a)(2)(ii) of this section;

(ii) *Per-fund limits.* (A) Except as provided in paragraph (a)(2)(ii)(B) of this section, an investment by a banking entity and its affiliates in any covered fund made or held pursuant to paragraph (a)(1)(ii) of this section may not exceed 3 percent of the total number or value of the outstanding ownership interests of the fund.

(B) An investment by a banking entity and its affiliates in a covered fund that is an issuing entity of asset-backed securities may not exceed 3 percent of the total fair market value of the ownership interests of the fund measured in accordance with paragraph (b)(3) of this section, unless a greater percentage is retained by the banking entity and its affiliates in compliance with the requirements of section 15G of the Exchange Act (15 U.S.C. 78*o*–11) and the implementing regulations issued thereunder, in which case the investment by the banking entity and its affiliates in the covered fund may not exceed the amount, number, or value of ownership interests of the fund required under section 15G of the Exchange Act and the implementing regulations issued thereunder.

(iii) *Aggregate limit.* The aggregate value of all ownership interests of the banking entity and its affiliates in all covered funds acquired or retained under this section may not exceed 3 percent of the tier 1 capital of the banking entity, as provided under paragraph (c) of this section, and shall be calculated as of the last day of each calendar quarter.

(iv) *Date of establishment.* For purposes of this section, the date of establishment of a covered fund shall be:

(A) *In general.* The date on which the investment adviser or similar entity to the covered fund begins making investments pursuant to the written investment strategy for the fund;

(B) *Issuing entities of asset-backed securities.* In the case of an issuing entity of asset-backed securities, the date on which the assets are initially transferred into the issuing entity of asset-backed securities.

(b) *Rules of construction*—(1) *Attribution of ownership interests to a covered banking entity.* (i) For purposes of paragraph (a)(2) of this section, the amount and value of a banking entity's permitted investment in any single covered fund shall include any ownership interest held under § 351.12 directly by the banking entity, including any affiliate of the banking entity.

(ii) *Treatment of registered investment companies, SEC-regulated business development companies and foreign public funds.* For purposes of paragraph (b)(1)(i) of this section, a registered investment company, SEC-regulated business development companies or foreign public fund as described in § 351.10(c)(1) of this subpart will not be considered to be an affiliate of the banking entity so long as the banking entity:

(A) Does not own, control, or hold with the power to vote 25 percent or more of the voting shares of the company or fund; and

(B) Provides investment advisory, commodity trading advisory, administrative, and other services to the company or fund in compliance with the limitations under applicable regulation, order, or other authority.

(iii) *Covered funds.* For purposes of paragraph (b)(1)(i) of this section, a covered fund will not be considered to be an affiliate of a banking entity so long as the covered fund is held in compliance with the requirements of this subpart.

(iv) *Treatment of employee and director investments financed by the banking entity.* For purposes of paragraph (b)(1)(i) of this section, an investment by a director or employee of a banking entity who acquires an ownership interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the ownership interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

(2) *Calculation of permitted ownership interests in a single covered fund.* Except as provided in paragraph (b)(3) or (4), for purposes of determining whether an investment in a single covered fund complies with the restrictions on ownership interests under paragraphs (a)(2)(i)(B) and (a)(2)(ii)(A) of this section:

(i) The aggregate number of the outstanding ownership interests held by the banking entity shall be the total number of ownership interests held under this section by the banking entity in a covered fund divided by the total number of ownership interests held by all entities in that covered fund, as of the last day of each calendar quarter (both measured without regard to committed funds not yet called for investment);

(ii) The aggregate value of the outstanding ownership interests held by the banking entity shall be the aggregate fair market value of all investments in and capital contributions made to the covered fund by the banking entity, divided by the value of all investments in and capital contributions made to that covered fund by all entities, as of the last day of each calendar quarter (all measured without regard to committed funds not yet called for investment). If fair market value cannot be determined, then the value shall be the historical cost basis of all investments in and contributions made by the banking entity to the covered fund;

(iii) For purposes of the calculation under paragraph (b)(2)(ii) of this section, once a valuation methodology is chosen, the banking entity must calculate the value of its investment and the investments of all others in the covered fund in the same manner and according to the same standards.

(3) *Issuing entities of asset-backed securities.* In the case of an ownership interest in an issuing entity of asset-backed securities, for purposes of determining whether an investment in a single covered fund complies with the restrictions on ownership interests under paragraphs (a)(2)(i)(B) and (a)(2)(ii)(B) of this section:

(i) For securitizations subject to the requirements of section 15G of the Exchange Act (15 U.S.C. 78o–11), the calculations shall be made as of the date and according to the valuation methodology applicable pursuant to the requirements of section 15G of the Exchange Act (15 U.S.C. 78o–11) and the implementing regulations issued thereunder; or

(ii) For securitization transactions completed prior to the compliance date of such implementing regulations (or as to which such implementing regulations do not apply), the calculations shall be made as of the date of establishment as defined in paragraph (a)(2)(iv)(B) of this section or such earlier date on which the transferred assets have been valued for purposes of transfer to the covered fund, and thereafter only upon the date on which additional securities of the issuing entity of asset-backed securities are priced for purposes of the sales of ownership interests to unaffiliated investors.

(iii) For securitization transactions completed prior to the compliance date of such implementing regulations (or as to which such implementing regulations do not apply), the aggregate value of the outstanding ownership interests in the covered fund shall be the fair market value of the assets transferred to the issuing entity of the securitization and any other assets otherwise held by the issuing entity at such time, determined in a manner that is consistent with its determination of the fair market value of those assets for financial statement purposes.

(iv) For purposes of the calculation under paragraph (b)(3)(iii) of this section, the valuation methodology used to calculate the fair market value of the ownership interests must be the same for both the ownership interests held by a banking entity and the ownership interests held by all others in the covered fund in the same manner and according to the same standards.

(4) *Multi-tier fund investments*—(i) *Master-feeder fund investments.* If the principal investment strategy of a covered fund (the ''feeder fund'') is to invest substantially all of its assets in another single covered fund (the ''master fund''), then for purposes of the investment limitations in paragraphs (a)(2)(i)(B) and (a)(2)(ii) of this section, the banking entity's permitted investment in such funds shall be measured only by reference to the value of the master fund. The banking entity's permitted investment in the master fund shall include any investment by the banking entity in the master fund, as well as the banking entity's pro-rata share of any ownership interest of the master fund that is held through the feeder fund; and

(ii) *Fund-of-funds investments.* If a banking entity organizes and offers a covered fund pursuant to § 351.11 of this subpart for the purpose of investing in other covered funds (a ''fund of funds'') and that fund of funds itself invests in another covered fund that the banking entity is permitted to own, then the banking entity's permitted investment in that other fund shall include any investment by the banking entity in that other fund, as well as the banking entity's pro-rata share of any ownership interest of the fund that is held through the fund of funds. The investment of the banking entity may not represent more than 3 percent of the amount or value of any single covered fund.

(c) *Aggregate permitted investments in all covered funds.* (1) For purposes of paragraph (a)(2)(iii) of this section, the aggregate value of all ownership interests held by a banking entity shall be the sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest in covered funds (together with any amounts paid by the entity (or employee thereof) in connection with obtaining a restricted profit interest under § 351.10(d)(6)(ii) of this subpart), on a historical cost basis.

(2) *Calculation of tier 1 capital.* For purposes of paragraph (a)(2)(iii) of this section:

(i) *Entities that are required to hold and report tier 1 capital.* If a banking entity is required to calculate and report tier 1 capital, the banking entity's tier 1 capital shall be equal to the amount of tier 1 capital of the banking entity as of the last day of the most recent calendar quarter, as reported to its primary financial regulatory agency; and

(ii) If a banking entity is not required to calculate and report tier 1 capital, the banking entity's tier 1 capital shall be determined to be equal to:

(A) In the case of a banking entity that is controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital, be equal to the amount of tier 1 capital reported by such controlling depository institution in the manner described in paragraph (c)(2)(i) of this section;

(B) In the case of a banking entity that is not controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital:

(*1*) *Bank holding company subsidiaries.* If the banking entity is a subsidiary of a bank holding company or company that is treated as a bank holding company, be equal to the amount of tier 1 capital reported by the top-tier affiliate of such covered banking entity that calculates and reports tier 1 capital in the manner described in paragraph (c)(2)(i) of this section; and

(*2*) *Other holding companies and any subsidiary or affiliate thereof.* If the banking entity is not a subsidiary of a bank holding company or a company that is treated as a bank holding company, be equal to the total amount of shareholders' equity of the top-tier affiliate within such organization as of the last day of the most recent calendar quarter that has ended, as determined under applicable accounting standards.

(iii) *Treatment of foreign banking entities*—(A) *Foreign banking entities.* Except as provided in paragraph (c)(2)(iii)(B) of this section, with respect to a banking entity that is not itself, and is not controlled directly or indirectly by, a banking entity that is located or organized under the laws of the United States or of any State, the tier 1 capital of the banking entity shall be the consolidated tier 1 capital of the entity as calculated under applicable home country standards.

(B) *U.S. affiliates of foreign banking entities.* With respect to a banking entity that is located or organized under the laws of the United States or of any State and is controlled by a foreign banking entity identified under paragraph (c)(2)(iii)(A) of this section, the banking entity's tier 1 capital shall be as calculated under paragraphs (c)(2)(i) or (ii) of this section.

(d) *Capital treatment for a permitted investment in a covered fund.* For purposes of calculating compliance with the applicable regulatory capital requirements, a banking entity shall deduct from the banking entity's tier 1 capital (as determined under paragraph (c)(2) of this section) the greater of:

(1) The sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest (together with any amounts paid by the entity (or employee thereof) in connection with obtaining a restricted profit interest under § 351.10(d)(6)(ii) of subpart C), on a historical cost basis, plus any earnings received; and

(2) The fair market value of the banking entity's ownership interests in the covered fund as determined under paragraph (b)(2)(ii) or (b)(3) of this section (together with any amounts paid by the entity (or employee thereof) in connection with obtaining a restricted profit interest under § 351.10(d)(6)(ii) of subpart C), if the banking entity accounts for the profits (or losses) of the fund investment in its financial statements.

(e) *Extension of time to divest an ownership interest.* (1) Upon application by a banking entity, the Board may extend the period under paragraph (a)(2)(i) of this section for up to 2 additional years if the Board finds that an extension would be consistent with safety and soundness and not detrimental to the public interest. An application for extension must:

(i) Be submitted to the Board at least 90 days prior to the expiration of the applicable time period;

(ii) Provide the reasons for application, including information that addresses the factors in paragraph (e)(2) of this section; and

(iii) Explain the banking entity's plan for reducing the permitted investment in a covered fund through redemption, sale, dilution or other methods as required in paragraph (a)(2) of this section.

(2) *Factors governing Board determinations.* In reviewing any application under paragraph (e)(1) of this section, the Board may consider all the facts and circumstances related to the permitted investment in a covered fund, including:

(i) Whether the investment would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies;

(ii) The contractual terms governing the banking entity's interest in the covered fund;

(iii) The date on which the covered fund is expected to have attracted sufficient investments from investors unaffiliated with the banking entity to enable the banking entity to comply with the limitations in paragraph (a)(2)(i) of this section;

(iv) The total exposure of the covered banking entity to the investment and the risks that disposing of, or maintaining, the investment in the covered fund may pose to the banking entity and the financial stability of the United States;

(v) The cost to the banking entity of divesting or disposing of the investment within the applicable period;

(vi) Whether the investment or the divestiture or conformance of the investment would involve or result in a material conflict of interest between the banking entity and unaffiliated parties, including clients, customers or counterparties to which it owes a duty;

(vi) The banking entity's prior efforts to reduce through redemption, sale, dilution, or other methods its ownership interests in the covered fund, including activities related to the marketing of interests in such covered fund;

(viii) Market conditions; and

(ix) Any other factor that the Board believes appropriate.

(3) *Authority to impose restrictions on activities or investment during any extension period.* The Board may impose such conditions on any extension approved under paragraph (e)(1) of this section as the Board determines are necessary or appropriate to protect the safety and soundness of the banking entity or the financial stability of the United States, address material conflicts of interest or other unsound banking practices, or otherwise further the purposes of section 13 of the BHC Act and this part.

(4) *Consultation.* In the case of a banking entity that is primarily regulated by another Federal banking agency, the SEC, or the CFTC, the Board will consult with such agency prior to acting on an application by the banking entity for an extension under paragraph (e)(1) of this section.

§ 351.13 Other permitted covered fund activities and investments.

(a) *Permitted risk-mitigating hedging activities.* (1) The prohibition contained in § 351.10(a) of this subpart does not apply with respect to an ownership interest in a covered fund acquired or retained by a banking entity that is designed to demonstrably reduce or otherwise significantly mitigate the specific, identifiable risks to the banking entity in connection with a compensation arrangement with an employee of the banking entity or an affiliate thereof that directly provides investment advisory, commodity trading advisory or other services to the covered fund.

(2) *Requirements.* The risk-mitigating hedging activities of a banking entity are permitted under this paragraph (a) only if:

(i) The banking entity has established and implements, maintains and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(A) Reasonably designed written policies and procedures; and

(B) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(ii) The acquisition or retention of the ownership interest:

(A) Is made in accordance with the written policies, procedures and internal controls required under this section;

(B) At the inception of the hedge, is designed to reduce or otherwise significantly mitigate and demonstrably reduces or otherwise significantly mitigates one or more specific, identifiable risks arising in connection with the compensation arrangement with the employee that directly provides investment advisory, commodity trading advisory, or other services to the covered fund;

(C) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section; and

(D) Is subject to continuing review, monitoring and management by the banking entity.

(iii) The compensation arrangement relates solely to the covered fund in which the banking entity or any affiliate has acquired an ownership interest pursuant to this paragraph and such compensation arrangement provides that any losses incurred by the banking entity on such ownership interest will be offset by corresponding decreases in amounts payable under such compensation arrangement.

(b) *Certain permitted covered fund activities and investments outside of the United States.* (1) The prohibition contained in § 351.10(a) of this subpart does not apply to the acquisition or retention of any ownership interest in, or the sponsorship of, a covered fund by a banking entity only if:

(i) The banking entity is not organized or directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States;

(ii) The activity or investment by the banking entity is pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act;

(iii) No ownership interest in the covered fund is offered for sale or sold to a resident of the United States; and

(iv) The activity or investment occurs solely outside of the United States.

(2) An activity or investment by the banking entity is pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act for purposes of paragraph (b)(1)(ii) of this section only if:

(i) The activity or investment is conducted in accordance with the requirements of this section; and

(ii)(A) With respect to a banking entity that is a foreign banking organization, the banking entity meets the qualifying foreign banking organization requirements of section 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c) or (e)), as applicable; or

(B) With respect to a banking entity that is not a foreign banking organization, the banking entity is not organized under the laws of the United States or of one or more States and the banking entity, on a fully-consolidated basis, meets at least two of the following requirements:

(*1*) Total assets of the banking entity held outside of the United States exceed total assets of the banking entity held in the United States;

(*2*) Total revenues derived from the business of the banking entity outside of the United States exceed total revenues derived from the business of the banking entity in the United States; or

(*3*) Total net income derived from the business of the banking entity outside of the United States exceeds total net income derived from the business of the banking entity in the United States.

(3) An ownership interest in a covered fund is not offered for sale or sold to a resident of the United States for purposes of paragraph (b)(1)(iii) of this section only if it is sold or has been sold pursuant to an offering that does not target residents of the United States.

(4) An activity or investment occurs solely outside of the United States for purposes of paragraph (b)(1)(iv) of this section only if:

(i) The banking entity acting as sponsor, or engaging as principal in the acquisition or retention of an ownership interest in the covered fund, is not itself, and is not controlled directly or indirectly by, a banking entity that is located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to acquire or retain the ownership interest or act as sponsor to the covered fund is not located in the United States or organized under the laws of the United States or of any State;

(iii) The investment or sponsorship, including any transaction arising from risk-mitigating hedging related to an ownership interest, is not accounted for as principal directly or indirectly on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State; and

(iv) No financing for the banking entity's ownership or sponsorship is provided, directly or indirectly, by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State.

(5) For purposes of this section, a U.S. branch, agency, or subsidiary of a foreign bank, or any subsidiary thereof, is located in the United States; however, a foreign bank of which that branch, agency, or subsidiary is a part is not considered to be located in the United States solely by virtue of operation of the U.S. branch, agency, or subsidiary.

(c) *Permitted covered fund interests and activities by a regulated insurance company.* The prohibition contained in § 351.10(a) of this subpart does not apply to the acquisition or retention by an insurance company, or an affiliate thereof, of any ownership interest in, or the sponsorship of, a covered fund only if:

(1) The insurance company or its affiliate acquires and retains the ownership interest solely for the general account of the insurance company or for one or more separate accounts established by the insurance company;

(2) The acquisition and retention of the ownership interest is conducted in compliance with, and subject to, the insurance company investment laws, regulations, and written guidance of the State or jurisdiction in which such insurance company is domiciled; and

(3) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and foreign jurisdictions, as appropriate, have not jointly determined, after notice and comment, that a particular law, regulation, or written guidance described in paragraph (c)(2) of this section is insufficient to protect the safety and soundness of the banking entity, or the financial stability of the United States.

§ 351.14 Limitations on relationships with a covered fund.

(a) *Relationships with a covered fund.* (1) Except as provided for in paragraph (a)(2) of this section, no banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, that organizes and offers a covered fund pursuant to § 351.11 of this subpart, or that continues to hold an ownership interest in accordance with § 351.11(b) of this subpart, and no affiliate of such entity, may enter into a transaction with the covered fund, or with any other covered fund that is controlled by such covered fund, that would be a covered transaction as defined in section 23A of the Federal Reserve Act (12 U.S.C. 371c(b)(7)), as if such banking entity and the affiliate thereof were a member bank and the covered fund were an affiliate thereof.

(2) Notwithstanding paragraph (a)(1) of this section, a banking entity may:

(i) Acquire and retain any ownership interest in a covered fund in accordance with the requirements of § 351.11, § 351.12, or § 351.13 of this subpart; and

(ii) Enter into any prime brokerage transaction with any covered fund in which a covered fund managed, sponsored, or advised by such banking entity (or an affiliate thereof) has taken an ownership interest, if:

(A) The banking entity is in compliance with each of the limitations set forth in § 351.11 of this subpart with respect to a covered fund organized and offered by such banking entity (or an affiliate thereof);

(B) The chief executive officer (or equivalent officer) of the banking entity certifies in writing annually to the FDIC (with a duty to update the certification if the information in the certification materially changes) that the banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests; and

(C) The Board has not determined that such transaction is inconsistent with the safe and sound operation and condition of the banking entity.

(b) *Restrictions on transactions with covered funds.* A banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, or that organizes and offers a covered fund pursuant to § 351.11 of this subpart, or that continues to hold an ownership interest in accordance with § 351.11(b) of this subpart, shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1), as if such banking entity were a member bank and such covered fund were an affiliate thereof.

(c) *Restrictions on prime brokerage transactions.* A prime brokerage transaction permitted under paragraph (a)(2)(ii) of this section shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1) as if the counterparty were an affiliate of the banking entity.

§ 351.15 Other limitations on permitted covered fund activities.

(a) No transaction, class of transactions, or activity may be deemed permissible under §§ 351.11 through 351.13 of this subpart if the transaction, class of transactions, or activity would:

(1) Involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties;

(2) Result, directly or indirectly, in a material exposure by the banking entity to a high-risk asset or a high-risk trading strategy; or

(3) Pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.

(b) *Definition of material conflict of interest.* (1) For purposes of this section, a material conflict of interest between a banking entity and its clients, customers, or counterparties exists if the banking entity engages in any transaction, class of transactions, or activity that would involve or result in the banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, and the banking entity has not taken at least one of the actions in paragraph (b)(2) of this section.

(2) Prior to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, the banking entity:

(i) *Timely and effective disclosure.* (A) Has made clear, timely, and effective disclosure of the conflict of interest, together with other necessary information, in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest; and

(B) Such disclosure is made in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty created by the conflict of interest; or

(ii) *Information barriers.* Has established, maintained, and enforced information barriers that are memorialized in written policies and procedures, such as physical separation of personnel, or functions, or limitations on types of activity, that are reasonably designed, taking into consideration the nature of the banking entity's business, to prevent the conflict of interest from involving or resulting in a materially adverse effect on a client, customer, or counterparty. A banking entity may not rely on such information barriers if, in the case of any specific transaction, class or type of transactions or activity, the banking entity knows or should reasonably know that, notwithstanding the banking entity's establishment of information barriers, the conflict of interest may involve or result in a materially adverse effect on a client, customer, or counterparty.

(c) *Definition of high-risk asset and high-risk trading strategy.* For purposes of this section:

(1) *High-risk asset* means an asset or group of related assets that would, if held by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

(2) *High-risk trading strategy* means a trading strategy that would, if engaged in by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

§ 351.16 Ownership of Interests in and Sponsorship of Issuers of Certain Collateralized Debt Obligations Backed by Trust-Preferred Securities.

(a) The prohibition contained in § 351.10(a)(1) does not apply to the ownership by a banking entity of an interest in, or sponsorship of, any issuer if:

(1) The issuer was established, and the interest was issued, before May 19, 2010;

(2) The banking entity reasonably believes that the offering proceeds received by the issuer were invested primarily in Qualifying TruPS Collateral; and

(3) The banking entity acquired such interest on or before December 10, 2013 (or acquired such interest in connection with a merger with or acquisition of a banking entity that acquired the interest on or before December 10, 2013).

(b) For purposes of this § 351.16, *Qualifying TruPS Collateral* shall mean any trust preferred security or subordinated debt instrument issued prior to May 19, 2010 by a depository institution holding company that, as of the end of any reporting period within 12 months immediately preceding the issuance of such trust preferred security or subordinated debt instrument, had total consolidated assets of less than $15,000,000,000 or issued prior to May 19, 2010 by a mutual holding company.

(c) Notwithstanding paragraph (a)(3) of this section, a banking entity may act as a market maker with respect to the interests of an issuer described in paragraph (a) of this section in accordance with the applicable provisions of §§ 351.4 and 351.11.

(d) Without limiting the applicability of paragraph (a) of this section, the Board, the FDIC and the OCC will make public a non-exclusive list of issuers that meet the requirements of paragraph (a). A banking entity may rely on the list published by the Board, the FDIC and the OCC.

§§ 351.17–351.19 [Reserved]

Subpart D—Compliance Program Requirement; Violations

§ 351.20 Program for compliance; reporting.

(a) *Program requirement.* Each banking entity shall develop and provide for the continued administration of a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part. The terms, scope and detail of the compliance program shall be appropriate for the types, size, scope and complexity of activities and business structure of the banking entity.

(b) *Contents of compliance program.* Except as provided in paragraph (f) of this section, the compliance program required by paragraph (a) of this section, at a minimum, shall include:

(1) Written policies and procedures reasonably designed to document, describe, monitor and limit trading activities subject to subpart B (including those permitted under §§ 351.3 to 351.6 of subpart B), including setting, monitoring and managing required limits set out in § 351.4 and § 351.5, and activities and investments with respect to a covered fund subject to subpart C (including those permitted under §§ 351.11 through 351.14 of subpart C) conducted by the banking entity to ensure that all activities and investments conducted by the banking entity that are subject to section 13 of the BHC Act and this part comply with section 13 of the BHC Act and this part;

(2) A system of internal controls reasonably designed to monitor compliance with section 13 of the BHC Act and this part and to prevent the occurrence of activities or investments that are prohibited by section 13 of the BHC Act and this part;

(3) A management framework that clearly delineates responsibility and accountability for compliance with section 13 of the BHC Act and this part and includes appropriate management review of trading limits, strategies, hedging activities, investments, incentive compensation and other matters identified in this part or by management as requiring attention;

(4) Independent testing and audit of the effectiveness of the compliance program conducted periodically by qualified personnel of the banking entity or by a qualified outside party;

(5) Training for trading personnel and managers, as well as other appropriate personnel, to effectively implement and enforce the compliance program; and

(6) Records sufficient to demonstrate compliance with section 13 of the BHC Act and this part, which a banking entity must promptly provide to the FDIC upon request and retain for a period of no less than 5 years or such longer period as required by the FDIC.

(c) *Additional standards.* In addition to the requirements in paragraph (b) of this section, the compliance program of a banking entity must satisfy the requirements and other standards contained in Appendix B, if:

(1) The banking entity engages in proprietary trading permitted under subpart B and is required to comply with the reporting requirements of paragraph (d) of this section;

(2) The banking entity has reported total consolidated assets as of the previous calendar year end of $50 billion or more or, in the case of a foreign banking entity, has total U.S. assets as of the previous calendar year end of $50 billion or more (including all subsidiaries, affiliates, branches and agencies of the foreign banking entity operating, located or organized in the United States); or

(3) The FDIC notifies the banking entity in writing that it must satisfy the requirements and other standards contained in Appendix B to this part.

(d) *Reporting requirements under Appendix A to this part.* (1) A banking entity engaged in proprietary trading activity permitted under subpart B shall comply with the reporting requirements described in Appendix A, if:

(i) The banking entity (other than a foreign banking entity as provided in paragraph (d)(1)(ii) of this section) has, together with its affiliates and subsidiaries, trading assets and liabilities (excluding trading assets and liabilities involving obligations of or guaranteed by the United States or any agency of the United States) the average gross sum of which (on a worldwide consolidated basis) over the previous consecutive four quarters, as measured as of the last day of each of the four prior calendar quarters, equals or exceeds the threshold established in paragraph (d)(2) of this section;

(ii) In the case of a foreign banking entity, the average gross sum of the trading assets and liabilities of the combined U.S. operations of the foreign banking entity (including all subsidiaries, affiliates, branches and agencies of the foreign banking entity operating, located or organized in the United States and excluding trading assets and liabilities involving obligations of or guaranteed by the United States or any agency of the United States) over the previous consecutive four quarters, as measured as of the last day of each of the four prior calendar quarters, equals or exceeds the threshold established in paragraph (d)(2) of this section; or

(iii) The FDIC notifies the banking entity in writing that it must satisfy the reporting requirements contained in Appendix A.

(2) The threshold for reporting under paragraph (d)(1) of this section shall be $50 billion beginning on June 30, 2014; $25 billion beginning on April 30, 2016; and $10 billion beginning on December 31, 2016.

(3) Frequency of reporting: Unless the FDIC notifies the banking entity in writing that it must report on a different basis, a banking entity with $50 billion or more in trading assets and liabilities (as calculated in accordance with paragraph (d)(1) of this section) shall report the information required by Appendix A for each calendar month within 30 days of the end of the relevant calendar month; beginning with information for the month of January 2015, such information shall be reported within 10 days of the end of each calendar month. Any other banking entity subject to Appendix A shall report the information required by Appendix A for each calendar quarter within 30 days of the end of that calendar quarter unless the FDIC notifies the banking entity in writing that it must report on a different basis.

(e) *Additional documentation for covered funds.* Any banking entity that has more than $10 billion in total consolidated assets as reported on December 31 of the previous two calendar years shall maintain records that include:

(1) Documentation of the exclusions or exemptions other than sections 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940 relied on by each fund sponsored by the banking entity (including all subsidiaries and affiliates) in determining that such fund is not a covered fund;

(2) For each fund sponsored by the banking entity (including all subsidiaries and affiliates) for which the banking entity relies on one or more of the exclusions from the definition of covered fund provided by §§ 351.10(c)(1), 351.10(c)(5), 351.10(c)(8), 351.10(c)(9), or 351.10(c)(10) of subpart C, documentation supporting the banking entity's determination that the fund is not a covered fund pursuant to one or more of those exclusions;

(3) For each seeding vehicle described in § 351.10(c)(12)(i) or (iii) of subpart C that will become a registered investment company or SEC-regulated business development company, a written plan documenting the banking entity's determination that the seeding vehicle will become a registered investment company or SEC-regulated business development company; the period of time during which the vehicle will operate as a seeding vehicle; and the banking entity's plan to market the vehicle to third-party investors and convert it into a registered investment company or SEC-regulated business development company within the time period specified in § 351.12(a)(2)(i)(B) of subpart C;

(4) For any banking entity that is, or is controlled directly or indirectly by a

banking entity that is, located in or organized under the laws of the United States or of any State, if the aggregate amount of ownership interests in foreign public funds that are described in § 351.10(c)(1) of subpart C owned by such banking entity (including ownership interests owned by any affiliate that is controlled directly or indirectly by a banking entity that is located in or organized under the laws of the United States or of any State) exceeds $50 million at the end of two or more consecutive calendar quarters, beginning with the next succeeding calendar quarter, documentation of the value of the ownership interests owned by the banking entity (and such affiliates) in each foreign public fund and each jurisdiction in which any such foreign public fund is organized, calculated as of the end of each calendar quarter, which documentation must continue until the banking entity's aggregate amount of ownership interests in foreign public funds is below $50 million for two consecutive calendar quarters; and

(5) For purposes of paragraph (e)(4) of this section, a U.S. branch, agency, or subsidiary of a foreign banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(f) *Simplified programs for less active banking entities*—(1) *Banking entities with no covered activities.* A banking entity that does not engage in activities or investments pursuant to subpart B or subpart C (other than trading activities permitted pursuant to § 351.6(a) of subpart B) may satisfy the requirements of this section by establishing the required compliance program prior to becoming engaged in such activities or making such investments (other than trading activities permitted pursuant to § 351.6(a) of subpart B).

(2) *Banking entities with modest activities.* A banking entity with total consolidated assets of $10 billion or less as reported on December 31 of the previous two calendar years that engages in activities or investments pursuant to subpart B or subpart C (other than trading activities permitted under § 351.6(a) of subpart B) may satisfy the requirements of this section by including in its existing compliance policies and procedures appropriate references to the requirements of section 13 of the BHC Act and this part and adjustments as appropriate given the activities, size, scope and complexity of the banking entity.

§ 351.21 Termination of activities or investments; penalties for violations.

(a) Any banking entity that engages in an activity or makes an investment in violation of section 13 of the BHC Act or this part, or acts in a manner that functions as an evasion of the requirements of section 13 of the BHC Act or this part, including through an abuse of any activity or investment permitted under subparts B or C, or otherwise violates the restrictions and requirements of section 13 of the BHC Act or this part, shall, upon discovery, promptly terminate the activity and, as relevant, dispose of the investment.

(b) Whenever the FDIC finds reasonable cause to believe any banking entity has engaged in an activity or made an investment in violation of section 13 of the BHC Act or this part, or engaged in any activity or made any investment that functions as an evasion of the requirements of section 13 of the BHC Act or this part, the FDIC may take any action permitted by law to enforce compliance with section 13 of the BHC Act and this part, including directing the banking entity to restrict, limit, or terminate any or all activities under this part and dispose of any investment.

Appendix A to Part 351—Reporting and Recordkeeping Requirements for Covered Trading Activities

I. Purpose

a. This appendix sets forth reporting and recordkeeping requirements that certain banking entities must satisfy in connection with the restrictions on proprietary trading set forth in subpart B (''proprietary trading restrictions''). Pursuant to § 351.20(d), this appendix generally applies to a banking entity that, together with its affiliates and subsidiaries, has significant trading assets and liabilities. These entities are required to (i) furnish periodic reports to the FDIC regarding a variety of quantitative measurements of their covered trading activities, which vary depending on the scope and size of covered trading activities, and (ii) create and maintain records documenting the preparation and content of these reports. The requirements of this appendix must be incorporated into the banking entity's internal compliance program under § 351.20 and Appendix B.

b. The purpose of this appendix is to assist banking entities and the FDIC in:

(i) Better understanding and evaluating the scope, type, and profile of the banking entity's covered trading activities;

(ii) Monitoring the banking entity's covered trading activities;

(iii) Identifying covered trading activities that warrant further review or examination by the banking entity to verify compliance with the proprietary trading restrictions;

(iv) Evaluating whether the covered trading activities of trading desks engaged in market making-related activities subject to § 351.4(b) are consistent with the requirements governing permitted market making-related activities;

(v) Evaluating whether the covered trading activities of trading desks that are engaged in permitted trading activity subject to §§ 351.4, 351.5, or 351.6(a)–(b) (*i.e.,* underwriting and market making-related related activity, risk-mitigating hedging, or trading in certain government obligations) are consistent with the requirement that such activity not result, directly or indirectly, in a material exposure to high-risk assets or high-risk trading strategies;

(vi) Identifying the profile of particular covered trading activities of the banking entity, and the individual trading desks of the banking entity, to help establish the appropriate frequency and scope of examination by the FDIC of such activities; and

(vii) Assessing and addressing the risks associated with the banking entity's covered trading activities.

c. The quantitative measurements that must be furnished pursuant to this appendix are *not* intended to serve as a dispositive tool for the identification of permissible or impermissible activities.

d. In order to allow banking entities and the Agencies to evaluate the effectiveness of these metrics, banking entities must collect and report these metrics for all trading desks beginning on the dates established in § 351.20 of the final rule. The Agencies will review the data collected and revise this collection requirement as appropriate based on a review of the data collected prior to September 30, 2015.

e. In addition to the quantitative measurements required in this appendix, a banking entity may need to develop and implement other quantitative measurements in order to effectively monitor its covered trading activities for compliance with section 13 of the BHC Act and this part and to have an effective compliance program, as required by § 351.20 and Appendix B to this part. The effectiveness of particular quantitative measurements may differ based on the profile of the banking entity's businesses in general and, more specifically, of the particular trading desk, including types of instruments traded, trading activities and strategies, and history and experience (*e.g.,* whether the trading desk is an established, successful market maker or a new entrant to a competitive market). In all cases, banking entities must ensure that they have robust measures in place to identify and monitor the risks taken in their trading activities, to ensure that the activities are within risk tolerances established by the banking entity, and to monitor and examine for compliance with the proprietary trading restrictions in this part.

f. On an ongoing basis, banking entities must carefully monitor, review, and evaluate all furnished quantitative measurements, as well as any others that they choose to utilize in order to maintain compliance with section 13 of the BHC Act and this part. All measurement results that indicate a heightened risk of impermissible proprietary trading, including with respect to otherwise-permitted activities under §§ 351.4 through 351.6(a) and (b), or that result in a material exposure to high-risk assets or high-risk trading strategies, must be escalated within the banking entity for review, further analysis, explanation to the FDIC, and remediation, where appropriate. The quantitative measurements discussed in this appendix should be helpful to banking entities in identifying and managing the risks related to their covered trading activities.

II. Definitions

The terms used in this appendix have the same meanings as set forth in §§ 351.2 and 351.3. In addition, for purposes of this appendix, the following definitions apply:

Calculation period means the period of time for which a particular quantitative measurement must be calculated.

Comprehensive profit and loss means the net profit or loss of a trading desk's material sources of trading revenue over a specific period of time, including, for example, any increase or decrease in the market value of a trading desk's holdings, dividend income, and interest income and expense.

Covered trading activity means trading conducted by a trading desk under §§ 351.4, 351.5, 351.6(a), or 351.6(b). A banking entity may include trading under §§ 351.3(d), 351.6(c), 351.6(d) or 351.6(e).

Measurement frequency means the frequency with which a particular quantitative metric must be calculated and recorded.

Trading desk means the smallest discrete unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof.

III. Reporting and Recordkeeping of Quantitative Measurements

a. Scope of Required Reporting

General scope. Each banking entity made subject to this part by § 351.20 must furnish the following quantitative measurements for each trading desk of the banking entity, calculated in accordance with this appendix:

• Risk and Position Limits and Usage;
• Risk Factor Sensitivities;
• Value-at-Risk and Stress VaR;
• Comprehensive Profit and Loss Attribution;
• Inventory Turnover;
• Inventory Aging; and
• Customer-Facing Trade Ratio

b. Frequency of Required Calculation and Reporting

A banking entity must calculate any applicable quantitative measurement for each trading day. A banking entity must report each applicable quantitative measurement to the FDIC on the reporting schedule established in § 351.20 unless otherwise requested by the FDIC. All quantitative measurements for any calendar month must be reported within the time period required by § 351.20.

c. Recordkeeping

A banking entity must, for any quantitative measurement furnished to the FDIC pursuant to this appendix and § 351.20(d), create and maintain records documenting the preparation and content of these reports, as well as such information as is necessary to permit the FDIC to verify the accuracy of such reports, for a period of 5 years from the end of the calendar year for which the measurement was taken.

IV. Quantitative Measurements

a. Risk-Management Measurements

1. Risk and Position Limits and Usage

i. *Description:* For purposes of this appendix, Risk and Position Limits are the constraints that define the amount of risk that a trading desk is permitted to take at a point in time, as defined by the banking entity for a specific trading desk. Usage represents the portion of the trading desk's limits that are accounted for by the current activity of the desk. Risk and position limits and their usage are key risk management tools used to control and monitor risk taking and include, but are not limited, to the limits set out in § 351.4 and § 351.5. A number of the metrics that are described below, including ''Risk Factor Sensitivities'' and ''Value-at-Risk and Stress Value-at-Risk,'' relate to a trading desk's risk and position limits and are useful in evaluating and setting these limits in the broader context of the trading desk's overall activities, particularly for the market making activities under § 351.4(b) and hedging activity under § 351.5. Accordingly, the limits required under § 351.4(b)(2)(iii) and § 351.5(b)(1)(i) must meet the applicable requirements under § 351.4(b)(2)(iii) and § 351.5(b)(1)(i) and also must include appropriate metrics for the trading desk limits including, at a minimum, the ''Risk Factor Sensitivities'' and ''Value-at-Risk and Stress Value-at-Risk'' metrics except to the extent any of the ''Risk Factor Sensitivities'' or ''Value-at-Risk and Stress Value-at-Risk'' metrics are demonstrably ineffective for measuring and monitoring the risks of a trading desk based on the types of positions traded by, and risk exposures of, that desk.

ii. *General Calculation Guidance:* Risk and Position Limits must be reported in the format used by the banking entity for the purposes of risk management of each trading desk. Risk and Position Limits are often expressed in terms of risk measures, such as VaR and Risk Factor Sensitivities, but may also be expressed in terms of other observable criteria, such as net open positions. When criteria other than VaR or Risk Factor Sensitivities are used to define the Risk and Position Limits, both the value of the Risk and Position Limits and the value of the variables used to assess whether these limits have been reached must be reported.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

2. Risk Factor Sensitivities

i. *Description:* For purposes of this appendix, Risk Factor Sensitivities are changes in a trading desk's Comprehensive Profit and Loss that are expected to occur in the event of a change in one or more underlying variables that are significant sources of the trading desk's profitability and risk.

ii. *General Calculation Guidance:* A banking entity must report the Risk Factor Sensitivities that are monitored and managed as part of the trading desk's overall risk management policy. The underlying data and methods used to compute a trading desk's Risk Factor Sensitivities will depend on the specific function of the trading desk and the internal risk management models employed. The number and type of Risk Factor Sensitivities that are monitored and managed by a trading desk, and furnished to the FDIC, will depend on the explicit risks assumed by the trading desk. In general, however, reported Risk Factor Sensitivities must be sufficiently granular to account for a preponderance of the expected price variation in the trading desk's holdings.

A. Trading desks must take into account any relevant factors in calculating Risk Factor Sensitivities, including, for example, the following with respect to particular asset classes:

• *Commodity derivative positions:* Risk factors with respect to the related commodities set out in 17 CFR 20.2, the maturity of the positions, volatility and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;

• *Credit positions:* Risk factors with respect to credit spreads that are sufficiently granular to account for specific credit sectors and market segments, the maturity profile of the positions, and risk factors with respect to interest rates of all relevant maturities;

• *Credit-related derivative positions:* Risk factor sensitivities, for example credit spreads, shifts (parallel and non-parallel) in credit spreads—volatility, and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;

• *Equity derivative positions:* Risk factor sensitivities such as equity positions, volatility, and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;

• *Equity positions:* Risk factors for equity prices and risk factors that differentiate between important equity market sectors and segments, such as a small capitalization equities and international equities;

• *Foreign exchange derivative positions:* Risk factors with respect to major currency pairs and maturities, exposure to interest rates at relevant maturities, volatility, and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), as well as the maturity profile of the positions; and

• *Interest rate positions, including interest rate derivative positions:* Risk factors with respect to major interest rate categories and maturities and volatility and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and shifts (parallel and non-parallel) in the interest rate curve, as well as the maturity profile of the positions.

B. The methods used by a banking entity to calculate sensitivities to a common factor shared by multiple trading desks, such as an equity price factor, must be applied consistently across its trading desks so that the sensitivities can be compared from one trading desk to another.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

3. Value-at-Risk and Stress Value-at-Risk

i. *Description:* For purposes of this appendix, Value-at-Risk (''VaR'') is the commonly used percentile measurement of the risk of future financial loss in the value of a given set of aggregated positions over a specified period of time, based on current market conditions. For purposes of this appendix, Stress Value-at-Risk (''Stress VaR'') is the percentile measurement of the risk of future financial loss in the value of a given set of aggregated positions over a specified period of time, based on market conditions during a period of significant financial stress.

ii. *General Calculation Guidance:* Banking entities must compute and report VaR and Stress VaR by employing generally accepted standards and methods of calculation. VaR should reflect a loss in a trading desk that is expected to be exceeded less than one percent of the time over a one-day period. For those banking entities that are subject to regulatory capital requirements imposed by a Federal banking agency, VaR and Stress VaR must be computed and reported in a manner that is consistent with such regulatory capital requirements. In cases where a trading desk does not have a standalone VaR or Stress VaR calculation but is part of a larger aggregation of positions for which a VaR or Stress VaR calculation is performed, a VaR or Stress VaR calculation that includes only the trading desk's holdings must be performed consistent with the VaR or Stress VaR model and methodology used for the larger aggregation of positions.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

b. Source-of-Revenue Measurements

1. Comprehensive Profit and Loss Attribution

i. *Description:* For purposes of this appendix, Comprehensive Profit and Loss Attribution is an analysis that attributes the daily fluctuation in the value of a trading desk's positions to various sources. First, the daily profit and loss of the aggregated positions is divided into three categories: (i) Profit and loss attributable to a trading desk's existing positions that were also positions held by the trading desk as of the end of the prior day (''existing positions''); (ii) profit and loss attributable to new positions resulting from the current day's trading activity (''new positions''); and (iii) residual profit and loss that cannot be specifically attributed to existing positions or new positions. The sum of (i), (ii), and (iii) must equal the trading desk's comprehensive profit and loss at each point in time. In addition, profit and loss measurements must calculate volatility of comprehensive profit and loss (*i.e.,* the standard deviation of the trading desk's one-day profit and loss, in dollar terms) for the reporting period for at least a 30-, 60- and 90-day lag period, from the end of the reporting period, and any other period that the banking entity deems necessary to meet the requirements of the rule.

A. The comprehensive profit and loss associated with existing positions must reflect changes in the value of these positions on the applicable day. The comprehensive profit and loss from existing positions must be further attributed, as applicable, to changes in (i) the specific Risk Factors and other factors that are monitored and managed as part of the trading desk's overall risk management policies and procedures; and (ii) any other applicable elements, such as cash flows, carry, changes in reserves, and the correction, cancellation, or exercise of a trade.

B. The comprehensive profit and loss attributed to new positions must reflect commissions and fee income or expense and market gains or losses associated with transactions executed on the applicable day. New positions include purchases and sales of financial instruments and other assets/liabilities and negotiated amendments to existing positions. The comprehensive profit and loss from new positions may be reported in the aggregate and does not need to be further attributed to specific sources.

C. The portion of comprehensive profit and loss that cannot be specifically attributed to known sources must be allocated to a residual category identified as an unexplained portion of the comprehensive profit and loss. Significant unexplained profit and loss must be escalated for further investigation and analysis.

ii. *General Calculation Guidance:* The specific categories used by a trading desk in the attribution analysis and amount of detail for the analysis should be tailored to the type and amount of trading activities undertaken by the trading desk. The new position attribution must be computed by calculating the difference between the prices at which instruments were bought and/or sold and the prices at which those instruments are marked to market at the close of business on that day multiplied by the notional or principal amount of each purchase or sale. Any fees, commissions, or other payments received (paid) that are associated with transactions executed on that day must be added (subtracted) from such difference. These factors must be measured consistently over time to facilitate historical comparisons.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

c. Customer-Facing Activity Measurements

1. Inventory Turnover

i. *Description:* For purposes of this appendix, Inventory Turnover is a ratio that measures the turnover of a trading desk's inventory. The numerator of the ratio is the absolute value of all transactions over the reporting period. The denominator of the ratio is the value of the trading desk's inventory at the beginning of the reporting period.

ii. *General Calculation Guidance:* For purposes of this appendix, for derivatives, other than options and interest rate derivatives, value means gross notional value, for options, value means delta adjusted notional value, and for interest rate derivatives, value means 10-year bond equivalent value.

iii. *Calculation Period:* 30 days, 60 days, and 90 days.

iv. *Measurement Frequency:* Daily.

2. Inventory Aging

i. *Description:* For purposes of this appendix, Inventory Aging generally describes a schedule of the trading desk's aggregate assets and liabilities and the amount of time that those assets and liabilities have been held. Inventory Aging should measure the age profile of the trading desk's assets and liabilities.

ii. *General Calculation Guidance:* In general, Inventory Aging must be computed using a trading desk's trading activity data and must identify the value of a trading desk's aggregate assets and liabilities. Inventory Aging must include two schedules, an asset-aging schedule and a liability-aging schedule. Each schedule must record the value of assets or liabilities held over all holding periods. For derivatives, other than options, and interest rate derivatives, value means gross notional value, for options, value means delta adjusted notional value and, for interest rate derivatives, value means 10-year bond equivalent value.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

3. Customer-Facing Trade Ratio—Trade Count Based and Value Based

i. *Description:* For purposes of this appendix, the Customer-Facing Trade Ratio is a ratio comparing (i) the transactions involving a counterparty that is a customer of the trading desk to (ii) the transactions involving a counterparty that is not a customer of the trading desk. A trade count based ratio must be computed that records the number of transactions involving a counterparty that is a customer of the trading desk and the number of transactions involving a counterparty that is not a customer of the trading desk. A value based ratio must be computed that records the value of transactions involving a counterparty that is a customer of the trading desk and the value of transactions involving a counterparty that is not a customer of the trading desk.

ii. *General Calculation Guidance:* For purposes of calculating the Customer-Facing Trade Ratio, a counterparty is considered to be a customer of the trading desk if the counterparty is a market participant that makes use of the banking entity's market making-related services by obtaining such services, responding to quotations, or entering into a continuing relationship with respect to such services. However, a trading desk or other organizational unit of another banking entity would not be a client, customer, or counterparty of the trading desk if the other entity has trading assets and liabilities of $50 billion or more as measured in accordance with § 351.20(d)(1) unless the trading desk documents how and why a particular trading desk or other organizational unit of the entity should be treated as a client, customer, or counterparty of the trading desk. Transactions conducted anonymously on an exchange or similar trading facility that permits trading on behalf of a broad range of market participants would be considered transactions with customers of the trading desk. For derivatives, other than options, and interest rate derivatives, value means gross notional value, for options, value means delta adjusted notional value, and for interest rate derivatives, value means 10-year bond equivalent value.

iii. *Calculation Period:* 30 days, 60 days, and 90 days.

iv. *Measurement Frequency:* Daily.

Appendix B to Part 351—Enhanced Minimum Standards for Compliance Programs

I. Overview

Section 351.20(c) requires certain banking entities to establish, maintain, and enforce an enhanced compliance program that includes the requirements and standards in this Appendix as well as the minimum written policies and procedures, internal controls, management framework, independent testing, training, and recordkeeping provisions outlined in § 351.20. This Appendix sets forth additional minimum standards with respect to the establishment, oversight, maintenance, and enforcement by these banking entities of an enhanced internal compliance program for ensuring and monitoring compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part.

a. This compliance program must:

1. Be reasonably designed to identify, document, monitor, and report the permitted trading and covered fund activities and investments of the banking entity; identify, monitor and promptly address the risks of these covered activities and investments and potential areas of noncompliance; and prevent activities or investments prohibited by, or that do not comply with, section 13 of the BHC Act and this part;

2. Establish and enforce appropriate limits on the covered activities and investments of the banking entity, including limits on the size, scope, complexity, and risks of the individual activities or investments consistent with the requirements of section 13 of the BHC Act and this part;

3. Subject the effectiveness of the compliance program to periodic independent review and testing, and ensure that the entity's internal audit, corporate compliance and internal control functions involved in review and testing are effective and independent;

4. Make senior management, and others as appropriate, accountable for the effective implementation of the compliance program, and ensure that the board of directors and chief executive officer (or equivalent) of the banking entity review the effectiveness of the compliance program; and

5. Facilitate supervision and examination by the Agencies of the banking entity's permitted trading and covered fund activities and investments.

II. Enhanced Compliance Program

a. *Proprietary Trading Activities.* A banking entity must establish, maintain and enforce a compliance program that includes written policies and procedures that are appropriate for the types, size, and complexity of, and risks associated with, its permitted trading activities. The compliance program may be tailored to the types of trading activities conducted by the banking entity, and must include a detailed description of controls established by the banking entity to reasonably ensure that its trading activities are conducted in accordance with the requirements and limitations applicable to those trading activities under section 13 of the BHC Act and this part, and provide for appropriate revision of the compliance program before expansion of the trading activities of the banking entity. A banking entity must devote adequate resources and use knowledgeable personnel in conducting, supervising and managing its trading activities, and promote consistency, independence and rigor in implementing its risk controls and compliance efforts. The compliance program must be updated with a frequency sufficient to account for changes in the activities of the banking entity, results of independent testing of the program, identification of weaknesses in the program, and changes in legal, regulatory or other requirements.

1. *Trading Desks:* The banking entity must have written policies and procedures governing each trading desk that include a description of:

i. The process for identifying, authorizing and documenting financial instruments each trading desk may purchase or sell, with separate documentation for market making-related activities conducted in reliance on § 351.4(b) and for hedging activity conducted in reliance on § 351.5;

ii. A mapping for each trading desk to the division, business line, or other organizational structure that is responsible for managing and overseeing the trading desk's activities;

iii. The mission (*i.e.,* the type of trading activity, such as market-making, trading in sovereign debt, etc.) and strategy (*i.e.,* methods for conducting authorized trading activities) of each trading desk;

iv. The activities that the trading desk is authorized to conduct, including (i) authorized instruments and products, and (ii) authorized hedging strategies, techniques and instruments;

v. The types and amount of risks allocated by the banking entity to each trading desk to implement the mission and strategy of the trading desk, including an enumeration of material risks resulting from the activities in which the trading desk is authorized to engage (including but not limited to price risks, such as basis, volatility and correlation risks, as well as counterparty credit risk). Risk assessments must take into account both the risks inherent in the trading activity and the strength and effectiveness of controls designed to mitigate those risks;

vi. How the risks allocated to each trading desk will be measured;

vii. Why the allocated risks levels are appropriate to the activities authorized for the trading desk;

viii. The limits on the holding period of, and the risk associated with, financial instruments under the responsibility of the trading desk;

ix. The process for setting new or revised limits, as well as escalation procedures for granting exceptions to any limits or to any policies or procedures governing the desk, the analysis that will be required to support revising limits or granting exceptions, and the process for independently reviewing and documenting those exceptions and the underlying analysis;

x. The process for identifying, documenting and approving new products, trading strategies, and hedging strategies;

xi. The types of clients, customers, and counterparties with whom the trading desk may trade; and

xii. The compensation arrangements, including incentive arrangements, for employees associated with the trading desk, which may not be designed to reward or incentivize prohibited proprietary trading or excessive or imprudent risk-taking.

2. *Description of risks and risk management processes:* The compliance program for the banking entity must include a comprehensive description of the risk management program for the trading activity of the banking entity. The compliance program must also include a description of the governance, approval, reporting, escalation, review and other processes the banking entity will use to reasonably ensure that trading activity is conducted in compliance with section 13 of the BHC Act and this part. Trading activity in similar financial instruments should be subject to similar governance, limits, testing, controls, and review, unless the banking entity specifically determines to establish different limits or processes and documents those differences. Descriptions must include, at a minimum, the following elements:

i. A description of the supervisory and risk management structure governing all trading activity, including a description of processes for initial and senior-level review of new products and new strategies;

ii. A description of the process for developing, documenting, testing, approving and reviewing all models used for valuing, identifying and monitoring the risks of trading activity and related positions, including the process for periodic independent testing of the reliability and accuracy of those models;

iii. A description of the process for developing, documenting, testing, approving and reviewing the limits established for each trading desk;

iv. A description of the process by which a security may be purchased or sold pursuant to the liquidity management plan, including the process for authorizing and monitoring such activity to ensure compliance with the banking entity's liquidity management plan and the restrictions on liquidity management activities in this part;

v. A description of the management review process, including escalation procedures, for approving any temporary exceptions or permanent adjustments to limits on the activities, positions, strategies, or risks associated with each trading desk; and

vi. The role of the audit, compliance, risk management and other relevant units for conducting independent testing of trading and hedging activities, techniques and strategies.

3. *Authorized risks, instruments, and products.* The banking entity must implement and enforce limits and internal controls for each trading desk that are reasonably designed to ensure that trading activity is conducted in conformance with

section 13 of the BHC Act and this part and with the banking entity's written policies and procedures. The banking entity must establish and enforce risk limits appropriate for the activity of each trading desk. These limits should be based on probabilistic and non-probabilistic measures of potential loss (*e.g.,* Value-at-Risk and notional exposure, respectively), and measured under normal and stress market conditions. At a minimum, these internal controls must monitor, establish and enforce limits on:

i. The financial instruments (including, at a minimum, by type and exposure) that the trading desk may trade;

ii. The types and levels of risks that may be taken by each trading desk; and

iii. The types of hedging instruments used, hedging strategies employed, and the amount of risk effectively hedged.

4. *Hedging policies and procedures.* The banking entity must establish, maintain, and enforce written policies and procedures regarding the use of risk-mitigating hedging instruments and strategies that, at a minimum, describe:

i. The positions, techniques and strategies that each trading desk may use to hedge the risk of its positions;

ii. The manner in which the banking entity will identify the risks arising in connection with and related to the individual or aggregated positions, contracts or other holdings of the banking entity that are to be hedged and determine that those risks have been properly and effectively hedged;

iii. The level of the organization at which hedging activity and management will occur;

iv. The manner in which hedging strategies will be monitored and the personnel responsible for such monitoring;

v. The risk management processes used to control unhedged or residual risks; and

vi. The process for developing, documenting, testing, approving and reviewing all hedging positions, techniques and strategies permitted for each trading desk and for the banking entity in reliance on § 351.5.

5. *Analysis and quantitative measurements.* The banking entity must perform robust analysis and quantitative measurement of its trading activities that is reasonably designed to ensure that the trading activity of each trading desk is consistent with the banking entity's compliance program; monitor and assist in the identification of potential and actual prohibited proprietary trading activity; and prevent the occurrence of prohibited proprietary trading. Analysis and models used to determine, measure and limit risk must be rigorously tested and be reviewed by management responsible for trading activity to ensure that trading activities, limits, strategies, and hedging activities do not understate the risk and exposure to the banking entity or allow prohibited proprietary trading. This review should include periodic and independent back-testing and revision of activities, limits, strategies and hedging as appropriate to contain risk and ensure compliance. In addition to the quantitative measurements reported by any banking entity subject to Appendix A to this part, each banking entity must develop and implement, to the extent appropriate to facilitate compliance with this part, additional quantitative measurements specifically tailored to the particular risks, practices, and strategies of its trading desks. The banking entity's analysis and quantitative measurements must incorporate the quantitative measurements reported by the banking entity pursuant to Appendix A (if applicable) and include, at a minimum, the following:

i. Internal controls and written policies and procedures reasonably designed to ensure the accuracy and integrity of quantitative measurements;

ii. Ongoing, timely monitoring and review of calculated quantitative measurements;

iii. The establishment of numerical thresholds and appropriate trading measures for each trading desk and heightened review of trading activity not consistent with those thresholds to ensure compliance with section 13 of the BHC Act and this part, including analysis of the measurement results or other information, appropriate escalation procedures, and documentation related to the review; and

iv. Immediate review and compliance investigation of the trading desk's activities, escalation to senior management with oversight responsibilities for the applicable trading desk, timely notification to the FDIC, appropriate remedial action (*e.g.,* divesting of impermissible positions, cessation of impermissible activity, disciplinary actions), and documentation of the investigation findings and remedial action taken when quantitative measurements or other information, considered together with the facts and circumstances, or findings of internal audit, independent testing or other review suggest a reasonable likelihood that the trading desk has violated any part of section 13 of the BHC Act or this part.

6. *Other Compliance Matters.* In addition to the requirements specified above, the banking entity's compliance program must:

i. Identify activities of each trading desk that will be conducted in reliance on exemptions contained in §§ 351.4 through 351.6, including an explanation of:

A. How and where in the organization the activity occurs; and

B. Which exemption is being relied on and how the activity meets the specific requirements for reliance on the applicable exemption;

ii. Include an explanation of the process for documenting, approving and reviewing actions taken pursuant to the liquidity management plan, where in the organization this activity occurs, the securities permissible for liquidity management, the process for ensuring that liquidity management activities are not conducted for the purpose of prohibited proprietary trading, and the process for ensuring that securities purchased as part of the liquidity management plan are highly liquid and conform to the requirements of this part;

iii. Describe how the banking entity monitors for and prohibits potential or actual material exposure to high-risk assets or high-risk trading strategies presented by each trading desk that relies on the exemptions contained in §§ 351.3(d)(3), and 351.4 through 351.6, which must take into account potential or actual exposure to:

A. Assets whose values cannot be externally priced or, where valuation is reliant on pricing models, whose model inputs cannot be externally validated;

B. Assets whose changes in value cannot be adequately mitigated by effective hedging;

C. New products with rapid growth, including those that do not have a market history;

D. Assets or strategies that include significant embedded leverage;

E. Assets or strategies that have demonstrated significant historical volatility;

F. Assets or strategies for which the application of capital and liquidity standards would not adequately account for the risk; and

G. Assets or strategies that result in large and significant concentrations to sectors, risk factors, or counterparties;

iv. Establish responsibility for compliance with the reporting and recordkeeping requirements of subpart B and § 351.20; and

v. Establish policies for monitoring and prohibiting potential or actual material conflicts of interest between the banking entity and its clients, customers, or counterparties.

7. *Remediation of violations.* The banking entity's compliance program must be reasonably designed and established to effectively monitor and identify for further analysis any trading activity that may indicate potential violations of section 13 of the BHC Act and this part and to prevent actual violations of section 13 of the BHC Act and this part. The compliance program must describe procedures for identifying and remedying violations of section 13 of the BHC Act and this part, and must include, at a minimum, a requirement to promptly document, address and remedy any violation of section 13 of the BHC Act or this part, and document all proposed and actual remediation efforts. The compliance program must include specific written policies and procedures that are reasonably designed to assess the extent to which any activity indicates that modification to the banking entity's compliance program is warranted and to ensure that appropriate modifications are implemented. The written policies and procedures must provide for prompt notification to appropriate management, including senior management and the board of directors, of any material weakness or significant deficiencies in the design or implementation of the compliance program of the banking entity.

b. *Covered Fund Activities or Investments.* A banking entity must establish, maintain and enforce a compliance program that includes written policies and procedures that are appropriate for the types, size, complexity and risks of the covered fund and related activities conducted and investments made, by the banking entity.

1. *Identification of covered funds.* The banking entity's compliance program must provide a process, which must include appropriate management review and independent testing, for identifying and documenting covered funds that each unit within the banking entity's organization

sponsors or organizes and offers, and covered funds in which each such unit invests. In addition to the documentation requirements for covered funds, as specified under § 351.20(e), the documentation must include information that identifies all pools that the banking entity sponsors or has an interest in and the type of exemption from the Commodity Exchange Act (whether or not the pool relies on section 4.7 of the regulations under the Commodity Exchange Act), and the amount of ownership interest the banking entity has in those pools.

2. *Identification of covered fund activities and investments.* The banking entity's compliance program must identify, document and map each unit within the organization that is permitted to acquire or hold an interest in any covered fund or sponsor any covered fund and map each unit to the division, business line, or other organizational structure that will be responsible for managing and overseeing that unit's activities and investments.

3. *Explanation of compliance.* The banking entity's compliance program must explain how:

i. The banking entity monitors for and prohibits potential or actual material conflicts of interest between the banking entity and its clients, customers, or counterparties related to its covered fund activities and investments;

ii. The banking entity monitors for and prohibits potential or actual transactions or activities that may threaten the safety and soundness of the banking entity related to its covered fund activities and investments; and

iii. The banking entity monitors for and prohibits potential or actual material exposure to high-risk assets or high-risk trading strategies presented by its covered fund activities and investments, taking into account potential or actual exposure to:

A. Assets whose values cannot be externally priced or, where valuation is reliant on pricing models, whose model inputs cannot be externally validated;

B. Assets whose changes in values cannot be adequately mitigated by effective hedging;

C. New products with rapid growth, including those that do not have a market history;

D. Assets or strategies that include significant embedded leverage;

E. Assets or strategies that have demonstrated significant historical volatility;

F. Assets or strategies for which the application of capital and liquidity standards would not adequately account for the risk; and

G. Assets or strategies that expose the banking entity to large and significant concentrations with respect to sectors, risk factors, or counterparties;

4. *Description and documentation of covered fund activities and investments.* For each organizational unit engaged in covered fund activities and investments, the banking entity's compliance program must document:

i. The covered fund activities and investments that the unit is authorized to conduct;

ii. The banking entity's plan for actively seeking unaffiliated investors to ensure that any investment by the banking entity conforms to the limits contained in § 351.12 or registered in compliance with the securities laws and thereby exempt from those limits within the time periods allotted in § 351.12; and

iii. How it complies with the requirements of subpart C.

5. *Internal Controls.* A banking entity must establish, maintain, and enforce internal controls that are reasonably designed to ensure that its covered fund activities or investments comply with the requirements of section 13 of the BHC Act and this part and are appropriate given the limits on risk established by the banking entity. These written internal controls must be reasonably designed and established to effectively monitor and identify for further analysis any covered fund activity or investment that may indicate potential violations of section 13 of the BHC Act or this part. The internal controls must, at a minimum require:

i. Monitoring and limiting the banking entity's individual and aggregate investments in covered funds;

ii. Monitoring the amount and timing of seed capital investments for compliance with the limitations under subpart C (including but not limited to the redemption, sale or disposition requirements) of § 351.12, and the effectiveness of efforts to seek unaffiliated investors to ensure compliance with those limits;

iii. Calculating the individual and aggregate levels of ownership interests in one or more covered fund required by § 351.12;

iv. Attributing the appropriate instruments to the individual and aggregate ownership interest calculations above;

v. Making disclosures to prospective and actual investors in any covered fund organized and offered or sponsored by the banking entity, as provided under § 351.11(a)(8);

vi. Monitoring for and preventing any relationship or transaction between the banking entity and a covered fund that is prohibited under § 351.14, including where the banking entity has been designated as the sponsor, investment manager, investment adviser, or commodity trading advisor to a covered fund by another banking entity; and

vii. Appropriate management review and supervision across legal entities of the banking entity to ensure that services and products provided by all affiliated entities comply with the limitation on services and products contained in § 351.14.

6. *Remediation of violations.* The banking entity's compliance program must be reasonably designed and established to effectively monitor and identify for further analysis any covered fund activity or investment that may indicate potential violations of section 13 of the BHC Act or this part and to prevent actual violations of section 13 of the BHC Act and this part. The banking entity's compliance program must describe procedures for identifying and remedying violations of section 13 of the BHC Act and this part, and must include, at a minimum, a requirement to promptly document, address and remedy any violation of section 13 of the BHC Act or this part, including § 351.21, and document all proposed and actual remediation efforts. The compliance program must include specific written policies and procedures that are reasonably designed to assess the extent to which any activity or investment indicates that modification to the banking entity's compliance program is warranted and to ensure that appropriate modifications are implemented. The written policies and procedures must provide for prompt notification to appropriate management, including senior management and the board of directors, of any material weakness or significant deficiencies in the design or implementation of the compliance program of the banking entity.

III. Responsibility and Accountability for the Compliance Program

a. A banking entity must establish, maintain, and enforce a governance and management framework to manage its business and employees with a view to preventing violations of section 13 of the BHC Act and this part. A banking entity must have an appropriate management framework reasonably designed to ensure that: Appropriate personnel are responsible and accountable for the effective implementation and enforcement of the compliance program; a clear reporting line with a chain of responsibility is delineated; and the compliance program is reviewed periodically by senior management. The board of directors (or equivalent governance body) and senior management should have the appropriate authority and access to personnel and information within the organizations as well as appropriate resources to conduct their oversight activities effectively.

1. *Corporate governance.* The banking entity must adopt a written compliance program approved by the board of directors, an appropriate committee of the board, or equivalent governance body, and senior management.

2. *Management procedures.* The banking entity must establish, maintain, and enforce a governance framework that is reasonably designed to achieve compliance with section 13 of the BHC Act and this part, which, at a minimum, provides for:

i. The designation of appropriate senior management or committee of senior management with authority to carry out the management responsibilities of the banking entity for each trading desk and for each organizational unit engaged in covered fund activities;

ii. Written procedures addressing the management of the activities of the banking entity that are reasonably designed to achieve compliance with section 13 of the BHC Act and this part, including:

A. A description of the management system, including the titles, qualifications, and locations of managers and the specific responsibilities of each person with respect to the banking entity's activities governed by section 13 of the BHC Act and this part; and

B. Procedures for determining compensation arrangements for traders engaged in underwriting or market making-related activities under § 351.4 or risk-mitigating hedging activities under § 351.5 so that such compensation arrangements are designed not to reward or incentivize prohibited proprietary trading and appropriately balance risk and financial results in a manner that does not encourage employees to expose the banking entity to excessive or imprudent risk.

3. *Business line managers.* Managers with responsibility for one or more trading desks of the banking entity are accountable for the effective implementation and enforcement of the compliance program with respect to the applicable trading desk(s).

4. *Board of directors, or similar corporate body, and senior management.* The board of directors, or similar corporate body, and senior management are responsible for setting and communicating an appropriate culture of compliance with section 13 of the BHC Act and this part and ensuring that appropriate policies regarding the management of trading activities and covered fund activities or investments are adopted to comply with section 13 of the BHC Act and this part. The board of directors or similar corporate body (such as a designated committee of the board or an equivalent governance body) must ensure that senior management is fully capable, qualified, and properly motivated to manage compliance with this part in light of the organization's business activities and the expectations of the board of directors. The board of directors or similar corporate body must also ensure that senior management has established appropriate incentives and adequate resources to support compliance with this part, including the implementation of a compliance program meeting the requirements of this appendix into management goals and compensation structures across the banking entity.

5. *Senior management.* Senior management is responsible for implementing and enforcing the approved compliance program. Senior management must also ensure that effective corrective action is taken when failures in compliance with section 13 of the BHC Act and this part are identified. Senior management and control personnel charged with overseeing compliance with section 13 of the BHC Act and this part should review the compliance program for the banking entity periodically and report to the board, or an appropriate committee thereof, on the effectiveness of the compliance program and compliance matters with a frequency appropriate to the size, scope, and risk profile of the banking entity's trading activities and covered fund activities or investments, which shall be at least annually.

6. *CEO attestation.* Based on a review by the CEO of the banking entity, the CEO of the banking entity must, annually, attest in writing to the FDIC that the banking entity has in place processes to establish, maintain, enforce, review, test and modify the compliance program established under this Appendix and § 351.20 of this part in a manner reasonably designed to achieve compliance with section 13 of the BHC Act and this part. In the case of a U.S. branch or agency of a foreign banking entity, the attestation may be provided for the entire U.S. operations of the foreign banking entity by the senior management officer of the United States operations of the foreign banking entity who is located in the United States.

IV. Independent Testing

a. Independent testing must occur with a frequency appropriate to the size, scope, and risk profile of the banking entity's trading and covered fund activities or investments, which shall be at least annually. This independent testing must include an evaluation of:

1. The overall adequacy and effectiveness of the banking entity's compliance program, including an analysis of the extent to which the program contains all the required elements of this appendix;

2. The effectiveness of the banking entity's internal controls, including an analysis and documentation of instances in which such internal controls have been breached, and how such breaches were addressed and resolved; and

3. The effectiveness of the banking entity's management procedures.

b. A banking entity must ensure that independent testing regarding the effectiveness of the banking entity's compliance program is conducted by a qualified independent party, such as the banking entity's internal audit department, compliance personnel or risk managers independent of the organizational unit being tested, outside auditors, consultants, or other qualified independent parties. A banking entity must promptly take appropriate action to remedy any significant deficiencies or material weaknesses in its compliance program and to terminate any violations of section 13 of the BHC Act or this part.

V. Training

Banking entities must provide adequate training to personnel and managers of the banking entity engaged in activities or investments governed by section 13 of the BHC Act or this part, as well as other appropriate supervisory, risk, independent testing, and audit personnel, in order to effectively implement and enforce the compliance program. This training should occur with a frequency appropriate to the size and the risk profile of the banking entity's trading activities and covered fund activities or investments.

VI. Recordkeeping

Banking entities must create and retain records sufficient to demonstrate compliance and support the operations and effectiveness of the compliance program. A banking entity must retain these records for a period that is no less than 5 years or such longer period as required by the FDIC in a form that allows it to promptly produce such records to the FDIC on request.

COMMODITY FUTURES TRADING COMMISSION

17 CFR Chapter I

Authority and Issuance

For the reasons stated in the Common Preamble, the Commodity Futures Trading Commission amends part 75 to chapter I of Title 17 Code of Federal Regulations as follows:

PART 75—PROPRIETARY TRADING AND CERTAIN INTERESTS IN AND RELATIONSHIPS WITH COVERED FUNDS

■ 46. The authority citation for part 75 continues to read as follows:

Authority: 12 U.S.C. 1851.

Subpart A—Authority and Definitions

■ 47. Section 75.2 is revised to read as follows:

§ 75.2 Definitions.

Unless otherwise specified, for purposes of this part:

(a) *Affiliate* has the same meaning as in section 2(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(k)).

(b) *Bank holding company* has the same meaning as in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

(c) *Banking entity.* (1) Except as provided in paragraph (c)(2) of this section, *banking entity* means:

(i) Any insured depository institution;

(ii) Any company that controls an insured depository institution;

(iii) Any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(iv) Any affiliate or subsidiary of any entity described in paragraph (c)(1)(i), (ii), or (iii) of this section.

(2) Banking entity does not include:

(i) A covered fund that is not itself a banking entity under paragraph (c)(1)(i), (ii), or (iii) of this section;

(ii) A portfolio company held under the authority contained in section 4(k)(4)(H) or (I) of the BHC Act (12 U.S.C. 1843(k)(4)(H), (I)), or any 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), so long as the portfolio company or portfolio concern is not itself a banking entity under paragraph (c)(1)(i), (ii), or (iii) of this section; or

(iii) The FDIC acting in its corporate capacity or as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(d) *Board* means the Board of Governors of the Federal Reserve System.

(e) *CFTC* means the Commodity Futures Trading Commission.

(f) *Dealer* has the same meaning as in section 3(a)(5) of the Exchange Act (15 U.S.C. 78c(a)(5)).

(g) *Depository institution* has the same meaning as in section 3(c) of the Federal

Deposit Insurance Act (12 U.S.C. 1813(c)).

(h) *Derivative.* (1) Except as provided in paragraph (h)(2) of this section, *derivative* means:

(i) Any swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68));

(ii) Any purchase or sale of a commodity, that is not an excluded commodity, for deferred shipment or delivery that is intended to be physically settled;

(iii) Any foreign exchange forward (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)) or foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25));

(iv) Any agreement, contract, or transaction in foreign currency described in section 2(c)(2)(C)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(C)(i));

(v) Any agreement, contract, or transaction in a commodity other than foreign currency described in section 2(c)(2)(D)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(D)(i)); and

(vi) Any transaction authorized under section 19 of the Commodity Exchange Act (7 U.S.C. 23(a) or (b));

(2) A derivative does not include:

(i) Any consumer, commercial, or other agreement, contract, or transaction that the CFTC and SEC have further defined by joint regulation, interpretation, or other action as not within the definition of swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)); or

(ii) Any identified banking product, as defined in section 402(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b)), that is subject to section 403(a) of that Act (7 U.S.C. 27a(a)).

(i) *Employee* includes a member of the immediate family of the employee.

(j) *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(k) *Excluded commodity* has the same meaning as in section 1a(19) of the Commodity Exchange Act (7 U.S.C. 1a(19)).

(l) *FDIC* means the Federal Deposit Insurance Corporation.

(m) *Federal banking agencies* means the Board, the Office of the Comptroller of the Currency, and the FDIC.

(n) *Foreign banking organization* has the same meaning as in § 211.21(o) of the Board's Regulation K (12 CFR 211.21(o)), but does not include a foreign bank, as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(7)), that is organized under the laws of the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, or the Commonwealth of the Northern Mariana Islands.

(o) *Foreign insurance regulator* means the insurance commissioner, or a similar official or agency, of any country other than the United States that is engaged in the supervision of insurance companies under foreign insurance law.

(p) *General account* means all of the assets of an insurance company except those allocated to one or more separate accounts.

(q) *Insurance company* means a company that is organized as an insurance company, primarily and predominantly engaged in writing insurance or reinsuring risks underwritten by insurance companies, subject to supervision as such by a state insurance regulator or a foreign insurance regulator, and not operated for the purpose of evading the provisions of section 13 of the BHC Act (12 U.S.C. 1851).

(r) *Insured depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)), but does not include: (1) An insured depository institution that is described in section 2(c)(2)(D) of the BHC Act (12 U.S.C. 1841(c)(2)(D)); or (2) An insured depository institution if it has, and if every company that controls it has, total consolidated assets of $10 billion or less and total trading assets and trading liabilities, on a consolidated basis, that are 5 percent or less of total consolidated assets.

(s) *Limited trading assets and liabilities* means with respect to a banking entity that:

(1)(i) The banking entity has, together with its affiliates and subsidiaries, trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 75.6(a)(1) and (2) of subpart B) the average gross sum of which over the previous consecutive four quarters, as measured as of the last day of each of the four previous calendar quarters, is less than $1 billion; and

(ii) The CFTC has not determined pursuant to § 75.20(g) or (h) of this part that the banking entity should not be treated as having limited trading assets and liabilities.

(2) With respect to a banking entity other than a banking entity described in paragraph (s)(3) of this section, trading assets and liabilities for purposes of this paragraph (s) means trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 75.6(a)(1) and (2) of subpart B) on a worldwide consolidated basis.

(3)(i) With respect to a banking entity that is a foreign banking organization or a subsidiary of a foreign banking organization, trading assets and liabilities for purposes of this paragraph (s) means the trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 75.6(a)(1) and (2) of subpart B) of the combined U.S. operations of the top-tier foreign banking organization (including all subsidiaries, affiliates, branches, and agencies of the foreign banking organization operating, located, or organized in the United States).

(ii) For purposes of paragraph (s)(3)(i) of this section, a U.S. branch, agency, or subsidiary of a banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary. For purposes of paragraph (s)(3)(i) of this section, all foreign operations of a U.S. agency, branch, or subsidiary of a foreign banking organization are considered to be located in the United States, including branches outside the United States that are managed or controlled by a U.S. branch or agency of the foreign banking organization, for purposes of calculating the banking entity's U.S. trading assets and liabilities.

(t) *Loan* means any loan, lease, extension of credit, or secured or unsecured receivable that is not a security or derivative.

(u) *Moderate trading assets and liabilities* means, with respect to a banking entity, that the banking entity does not have significant trading assets and liabilities or limited trading assets and liabilities.

(v) *Primary financial regulatory agency* has the same meaning as in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5301(12)).

(w) *Purchase* includes any contract to buy, purchase, or otherwise acquire. For security futures products, purchase includes any contract, agreement, or transaction for future delivery. With respect to a commodity future, purchase includes any contract, agreement, or transaction for future delivery. With respect to a derivative, purchase includes the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(x) *Qualifying foreign banking organization* means a foreign banking organization that qualifies as such under § 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c), or (e)).

(y) *SEC* means the Securities and Exchange Commission.

(z) *Sale* and *sell* each include any contract to sell or otherwise dispose of. For security futures products, such terms include any contract, agreement, or transaction for future delivery. With respect to a commodity future, such terms include any contract, agreement, or transaction for future delivery. With respect to a derivative, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(aa) *Security* has the meaning specified in section 3(a)(10) of the Exchange Act (15 U.S.C. 78c(a)(10)).

(bb) *Security-based swap dealer* has the same meaning as in section 3(a)(71) of the Exchange Act (15 U.S.C. 78c(a)(71)).

(cc) *Security future* has the meaning specified in section 3(a)(55) of the Exchange Act (15 U.S.C. 78c(a)(55)).

(dd) *Separate account* means an account established and maintained by an insurance company in connection with one or more insurance contracts to hold assets that are legally segregated from the insurance company's other assets, under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(ee) *Significant trading assets and liabilities* means with respect to a banking entity that:

(1)(i) The banking entity has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which over the previous consecutive four quarters, as measured as of the last day of each of the four previous calendar quarters, equals or exceeds $20 billion; or

(ii) The CFTC has determined pursuant to § 75.20(h) of this part that the banking entity should be treated as having significant trading assets and liabilities.

(2) With respect to a banking entity, other than a banking entity described in paragraph (ee)(3) of this section, trading assets and liabilities for purposes of this paragraph (ee) means trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 75.6(a)(1) and (2) of subpart B) on a worldwide consolidated basis.

(3)(i) With respect to a banking entity that is a foreign banking organization or a subsidiary of a foreign banking organization, trading assets and liabilities for purposes of this paragraph (ee) means the trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 75.6(a)(1) and (2) of subpart B) of the combined U.S. operations of the top-tier foreign banking organization (including all subsidiaries, affiliates, branches, and agencies of the foreign banking organization operating, located, or organized in the United States as well as branches outside the United States that are managed or controlled by a branch or agency of the foreign banking entity operating, located or organized in the United States).

(ii) For purposes of paragraph (ee)(3)(i) of this section, a U.S. branch, agency, or subsidiary of a banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary. For purposes of paragraph (ee)(3)(i) of this section, all foreign operations of a U.S. agency, branch, or subsidiary of a foreign banking organization are considered to be located in the United States for purposes of calculating the banking entity's U.S. trading assets and liabilities.

(ff) *State* means any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(gg) *Subsidiary* has the same meaning as in section 2(d) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(d)).

(hh) *State insurance regulator* means the insurance commissioner, or a similar official or agency, of a State that is engaged in the supervision of insurance companies under State insurance law.

(ii) *Swap dealer* has the same meaning as in section 1(a)(49) of the Commodity Exchange Act (7 U.S.C. 1a(49)).

Subpart B—Proprietary Trading

■ 48. Section 75.3 is amended by:

■ a. Revising paragraphs (b), and (d)(3), (8), and (9);

■ b. Adding paragraphs (d)(10) through (13);

■ c. Redesignating paragraphs (e)(5) through (13) as paragraphs (e)(6) through (14);

■ d. Adding new paragraph (e)(5); and

■ e. Revising paragraph (e)(11), (12), and (14).

The revisions and additions read as follows:

§ 75.3 Prohibition on proprietary trading.

* * * * *

(b) *Definition of trading account.* (1) *Trading account.* Trading account means:

(i) Any account that is used by a banking entity to purchase or sell one or more financial instruments principally for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging one or more of the positions resulting from the purchases or sales of financial instruments described in this paragraph;

(ii) Any account that is used by a banking entity to purchase or sell one or more financial instruments that are both market risk capital rule covered positions and trading positions (or hedges of other market risk capital rule covered positions), if the banking entity, or any affiliate with which the banking entity is consolidated for regulatory reporting purposes, calculates risk-based capital ratios under the market risk capital rule; or

(iii) Any account that is used by a banking entity to purchase or sell one or more financial instruments, if the banking entity:

(A) Is licensed or registered, or is required to be licensed or registered, to engage in the business of a dealer, swap dealer, or security-based swap dealer, to the extent the instrument is purchased or sold in connection with the activities that require the banking entity to be licensed or registered as such; or

(B) Is engaged in the business of a dealer, swap dealer, or security-based swap dealer outside of the United States, to the extent the instrument is purchased or sold in connection with the activities of such business.

(2) *Trading account application for certain banking entities.* (i) A banking entity that is subject to paragraph (b)(1)(ii) of this section in determining the scope of its trading account is not subject to paragraph (b)(1)(i) of this section.

(ii) A banking entity that does not calculate risk-based capital ratios under the market risk capital rule and is not a consolidated affiliate for regulatory reporting purposes of a banking entity that calculates risk based capital ratios under the market risk capital rule may elect to apply paragraph (b)(1)(ii) of this section in determining the scope of its trading account as if it were subject to that paragraph. A banking entity that elects under this subsection to apply paragraph (b)(1)(ii) of this section in determining the scope of its trading account as if it were subject to that paragraph is not required to apply paragraph (b)(1)(i) of this section.

(3) *Consistency of account election for certain banking entities.* (i) Any election or change to an election under paragraph (b)(2)(ii) of this section must apply to the electing banking entity and all of its wholly owned subsidiaries. The primary financial regulatory agency of a banking entity that is affiliated with but is not a wholly owned subsidiary of such electing banking entity may require that the banking entity be subject to this uniform application requirement if the primary financial regulatory agency determines that it is necessary to prevent evasion of the requirements of this part after notice and opportunity for response as provided in subpart D of this part.

(ii) A banking entity that does not elect under paragraph (b)(2)(ii) of this section to be subject to the trading account definition in (b)(1)(ii) may continue to apply the trading account definition in paragraph (b)(1)(i) of this section for one year from the date on which it becomes, or becomes a consolidated affiliate for regulatory reporting purposes with, a banking entity that calculates risk-based capital ratios under the market risk capital rule.

(4) *Rebuttable presumption for certain purchases and sales.* The purchase (or sale) of a financial instrument by a banking entity shall be presumed not to be for the trading account of the banking entity under paragraph (b)(1)(i) of this section if the banking entity holds the financial instrument for sixty days or longer and does not transfer substantially all of the risk of the financial instrument within sixty days of the purchase (or sale).

* * * * *

(d) * * *

(3) Any purchase or sale of a security, foreign exchange forward (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)), foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25)), or cross-currency swap by a banking entity for the purpose of liquidity management in accordance with a documented liquidity management plan of the banking entity that:

(i) Specifically contemplates and authorizes the particular financial instruments to be used for liquidity management purposes, the amount, types, and risks of these financial instruments that are consistent with liquidity management, and the liquidity circumstances in which the particular financial instruments may or must be used;

(ii) Requires that any purchase or sale of financial instruments contemplated and authorized by the plan be principally for the purpose of managing the liquidity of the banking entity, and not for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging a position taken for such short-term purposes;

(iii) Requires that any financial instruments purchased or sold for liquidity management purposes be highly liquid and limited to financial instruments the market, credit, and other risks of which the banking entity does not reasonably expect to give rise to appreciable profits or losses as a result of short-term price movements;

(iv) Limits any financial instruments purchased or sold for liquidity management purposes, together with any other financial instruments purchased or sold for such purposes, to an amount that is consistent with the banking entity's near-term funding needs, including deviations from normal operations of the banking entity or any affiliate thereof, as estimated and documented pursuant to methods specified in the plan;

(v) Includes written policies and procedures, internal controls, analysis, and independent testing to ensure that the purchase and sale of financial instruments that are not permitted under § 75.6(a) or (b) of this subpart are for the purpose of liquidity management and in accordance with the liquidity management plan described in this paragraph (d)(3); and

(vi) Is consistent with the CFTC's regulatory requirements regarding liquidity management;

* * * * *

(8) Any purchase or sale of one or more financial instruments by a banking entity through a deferred compensation, stock-bonus, profit-sharing, or pension plan of the banking entity that is established and administered in accordance with the law of the United States or a foreign sovereign, if the purchase or sale is made directly or indirectly by the banking entity as trustee for the benefit of persons who are or were employees of the banking entity;

(9) Any purchase or sale of one or more financial instruments by a banking entity in the ordinary course of collecting a debt previously contracted in good faith, provided that the banking entity divests the financial instrument as soon as practicable, and in no event may the banking entity retain such instrument for longer than such period permitted by the OCC;

(10) Any purchase or sale of one or more financial instruments that was made in error by a banking entity in the course of conducting a permitted or excluded activity or is a subsequent transaction to correct such an error;

(11) Contemporaneously entering into a customer-driven swap or customer-driven security-based swap and a matched swap or security-based swap if:

(i) The banking entity retains no more than minimal price risk; and

(ii) The banking entity is not a registered dealer, swap dealer, or security-based swap dealer;

(12) Any purchase or sale of one or more financial instruments that the banking entity uses to hedge mortgage servicing rights or mortgage servicing assets in accordance with a documented hedging strategy; or

(13) Any purchase or sale of a financial instrument that does not meet the definition of trading asset or trading liability under the applicable reporting form for a banking entity as of January 1, 2020.

(e) * * *

(5) *Cross-currency swap* means a swap in which one party exchanges with another party principal and interest rate payments in one currency for principal and interest rate payments in another currency, and the exchange of principal occurs on the date the swap is entered into, with a reversal of the exchange of principal at a later date that is agreed upon when the swap is entered into.

* * * * *

(11) *Market risk capital rule covered position and trading position* means a financial instrument that meets the criteria to be a covered position and a trading position, as those terms are respectively defined, without regard to whether the financial instrument is reported as a covered position or trading position on any applicable regulatory reporting forms:

(i) In the case of a banking entity that is a bank holding company, savings and loan holding company, or insured depository institution, under the market risk capital rule that is applicable to the banking entity; and

(ii) In the case of a banking entity that is affiliated with a bank holding company or savings and loan holding company, other than a banking entity to which a market risk capital rule is applicable, under the market risk capital rule that is applicable to the affiliated bank holding company or savings and loan holding company.

(12) *Market risk capital rule* means the market risk capital rule that is contained in 12 CFR part 3, subpart F, with respect to a banking entity for which the OCC is the primary financial regulatory agency, 12 CFR part 217 with respect to a banking entity for which the Board is the primary financial regulatory agency, or 12 CFR part 324 with respect to a banking entity for which the FDIC is the primary financial regulatory agency.

* * * * *

(14) *Trading desk* means a unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof that is:

(i)(A) Structured by the banking entity to implement a well-defined business strategy;

(B) Organized to ensure appropriate setting, monitoring, and management review of the desk's trading and hedging limits, current and potential future loss exposures, and strategies; and

(C) Characterized by a clearly defined unit that:

(*1*) Engages in coordinated trading activity with a unified approach to its key elements;

(*2*) Operates subject to a common and calibrated set of risk metrics, risk levels, and joint trading limits;

(*3*) Submits compliance reports and other information as a unit for monitoring by management; and

(*4*) Books its trades together; or

(ii) For a banking entity that calculates risk-based capital ratios under the market risk capital rule, or a consolidated affiliate for regulatory reporting purposes of a banking entity that calculates risk-based capital ratios under the market risk capital rule, established by the banking entity or its affiliate for purposes of market risk capital calculations under the market risk capital rule.

■ 49. Section 75.4 is revised to read as follows:

§ 75.4 Permitted underwriting and market making-related activities.

(a) *Underwriting activities*—(1) *Permitted underwriting activities.* The prohibition contained in § 75.3(a) does not apply to a banking entity's underwriting activities conducted in accordance with this paragraph (a).

(2) *Requirements.* The underwriting activities of a banking entity are permitted under paragraph (a)(1) of this section only if:

(i) The banking entity is acting as an underwriter for a distribution of securities and the trading desk's underwriting position is related to such distribution;

(ii)(A) The amount and type of the securities in the trading desk's underwriting position are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, taking into account the liquidity, maturity, and depth of the market for the relevant types of securities; and

(B) Reasonable efforts are made to sell or otherwise reduce the underwriting position within a reasonable period, taking into account the liquidity, maturity, and depth of the market for the relevant types of securities;

(iii) In the case of a banking entity with significant trading assets and liabilities, the banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of paragraph (a) of this section, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The products, instruments or exposures each trading desk may purchase, sell, or manage as part of its underwriting activities;

(B) Limits for each trading desk, in accordance with paragraph (a)(2)(ii)(A) of this section;

(C) Written authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval; and

(D) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits.

(iv) A banking entity with significant trading assets and liabilities may satisfy the requirements in paragraphs (a)(2))iii)(B) and (C) of this section by complying with the requirements set forth below in paragraph (c) of this section;

(v) The compensation arrangements of persons performing the activities described in this paragraph (a) are designed not to reward or incentivize prohibited proprietary trading; and

(vi) The banking entity is licensed or registered to engage in the activity described in this paragraph (a) in accordance with applicable law.

(3) *Definition of distribution.* For purposes of this paragraph (a), a distribution of securities means:

(i) An offering of securities, whether or not subject to registration under the Securities Act of 1933, that is distinguished from ordinary trading transactions by the presence of special selling efforts and selling methods; or

(ii) An offering of securities made pursuant to an effective registration statement under the Securities Act of 1933.

(4) *Definition of underwriter.* For purposes of this paragraph (a), *underwriter* means:

(i) A person who has agreed with an issuer or selling security holder to:

(A) Purchase securities from the issuer or selling security holder for distribution;

(B) Engage in a distribution of securities for or on behalf of the issuer or selling security holder; or

(C) Manage a distribution of securities for or on behalf of the issuer or selling security holder; or

(ii) A person who has agreed to participate or is participating in a distribution of such securities for or on behalf of the issuer or selling security holder.

(5) *Definition of selling security holder.* For purposes of this paragraph (a), *selling security holder* means any person, other than an issuer, on whose behalf a distribution is made.

(6) *Definition of underwriting position.* For purposes of this section, *underwriting position* means the long or short positions in one or more securities held by a banking entity or its affiliate, and managed by a particular trading desk, in connection with a particular distribution of securities for which such banking entity or affiliate is acting as an underwriter.

(7) *Definition of client, customer, and counterparty.* For purposes of this paragraph (a), the terms *client, customer, and counterparty,* on a collective or individual basis, refer to market participants that may transact with the banking entity in connection with a particular distribution for which the banking entity is acting as underwriter.

(b) *Market making-related activities*—(1) *Permitted market making-related activities.* The prohibition contained in § 75.3(a) does not apply to a banking entity's market making-related activities conducted in accordance with this paragraph (b).

(2) *Requirements.* The market making-related activities of a banking entity are permitted under paragraph (b)(1) of this section only if:

(i) The trading desk that establishes and manages the financial exposure, routinely stands ready to purchase and sell one or more types of financial instruments related to its financial exposure, and is willing and available to quote, purchase and sell, or otherwise enter into long and short positions in those types of financial instruments for its own account, in commercially reasonable amounts and throughout market cycles on a basis appropriate for the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(ii) The trading desk's market-making related activities are designed not to exceed, on an ongoing basis, the reasonably expected near term demands of clients, customers, or counterparties, taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(iii) In the case of a banking entity with significant trading assets and liabilities, the banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of paragraph (b) of this section, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The financial instruments each trading desk stands ready to purchase and sell in accordance with paragraph (b)(2)(i) of this section;

(B) The actions the trading desk will take to demonstrably reduce or otherwise significantly mitigate promptly the risks of its financial exposure consistent with the limits required under paragraph (b)(2)(iii)(C) of this section; the products, instruments, and exposures each trading desk may use for risk management purposes; the techniques and strategies each trading desk may use to manage the risks of its market making-related activities and positions; and the process, strategies, and personnel responsible for ensuring that the actions taken by the trading desk to mitigate these risks are and continue to be effective;

(C) Limits for each trading desk, in accordance with paragraph (b)(2)(ii) of this section;

(D) Written authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval; and

(E) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits.

(iv) A banking entity with significant trading assets and liabilities may satisfy the requirements in paragraphs (b)(2)(iii)(C) and (D) of this section by complying with the requirements set forth below in paragraph (c) of this section;

(v) The compensation arrangements of persons performing the activities described in this paragraph (b) are designed not to reward or incentivize prohibited proprietary trading; and

(vi) The banking entity is licensed or registered to engage in activity described in this paragraph (b) in accordance with applicable law.

(3) *Definition of client, customer, and counterparty.* For purposes of paragraph (b) of this section, the terms *client, customer, and counterparty,* on a collective or individual basis refer to market participants that make use of the banking entity's market making-related services by obtaining such services, responding to quotations, or entering into a continuing relationship with respect to such services, provided that:

(i) A trading desk or other organizational unit of another banking entity is not a client, customer, or counterparty of the trading desk if that other entity has trading assets and liabilities of $50 billion or more as measured in accordance with the methodology described in § 75.2(ee) of this part, unless:

(A) The trading desk documents how and why a particular trading desk or other organizational unit of the entity should be treated as a client, customer, or counterparty of the trading desk for purposes of paragraph (b)(2) of this section; or

(B) The purchase or sale by the trading desk is conducted anonymously on an exchange or similar trading facility that permits trading on behalf of a broad range of market participants.

(ii) [Reserved]

(4) *Definition of financial exposure.* For purposes of this section, *financial exposure* means the aggregate risks of one or more financial instruments and any associated loans, commodities, or foreign exchange or currency, held by a banking entity or its affiliate and managed by a particular trading desk as part of the trading desk's market making-related activities.

(5) *Definition of market-maker positions.* For the purposes of this section, *market-maker positions* means all of the positions in the financial instruments for which the trading desk stands ready to make a market in accordance with paragraph (b)(2)(i) of this section, that are managed by the trading desk, including the trading desk's open positions or exposures arising from open transactions.

(c) *Rebuttable presumption of compliance*—(1) *Internal limits.* (i) A banking entity shall be presumed to meet the requirement in paragraph (a)(2)(ii)(A) or (b)(2)(ii) of this section with respect to the purchase or sale of a financial instrument if the banking entity has established and implements, maintains, and enforces the internal limits for the relevant trading desk as described in paragraph (c)(1)(ii) of this section.

(ii)(A) With respect to underwriting activities conducted pursuant to paragraph (a) of this section, the presumption described in paragraph (c)(1)(i) of this section shall be available to each trading desk that establishes, implements, maintains, and enforces internal limits that should take into account the liquidity, maturity, and depth of the market for the relevant types of securities and are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, based on the nature and amount of the trading desk's underwriting activities, on the:

(*1*) Amount, types, and risk of its underwriting position;

(*2*) Level of exposures to relevant risk factors arising from its underwriting position; and

(*3*) Period of time a security may be held.

(B) With respect to market making-related activities conducted pursuant to paragraph (b) of this section, the presumption described in paragraph (c)(1)(i) of this section shall be available to each trading desk that establishes, implements, maintains, and enforces internal limits that should take into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments and are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, based on the nature and amount of the trading desk's market-making related activities, that address the:

(*1*) Amount, types, and risks of its market-maker positions;

(*2*) Amount, types, and risks of the products, instruments, and exposures the trading desk may use for risk management purposes;

(*3*) Level of exposures to relevant risk factors arising from its financial exposure; and

(*4*) Period of time a financial instrument may be held.

(2) *Supervisory review and oversight.* The limits described in paragraph (c)(1) of this section shall be subject to supervisory review and oversight by the CFTC on an ongoing basis.

(3) *Limit Breaches and Increases.* (i) With respect to any limit set pursuant to paragraph (c)(1)(ii)(A) or (B) of this section, a banking entity shall maintain and make available to the CFTC upon request records regarding:

(A) Any limit that is exceeded; and

(B) Any temporary or permanent increase to any limit(s), in each case in the form and manner as directed by the CFTC.

(ii) In the event of a breach or increase of any limit set pursuant to paragraph (c)(1)(ii)(A) or (B) of this section, the presumption described in paragraph (c)(1)(i) of this section shall continue to be available only if the banking entity:

(A) Takes action as promptly as possible after a breach to bring the trading desk into compliance; and

(B) Follows established written authorization procedures, including escalation procedures that require review and approval of any trade that exceeds a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval.

(4) *Rebutting the presumption.* The presumption in paragraph (c)(1)(i) of this section may be rebutted by the CFTC if the CFTC determines, taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments and based on all relevant facts and circumstances, that a trading desk is engaging in activity that is not based on the reasonably expected near term demands of clients, customers, or counterparties. The CFTC's rebuttal of the presumption in paragraph (c)(1)(i) of this section must be made in accordance with the notice and response procedures in subpart D of this part.

■ 50. Section 75.5 is amended by revising paragraphs (b) and (c)(1) introductory text and adding paragraph (c)(4) to read as follows:

§ 75.5 Permitted risk-mitigating hedging activities.

* * * * *

(b) *Requirements.* (1) The risk-mitigating hedging activities of a banking entity that has significant trading assets and liabilities are permitted under paragraph (a) of this section only if:

(i) The banking entity has established and implements, maintains and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(A) Reasonably designed written policies and procedures regarding the positions, techniques and strategies that may be used for hedging, including documentation indicating what positions, contracts or other holdings a particular trading desk may use in its risk-mitigating hedging activities, as well as position and aging limits with respect to such positions, contracts or other holdings;

(B) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(C) The conduct of analysis and independent testing designed to ensure that the positions, techniques and strategies that may be used for hedging may reasonably be expected to reduce or otherwise significantly mitigate the specific, identifiable risk(s) being hedged;

(ii) The risk-mitigating hedging activity:

(A) Is conducted in accordance with the written policies, procedures, and internal controls required under this section;

(B) At the inception of the hedging activity, including, without limitation, any adjustments to the hedging activity, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, commodity price risk, basis risk, or similar risks, arising in connection with and related to identified positions, contracts, or other holdings of the banking entity, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof;

(C) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section;

(D) Is subject to continuing review, monitoring and management by the banking entity that:

(*1*) Is consistent with the written hedging policies and procedures required under paragraph (b)(1)(i) of this section;

(*2*) Is designed to reduce or otherwise significantly mitigate the specific, identifiable risks that develop over time from the risk-mitigating hedging activities undertaken under this section and the underlying positions, contracts, and other holdings of the banking entity, based upon the facts and circumstances of the underlying and hedging positions, contracts and other holdings of the banking entity and the risks and liquidity thereof; and

(*3*) Requires ongoing recalibration of the hedging activity by the banking entity to ensure that the hedging activity satisfies the requirements set out in paragraph (b)(1)(ii) of this section and is not prohibited proprietary trading; and

(iii) The compensation arrangements of persons performing risk-mitigating hedging activities are designed not to reward or incentivize prohibited proprietary trading.

(2) The risk-mitigating hedging activities of a banking entity that does not have significant trading assets and liabilities are permitted under paragraph (a) of this section only if the risk-mitigating hedging activity:

(i) At the inception of the hedging activity, including, without limitation, any adjustments to the hedging activity, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, commodity price risk, basis risk, or similar risks, arising in connection with and related to identified positions, contracts, or other holdings of the banking entity, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof; and

(ii) Is subject, as appropriate, to ongoing recalibration by the banking entity to ensure that the hedging activity satisfies the requirements set out in paragraph (b)(2) of this section and is not prohibited proprietary trading.

(c) * * *

(1) A banking entity that has significant trading assets and liabilities must comply with the requirements of paragraphs (c)(2) and (3) of this section, unless the requirements of paragraph (c)(4) of this section are met, with respect to any purchase or sale of financial instruments made in reliance on this section for risk-mitigating hedging purposes that is:

* * * * *

(4) The requirements of paragraphs (c)(2) and (3) of this section do not

apply to the purchase or sale of a financial instrument described in paragraph (c)(1) of this section if:

(i) The financial instrument purchased or sold is identified on a written list of pre-approved financial instruments that are commonly used by the trading desk for the specific type of hedging activity for which the financial instrument is being purchased or sold; and

(ii) At the time the financial instrument is purchased or sold, the hedging activity (including the purchase or sale of the financial instrument) complies with written, pre-approved limits for the trading desk purchasing or selling the financial instrument for hedging activities undertaken for one or more other trading desks. The limits shall be appropriate for the:

(A) Size, types, and risks of the hedging activities commonly undertaken by the trading desk;

(B) Financial instruments purchased and sold for hedging activities by the trading desk; and

(C) Levels and duration of the risk exposures being hedged.

■ 51. Section 75.6 is amended by revising paragraph (e)(3); removing paragraphs (e)(4) and (6); and redesignating paragraph (e)(5) as paragraph (e)(4).

The revision reads as follows:

§ 75.6 Other permitted proprietary trading activities.

* * * * *

(e) * * *

(3) A purchase or sale by a banking entity is permitted for purposes of this paragraph (e) if:

(i) The banking entity engaging as principal in the purchase or sale (including relevant personnel) is not located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to purchase or sell as principal is not located in the United States or organized under the laws of the United States or of any State; and

(iii) The purchase or sale, including any transaction arising from risk-mitigating hedging related to the instruments purchased or sold, is not accounted for as principal directly or on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State.

* * * * *

Subpart C—Covered Funds Activities and Investments

■ 52. Section 75.10 is amended by revising paragraphs (c)(7)(ii) and (c)(8)(i)(A) to read as follows:

§ 75.10 Prohibition on Acquiring or Retaining an Ownership Interest in and Having Certain Relationships with a Covered Fund

* * * * *

(c) * * *

(7) * * *

(ii) Participates in the profits and losses of the separate account other than in compliance with applicable requirements regarding bank owned life insurance.

(8) * * *

(i) * * *

(A) Loans as defined in § 75.2(t) of subpart A;

* * * * *

■ 53. Section 75.11 is amended by revising paragraph (c) to read as follows:

§ 75.11 Permitted organizing and offering, underwriting, and market making with respect to a covered fund.

* * * * *

(c) *Underwriting and market making in ownership interests of a covered fund.* The prohibition contained in § 75.10(a) of this subpart does not apply to a banking entity's underwriting activities or market making-related activities involving a covered fund so long as:

(1) Those activities are conducted in accordance with the requirements of § 75.4(a) or (b) of subpart B, respectively; and

(2) With respect to any banking entity (or any affiliate thereof) that: Acts as a sponsor, investment adviser or commodity trading advisor to a particular covered fund or otherwise acquires and retains an ownership interest in such covered fund in reliance on paragraph (a) of this section; or acquires and retains an ownership interest in such covered fund and is either a securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78*o*–11(a)(3)), or is acquiring and retaining an ownership interest in such covered fund in compliance with section 15G of that Act (15 U.S.C. 78*o*–11) and the implementing regulations issued thereunder each as permitted by paragraph (b) of this section, then in each such case any ownership interests acquired or retained by the banking entity and its affiliates in connection with underwriting and market making related activities for that particular covered fund are included in the calculation of ownership interests permitted to be held by the banking entity and its affiliates under the limitations of § 75.12(a)(2)(ii); § 75.12(a)(2)(iii), and § 75.12(d) of this subpart.

■ 54. Section 75.13 is amended by revising paragraphs (a), (b)(3) and (4), and (c) to read as follows:

§ 75.13 Other permitted covered fund activities and investments.

(a) *Permitted risk-mitigating hedging activities.* (1) The prohibition contained in § 75.10(a) of this subpart does not apply with respect to an ownership interest in a covered fund acquired or retained by a banking entity that is designed to reduce or otherwise significantly mitigate the specific, identifiable risks to the banking entity in connection with:

(i) A compensation arrangement with an employee of the banking entity or an affiliate thereof that directly provides investment advisory, commodity trading advisory or other services to the covered fund; or

(ii) A position taken by the banking entity when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund.

(2) The risk-mitigating hedging activities of a banking entity are permitted under this paragraph (a) only if:

(i) The banking entity has established and implements, maintains and enforces an internal compliance program in accordance with subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(A) Reasonably designed written policies and procedures; and

(B) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(ii) The acquisition or retention of the ownership interest:

(A) Is made in accordance with the written policies, procedures, and internal controls required under this section;

(B) At the inception of the hedge, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks arising:

(*1*) Out of a transaction conducted solely to accommodate a specific customer request with respect to the covered fund; or

(*2*) In connection with the compensation arrangement with the employee that directly provides investment advisory, commodity trading advisory, or other services to the covered fund;

(C) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section; and

(D) Is subject to continuing review, monitoring and management by the banking entity.

(iii) With respect to risk-mitigating hedging activity conducted pursuant to paragraph (a)(1)(i) of this section, the compensation arrangement relates solely to the covered fund in which the banking entity or any affiliate has acquired an ownership interest pursuant to paragraph (a)(1)(i) and such compensation arrangement provides that any losses incurred by the banking entity on such ownership interest will be offset by corresponding decreases in amounts payable under such compensation arrangement.

(b) * * *

(3) An ownership interest in a covered fund is not offered for sale or sold to a resident of the United States for purposes of paragraph (b)(1)(iii) of this section only if it is not sold and has not been sold pursuant to an offering that targets residents of the United States in which the banking entity or any affiliate of the banking entity participates. If the banking entity or an affiliate sponsors or serves, directly or indirectly, as the investment manager, investment adviser, commodity pool operator or commodity trading advisor to a covered fund, then the banking entity or affiliate will be deemed for purposes of this paragraph (b)(3) to participate in any offer or sale by the covered fund of ownership interests in the covered fund.

(4) An activity or investment occurs solely outside of the United States for purposes of paragraph (b)(1)(iv) of this section only if:

(i) The banking entity acting as sponsor, or engaging as principal in the acquisition or retention of an ownership interest in the covered fund, is not itself, and is not controlled directly or indirectly by, a banking entity that is located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to acquire or retain the ownership interest or act as sponsor to the covered fund is not located in the United States or organized under the laws of the United States or of any State; and

(iii) The investment or sponsorship, including any transaction arising from risk-mitigating hedging related to an ownership interest, is not accounted for as principal directly or indirectly on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State.

* * * * *

(c) Permitted covered fund interests and activities by a regulated insurance company. The prohibition contained in § 75.10(a) of this subpart does not apply to the acquisition or retention by an insurance company, or an affiliate thereof, of any ownership interest in, or the sponsorship of, a covered fund only if:

(1) The insurance company or its affiliate acquires and retains the ownership interest solely for the general account of the insurance company or for one or more separate accounts established by the insurance company;

(2) The acquisition and retention of the ownership interest is conducted in compliance with, and subject to, the insurance company investment laws and regulations of the State or jurisdiction in which such insurance company is domiciled; and

(3) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and foreign jurisdictions, as appropriate, have not jointly determined, after notice and comment, that a particular law or regulation described in paragraph (c)(2) of this section is insufficient to protect the safety and soundness of the banking entity, or the financial stability of the United States.

■ 55. Section 75.14 is amended by revising paragraph (a)(2)(ii)(B) to read as follows:

§ 75.14 Limitations on relationships with a covered fund.

(a) * * *

(2) * * *

(ii) * * *

(B) The chief executive officer (or equivalent officer) of the banking entity certifies in writing annually no later than March 31 to the CFTC (with a duty to update the certification if the information in the certification materially changes) that the banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests; and

* * * * *

Subpart D—Compliance Program Requirement; Violations

■ 56. Section 75.20 is amended by revising paragraphs (a), (b) introductory text, (c), (d), (e) introductory text, and (f)(2) and adding paragraphs (g), (h), and (i) to read as follows:

§ 75.20 Program for compliance; reporting.

(a) *Program requirement.* Each banking entity (other than a banking entity with limited trading assets and liabilities) shall develop and provide for the continued administration of a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part. The terms, scope, and detail of the compliance program shall be appropriate for the types, size, scope, and complexity of activities and business structure of the banking entity.

(b) *Banking entities with significant trading assets and liabilities.* With respect to a banking entity with significant trading assets and liabilities, the compliance program required by paragraph (a) of this section, at a minimum, shall include:

* * * * *

(c) *CEO attestation.* The CEO of a banking entity that has significant trading assets and liabilities must, based on a review by the CEO of the banking entity, attest in writing to the CFTC, each year no later than March 31, that the banking entity has in place processes to establish, maintain, enforce, review, test and modify the compliance program required by paragraph (b) of this section in a manner reasonably designed to achieve compliance with section 13 of the BHC Act and this part. In the case of a U.S. branch or agency of a foreign banking entity, the attestation may be provided for the entire U.S. operations of the foreign banking entity by the senior management officer of the U.S. operations of the foreign banking entity who is located in the United States.

(d) *Reporting requirements under appendix A to this part.* (1) A banking entity engaged in proprietary trading activity permitted under subpart B of this part shall comply with the reporting requirements described in appendix A to this part, if:

(i) The banking entity has significant trading assets and liabilities; or

(ii) The CFTC notifies the banking entity in writing that it must satisfy the reporting requirements contained in appendix A to this part.

(2) Frequency of reporting: Unless the CFTC notifies the banking entity in writing that it must report on a different basis, a banking entity subject to appendix A to this part shall report the information required by appendix A for

each quarter within 30 days of the end of the quarter.

(e) *Additional documentation for covered funds.* A banking entity with significant trading assets and liabilities shall maintain records that include:

* * * * *

(f) * * *

(2) *Banking entities with moderate trading assets and liabilities.* A banking entity with moderate trading assets and liabilities may satisfy the requirements of this section by including in its existing compliance policies and procedures appropriate references to the requirements of section 13 of the BHC Act and this part and adjustments as appropriate given the activities, size, scope, and complexity of the banking entity.

(g) *Rebuttable presumption of compliance for banking entities with limited trading assets and liabilities*—(1) *Rebuttable presumption.* Except as otherwise provided in this paragraph, a banking entity with limited trading assets and liabilities shall be presumed to be compliant with subpart B and subpart C of this part and shall have no obligation to demonstrate compliance with this part on an ongoing basis.

(2) *Rebuttal of presumption.* If upon examination or audit, the CFTC determines that the banking entity has engaged in proprietary trading or covered fund activities that are otherwise prohibited under subpart B or subpart C of this part, the CFTC may require the banking entity to be treated under this part as if it did not have limited trading assets and liabilities. The CFTC's rebuttal of the presumption in this paragraph must be made in accordance with the notice and response procedures in paragraph (i) of this section.

(h) *Reservation of authority.* Notwithstanding any other provision of this part, the CFTC retains its authority to require a banking entity without significant trading assets and liabilities to apply any requirements of this part that would otherwise apply if the banking entity had significant or moderate trading assets and liabilities if the CFTC determines that the size or complexity of the banking entity's trading or investment activities, or the risk of evasion of subpart B or subpart C, of this part does not warrant a presumption of compliance under paragraph (g) of this section or treatment as a banking entity with moderate trading assets and liabilities, as applicable. The CFTC's exercise of this reservation of authority must be made in accordance with the notice and response procedures in paragraph (i) of this section.

(i) *Notice and response procedures*—(1) *Notice.* The CFTC will notify the banking entity in writing of any determination requiring notice under this part and will provide an explanation of the determination.

(2) *Response.* The banking entity may respond to any or all items in the notice described in paragraph (i)(1) of this section. The response should include any matters that the banking entity would have the CFTC consider in deciding whether to make the determination. The response must be in writing and delivered to the designated CFTC official within 30 days after the date on which the banking entity received the notice. The CFTC may shorten the time period when, in the opinion of the CFTC, the activities or condition of the banking entity so requires, provided that the banking entity is informed of the time period at the time of notice, or with the consent of the banking entity. In its discretion, the CFTC may extend the time period for good cause.

(3) *Waiver.* Failure to respond within 30 days or such other time period as may be specified by the CFTC shall constitute a waiver of any objections to the CFTC's determination.

(4) *Decision.* The CFTC will notify the banking entity of the decision in writing. The notice will include an explanation of the decision.

■ 57. Revise appendix A to part 75 to read as follows:

Appendix A to Part 75—Reporting and Recordkeeping Requirements for Covered Trading Activities

I. Purpose

a. This appendix sets forth reporting and recordkeeping requirements that certain banking entities must satisfy in connection with the restrictions on proprietary trading set forth in subpart B (''proprietary trading restrictions''). Pursuant to § 75.20(d), this appendix applies to a banking entity that, together with its affiliates and subsidiaries, has significant trading assets and liabilities. These entities are required to (i) furnish periodic reports to the CFTC regarding a variety of quantitative measurements of their covered trading activities, which vary depending on the scope and size of covered trading activities, and (ii) create and maintain records documenting the preparation and content of these reports. The requirements of this appendix must be incorporated into the banking entity's internal compliance program under § 75.20.

b. The purpose of this appendix is to assist banking entities and the CFTC in:

(1) Better understanding and evaluating the scope, type, and profile of the banking entity's covered trading activities;

(2) Monitoring the banking entity's covered trading activities;

(3) Identifying covered trading activities that warrant further review or examination by the banking entity to verify compliance with the proprietary trading restrictions;

(4) Evaluating whether the covered trading activities of trading desks engaged in market making-related activities subject to § 75.4(b) are consistent with the requirements governing permitted market making-related activities;

(5) Evaluating whether the covered trading activities of trading desks that are engaged in permitted trading activity subject to § 75.4, 75.5, or 75.6(a) and (b) (*i.e.,* underwriting and market making-related activity, risk-mitigating hedging, or trading in certain government obligations) are consistent with the requirement that such activity not result, directly or indirectly, in a material exposure to high-risk assets or high-risk trading strategies;

(6) Identifying the profile of particular covered trading activities of the banking entity, and the individual trading desks of the banking entity, to help establish the appropriate frequency and scope of examination by CFTC of such activities; and

(7) Assessing and addressing the risks associated with the banking entity's covered trading activities.

c. Information that must be furnished pursuant to this appendix is not intended to serve as a dispositive tool for the identification of permissible or impermissible activities.

d. In addition to the quantitative measurements required in this appendix, a banking entity may need to develop and implement other quantitative measurements in order to effectively monitor its covered trading activities for compliance with section 13 of the BHC Act and this part and to have an effective compliance program, as required by § 75.20. The effectiveness of particular quantitative measurements may differ based on the profile of the banking entity's businesses in general and, more specifically, of the particular trading desk, including types of instruments traded, trading activities and strategies, and history and experience (*e.g.,* whether the trading desk is an established, successful market maker or a new entrant to a competitive market). In all cases, banking entities must ensure that they have robust measures in place to identify and monitor the risks taken in their trading activities, to ensure that the activities are within risk tolerances established by the banking entity, and to monitor and examine for compliance with the proprietary trading restrictions in this part.

e. On an ongoing basis, banking entities must carefully monitor, review, and evaluate all furnished quantitative measurements, as well as any others that they choose to utilize in order to maintain compliance with section 13 of the BHC Act and this part. All measurement results that indicate a heightened risk of impermissible proprietary trading, including with respect to otherwise-permitted activities under §§ 75.4 through 75.6(a) and (b), or that result in a material exposure to high-risk assets or high-risk trading strategies, must be escalated within the banking entity for review, further analysis, explanation to CFTC, and remediation, where appropriate. The quantitative measurements discussed in this appendix should be helpful to banking entities in identifying and managing the risks related to their covered trading activities.

II. Definitions

The terms used in this appendix have the same meanings as set forth in §§ 75.2 and 75.3. In addition, for purposes of this appendix, the following definitions apply:

Applicability identifies the trading desks for which a banking entity is required to calculate and report a particular quantitative measurement based on the type of covered trading activity conducted by the trading desk.

Calculation period means the period of time for which a particular quantitative measurement must be calculated.

Comprehensive profit and loss means the net profit or loss of a trading desk's material sources of trading revenue over a specific period of time, including, for example, any increase or decrease in the market value of a trading desk's holdings, dividend income, and interest income and expense.

Covered trading activity means trading conducted by a trading desk under § 75.4, § 75.5, § 75.6(a), or § 75.6(b). A banking entity may include in its covered trading activity trading conducted under § 75.3(d), § 75.6(c), § 75.6(d) or § 75.6(e).

Measurement frequency means the frequency with which a particular quantitative metric must be calculated and recorded.

Trading day means a calendar day on which a trading desk is open for trading.

III. Reporting and Recordkeeping

a. Scope of Required Reporting

1. Quantitative measurements. Each banking entity made subject to this appendix by § 75.20 must furnish the following quantitative measurements, as applicable, for each trading desk of the banking entity engaged in covered trading activities and calculate these quantitative measurements in accordance with this appendix:

i. Internal Limits and Usage;
ii. Value-at-Risk;
iii. Comprehensive Profit and Loss Attribution;
iv. Positions; and
v. Transaction Volumes.

2. Trading desk information. Each banking entity made subject to this appendix by § 75.20 must provide certain descriptive information, as further described in this appendix, regarding each trading desk engaged in covered trading activities.

3. Quantitative measurements identifying information. Each banking entity made subject to this appendix by § 75.20 must provide certain identifying and descriptive information, as further described in this appendix, regarding its quantitative measurements.

4. Narrative statement. Each banking entity made subject to this appendix by § 75.20 may provide an optional narrative statement, as further described in this appendix.

5. File identifying information. Each banking entity made subject to this appendix by § 75.20 must provide file identifying information in each submission to the CFTC pursuant to this appendix, including the name of the banking entity, the RSSD ID assigned to the top-tier banking entity by the Board, and identification of the reporting period and creation date and time.

b. Trading Desk Information

1. Each banking entity must provide descriptive information regarding each trading desk engaged in covered trading activities, including:

i. Name of the trading desk used internally by the banking entity and a unique identification label for the trading desk;

ii. Identification of each type of covered trading activity in which the trading desk is engaged;

iii. Brief description of the general strategy of the trading desk;

v. A list identifying each Agency receiving the submission of the trading desk;

2. Indication of whether each calendar date is a trading day or not a trading day for the trading desk; and

3. Currency reported and daily currency conversion rate.

c. Quantitative Measurements Identifying Information

Each banking entity must provide the following information regarding the quantitative measurements:

1. An Internal Limits Information Schedule that provides identifying and descriptive information for each limit reported pursuant to the Internal Limits and Usage quantitative measurement, including the name of the limit, a unique identification label for the limit, a description of the limit, the unit of measurement for the limit, the type of limit, and identification of the corresponding risk factor attribution in the particular case that the limit type is a limit on a risk factor sensitivity and profit and loss attribution to the same risk factor is reported; and

2. A Risk Factor Attribution Information Schedule that provides identifying and descriptive information for each risk factor attribution reported pursuant to the Comprehensive Profit and Loss Attribution quantitative measurement, including the name of the risk factor or other factor, a unique identification label for the risk factor or other factor, a description of the risk factor or other factor, and the risk factor or other factor's change unit.

d. Narrative Statement

Each banking entity made subject to this appendix by § 75.20 may submit in a separate electronic document a Narrative Statement to the CFTC with any information the banking entity views as relevant for assessing the information reported. The Narrative Statement may include further description of or changes to calculation methods, identification of material events, description of and reasons for changes in the banking entity's trading desk structure or trading desk strategies, and when any such changes occurred.

e. Frequency and Method of Required Calculation and Reporting

A banking entity must calculate any applicable quantitative measurement for each trading day. A banking entity must report the Trading Desk Information, the Quantitative Measurements Identifying Information, and each applicable quantitative measurement electronically to the CFTC on the reporting schedule established in § 75.20 unless otherwise requested by the CFTC. A banking entity must report the Trading Desk Information, the Quantitative Measurements Identifying Information, and each applicable quantitative measurement to the CFTC in accordance with the XML Schema specified and published on the CFTC's website.

f. Recordkeeping

A banking entity must, for any quantitative measurement furnished to the CFTC pursuant to this appendix and § 75.20(d), create and maintain records documenting the preparation and content of these reports, as well as such information as is necessary to permit the CFTC to verify the accuracy of such reports, for a period of five years from the end of the calendar year for which the measurement was taken. A banking entity must retain the Narrative Statement, the Trading Desk Information, and the Quantitative Measurements Identifying Information for a period of five years from the end of the calendar year for which the information was reported to the CFTC.

IV. Quantitative Measurements

a. Risk-Management Measurements

1. Internal Limits and Usage

i. *Description:* For purposes of this appendix, Internal Limits are the constraints that define the amount of risk and the positions that a trading desk is permitted to take at a point in time, as defined by the banking entity for a specific trading desk. Usage represents the value of the trading desk's risk or positions that are accounted for by the current activity of the desk. Internal limits and their usage are key compliance and risk management tools used to control and monitor risk taking and include, but are not limited to, the limits set out in §§ 75.4 and 75.5. A trading desk's risk limits, commonly including a limit on ''Value-at-Risk,'' are useful in the broader context of the trading desk's overall activities, particularly for the market making activities under § 75.4(b) and hedging activity under § 75.5. Accordingly, the limits required under §§ 75.4(b)(2)(iii)(C) and 75.5(b)(1)(i)(A) must meet the applicable requirements under §§ 75.4(b)(2)(iii)(C) and 75.5(b)(1)(i)(A) and also must include appropriate metrics for the trading desk limits including, at a minimum, ''Value-at-Risk'' except to the extent the ''Value-at-Risk'' metric is demonstrably ineffective for measuring and monitoring the risks of a trading desk based on the types of positions traded by, and risk exposures of, that desk.

A. A banking entity must provide the following information for each limit reported pursuant to this quantitative measurement: The unique identification label for the limit reported in the Internal Limits Information Schedule, the limit size (distinguishing between an upper and a lower limit), and the value of usage of the limit.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks engaged in covered trading activities.

2. Value-at-Risk

i. *Description:* For purposes of this appendix, Value-at-Risk (''VaR'') is the measurement of the risk of future financial loss in the value of a trading desk's aggregated positions at the ninety-nine percent confidence level over a one-day period, based on current market conditions.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks engaged in covered trading activities.

b. Source-of-Revenue Measurements

1. Comprehensive Profit and Loss Attribution

i. *Description:* For purposes of this appendix, Comprehensive Profit and Loss Attribution is an analysis that attributes the daily fluctuation in the value of a trading desk's positions to various sources. First, the daily profit and loss of the aggregated positions is divided into two categories: (i) Profit and loss attributable to a trading desk's existing positions that were also positions held by the trading desk as of the end of the prior day (''existing positions''); and (ii) profit and loss attributable to new positions resulting from the current day's trading activity (''new positions'').

A. The comprehensive profit and loss associated with existing positions must reflect changes in the value of these positions on the applicable day. The comprehensive profit and loss from existing positions must be further attributed, as applicable, to (i) changes in the specific risk factors and other factors that are monitored and managed as part of the trading desk's overall risk management policies and procedures; and (ii) any other applicable elements, such as cash flows, carry, changes in reserves, and the correction, cancellation, or exercise of a trade.

B. For the attribution of comprehensive profit and loss from existing positions to specific risk factors and other factors, a banking entity must provide the following information for the factors that explain the preponderance of the profit or loss changes due to risk factor changes: The unique identification label for the risk factor or other factor listed in the Risk Factor Attribution Information Schedule, and the profit or loss due to the risk factor or other factor change.

C. The comprehensive profit and loss attributed to new positions must reflect commissions and fee income or expense and market gains or losses associated with transactions executed on the applicable day. New positions include purchases and sales of financial instruments and other assets/liabilities and negotiated amendments to existing positions. The comprehensive profit and loss from new positions may be reported in the aggregate and does not need to be further attributed to specific sources.

D. The portion of comprehensive profit and loss from existing positions that is not attributed to changes in specific risk factors and other factors must be allocated to a residual category. Significant unexplained profit and loss must be escalated for further investigation and analysis.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks engaged in covered trading activities.

c. Positions and Transaction Volumes Measurements

1. Positions

i. *Description:* For purposes of this appendix, Positions is the value of securities and derivatives positions managed by the trading desk. For purposes of the Positions quantitative measurement, do not include in the Positions calculation for ''securities'' those securities that are also ''derivatives,'' as those terms are defined under subpart A; instead, report those securities that are also derivatives as ''derivatives.'' [1227] A banking entity must separately report the trading desk's market value of long securities positions, short securities positions, derivatives receivables, and derivatives payables.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks that rely on § 75.4(a) or (b) to conduct underwriting activity or market-making-related activity, respectively.

2. Transaction Volumes

i. *Description:* For purposes of this appendix, Transaction Volumes measures three exclusive categories of covered trading activity conducted by a trading desk. A banking entity is required to report the value and number of security and derivative transactions conducted by the trading desk with: (i) Customers, excluding internal transactions; (ii) non-customers, excluding internal transactions; and (iii) trading desks and other organizational units where the transaction is booked into either the same banking entity or an affiliated banking entity. For securities, value means gross market value. For derivatives, value means gross notional value. For purposes of calculating the Transaction Volumes quantitative measurement, do not include in the Transaction Volumes calculation for ''securities'' those securities that are also ''derivatives,'' as those terms are defined under subpart A; instead, report those securities that are also derivatives as ''derivatives.'' [1228] Further, for purposes of the Transaction Volumes quantitative measurement, a customer of a trading desk that relies on § 75.4(a) to conduct underwriting activity is a market participant identified in § 75.4(a)(7), and a customer of a trading desk that relies on § 75.4(b) to conduct market making-related activity is a market participant identified in § 75.4(b)(3).

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks that rely on § 75.4(a) or (b) to conduct underwriting activity or market-making-related activity, respectively.

[1227] *See* § 75.2(h), (aa). For example, under this part, a security-based swap is both a ''security'' and a ''derivative.'' For purposes of the Positions quantitative measurement, security-based swaps are reported as derivatives rather than securities.

[1228] *See* § 75.2(h), (aa).

Appendix B to Part 75 [Removed]

■ 58. Appendix B to part 75 is removed.

■ 59. Effective January 1, 2020, until December 31, 2020, appendix Z to part 75 is added to read as follows:

Appendix Z to Part 75—Proprietary Trading and Certain Interests in and Relationships with Covered Funds (Alternative Compliance)

Note: The content of this appendix reproduces the regulation implementing Section 13 of the Bank Holding Company Act as of November 13, 2019.

Subpart A—Authority and Definitions

§ 75.1 Authority, purpose, scope, and relationship to other authorities.

(a) *Authority.* This part is issued by the Commission under section 13 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1851).

(b) *Purpose.* Section 13 of the Bank Holding Company Act establishes prohibitions and restrictions on proprietary trading by, and investments in or relationships with covered funds by, certain banking entities. This part implements section 13 of the Bank Holding Company Act by defining terms used in the statute and related terms, establishing prohibitions and restrictions on proprietary trading and investments in or relationships with covered funds, and further explaining the statute's requirements.

(c) *Scope.* This part implements section 13 of the Bank Holding Company Act with respect to banking entities for which the CFTC is the primary financial regulatory agency, as defined in section 2(12) of the Dodd-Frank Act, but does not include such entities to the extent they are not within the definition of banking entity in § 75.2(c).

(d) *Relationship to other authorities.* Except as otherwise provided under section 13 of the BHC Act, and notwithstanding any other provision of law, the prohibitions and restrictions under section 13 of the BHC Act shall apply to the activities of an applicable banking entity, even if such activities are authorized for the applicable banking entity under other applicable provisions of law.

§ 75.2 Definitions.

Unless otherwise specified, for purposes of this part:

(a) *Affiliate* has the same meaning as in section 2(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(k)).

(b) *Bank holding company* has the same meaning as in section 2 of the

Bank Holding Company Act of 1956 (12 U.S.C. 1841).

(c) *Banking entity.* (1) Except as provided in paragraph (c)(2) of this section, *banking entity* means:

(i) Any insured depository institution;

(ii) Any company that controls an insured depository institution;

(iii) Any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(iv) Any affiliate or subsidiary of any entity described in paragraphs (c)(1)(i), (ii), or (iii) of this section.

(2) Banking entity does not include:

(i) A covered fund that is not itself a banking entity under paragraphs (c)(1)(i), (ii), or (iii) of this section;

(ii) A portfolio company held under the authority contained in section 4(k)(4)(H) or (I) of the BHC Act (12 U.S.C. 1843(k)(4)(H), (I)), or any 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), so long as the portfolio company or portfolio concern is not itself a banking entity under paragraphs (c)(1)(i), (ii), or (iii) of this section; or

(iii) The FDIC acting in its corporate capacity or as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(d) *Board* means the Board of Governors of the Federal Reserve System.

(e) *CFTC* or *Commission* means the Commodity Futures Trading Commission.

(f) *Dealer* has the same meaning as in section 3(a)(5) of the Exchange Act (15 U.S.C. 78c(a)(5)).

(g) *Depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(h) *Derivative.* (1) Except as provided in paragraph (h)(2) of this section, *derivative* means:

(i) Any swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68));

(ii) Any purchase or sale of a commodity, that is not an excluded commodity, for deferred shipment or delivery that is intended to be physically settled;

(iii) Any foreign exchange forward (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)) or foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25));

(iv) Any agreement, contract, or transaction in foreign currency described in section 2(c)(2)(C)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(C)(i));

(v) Any agreement, contract, or transaction in a commodity other than foreign currency described in section 2(c)(2)(D)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(D)(i)); and

(vi) Any transaction authorized under section 19 of the Commodity Exchange Act (7 U.S.C. 23(a) or (b));

(2) A derivative does not include:

(i) Any consumer, commercial, or other agreement, contract, or transaction that the CFTC and SEC have further defined by joint regulation, interpretation, guidance, or other action as not within the definition of swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)); or

(ii) Any identified banking product, as defined in section 402(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b)), that is subject to section 403(a) of that Act (7 U.S.C. 27a(a)).

(i) *Employee* includes a member of the immediate family of the employee.

(j) *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(k) *Excluded commodity* has the same meaning as in section 1a(19) of the Commodity Exchange Act (7 U.S.C. 1a(19)).

(l) *FDIC* means the Federal Deposit Insurance Corporation.

(m) *Federal banking agencies* means the Board, the Office of the Comptroller of the Currency, and the FDIC.

(n) *Foreign banking organization* has the same meaning as in section 211.21(o) of the Board's Regulation K (12 CFR 211.21(o)), but does not include a foreign bank, as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(7)), that is organized under the laws of the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, or the Commonwealth of the Northern Mariana Islands.

(o) *Foreign insurance regulator* means the insurance commissioner, or a similar official or agency, of any country other than the United States that is engaged in the supervision of insurance companies under foreign insurance law.

(p) *General account* means all of the assets of an insurance company except those allocated to one or more separate accounts.

(q) *Insurance company* means a company that is organized as an insurance company, primarily and predominantly engaged in writing insurance or reinsuring risks underwritten by insurance companies, subject to supervision as such by a state insurance regulator or a foreign insurance regulator, and not operated for the purpose of evading the provisions of section 13 of the BHC Act (12 U.S.C. 1851).

(r) *Insured depository institution,* unless otherwise indicated, has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)), but does not include:

(1) An insured depository institution that is described in section 2(c)(2)(D) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)(2)(D)); or

(2) An insured depository institution if it has, and if every company that controls it has, total consolidated assets of $10 billion or less and total trading assets and trading liabilities, on a consolidated basis, that are 5 percent or less of total consolidated assets.

(s) *Loan* means any loan, lease, extension of credit, or secured or unsecured receivable that is not a security or derivative.

(t) *Primary financial regulatory agency* has the same meaning as in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5301(12)).

(u) *Purchase* includes any contract to buy, purchase, or otherwise acquire. For security futures products, purchase includes any contract, agreement, or transaction for future delivery. With respect to a commodity future, purchase includes any contract, agreement, or transaction for future delivery. With respect to a derivative, purchase includes the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(v) *Qualifying foreign banking organization* means a foreign banking organization that qualifies as such under § 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c), or (e)).

(w) *SEC* means the Securities and Exchange Commission.

(x) *Sale* and *sell* each include any contract to sell or otherwise dispose of. For security futures products, such terms include any contract, agreement, or transaction for future delivery. With respect to a commodity future, such terms include any contract, agreement, or transaction for future delivery. With respect to a derivative, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(y) *Security* has the meaning specified in section 3(a)(10) of the Exchange Act (15 U.S.C. 78c(a)(10)).

(z) *Security-based swap dealer* has the same meaning as in section 3(a)(71) of the Exchange Act (15 U.S.C. 78c(a)(71)).

(aa) *Security future* has the meaning specified in section 3(a)(55) of the Exchange Act (15 U.S.C. 78c(a)(55)).

(bb) *Separate account* means an account established and maintained by an insurance company in connection with one or more insurance contracts to hold assets that are legally segregated from the insurance company's other assets, under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(cc) *State* means any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(dd) *Subsidiary* has the same meaning as in section 2(d) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(d)).

(ee) *State insurance regulator* means the insurance commissioner, or a similar official or agency, of a State that is engaged in the supervision of insurance companies under State insurance law.

(ff) *Swap dealer* has the same meaning as in section 1(a)(49) of the Commodity Exchange Act (7 U.S.C. 1a(49)).

Subpart B—Proprietary Trading

§ 75.3 Prohibition on proprietary trading.

(a) *Prohibition.* Except as otherwise provided in this subpart, a banking entity may not engage in proprietary trading. *Proprietary trading* means engaging as principal for the trading account of the banking entity in any purchase or sale of one or more financial instruments.

(b) *Definition of trading account.* (1) Trading account means any account that is used by a banking entity to:

(i) Purchase or sell one or more financial instruments principally for the purpose of:

(A) Short-term resale;

(B) Benefitting from actual or expected short-term price movements;

(C) Realizing short-term arbitrage profits; or

(D) Hedging one or more positions resulting from the purchases or sales of financial instruments described in paragraphs (b)(1)(i)(A), (B), or (C) of this section;

(ii) Purchase or sell one or more financial instruments that are both market risk capital rule covered positions and trading positions (or hedges of other market risk capital rule covered positions), if the banking entity, or any affiliate of the banking entity, is an insured depository institution, bank holding company, or savings and loan holding company, and calculates risk-based capital ratios under the market risk capital rule; or

(iii) Purchase or sell one or more financial instruments for any purpose, if the banking entity:

(A) Is licensed or registered, or is required to be licensed or registered, to engage in the business of a dealer, swap dealer, or security-based swap dealer, to the extent the instrument is purchased or sold in connection with the activities that require the banking entity to be licensed or registered as such; or

(B) Is engaged in the business of a dealer, swap dealer, or security-based swap dealer outside of the United States, to the extent the instrument is purchased or sold in connection with the activities of such business.

(2) *Rebuttable presumption for certain purchases and sales.* The purchase (or sale) of a financial instrument by a banking entity shall be presumed to be for the trading account of the banking entity under paragraph (b)(1)(i) of this section if the banking entity holds the financial instrument for fewer than sixty days or substantially transfers the risk of the financial instrument within sixty days of the purchase (or sale), unless the banking entity can demonstrate, based on all relevant facts and circumstances, that the banking entity did not purchase (or sell) the financial instrument principally for any of the purposes described in paragraph (b)(1)(i) of this section.

(c) *Financial instrument*—(1) *Financial instrument* means:

(i) A security, including an option on a security;

(ii) A derivative, including an option on a derivative; or

(iii) A contract of sale of a commodity for future delivery, or option on a contract of sale of a commodity for future delivery.

(2) A financial instrument does not include:

(i) A loan;

(ii) A commodity that is not:

(A) An excluded commodity (other than foreign exchange or currency);

(B) A derivative;

(C) A contract of sale of a commodity for future delivery; or

(D) An option on a contract of sale of a commodity for future delivery; or

(iii) Foreign exchange or currency.

(d) *Proprietary trading does not include:*—(1) Any purchase or sale of one or more financial instruments by a banking entity that arises under a repurchase or reverse repurchase agreement pursuant to which the banking entity has simultaneously agreed, in writing, to both purchase and sell a stated asset, at stated prices, and on stated dates or on demand with the same counterparty;

(2) Any purchase or sale of one or more financial instruments by a banking entity that arises under a transaction in which the banking entity lends or borrows a security temporarily to or from another party pursuant to a written securities lending agreement under which the lender retains the economic interests of an owner of such security, and has the right to terminate the transaction and to recall the loaned security on terms agreed by the parties;

(3) Any purchase or sale of a security by a banking entity for the purpose of liquidity management in accordance with a documented liquidity management plan of the banking entity that:

(i) Specifically contemplates and authorizes the particular securities to be used for liquidity management purposes, the amount, types, and risks of these securities that are consistent with liquidity management, and the liquidity circumstances in which the particular securities may or must be used;

(ii) Requires that any purchase or sale of securities contemplated and authorized by the plan be principally for the purpose of managing the liquidity of the banking entity, and not for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging a position taken for such short-term purposes;

(iii) Requires that any securities purchased or sold for liquidity management purposes be highly liquid and limited to securities the market, credit, and other risks of which the banking entity does not reasonably expect to give rise to appreciable profits or losses as a result of short-term price movements;

(iv) Limits any securities purchased or sold for liquidity management purposes, together with any other instruments purchased or sold for such purposes, to an amount that is consistent with the banking entity's near-term funding needs, including deviations from normal operations of the banking entity or any affiliate thereof, as estimated and documented pursuant to methods specified in the plan;

(v) Includes written policies and procedures, internal controls, analysis, and independent testing to ensure that the purchase and sale of securities that are not permitted under § 75.6(a) or (b) are for the purpose of liquidity management and in accordance with the liquidity management plan described in paragraph (d)(3) of this section; and

(vi) Is consistent with the Commission's supervisory requirements, guidance, and expectations regarding liquidity management;

(4) Any purchase or sale of one or more financial instruments by a banking entity that is a derivatives clearing organization or a clearing agency in connection with clearing financial instruments;

(5) Any excluded clearing activities by a banking entity that is a member of a clearing agency, a member of a derivatives clearing organization, or a member of a designated financial market utility;

(6) Any purchase or sale of one or more financial instruments by a banking entity, so long as:

(i) The purchase (or sale) satisfies an existing delivery obligation of the banking entity or its customers, including to prevent or close out a failure to deliver, in connection with delivery, clearing, or settlement activity; or

(ii) The purchase (or sale) satisfies an obligation of the banking entity in connection with a judicial, administrative, self-regulatory organization, or arbitration proceeding;

(7) Any purchase or sale of one or more financial instruments by a banking entity that is acting solely as agent, broker, or custodian;

(8) Any purchase or sale of one or more financial instruments by a banking entity through a deferred compensation, stock-bonus, profit-sharing, or pension plan of the banking entity that is established and administered in accordance with the law of the United States or a foreign sovereign, if the purchase or sale is made directly or indirectly by the banking entity as trustee for the benefit of persons who are or were employees of the banking entity; or

(9) Any purchase or sale of one or more financial instruments by a banking entity in the ordinary course of collecting a debt previously contracted in good faith, provided that the banking entity divests the financial instrument as soon as practicable, and in no event may the banking entity retain such instrument for longer than such period permitted by the Commission.

(e) *Definition of other terms related to proprietary trading.* For purposes of this subpart:

(1) *Anonymous* means that each party to a purchase or sale is unaware of the identity of the other party(ies) to the purchase or sale.

(2) *Clearing agency* has the same meaning as in section 3(a)(23) of the Exchange Act (15 U.S.C. 78c(a)(23)).

(3) *Commodity* has the same meaning as in section 1a(9) of the Commodity Exchange Act (7 U.S.C. 1a(9)), except that a commodity does not include any security;

(4) *Contract of sale of a commodity for future delivery* means a contract of sale (as that term is defined in section 1a(13) of the Commodity Exchange Act (7 U.S.C. 1a(13)) for future delivery (as that term is defined in section 1a(27) of the Commodity Exchange Act (7 U.S.C. 1a(27))).

(5) *Derivatives clearing organization* means:

(i) A derivatives clearing organization registered under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1);

(ii) A derivatives clearing organization that, pursuant to CFTC regulation, is exempt from the registration requirements under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1); or

(iii) A foreign derivatives clearing organization that, pursuant to CFTC regulation, is permitted to clear for a foreign board of trade that is registered with the CFTC.

(6) *Exchange,* unless the context otherwise requires, means any designated contract market, swap execution facility, or foreign board of trade registered with the CFTC, or, for purposes of securities or security-based swaps, an exchange, as defined under section 3(a)(1) of the Exchange Act (15 U.S.C. 78c(a)(1)), or security-based swap execution facility, as defined under section 3(a)(77) of the Exchange Act (15 U.S.C. 78c(a)(77)).

(7) *Excluded clearing activities* means:

(i) With respect to customer transactions cleared on a derivatives clearing organization, a clearing agency, or a designated financial market utility, any purchase or sale necessary to correct trading errors made by or on behalf of a customer provided that such purchase or sale is conducted in accordance with, for transactions cleared on a derivatives clearing organization, the Commodity Exchange Act, CFTC regulations, and the rules or procedures of the derivatives clearing organization, or, for transactions cleared on a clearing agency, the rules or procedures of the clearing agency, or, for transactions cleared on a designated financial market utility that is neither a derivatives clearing organization nor a clearing agency, the rules or procedures of the designated financial market utility;

(ii) Any purchase or sale in connection with and related to the management of a default or threatened imminent default of a customer provided that such purchase or sale is conducted in accordance with, for transactions cleared on a derivatives clearing organization, the Commodity Exchange Act, CFTC regulations, and the rules or procedures of the derivatives clearing organization, or, for transactions cleared on a clearing agency, the rules or procedures of the clearing agency, or, for transactions cleared on a designated financial market utility that is neither a derivatives clearing organization nor a clearing agency, the rules or procedures of the designated financial market utility;

(iii) Any purchase or sale in connection with and related to the management of a default or threatened imminent default of a member of a clearing agency, a member of a derivatives clearing organization, or a member of a designated financial market utility;

(iv) Any purchase or sale in connection with and related to the management of the default or threatened default of a clearing agency, a derivatives clearing organization, or a designated financial market utility; and

(v) Any purchase or sale that is required by the rules or procedures of a clearing agency, a derivatives clearing organization, or a designated financial market utility to mitigate the risk to the clearing agency, derivatives clearing organization, or designated financial market utility that would result from the clearing by a member of security-based swaps that reference the member or an affiliate of the member.

(8) *Designated financial market utility* has the same meaning as in section 803(4) of the Dodd-Frank Act (12 U.S.C. 5462(4)).

(9) *Issuer* has the same meaning as in section 2(a)(4) of the Securities Act of 1933 (15 U.S.C. 77b(a)(4)).

(10) *Market risk capital rule covered position and trading position* means a financial instrument that is both a covered position and a trading position, as those terms are respectively defined:

(i) In the case of a banking entity that is a bank holding company, savings and loan holding company, or insured depository institution, under the market risk capital rule that is applicable to the banking entity; and

(ii) In the case of a banking entity that is affiliated with a bank holding company or savings and loan holding company, other than a banking entity to which a market risk capital rule is applicable, under the market risk capital rule that is applicable to the affiliated bank holding company or savings and loan holding company.

(11) *Market risk capital rule* means the market risk capital rule that is contained in subpart F of 12 CFR part 3, 12 CFR parts 208 and 225, or 12 CFR part 324, as applicable.

(12) *Municipal security* means a security that is a direct obligation of or issued by, or an obligation guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, or any municipal corporate instrumentality of one or more States or political subdivisions thereof.

(13) *Trading desk* means the smallest discrete unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof.

§ 75.4 Permitted underwriting and market making-related activities.

(a) *Underwriting activities*—(1) *Permitted underwriting activities.* The prohibition contained in § 75.3(a) does not apply to a banking entity's underwriting activities conducted in accordance with paragraph (a) of this section.

(2) *Requirements.* The underwriting activities of a banking entity are permitted under paragraph (a)(1) of this section only if:

(i) The banking entity is acting as an underwriter for a distribution of securities and the trading desk's underwriting position is related to such distribution;

(ii) The amount and type of the securities in the trading desk's underwriting position are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, and reasonable efforts are made to sell or otherwise reduce the underwriting position within a reasonable period, taking into account the liquidity, maturity, and depth of the market for the relevant type of security;

(iii) The banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of paragraph (a) of this section, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The products, instruments or exposures each trading desk may purchase, sell, or manage as part of its underwriting activities;

(B) Limits for each trading desk, based on the nature and amount of the trading desk's underwriting activities, including the reasonably expected near term demands of clients, customers, or counterparties, on the:

(*1*) Amount, types, and risk of its underwriting position;

(*2*) Level of exposures to relevant risk factors arising from its underwriting position; and

(*3*) Period of time a security may be held;

(C) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits; and

(D) Authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval;

(iv) The compensation arrangements of persons performing the activities described in paragraph (a) of this section are designed not to reward or incentivize prohibited proprietary trading; and

(v) The banking entity is licensed or registered to engage in the activity described in paragraph (a) of this section in accordance with applicable law.

(3) *Definition of distribution.* For purposes of paragraph (a) of this section, a *distribution* of securities means:

(i) An offering of securities, whether or not subject to registration under the Securities Act of 1933, that is distinguished from ordinary trading transactions by the presence of special selling efforts and selling methods; or

(ii) An offering of securities made pursuant to an effective registration statement under the Securities Act of 1933.

(4) *Definition of underwriter.* For purposes of paragraph (a) of this section, *underwriter* means:

(i) A person who has agreed with an issuer or selling security holder to:

(A) Purchase securities from the issuer or selling security holder for distribution;

(B) Engage in a distribution of securities for or on behalf of the issuer or selling security holder; or

(C) Manage a distribution of securities for or on behalf of the issuer or selling security holder; or

(ii) A person who has agreed to participate or is participating in a distribution of such securities for or on behalf of the issuer or selling security holder.

(5) *Definition of selling security holder.* For purposes of paragraph (a) of this section, *selling security holder* means any person, other than an issuer, on whose behalf a distribution is made.

(6) *Definition of underwriting position.* For purposes of paragraph (a) of this section, *underwriting position* means the long or short positions in one or more securities held by a banking entity or its affiliate, and managed by a particular trading desk, in connection with a particular distribution of securities for which such banking entity or affiliate is acting as an underwriter.

(7) *Definition of client, customer, and counterparty.* For purposes of paragraph (a) of this section, the terms *client, customer,* and *counterparty,* on a collective or individual basis, refer to market participants that may transact with the banking entity in connection with a particular distribution for which the banking entity is acting as underwriter.

(b) *Market making-related activities*—(1) *Permitted market making-related activities.* The prohibition contained in § 75.3(a) does not apply to a banking entity's market making-related activities conducted in accordance with paragraph (b) of this section.

(2) *Requirements.* The market making-related activities of a banking entity are permitted under paragraph (b)(1) of this section only if:

(i) The trading desk that establishes and manages the financial exposure routinely stands ready to purchase and sell one or more types of financial instruments related to its financial exposure and is willing and available to quote, purchase and sell, or otherwise enter into long and short positions in those types of financial instruments for its own account, in commercially reasonable amounts and throughout market cycles on a basis appropriate for the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(ii) The amount, types, and risks of the financial instruments in the trading desk's market-maker inventory are designed not to exceed, on an ongoing basis, the reasonably expected near term demands of clients, customers, or counterparties, based on:

(A) The liquidity, maturity, and depth of the market for the relevant types of financial instrument(s); and

(B) Demonstrable analysis of historical customer demand, current inventory of financial instruments, and market and other factors regarding the amount, types, and risks, of or associated with financial instruments in which the trading desk makes a market, including through block trades;

(iii) The banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of paragraph (b) of this section, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The financial instruments each trading desk stands ready to purchase and sell in accordance with paragraph (b)(2)(i) of this section;

(B) The actions the trading desk will take to demonstrably reduce or otherwise significantly mitigate promptly the risks of its financial exposure consistent with the limits required under paragraph (b)(2)(iii)(C) of this section; the products, instruments, and exposures each trading desk may use for risk management purposes; the techniques and strategies each trading desk may use to manage the risks of its market making-related activities and inventory; and the process, strategies, and personnel responsible for ensuring that the actions taken by the trading desk to mitigate these risks are and continue to be effective;

(C) Limits for each trading desk, based on the nature and amount of the trading desk's market making-related activities, that address the factors prescribed by paragraph (b)(2)(ii) of this section, on:

(*1*) The amount, types, and risks of its market-maker inventory;

(*2*) The amount, types, and risks of the products, instruments, and exposures the trading desk may use for risk management purposes;

(*3*) The level of exposures to relevant risk factors arising from its financial exposure; and

(*4*) The period of time a financial instrument may be held;

(D) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits; and

(E) Authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis that the basis for any temporary or permanent increase to a trading desk's limit(s) is consistent with the requirements of paragraph (b) of this section, and independent review of such demonstrable analysis and approval;

(iv) To the extent that any limit identified pursuant to paragraph (b)(2)(iii)(C) of this section is exceeded, the trading desk takes action to bring the trading desk into compliance with the limits as promptly as possible after the limit is exceeded;

(v) The compensation arrangements of persons performing the activities described in paragraph (b) of this section are designed not to reward or incentivize prohibited proprietary trading; and

(vi) The banking entity is licensed or registered to engage in activity described in paragraph (b) of this section in accordance with applicable law.

(3) *Definition of client, customer, and counterparty.* For purposes of paragraph (b) of this section, the terms *client, customer,* and *counterparty,* on a collective or individual basis refer to market participants that make use of the banking entity's market making-related services by obtaining such services, responding to quotations, or entering into a continuing relationship with respect to such services, provided that:

(i) A trading desk or other organizational unit of another banking entity is not a client, customer, or counterparty of the trading desk if that other entity has trading assets and liabilities of $50 billion or more as measured in accordance with § 75.20(d)(1), unless:

(A) The trading desk documents how and why a particular trading desk or other organizational unit of the entity should be treated as a client, customer, or counterparty of the trading desk for purposes of paragraph (b)(2) of this section; or

(B) The purchase or sale by the trading desk is conducted anonymously on an exchange or similar trading facility that permits trading on behalf of a broad range of market participants.

(ii) [Reserved]

(4) *Definition of financial exposure.* For purposes of paragraph (b) of this section, *financial exposure* means the aggregate risks of one or more financial instruments and any associated loans, commodities, or foreign exchange or currency, held by a banking entity or its affiliate and managed by a particular trading desk as part of the trading desk's market making-related activities.

(5) *Definition of market-maker inventory.* For the purposes of paragraph (b) of this section, *market-maker inventory* means all of the positions in the financial instruments for which the trading desk stands ready to make a market in accordance with paragraph (b)(2)(i) of this section that are managed by the trading desk, including the trading desk's open positions or exposures arising from open transactions.

§ 75.5 Permitted risk-mitigating hedging activities.

(a) *Permitted risk-mitigating hedging activities.* The prohibition contained in § 75.3(a) does not apply to the risk-mitigating hedging activities of a banking entity in connection with and related to individual or aggregated positions, contracts, or other holdings of the banking entity and designed to reduce the specific risks to the banking entity in connection with and related to such positions, contracts, or other holdings.

(b) *Requirements.* The risk-mitigating hedging activities of a banking entity are permitted under paragraph (a) of this section only if:

(1) The banking entity has established and implements, maintains and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(i) Reasonably designed written policies and procedures regarding the positions, techniques and strategies that may be used for hedging, including documentation indicating what positions, contracts or other holdings a particular trading desk may use in its risk-mitigating hedging activities, as well as position and aging limits with respect to such positions, contracts or other holdings;

(ii) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(iii) The conduct of analysis, including correlation analysis, and independent testing designed to ensure that the positions, techniques and strategies that may be used for hedging may reasonably be expected to demonstrably reduce or otherwise significantly mitigate the specific, identifiable risk(s) being hedged, and such correlation analysis demonstrates that the hedging activity demonstrably reduces or otherwise significantly mitigates the specific, identifiable risk(s) being hedged;

(2) The risk-mitigating hedging activity:

(i) Is conducted in accordance with the written policies, procedures, and internal controls required under this section;

(ii) At the inception of the hedging activity, including, without limitation, any adjustments to the hedging activity, is designed to reduce or otherwise significantly mitigate and demonstrably reduces or otherwise significantly mitigates one or more specific, identifiable risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, commodity price risk, basis risk, or similar risks, arising in connection with and related to identified positions, contracts, or other holdings of the banking entity, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof;

(iii) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section;

(iv) Is subject to continuing review, monitoring and management by the banking entity that:

(A) Is consistent with the written hedging policies and procedures required under paragraph (b)(1) of this section;

(B) Is designed to reduce or otherwise significantly mitigate and demonstrably reduces or otherwise significantly mitigates the specific, identifiable risks that develop over time from the risk-mitigating hedging activities undertaken under this section and the underlying positions, contracts, and other holdings of the banking entity, based upon the facts and circumstances of the underlying and hedging positions, contracts and other holdings of the banking entity and the risks and liquidity thereof; and

(C) Requires ongoing recalibration of the hedging activity by the banking entity to ensure that the hedging activity satisfies the requirements set out in paragraph (b)(2) of this section and is not prohibited proprietary trading; and

(3) The compensation arrangements of persons performing risk-mitigating hedging activities are designed not to reward or incentivize prohibited proprietary trading.

(c) *Documentation requirement.* (1) A banking entity must comply with the requirements of paragraphs (c)(2) and (c)(3) of this section with respect to any purchase or sale of financial instruments made in reliance on this section for risk-mitigating hedging purposes that is:

(i) Not established by the specific trading desk establishing or responsible for the underlying positions, contracts, or other holdings the risks of which the hedging activity is designed to reduce;

(ii) Established by the specific trading desk establishing or responsible for the underlying positions, contracts, or other holdings the risks of which the purchases or sales are designed to reduce, but that is effected through a financial instrument, exposure, technique, or strategy that is not specifically identified in the trading desk's written policies and procedures established under paragraph (b)(1) of this section or under § 75.4(b)(2)(iii)(B) as a product, instrument, exposure, technique, or strategy such trading desk may use for hedging; or

(iii) Established to hedge aggregated positions across two or more trading desks.

(2) In connection with any purchase or sale identified in paragraph (c)(1) of this section, a banking entity must, at a minimum, and contemporaneously with the purchase or sale, document:

(i) The specific, identifiable risk(s) of the identified positions, contracts, or other holdings of the banking entity that the purchase or sale is designed to reduce;

(ii) The specific risk-mitigating strategy that the purchase or sale is designed to fulfill; and

(iii) The trading desk or other business unit that is establishing and responsible for the hedge.

(3) A banking entity must create and retain records sufficient to demonstrate compliance with the requirements of paragraph (c) of this section for a period that is no less than five years in a form that allows the banking entity to promptly produce such records to the Commission on request, or such longer period as required under other law or this part.

§ 75.6 Other permitted proprietary trading activities.

(a) *Permitted trading in domestic government obligations.* The prohibition contained in § 75.3(a) does not apply to the purchase or sale by a banking entity of a financial instrument that is:

(1) An obligation of, or issued or guaranteed by, the United States;

(2) An obligation, participation, or other instrument of, or issued or guaranteed by, an agency of the United States, the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, a Federal Home Loan Bank, the Federal Agricultural Mortgage Corporation or a Farm Credit System institution chartered under and subject to the provisions of the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*);

(3) An obligation of any State or any political subdivision thereof, including any municipal security; or

(4) An obligation of the FDIC, or any entity formed by or on behalf of the FDIC for purpose of facilitating the disposal of assets acquired or held by the FDIC in its corporate capacity or as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(b) *Permitted trading in foreign government obligations*—(1) *Affiliates of foreign banking entities in the United States.* The prohibition contained in § 75.3(a) does not apply to the purchase or sale of a financial instrument that is an obligation of, or issued or guaranteed by, a foreign sovereign (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of such foreign sovereign, by a banking entity, so long as:

(i) The banking entity is organized under or is directly or indirectly controlled by a banking entity that is organized under the laws of a foreign sovereign and is not directly or indirectly controlled by a top-tier banking entity that is organized under the laws of the United States;

(ii) The financial instrument is an obligation of, or issued or guaranteed by, the foreign sovereign under the laws of which the foreign banking entity referred to in paragraph (b)(1)(i) of this section is organized (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of that foreign sovereign; and

(iii) The purchase or sale as principal is not made by an insured depository institution.

(2) *Foreign affiliates of a U.S. banking entity.* The prohibition contained in § 75.3(a) does not apply to the purchase or sale of a financial instrument that is an obligation of, or issued or guaranteed by, a foreign sovereign (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of that foreign sovereign, by a foreign entity that is owned or controlled by a banking entity organized or established under the laws of the United States or any State, so long as:

(i) The foreign entity is a foreign bank, as defined in § 211.2(j) of the Board's Regulation K (12 CFR 211.2(j)), or is regulated by the foreign sovereign as a securities dealer;

(ii) The financial instrument is an obligation of, or issued or guaranteed by, the foreign sovereign under the laws of which the foreign entity is organized (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of that foreign sovereign; and

(iii) The financial instrument is owned by the foreign entity and is not financed by an affiliate that is located in the United States or organized under the laws of the United States or of any State.

(c) *Permitted trading on behalf of customers*—(1) *Fiduciary transactions.* The prohibition contained in § 75.3(a) does not apply to the purchase or sale of financial instruments by a banking entity acting as trustee or in a similar fiduciary capacity, so long as:

(i) The transaction is conducted for the account of, or on behalf of, a customer; and

(ii) The banking entity does not have or retain beneficial ownership of the financial instruments.

(2) *Riskless principal transactions.* The prohibition contained in § 75.3(a) does not apply to the purchase or sale of financial instruments by a banking entity acting as riskless principal in a transaction in which the banking entity, after receiving an order to purchase (or sell) a financial instrument from a customer, purchases (or sells) the financial instrument for its own account to offset a contemporaneous sale to (or purchase from) the customer.

(d) *Permitted trading by a regulated insurance company.* The prohibition contained in § 75.3(a) does not apply to the purchase or sale of financial instruments by a banking entity that is an insurance company or an affiliate of an insurance company if:

(1) The insurance company or its affiliate purchases or sells the financial instruments solely for:

(i) The general account of the insurance company; or

(ii) A separate account established by the insurance company;

(2) The purchase or sale is conducted in compliance with, and subject to, the insurance company investment laws, regulations, and written guidance of the State or jurisdiction in which such insurance company is domiciled; and

(3) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and foreign jurisdictions, as appropriate, have not jointly determined, after notice and comment, that a particular law, regulation, or written guidance described in paragraph (d)(2) of this section is insufficient to protect the safety and soundness of the covered banking entity, or the financial stability of the United States.

(e) *Permitted trading activities of foreign banking entities.* (1) The prohibition contained in § 75.3(a) does not apply to the purchase or sale of financial instruments by a banking entity if:

(i) The banking entity is not organized or directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of any State;

(ii) The purchase or sale by the banking entity is made pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act; and

(iii) The purchase or sale meets the requirements of paragraph (e)(3) of this section.

(2) A purchase or sale of financial instruments by a banking entity is made pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act for purposes of paragraph (e)(1)(ii) of this section only if:

(i) The purchase or sale is conducted in accordance with the requirements of paragraph (e) of this section; and

(ii)(A) With respect to a banking entity that is a foreign banking organization, the banking entity meets the qualifying foreign banking organization requirements of § 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c) or (e)), as applicable; or

(B) With respect to a banking entity that is not a foreign banking organization, the banking entity is not organized under the laws of the United States or of any State and the banking entity, on a fully-consolidated basis, meets at least two of the following requirements:

(*1*) Total assets of the banking entity held outside of the United States exceed total assets of the banking entity held in the United States;

(*2*) Total revenues derived from the business of the banking entity outside of the United States exceed total revenues derived from the business of the banking entity in the United States; or

(*3*) Total net income derived from the business of the banking entity outside of the United States exceeds total net income derived from the business of the banking entity in the United States.

(3) A purchase or sale by a banking entity is permitted for purposes of paragraph (e) of this section only if:

(i) The banking entity engaging as principal in the purchase or sale (including any personnel of the banking entity or its affiliate that arrange, negotiate or execute such purchase or sale) is not located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to purchase or sell as principal is not located in the United States or organized under the laws of the United States or of any State;

(iii) The purchase or sale, including any transaction arising from risk-mitigating hedging related to the instruments purchased or sold, is not accounted for as principal directly or on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State;

(iv) No financing for the banking entity's purchases or sales is provided, directly or indirectly, by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State; and

(v) The purchase or sale is not conducted with or through any U.S. entity, other than:

(A) A purchase or sale with the foreign operations of a U.S. entity if no personnel of such U.S. entity that are located in the United States are involved in the arrangement, negotiation, or execution of such purchase or sale;

(B) A purchase or sale with an unaffiliated market intermediary acting as principal, provided the purchase or sale is promptly cleared and settled through a clearing agency or derivatives clearing organization acting as a central counterparty; or

(C) A purchase or sale through an unaffiliated market intermediary acting as agent, provided the purchase or sale is conducted anonymously on an exchange or similar trading facility and is promptly cleared and settled through a clearing agency or derivatives clearing organization acting as a central counterparty,

(4) For purposes of paragraph (e) of this section, a U.S. entity is any entity that is, or is controlled by, or is acting on behalf of, or at the direction of, any other entity that is, located in the United States or organized under the laws of the United States or of any State.

(5) For purposes of paragraph (e) of this section, a U.S. branch, agency, or subsidiary of a foreign banking entity is considered to be located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(6) For purposes of paragraph (e) of this section, *unaffiliated market*

intermediary means an unaffiliated entity, acting as an intermediary, that is:

(i) A broker or dealer registered with the SEC under section 15 of the Exchange Act or exempt from registration or excluded from regulation as such;

(ii) A swap dealer registered with the CFTC under section 4s of the Commodity Exchange Act or exempt from registration or excluded from regulation as such;

(iii) A security-based swap dealer registered with the SEC under section 15F of the Exchange Act or exempt from registration or excluded from regulation as such; or

(iv) A futures commission merchant registered with the CFTC under section 4f of the Commodity Exchange Act or exempt from registration or excluded from regulation as such.

§ 75.7 Limitations on permitted proprietary trading activities.

(a) No transaction, class of transactions, or activity may be deemed permissible under §§ 75.4 through 75.6 if the transaction, class of transactions, or activity would:

(1) Involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties;

(2) Result, directly or indirectly, in a material exposure by the banking entity to a high-risk asset or a high-risk trading strategy; or

(3) Pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.

(b) *Definition of material conflict of interest.* (1) For purposes of this section, a material conflict of interest between a banking entity and its clients, customers, or counterparties exists if the banking entity engages in any transaction, class of transactions, or activity that would involve or result in the banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, and the banking entity has not taken at least one of the actions in paragraph (b)(2) of this section.

(2) Prior to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, the banking entity:

(i) *Timely and effective disclosure.* (A) Has made clear, timely, and effective disclosure of the conflict of interest, together with other necessary information, in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest; and

(B) Such disclosure is made in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty created by the conflict of interest; or

(ii) *Information barriers.* Has established, maintained, and enforced information barriers that are memorialized in written policies and procedures, such as physical separation of personnel, or functions, or limitations on types of activity, that are reasonably designed, taking into consideration the nature of the banking entity's business, to prevent the conflict of interest from involving or resulting in a materially adverse effect on a client, customer, or counterparty. A banking entity may not rely on such information barriers if, in the case of any specific transaction, class or type of transactions or activity, the banking entity knows or should reasonably know that, notwithstanding the banking entity's establishment of information barriers, the conflict of interest may involve or result in a materially adverse effect on a client, customer, or counterparty.

(c) *Definition of high-risk asset and high-risk trading strategy.* For purposes of this section:

(1) *High-risk asset* means an asset or group of related assets that would, if held by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

(2) *High-risk trading strategy* means a trading strategy that would, if engaged in by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

§§ 75.8–75.9 [Reserved]

Subpart C—Covered Fund Activities and Investments

§ 75.10 Prohibition on acquiring or retaining an ownership interest in and having certain relationships with a covered fund.

(a) *Prohibition.* (1) Except as otherwise provided in this subpart, a banking entity may not, as principal, directly or indirectly, acquire or retain any ownership interest in or sponsor a covered fund.

(2) Paragraph (a)(1) of this section does not include acquiring or retaining an ownership interest in a covered fund by a banking entity:

(i) Acting solely as agent, broker, or custodian, so long as;

(A) The activity is conducted for the account of, or on behalf of, a customer; and

(B) The banking entity and its affiliates do not have or retain beneficial ownership of such ownership interest;

(ii) Through a deferred compensation, stock-bonus, profit-sharing, or pension plan of the banking entity (or an affiliate thereof) that is established and administered in accordance with the law of the United States or a foreign sovereign, if the ownership interest is held or controlled directly or indirectly by the banking entity as trustee for the benefit of persons who are or were employees of the banking entity (or an affiliate thereof);

(iii) In the ordinary course of collecting a debt previously contracted in good faith, provided that the banking entity divests the ownership interest as soon as practicable, and in no event may the banking entity retain such ownership interest for longer than such period permitted by the Commission; or

(iv) On behalf of customers as trustee or in a similar fiduciary capacity for a customer that is not a covered fund, so long as:

(A) The activity is conducted for the account of, or on behalf of, the customer; and

(B) The banking entity and its affiliates do not have or retain beneficial ownership of such ownership interest.

(b) *Definition of covered fund.* (1) Except as provided in paragraph (c) of this section, covered fund means:

(i) An issuer that would be an investment company, as defined in the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), *but for* section 3(c)(1) or 3(c)(7) of that Act (15 U.S.C. 80a–3(c)(1) or (7));

(ii) Any commodity pool under section 1a(10) of the Commodity Exchange Act (7 U.S.C. 1a(10)) for which:

(A) The commodity pool operator has claimed an exemption under § 4.7 of this chapter; or

(B)(*1*) A commodity pool operator is registered with the CFTC as a commodity pool operator in connection with the operation of the commodity pool;

(*2*) Substantially all participation units of the commodity pool are owned by qualified eligible persons under § 4.7(a)(2) and (3) of this chapter; and

(*3*) Participation units of the commodity pool have not been publicly offered to persons who are not qualified eligible persons under § 4.7(a)(2) and (3) of this chapter; or

(iii) For any banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State, an entity that:

(A) Is organized or established outside the United States and the ownership interests of which are offered and sold solely outside the United States;

(B) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities; and

(C)(*1*) Has as its sponsor that banking entity (or an affiliate thereof); or

(*2*) Has issued an ownership interest that is owned directly or indirectly by that banking entity (or an affiliate thereof).

(2) An issuer shall not be deemed to be a covered fund under paragraph (b)(1)(iii) of this section if, were the issuer subject to U.S. securities laws, the issuer could rely on an exclusion or exemption from the definition of ''investment company'' under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) other than the exclusions contained in section 3(c)(1) and 3(c)(7) of that Act.

(3) For purposes of paragraph (b)(1)(iii) of this section, a U.S. branch, agency, or subsidiary of a foreign banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(c) Notwithstanding paragraph (b) of this section, unless the appropriate Federal banking agencies, the SEC, and the CFTC jointly determine otherwise, a covered fund does not include:

(1) *Foreign public funds.* (i) Subject to paragraphs (c)(1)(ii) and (iii) of this section, an issuer that:

(A) Is organized or established outside of the United States;

(B) Is authorized to offer and sell ownership interests to retail investors in the issuer's home jurisdiction; and

(C) Sells ownership interests predominantly through one or more public offerings outside of the United States.

(ii) With respect to a banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State and any issuer for which such banking entity acts as sponsor, the sponsoring banking entity may not rely on the exemption in paragraph (c)(1)(i) of this section for such issuer unless ownership interests in the issuer are sold predominantly to persons other than:

(A) Such sponsoring banking entity;

(B) Such issuer;

(C) Affiliates of such sponsoring banking entity or such issuer; and

(D) Directors and employees of such entities.

(iii) For purposes of paragraph (c)(1)(i)(C) of this section, the term *public offering* means a distribution (as defined in § 75.4(a)(3)) of securities in any jurisdiction outside the United States to investors, including retail investors, provided that:

(A) The distribution complies with all applicable requirements in the jurisdiction in which such distribution is being made;

(B) The distribution does not restrict availability to investors having a minimum level of net worth or net investment assets; and

(C) The issuer has filed or submitted, with the appropriate regulatory authority in such jurisdiction, offering disclosure documents that are publicly available.

(2) *Wholly-owned subsidiaries.* An entity, all of the outstanding ownership interests of which are owned directly or indirectly by the banking entity (or an affiliate thereof), except that:

(i) Up to five percent of the entity's outstanding ownership interests, less any amounts outstanding under paragraph (c)(2)(ii) of this section, may be held by employees or directors of the banking entity or such affiliate (including former employees or directors if their ownership interest was acquired while employed by or in the service of the banking entity); and

(ii) Up to 0.5 percent of the entity's outstanding ownership interests may be held by a third party if the ownership interest is acquired or retained by the third party for the purpose of establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.

(3) *Joint ventures.* A joint venture between a banking entity or any of its affiliates and one or more unaffiliated persons, *provided that* the joint venture:

(i) Is comprised of no more than 10 unaffiliated co-venturers;

(ii) Is in the business of engaging in activities that are permissible for the banking entity or affiliate, other than investing in securities for resale or other disposition; and

(iii) Is not, and does not hold itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities.

(4) *Acquisition vehicles.* An issuer:

(i) Formed solely for the purpose of engaging in a *bona fide* merger or acquisition transaction; and

(ii) That exists only for such period as necessary to effectuate the transaction.

(5) *Foreign pension or retirement funds.* A plan, fund, or program providing pension, retirement, or similar benefits that is:

(i) Organized and administered outside the United States;

(ii) A broad-based plan for employees or citizens that is subject to regulation as a pension, retirement, or similar plan under the laws of the jurisdiction in which the plan, fund, or program is organized and administered; and

(iii) Established for the benefit of citizens or residents of one or more foreign sovereigns or any political subdivision thereof.

(6) *Insurance company separate accounts.* A separate account, provided that no banking entity other than the insurance company participates in the account's profits and losses.

(7) *Bank owned life insurance.* A separate account that is used solely for the purpose of allowing one or more banking entities to purchase a life insurance policy for which the banking entity or entities is beneficiary, provided that no banking entity that purchases the policy:

(i) Controls the investment decisions regarding the underlying assets or holdings of the separate account; or

(ii) Participates in the profits and losses of the separate account other than in compliance with applicable supervisory guidance regarding bank owned life insurance.

(8) *Loan securitizations*—(i) *Scope.* An issuing entity for asset-backed securities that satisfies all the conditions of paragraph (c)(8) of this section and the assets or holdings of which are comprised solely of:

(A) Loans as defined in § 75.2(s);

(B) Rights or other assets designed to assure the servicing or timely distribution of proceeds to holders of such securities and rights or other assets that are related or incidental to purchasing or otherwise acquiring and holding the loans, provided that each asset meets the requirements of paragraph (c)(8)(iii) of this section;

(C) Interest rate or foreign exchange derivatives that meet the requirements of paragraph (c)(8)(iv) of this section; and

(D) Special units of beneficial interest and collateral certificates that meet the requirements of paragraph (c)(8)(v) of this section.

(ii) *Impermissible assets.* For purposes of paragraph (c)(8) of this section, the assets or holdings of the issuing entity shall not include any of the following:

(A) A security, including an asset-backed security, or an interest in an equity or debt security other than as permitted in paragraph (c)(8)(iii) of this section;

(B) A derivative, other than a derivative that meets the requirements of paragraph (c)(8)(iv) of this section; or

(C) A commodity forward contract.

(iii) *Permitted securities.* Notwithstanding paragraph (c)(8)(ii)(A) of this section, the issuing entity may hold securities if those securities are:

(A) Cash equivalents for purposes of the rights and assets in paragraph (c)(8)(i)(B) of this section; or

(B) Securities received in lieu of debts previously contracted with respect to the loans supporting the asset-backed securities.

(iv) *Derivatives.* The holdings of derivatives by the issuing entity shall be limited to interest rate or foreign exchange derivatives that satisfy all of the following conditions:

(A) The written terms of the derivative directly relate to the loans, the asset-backed securities, or the contractual rights of other assets described in paragraph (c)(8)(i)(B) of this section; and

(B) The derivatives reduce the interest rate and/or foreign exchange risks related to the loans, the asset-backed securities, or the contractual rights or other assets described in paragraph (c)(8)(i)(B) of this section.

(v) *Special units of beneficial interest and collateral certificates.* The assets or holdings of the issuing entity may include collateral certificates and special units of beneficial interest issued by a special purpose vehicle, provided that:

(A) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate meets the requirements in paragraph (c)(8) of this section;

(B) The special unit of beneficial interest or collateral certificate is used for the sole purpose of transferring to the issuing entity for the loan securitization the economic risks and benefits of the assets that are permissible for loan securitizations under paragraph (c)(8) of this section and does not directly or indirectly transfer any interest in any other economic or financial exposure;

(C) The special unit of beneficial interest or collateral certificate is created solely to satisfy legal requirements or otherwise facilitate the structuring of the loan securitization; and

(D) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate and the issuing entity are established under the direction of the same entity that initiated the loan securitization.

(9) *Qualifying asset-backed commercial paper conduits.* (i) An issuing entity for asset-backed commercial paper that satisfies all of the following requirements:

(A) The asset-backed commercial paper conduit holds only:

(*1*) Loans and other assets permissible for a loan securitization under paragraph (c)(8)(i) of this section; and

(*2*) Asset-backed securities supported solely by assets that are permissible for loan securitizations under paragraph (c)(8)(i) of this section and acquired by the asset-backed commercial paper conduit as part of an initial issuance either directly from the issuing entity of the asset-backed securities or directly from an underwriter in the distribution of the asset-backed securities;

(B) The asset-backed commercial paper conduit issues only asset-backed securities, comprised of a residual interest and securities with a legal maturity of 397 days or less; and

(C) A regulated liquidity provider has entered into a legally binding commitment to provide full and unconditional liquidity coverage with respect to all of the outstanding asset-backed securities issued by the asset-backed commercial paper conduit (other than any residual interest) in the event that funds are required to redeem maturing asset-backed securities.

(ii) For purposes of this paragraph (c)(9) of this section, a regulated liquidity provider means:

(A) A depository institution, as defined in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c));

(B) A bank holding company, as defined in section 2(a) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(a)), or a subsidiary thereof;

(C) A savings and loan holding company, as defined in section 10a of the Home Owners' Loan Act (12 U.S.C. 1467a), provided all or substantially all of the holding company's activities are permissible for a financial holding company under section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)), or a subsidiary thereof;

(D) A foreign bank whose home country supervisor, as defined in § 211.21(q) of the Board's Regulation K (12 CFR 211.21(q)), has adopted capital standards consistent with the Capital Accord for the Basel Committee on Banking Supervision, as amended, and that is subject to such standards, or a subsidiary thereof; or

(E) The United States or a foreign sovereign.

(10) *Qualifying covered bonds*—(i) *Scope.* An entity owning or holding a dynamic or fixed pool of loans or other assets as provided in paragraph (c)(8) of this section for the benefit of the holders of covered bonds, provided that the assets in the pool are comprised solely of assets that meet the conditions in paragraph (c)(8)(i) of this section.

(ii) *Covered bond.* For purposes of paragraph (c)(10) of this section, a covered bond means:

(A) A debt obligation issued by an entity that meets the definition of foreign banking organization, the payment obligations of which are fully and unconditionally guaranteed by an entity that meets the conditions set forth in paragraph (c)(10)(i) of this section; or

(B) A debt obligation of an entity that meets the conditions set forth in paragraph (c)(10)(i) of this section, provided that the payment obligations are fully and unconditionally guaranteed by an entity that meets the definition of foreign banking organization and the entity is a wholly-owned subsidiary, as defined in paragraph (c)(2) of this section, of such foreign banking organization.

(11) *SBICs and public welfare investment funds.* An issuer:

(i) That is a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662), or that has received from the Small Business Administration notice to proceed to qualify for a license as a small business investment company, which notice or license has not been revoked; or

(ii) The business of which is to make investments that are:

(A) Designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs); or

(B) Qualified rehabilitation expenditures with respect to a qualified rehabilitated building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program.

(12) *Registered investment companies and excluded entities.* An issuer:

(i) That is registered as an investment company under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8), or that is formed and operated pursuant to a written plan to become a registered investment company as described in § 75.20(e)(3) and that complies with the requirements of section 18 of the Investment Company Act of 1940 (15 U.S.C. 80a–18);

(ii) That may rely on an exclusion or exemption from the definition of ''investment company'' under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) other than the exclusions contained in section 3(c)(1) and 3(c)(7) of that Act; or

(iii) That has elected to be regulated as a business development company pursuant to section 54(a) of that Act (15 U.S.C. 80a–53) and has not withdrawn its election, or that is formed and operated pursuant to a written plan to become a business development company as described in § 75.20(e)(3) and that complies with the requirements of section 61 of the Investment Company Act of 1940 (15 U.S.C. 80a–60).

(13) *Issuers in conjunction with the FDIC's receivership or conservatorship operations.* An issuer that is an entity formed by or on behalf of the FDIC for the purpose of facilitating the disposal of assets acquired in the FDIC's capacity as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(14) *Other excluded issuers.* (i) Any issuer that the appropriate Federal banking agencies, the SEC, and the CFTC jointly determine the exclusion of which is consistent with the purposes of section 13 of the BHC Act.

(ii) A determination made under paragraph (c)(14)(i) of this section will be promptly made public.

(d) *Definition of other terms related to covered funds.* For purposes of this subpart:

(1) *Applicable accounting standards* means U.S. generally accepted accounting principles, or such other accounting standards applicable to a banking entity that the Commission determines are appropriate and that the banking entity uses in the ordinary course of its business in preparing its consolidated financial statements.

(2) *Asset-backed security* has the meaning specified in section 3(a)(79) of the Exchange Act (15 U.S.C. 78c(a)(79)).

(3) *Director* has the same meaning as provided in § 215.2(d)(1) of the Board's Regulation O (12 CFR 215.2(d)(1)).

(4) *Issuer* has the same meaning as in section 2(a)(22) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(22)).

(5) *Issuing entity* means with respect to asset-backed securities the special purpose vehicle that owns or holds the pool assets underlying asset-backed securities and in whose name the asset-backed securities supported or serviced by the pool assets are issued.

(6) *Ownership interest*—(i) *Ownership interest* means any equity, partnership, or other similar interest. An ''other similar interest'' means an interest that:

(A) Has the right to participate in the selection or removal of a general partner, managing member, member of the board of directors or trustees, investment manager, investment adviser, or commodity trading advisor of the covered fund (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event);

(B) Has the right under the terms of the interest to receive a share of the income, gains or profits of the covered fund;

(C) Has the right to receive the underlying assets of the covered fund after all other interests have been redeemed and/or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event);

(D) Has the right to receive all or a portion of excess spread (the positive difference, if any, between the aggregate interest payments received from the underlying assets of the covered fund and the aggregate interest paid to the holders of other outstanding interests);

(E) Provides under the terms of the interest that the amounts payable by the covered fund with respect to the interest could be reduced based on losses arising from the underlying assets of the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the amount of interest due and payable on the interest;

(F) Receives income on a pass-through basis from the covered fund, or has a rate of return that is determined by reference to the performance of the underlying assets of the covered fund; or

(G) Any synthetic right to have, receive, or be allocated any of the rights in paragraphs (d)(6)(i)(A) through (d)(6)(i)(F) of this section.

(ii) *Ownership interest* does not include *restricted profit interest,* which is an interest held by an entity (or an employee or former employee thereof) in a covered fund for which the entity (or employee thereof) serves as investment manager, investment adviser, commodity trading advisor, or other service provider so long as:

(A) The sole purpose and effect of the interest is to allow the entity (or employee or former employee thereof) to share in the profits of the covered fund as performance compensation for the investment management, investment advisory, commodity trading advisory, or other services provided to the covered fund by the entity (or employee or former employee thereof), provided that the entity (or employee or former employee thereof) may be obligated under the terms of such interest to return profits previously received;

(B) All such profit, once allocated, is distributed to the entity (or employee or former employee thereof) promptly after being earned or, if not so distributed, is retained by the covered fund for the sole purpose of establishing a reserve amount to satisfy contractual obligations with respect to subsequent losses of the covered fund and such undistributed profit of the entity (or employee or former employee thereof) does not share in the subsequent investment gains of the covered fund;

(C) Any amounts invested in the covered fund, including any amounts paid by the entity (or employee or former employee thereof) in connection with obtaining the restricted profit interest, are within the limits of § 75.12; and

(D) The interest is not transferable by the entity (or employee or former employee thereof) except to an affiliate thereof (or an employee of the banking entity or affiliate), to immediate family members, or through the intestacy, of the employee or former employee, or in connection with a sale of the business that gave rise to the restricted profit interest by the entity (or employee or former employee thereof) to an unaffiliated party that provides investment management, investment advisory, commodity trading advisory, or other services to the fund.

(7) *Prime brokerage transaction* means any transaction that would be a covered transaction, as defined in section 23A(b)(7) of the Federal Reserve Act (12 U.S.C. 371c(b)(7)), that is provided in connection with custody, clearance and settlement, securities borrowing or lending services, trade execution, financing, or data, operational, and administrative support.

(8) *Resident of the United States* means a person that is a ''U.S. person'' as defined in rule 902(k) of the SEC's Regulation S (17 CFR 230.902(k)).

(9) *Sponsor* means, with respect to a covered fund:

(i) To serve as a general partner, managing member, or trustee of a covered fund, or to serve as a commodity pool operator with respect to a covered fund as defined in (b)(1)(ii) of this section;

(ii) In any manner to select or to control (or to have employees, officers, or directors, or agents who constitute) a majority of the directors, trustees, or management of a covered fund; or

(iii) To share with a covered fund, for corporate, marketing, promotional, or other purposes, the same name or a variation of the same name, except as permitted under § 75.11(a)(6).

(10) *Trustee.* (i) For purposes of paragraph (d)(9) of this section and § 75.11, a trustee does *not* include:

(A) A trustee that does not exercise investment discretion with respect to a covered fund, including a trustee that is subject to the direction of an unaffiliated named fiduciary who is not a trustee pursuant to section 403(a)(1) of the Employee's Retirement Income Security Act (29 U.S.C. 1103(a)(1)); or

(B) A trustee that is subject to fiduciary standards imposed under foreign law that are substantially equivalent to those described in paragraph (d)(10)(i)(A) of this section;

(ii) Any entity that directs a person described in paragraph (d)(10)(i) of this section, or that possesses authority and discretion to manage and control the investment decisions of a covered fund for which such person serves as trustee, shall be considered to be a trustee of such covered fund.

§ 75.11 Permitted organizing and offering, underwriting, and market making with respect to a covered fund.

(a) *Organizing and offering a covered fund in general.* Notwithstanding § 75.10(a), a banking entity is not prohibited from acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund in connection with, directly or indirectly, organizing and offering a covered fund, including serving as a general partner, managing member, trustee, or commodity pool operator of the covered fund and in any manner selecting or controlling (or having employees, officers, directors, or agents who constitute) a majority of the directors, trustees, or management of the covered fund, including any necessary expenses for the foregoing, only if:

(1) The banking entity (or an affiliate thereof) provides *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services;

(2) The covered fund is organized and offered only in connection with the provision of *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services and only to persons that are customers of such services of the banking entity (or an affiliate thereof), pursuant to a written plan or similar documentation outlining how the banking entity or such affiliate intends to provide advisory or similar services to its customers through organizing and offering such fund;

(3) The banking entity and its affiliates do not acquire or retain an ownership interest in the covered fund except as permitted under § 75.12;

(4) The banking entity and its affiliates comply with the requirements of § 75.14;

(5) The banking entity and its affiliates do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests;

(6) The covered fund, for corporate, marketing, promotional, or other purposes:

(i) Does not share the same name or a variation of the same name with the banking entity (or an affiliate thereof), except that a covered fund may share the same name or a variation of the same name with a banking entity that is an investment adviser to the covered fund if:

(A) The investment adviser is not an insured depository institution, a company that controls an insured depository institution, or a company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(B) The investment adviser does not share the same name or a variation of the same name as an insured depository institution, a company that controls an insured depository institution, or a company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(ii) Does not use the word ''bank'' in its name;

(7) No director or employee of the banking entity (or an affiliate thereof) takes or retains an ownership interest in the covered fund, except for any director or employee of the banking entity or such affiliate who is directly engaged in providing investment advisory, commodity trading advisory, or other services to the covered fund at the time the director or employee takes the ownership interest; and

(8) The banking entity:

(i) Clearly and conspicuously discloses, in writing, to any prospective and actual investor in the covered fund (such as through disclosure in the covered fund's offering documents):

(A) That ''any losses in [such covered fund] will be borne solely by investors in [the covered fund] and not by [the banking entity] or its affiliates; therefore, [the banking entity's] losses in [such covered fund] will be limited to losses attributable to the ownership interests in the covered fund held by [the banking entity] and any affiliate in its capacity as investor in the [covered fund] or as beneficiary of a restricted profit interest held by [the banking entity] or any affiliate'';

(B) That such investor should read the fund offering documents before investing in the covered fund;

(C) That the ''ownership interests in the covered fund are not insured by the FDIC, and are not deposits, obligations of, or endorsed or guaranteed in any way, by any banking entity'' (unless that happens to be the case); and

(D) The role of the banking entity and its affiliates and employees in sponsoring or providing any services to the covered fund; and

(ii) Complies with any additional rules of the appropriate Federal banking agencies, the SEC, or the CFTC, as provided in section 13(b)(2) of the BHC Act, designed to ensure that losses in such covered fund are borne solely by investors in the covered fund and not by the covered banking entity and its affiliates.

(b) *Organizing and offering an issuing entity of asset-backed securities.* (1) Notwithstanding § 75.10(a), a banking entity is not prohibited from acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund that is an issuing entity of asset-backed securities in connection with, directly or indirectly, organizing and offering that issuing entity, so long as the banking entity and its affiliates comply with all of the requirements of paragraphs (a)(3) through (a)(8) of this section.

(2) For purposes of paragraph (b) of this section, organizing and offering a covered fund that is an issuing entity of asset-backed securities means acting as the securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78*o*–11(a)(3)) of the issuing entity, or acquiring or retaining an ownership interest in the issuing entity as required by section 15G of that Act (15 U.S.C. 78*o*–11) and the implementing regulations issued thereunder.

(c) *Underwriting and market making in ownership interests of a covered fund.* The prohibition contained in § 75.10(a) does not apply to a banking entity's underwriting activities or market making-related activities involving a covered fund so long as:

(1) Those activities are conducted in accordance with the requirements of § 75.4(a) or (b), respectively;

(2) With respect to any banking entity (or any affiliate thereof) that acts as a

sponsor, investment adviser or commodity trading advisor to a particular covered fund or otherwise acquires and retains an ownership interest in such covered fund in reliance on paragraph (a) of this section; acquires and retains an ownership interest in such covered fund and is either a securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78o–11(a)(3)), or is acquiring and retaining an ownership interest in such covered fund in compliance with section 15G of that Act (15 U.S.C. 78o–11) and the implementing regulations issued thereunder each as permitted by paragraph (b) of this section; or, directly or indirectly, guarantees, assumes, or otherwise insures the obligations or performance of the covered fund or of any covered fund in which such fund invests, then in each such case any ownership interests acquired or retained by the banking entity and its affiliates in connection with underwriting and market making related activities for that particular covered fund are included in the calculation of ownership interests permitted to be held by the banking entity and its affiliates under the limitations of § 75.12(a)(2)(ii) and (d); and

(3) With respect to any banking entity, the aggregate value of all ownership interests of the banking entity and its affiliates in all covered funds acquired and retained under § 75.11, including all covered funds in which the banking entity holds an ownership interest in connection with underwriting and market making related activities permitted under paragraph (c) of this section, are included in the calculation of all ownership interests under § 75.12(a)(2)(iii) and (d).

§ 75.12 Permitted investment in a covered fund.

(a) *Authority and limitations on permitted investments in covered funds.* (1) Notwithstanding the prohibition contained in § 75.10(a), a banking entity may acquire and retain an ownership interest in a covered fund that the banking entity or an affiliate thereof organizes and offers pursuant to § 75.11, for the purposes of:

(i) *Establishment.* Establishing the fund and providing the fund with sufficient initial equity for investment to permit the fund to attract unaffiliated investors, subject to the limits contained in paragraphs (a)(2)(i) and (a)(2)(iii) of this section; or

(ii) *De minimis investment.* Making and retaining an investment in the covered fund subject to the limits contained in paragraphs (a)(2)(ii) and (a)(2)(iii) of this section.

(2) *Investment limits*—(i) *Seeding period.* With respect to an investment in any covered fund made or held pursuant to paragraph (a)(1)(i) of this section, the banking entity and its affiliates:

(A) Must actively seek unaffiliated investors to reduce, through redemption, sale, dilution, or other methods, the aggregate amount of all ownership interests of the banking entity in the covered fund to the amount permitted in paragraph (a)(2)(i)(B) of this section; and

(B) Must, no later than 1 year after the date of establishment of the fund (or such longer period as may be provided by the Board pursuant to paragraph (e) of this section), conform its ownership interest in the covered fund to the limits in paragraph (a)(2)(ii) of this section;

(ii) *Per-fund limits.* (A) Except as provided in paragraph (a)(2)(ii)(B) of this section, an investment by a banking entity and its affiliates in any covered fund made or held pursuant to paragraph (a)(1)(ii) of this section may not exceed 3 percent of the total number or value of the outstanding ownership interests of the fund.

(B) An investment by a banking entity and its affiliates in a covered fund that is an issuing entity of asset-backed securities may not exceed 3 percent of the total fair market value of the ownership interests of the fund measured in accordance with paragraph (b)(3) of this section, unless a greater percentage is retained by the banking entity and its affiliates in compliance with the requirements of section 15G of the Exchange Act (15 U.S.C. 78*o*–11) and the implementing regulations issued thereunder, in which case the investment by the banking entity and its affiliates in the covered fund may not exceed the amount, number, or value of ownership interests of the fund required under section 15G of the Exchange Act and the implementing regulations issued thereunder.

(iii) *Aggregate limit.* The aggregate value of all ownership interests of the banking entity and its affiliates in all covered funds acquired or retained under this section may not exceed 3 percent of the tier 1 capital of the banking entity, as provided under paragraph (c) of this section, and shall be calculated as of the last day of each calendar quarter.

(iv) *Date of establishment.* For purposes of this section, the date of establishment of a covered fund shall be:

(A) *In general.* The date on which the investment adviser or similar entity to the covered fund begins making investments pursuant to the written investment strategy for the fund;

(B) *Issuing entities of asset-backed securities.* In the case of an issuing entity of asset-backed securities, the date on which the assets are initially transferred into the issuing entity of asset-backed securities.

(b) *Rules of construction*—(1) *Attribution of ownership interests to a covered banking entity.* (i) For purposes of paragraph (a)(2) of this section, the amount and value of a banking entity's permitted investment in any single covered fund shall include any ownership interest held under § 75.12 directly by the banking entity, including any affiliate of the banking entity.

(ii) *Treatment of registered investment companies, SEC-regulated business development companies and foreign public funds.* For purposes of paragraph (b)(1)(i) of this section, a registered investment company, SEC-regulated business development companies or foreign public fund as described in § 75.10(c)(1) will not be considered to be an affiliate of the banking entity so long as the banking entity:

(A) Does not own, control, or hold with the power to vote 25 percent or more of the voting shares of the company or fund; and

(B) Provides investment advisory, commodity trading advisory, administrative, and other services to the company or fund in compliance with the limitations under applicable regulation, order, or other authority.

(iii) *Covered funds.* For purposes of paragraph (b)(1)(i) of this section, a covered fund will not be considered to be an affiliate of a banking entity so long as the covered fund is held in compliance with the requirements of this subpart.

(iv) *Treatment of employee and director investments financed by the banking entity.* For purposes of paragraph (b)(1)(i) of this section, an investment by a director or employee of a banking entity who acquires an ownership interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the ownership interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

(2) *Calculation of permitted ownership interests in a single covered fund.* Except as provided in paragraphs (b)(3) or (4) of this section, for purposes of determining whether an investment in a single covered fund complies with

the restrictions on ownership interests under paragraphs (a)(2)(i)(B) and (ii)(A) of this section:

(i) The aggregate number of the outstanding ownership interests held by the banking entity shall be the total number of ownership interests held under this section by the banking entity in a covered fund divided by the total number of ownership interests held by all entities in that covered fund, as of the last day of each calendar quarter (both measured without regard to committed funds not yet called for investment);

(ii) The aggregate value of the outstanding ownership interests held by the banking entity shall be the aggregate fair market value of all investments in and capital contributions made to the covered fund by the banking entity, divided by the value of all investments in and capital contributions made to that covered fund by all entities, as of the last day of each calendar quarter (all measured without regard to committed funds not yet called for investment). If fair market value cannot be determined, then the value shall be the historical cost basis of all investments in and contributions made by the banking entity to the covered fund;

(iii) For purposes of the calculation under paragraph (b)(2)(ii) of this section, once a valuation methodology is chosen, the banking entity must calculate the value of its investment and the investments of all others in the covered fund in the same manner and according to the same standards.

(3) *Issuing entities of asset-backed securities.* In the case of an ownership interest in an issuing entity of asset-backed securities, for purposes of determining whether an investment in a single covered fund complies with the restrictions on ownership interests under paragraphs (a)(2)(i)(B) and (a)(2)(ii)(B) of this section:

(i) For securitizations subject to the requirements of section 15G of the Exchange Act (15 U.S.C. 78o–11), the calculations shall be made as of the date and according to the valuation methodology applicable pursuant to the requirements of section 15G of the Exchange Act (15 U.S.C. 78o–11) and the implementing regulations issued thereunder; or

(ii) For securitization transactions completed prior to the compliance date of such implementing regulations (or as to which such implementing regulations do not apply), the calculations shall be made as of the date of establishment as defined in paragraph (a)(2)(iv)(B) of this section or such earlier date on which the transferred assets have been valued for purposes of transfer to the covered fund, and thereafter only upon the date on which additional securities of the issuing entity of asset-backed securities are priced for purposes of the sales of ownership interests to unaffiliated investors.

(iii) For securitization transactions completed prior to the compliance date of such implementing regulations (or as to which such implementing regulations do not apply), the aggregate value of the outstanding ownership interests in the covered fund shall be the fair market value of the assets transferred to the issuing entity of the securitization and any other assets otherwise held by the issuing entity at such time, determined in a manner that is consistent with its determination of the fair market value of those assets for financial statement purposes.

(iv) For purposes of the calculation under paragraph (b)(3)(iii) of this section, the valuation methodology used to calculate the fair market value of the ownership interests must be the same for both the ownership interests held by a banking entity and the ownership interests held by all others in the covered fund in the same manner and according to the same standards.

(4) *Multi-tier fund investments*—(i) *Master-feeder fund investments.* If the principal investment strategy of a covered fund (the ''feeder fund'') is to invest substantially all of its assets in another single covered fund (the ''master fund''), then for purposes of the investment limitations in paragraphs (a)(2)(i)(B) and (a)(2)(ii) of this section, the banking entity's permitted investment in such funds shall be measured only by reference to the value of the master fund. The banking entity's permitted investment in the master fund shall include any investment by the banking entity in the master fund, as well as the banking entity's pro-rata share of any ownership interest of the master fund that is held through the feeder fund; and

(ii) *Fund-of-funds investments.* If a banking entity organizes and offers a covered fund pursuant to § 75.11 for the purpose of investing in other covered funds (a ''fund of funds'') and that fund of funds itself invests in another covered fund that the banking entity is permitted to own, then the banking entity's permitted investment in that other fund shall include any investment by the banking entity in that other fund, as well as the banking entity's pro-rata share of any ownership interest of the fund that is held through the fund of funds. The investment of the banking entity may not represent more than 3 percent of the amount or value of any single covered fund.

(c) *Aggregate permitted investments in all covered funds.* (1) For purposes of paragraph (a)(2)(iii) of this section, the aggregate value of all ownership interests held by a banking entity shall be the sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest in covered funds (together with any amounts paid by the entity (or employee thereof) in connection with obtaining a restricted profit interest under § 75.10(d)(6)(ii)), on a historical cost basis.

(2) *Calculation of tier 1 capital.* For purposes of paragraph (a)(2)(iii) of this section:

(i) *Entities that are required to hold and report tier 1 capital.* If a banking entity is required to calculate and report tier 1 capital, the banking entity's tier 1 capital shall be equal to the amount of tier 1 capital of the banking entity as of the last day of the most recent calendar quarter, as reported to its primary financial regulatory agency; and

(ii) If a banking entity is not required to calculate and report tier 1 capital, the banking entity's tier 1 capital shall be determined to be equal to:

(A) In the case of a banking entity that is controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital, be equal to the amount of tier 1 capital reported by such controlling depository institution in the manner described in paragraph (c)(2)(i) of this section;

(B) In the case of a banking entity that is not controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital:

(*1*) *Bank holding company subsidiaries.* If the banking entity is a subsidiary of a bank holding company or company that is treated as a bank holding company, be equal to the amount of tier 1 capital reported by the top-tier affiliate of such covered banking entity that calculates and reports tier 1 capital in the manner described in paragraph (c)(2)(i) of this section; and

(*2*) *Other holding companies and any subsidiary or affiliate thereof.* If the banking entity is not a subsidiary of a bank holding company or a company that is treated as a bank holding company, be equal to the total amount of shareholders' equity of the top-tier affiliate within such organization as of the last day of the most recent calendar quarter that has ended, as determined under applicable accounting standards.

(iii) *Treatment of foreign banking entities*—(A) *Foreign banking entities.* Except as provided in paragraph (c)(2)(iii)(B) of this section, with respect to a banking entity that is not itself, and is not controlled directly or indirectly by, a banking entity that is located or organized under the laws of the United States or of any State, the tier 1 capital of the banking entity shall be the consolidated tier 1 capital of the entity as calculated under applicable home country standards.

(B) *U.S. affiliates of foreign banking entities.* With respect to a banking entity that is located or organized under the laws of the United States or of any State and is controlled by a foreign banking entity identified under paragraph (c)(2)(iii)(A) of this section, the banking entity's tier 1 capital shall be as calculated under paragraphs (c)(2)(i) or (ii) of this section.

(d) *Capital treatment for a permitted investment in a covered fund.* For purposes of calculating compliance with the applicable regulatory capital requirements, a banking entity shall deduct from the banking entity's tier 1 capital (as determined under paragraph (c)(2) of this section) the greater of:

(1) The sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest (together with any amounts paid by the entity (or employee thereof) in connection with obtaining a restricted profit interest under § 75.10(d)(6)(ii)), on a historical cost basis, plus any earnings received; and

(2) The fair market value of the banking entity's ownership interests in the covered fund as determined under paragraph (b)(2)(ii) or (3) of this section (together with any amounts paid by the entity (or employee thereof) in connection with obtaining a restricted profit interest under § 75.10(d)(6)(ii)), if the banking entity accounts for the profits (or losses) of the fund investment in its financial statements.

(e) *Extension of time to divest an ownership interest.* (1) Upon application by a banking entity, the Board may extend the period under paragraph (a)(2)(i) of this section for up to 2 additional years if the Board finds that an extension would be consistent with safety and soundness and not detrimental to the public interest. An application for extension must:

(i) Be submitted to the Board at least 90 days prior to the expiration of the applicable time period;

(ii) Provide the reasons for application, including information that addresses the factors in paragraph (e)(2) of this section; and

(iii) Explain the banking entity's plan for reducing the permitted investment in a covered fund through redemption, sale, dilution or other methods as required in paragraph (a)(2) of this section.

(2) *Factors governing Board determinations.* In reviewing any application under paragraph (e)(1) of this section, the Board may consider all the facts and circumstances related to the permitted investment in a covered fund, including:

(i) Whether the investment would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies;

(ii) The contractual terms governing the banking entity's interest in the covered fund;

(iii) The date on which the covered fund is expected to have attracted sufficient investments from investors unaffiliated with the banking entity to enable the banking entity to comply with the limitations in paragraph (a)(2)(i) of this section;

(iv) The total exposure of the covered banking entity to the investment and the risks that disposing of, or maintaining, the investment in the covered fund may pose to the banking entity and the financial stability of the United States;

(v) The cost to the banking entity of divesting or disposing of the investment within the applicable period;

(vi) Whether the investment or the divestiture or conformance of the investment would involve or result in a material conflict of interest between the banking entity and unaffiliated parties, including clients, customers or counterparties to which it owes a duty;

(vii) The banking entity's prior efforts to reduce through redemption, sale, dilution, or other methods its ownership interests in the covered fund, including activities related to the marketing of interests in such covered fund;

(viii) Market conditions; and

(ix) Any other factor that the Board believes appropriate.

(3) *Authority to impose restrictions on activities or investment during any extension period.* The Board may impose such conditions on any extension approved under paragraph (e)(1) of this section as the Board determines are necessary or appropriate to protect the safety and soundness of the banking entity or the financial stability of the United States, address material conflicts of interest or other unsound banking practices, or otherwise further the purposes of section 13 of the BHC Act and this part.

(4) *Consultation.* In the case of a banking entity that is primarily regulated by another Federal banking agency, the SEC, or the CFTC, the Board will consult with such agency prior to acting on an application by the banking entity for an extension under paragraph (e)(1) of this section.

§ 75.13 Other permitted covered fund activities and investments.

(a) *Permitted risk-mitigating hedging activities.* (1) The prohibition contained in § 75.10(a) does not apply with respect to an ownership interest in a covered fund acquired or retained by a banking entity that is designed to demonstrably reduce or otherwise significantly mitigate the specific, identifiable risks to the banking entity in connection with a compensation arrangement with an employee of the banking entity or an affiliate thereof that directly provides investment advisory, commodity trading advisory or other services to the covered fund.

(2) *Requirements.* The risk-mitigating hedging activities of a banking entity are permitted under paragraph (a) of this section only if:

(i) The banking entity has established and implements, maintains and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(A) Reasonably designed written policies and procedures; and

(B) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(ii) The acquisition or retention of the ownership interest:

(A) Is made in accordance with the written policies, procedures and internal controls required under this section;

(B) At the inception of the hedge, is designed to reduce or otherwise significantly mitigate and demonstrably reduces or otherwise significantly mitigates one or more specific, identifiable risks arising in connection with the compensation arrangement with the employee that directly provides investment advisory, commodity trading advisory, or other services to the covered fund;

(C) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section; and

(D) Is subject to continuing review, monitoring and management by the banking entity.

(iii) The compensation arrangement relates solely to the covered fund in which the banking entity or any affiliate has acquired an ownership interest pursuant to this paragraph and such compensation arrangement provides that any losses incurred by the banking entity on such ownership interest will be offset by corresponding decreases in amounts payable under such compensation arrangement.

(b) *Certain permitted covered fund activities and investments outside of the United States.* (1) The prohibition contained in § 75.10(a) does not apply to the acquisition or retention of any ownership interest in, or the sponsorship of, a covered fund by a banking entity only if:

(i) The banking entity is not organized or directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States;

(ii) The activity or investment by the banking entity is pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act;

(iii) No ownership interest in the covered fund is offered for sale or sold to a resident of the United States; and

(iv) The activity or investment occurs solely outside of the United States.

(2) An activity or investment by the banking entity is pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act for purposes of paragraph (b)(1)(ii) of this section only if:

(i) The activity or investment is conducted in accordance with the requirements of this section; and

(ii)(A) With respect to a banking entity that is a foreign banking organization, the banking entity meets the qualifying foreign banking organization requirements of § 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c) or (e)), as applicable; or

(B) With respect to a banking entity that is not a foreign banking organization, the banking entity is not organized under the laws of the United States or of one or more States and the banking entity, on a fully-consolidated basis, meets at least two of the following requirements:

(*1*) Total assets of the banking entity held outside of the United States exceed total assets of the banking entity held in the United States;

(*2*) Total revenues derived from the business of the banking entity outside of the United States exceed total revenues derived from the business of the banking entity in the United States; or

(*3*) Total net income derived from the business of the banking entity outside of the United States exceeds total net income derived from the business of the banking entity in the United States.

(3) An ownership interest in a covered fund is not offered for sale or sold to a resident of the United States for purposes of paragraph (b)(1)(iii) of this section only if it is sold or has been sold pursuant to an offering that does not target residents of the United States.

(4) An activity or investment occurs solely outside of the United States for purposes of paragraph (b)(1)(iv) of this section only if:

(i) The banking entity acting as sponsor, or engaging as principal in the acquisition or retention of an ownership interest in the covered fund, is not itself, and is not controlled directly or indirectly by, a banking entity that is located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to acquire or retain the ownership interest or act as sponsor to the covered fund is not located in the United States or organized under the laws of the United States or of any State;

(iii) The investment or sponsorship, including any transaction arising from risk-mitigating hedging related to an ownership interest, is not accounted for as principal directly or indirectly on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State; and

(iv) No financing for the banking entity's ownership or sponsorship is provided, directly or indirectly, by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State.

(5) For purposes of this section, a U.S. branch, agency, or subsidiary of a foreign bank, or any subsidiary thereof, is located in the United States; however, a foreign bank of which that branch, agency, or subsidiary is a part is not considered to be located in the United States solely by virtue of operation of the U.S. branch, agency, or subsidiary.

(c) *Permitted covered fund interests and activities by a regulated insurance company.* The prohibition contained in § 75.10(a) does not apply to the acquisition or retention by an insurance company, or an affiliate thereof, of any ownership interest in, or the sponsorship of, a covered fund only if:

(1) The insurance company or its affiliate acquires and retains the ownership interest solely for the general account of the insurance company or for one or more separate accounts established by the insurance company;

(2) The acquisition and retention of the ownership interest is conducted in compliance with, and subject to, the insurance company investment laws, regulations, and written guidance of the State or jurisdiction in which such insurance company is domiciled; and

(3) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and foreign jurisdictions, as appropriate, have not jointly determined, after notice and comment, that a particular law, regulation, or written guidance described in paragraph (c)(2) of this section is insufficient to protect the safety and soundness of the banking entity, or the financial stability of the United States.

§ 75.14 Limitations on relationships with a covered fund.

(a) *Relationships with a covered fund.* (1) Except as provided for in paragraph (a)(2) of this section, no banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, that organizes and offers a covered fund pursuant to § 75.11, or that continues to hold an ownership interest in accordance with § 75.11(b), and no affiliate of such entity, may enter into a transaction with the covered fund, or with any other covered fund that is controlled by such covered fund, that would be a covered transaction as defined in section 23A of the Federal Reserve Act (12 U.S.C. 371c(b)(7)), as if such banking entity and the affiliate thereof were a member bank and the covered fund were an affiliate thereof.

(2) Notwithstanding paragraph (a)(1) of this section, a banking entity may:

(i) Acquire and retain any ownership interest in a covered fund in accordance with the requirements of § 75.11, § 75.12, or § 75.13; and

(ii) Enter into any prime brokerage transaction with any covered fund in which a covered fund managed, sponsored, or advised by such banking entity (or an affiliate thereof) has taken an ownership interest, if:

(A) The banking entity is in compliance with each of the limitations set forth in § 75.11 with respect to a covered fund organized and offered by such banking entity (or an affiliate thereof);

(B) The chief executive officer (or equivalent officer) of the banking entity certifies in writing annually to the Commission (with a duty to update the certification if the information in the certification materially changes) that the banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests; and

(C) The Board has not determined that such transaction is inconsistent with the safe and sound operation and condition of the banking entity.

(b) *Restrictions on transactions with covered funds.* A banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, or that organizes and offers a covered fund pursuant to § 75.11, or that continues to hold an ownership interest in accordance with § 75.11(b), shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1), as if such banking entity were a member bank and such covered fund were an affiliate thereof.

(c) *Restrictions on prime brokerage transactions.* A prime brokerage transaction permitted under paragraph (a)(2)(ii) of this section shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1) as if the counterparty were an affiliate of the banking entity.

§ 75.15 Other limitations on permitted covered fund activities.

(a) No transaction, class of transactions, or activity may be deemed permissible under §§ 75.11 through 75.13 if the transaction, class of transactions, or activity would:

(1) Involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties;

(2) Result, directly or indirectly, in a material exposure by the banking entity to a high-risk asset or a high-risk trading strategy; or

(3) Pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.

(b) *Definition of material conflict of interest.* (1) For purposes of this section, a material conflict of interest between a banking entity and its clients, customers, or counterparties exists if the banking entity engages in any transaction, class of transactions, or activity that would involve or result in the banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, and the banking entity has not taken at least one of the actions in paragraph (b)(2) of this section.

(2) Prior to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, the banking entity:

(i) *Timely and effective disclosure.* (A) Has made clear, timely, and effective disclosure of the conflict of interest, together with other necessary information, in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest; and

(B) Such disclosure is made in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty created by the conflict of interest; or

(ii) *Information barriers.* Has established, maintained, and enforced information barriers that are memorialized in written policies and procedures, such as physical separation of personnel, or functions, or limitations on types of activity, that are reasonably designed, taking into consideration the nature of the banking entity's business, to prevent the conflict of interest from involving or resulting in a materially adverse effect on a client, customer, or counterparty. A banking entity may not rely on such information barriers if, in the case of any specific transaction, class or type of transactions or activity, the banking entity knows or should reasonably know that, notwithstanding the banking entity's establishment of information barriers, the conflict of interest may involve or result in a materially adverse effect on a client, customer, or counterparty.

(c) *Definition of high-risk asset and high-risk trading strategy.* For purposes of this section:

(1) *High-risk asset* means an asset or group of related assets that would, if held by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

(2) *High-risk trading strategy* means a trading strategy that would, if engaged in by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

§ 75.16 Ownership of interests in and sponsorship of issuers of certain collateralized debt obligations backed by trust-preferred securities.

(a) The prohibition contained in § 75.10(a)(1) does not apply to the ownership by a banking entity of an interest in, or sponsorship of, any issuer if:

(1) The issuer was established, and the interest was issued, before May 19, 2010;

(2) The banking entity reasonably believes that the offering proceeds received by the issuer were invested primarily in Qualifying TruPS Collateral; and

(3) The banking entity acquired such interest on or before December 10, 2013 (or acquired such interest in connection with a merger with or acquisition of a banking entity that acquired the interest on or before December 10, 2013).

(b) For purposes of this § 75.16, *Qualifying TruPS Collateral* shall mean any trust preferred security or subordinated debt instrument issued prior to May 19, 2010 by a depository institution holding company that, as of the end of any reporting period within 12 months immediately preceding the issuance of such trust preferred security or subordinated debt instrument, had total consolidated assets of less than $15,000,000,000 or issued prior to May 19, 2010 by a mutual holding company.

(c) Notwithstanding paragraph (a)(3) of this section, a banking entity may act as a market maker with respect to the interests of an issuer described in paragraph (a) of this section in accordance with the applicable provisions of §§ 75.4 and 75.11.

(d) Without limiting the applicability of paragraph (a) of this section, the Board, the FDIC and the OCC will make public a non-exclusive list of issuers that meet the requirements of paragraph (a). A banking entity may rely on the list published by the Board, the FDIC and the OCC.

§§ 75.17–75.19 [Reserved]

Subpart D—Compliance Program Requirement; Violations

§ 75.20 Program for compliance; reporting.

(a) *Program requirement.* Each banking entity shall develop and provide for the continued administration of a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part. The terms, scope and detail of the compliance program shall be appropriate for the types, size, scope and complexity of activities and business structure of the banking entity.

(b) *Contents of compliance program.* Except as provided in paragraph (f) of this section, the compliance program required by paragraph (a) of this section, at a minimum, shall include:

(1) Written policies and procedures reasonably designed to document, describe, monitor and limit trading activities subject to subpart B of this part (including those permitted under §§ 75.3 to 75.6), including setting,

monitoring and managing required limits set out in §§ 75.4 and 75.5, and activities and investments with respect to a covered fund subject to subpart C of this part (including those permitted under §§ 75.11 through 75.14) conducted by the banking entity to ensure that all activities and investments conducted by the banking entity that are subject to section 13 of the BHC Act and this part comply with section 13 of the BHC Act and this part;

(2) A system of internal controls reasonably designed to monitor compliance with section 13 of the BHC Act and this part and to prevent the occurrence of activities or investments that are prohibited by section 13 of the BHC Act and this part;

(3) A management framework that clearly delineates responsibility and accountability for compliance with section 13 of the BHC Act and this part and includes appropriate management review of trading limits, strategies, hedging activities, investments, incentive compensation and other matters identified in this part or by management as requiring attention;

(4) Independent testing and audit of the effectiveness of the compliance program conducted periodically by qualified personnel of the banking entity or by a qualified outside party;

(5) Training for trading personnel and managers, as well as other appropriate personnel, to effectively implement and enforce the compliance program; and

(6) Records sufficient to demonstrate compliance with section 13 of the BHC Act and this part, which a banking entity must promptly provide to the Commission upon request and retain for a period of no less than 5 years or such longer period as required by the Commission.

(c) *Additional standards.* In addition to the requirements in paragraph (b) of this section, the compliance program of a banking entity must satisfy the requirements and other standards contained in appendix B of this part, if:

(1) The banking entity engages in proprietary trading permitted under subpart B of this part and is required to comply with the reporting requirements of paragraph (d) of this section;

(2) The banking entity has reported total consolidated assets as of the previous calendar year end of $50 billion or more or, in the case of a foreign banking entity, has total U.S. assets as of the previous calendar year end of $50 billion or more (including all subsidiaries, affiliates, branches and agencies of the foreign banking entity operating, located or organized in the United States); or

(3) The Commission notifies the banking entity in writing that it must satisfy the requirements and other standards contained in appendix B of this part.

(d) *Reporting requirements under appendix A of this part.* (1) A banking entity engaged in proprietary trading activity permitted under subpart B of this part shall comply with the reporting requirements described in appendix A of this part, if:

(i) The banking entity (other than a foreign banking entity as provided in paragraph (d)(1)(ii) of this section) has, together with its affiliates and subsidiaries, trading assets and liabilities (excluding trading assets and liabilities involving obligations of or guaranteed by the United States or any agency of the United States) the average gross sum of which (on a worldwide consolidated basis) over the previous consecutive four quarters, as measured as of the last day of each of the four prior calendar quarters, equals or exceeds the threshold established in paragraph (d)(2) of this section;

(ii) In the case of a foreign banking entity, the average gross sum of the trading assets and liabilities of the combined U.S. operations of the foreign banking entity (including all subsidiaries, affiliates, branches and agencies of the foreign banking entity operating, located or organized in the United States and excluding trading assets and liabilities involving obligations of or guaranteed by the United States or any agency of the United States) over the previous consecutive four quarters, as measured as of the last day of each of the four prior calendar quarters, equals or exceeds the threshold established in paragraph (d)(2) of this section; or

(iii) The Commission notifies the banking entity in writing that it must satisfy the reporting requirements contained in appendix A of this part.

(2) The threshold for reporting under paragraph (d)(1) of this section shall be $50 billion beginning on June 30, 2014; $25 billion beginning on April 30, 2016; and $10 billion beginning on December 31, 2016.

(3) *Frequency of reporting.* Unless the Commission notifies the banking entity in writing that it must report on a different basis, a banking entity with $50 billion or more in trading assets and liabilities (as calculated in accordance with paragraph (d)(1) of this section) shall report the information required by appendix A of this part for each calendar month within 30 days of the end of the relevant calendar month; beginning with information for the month of January 2015, such information shall be reported within 10 days of the end of each calendar month. Any other banking entity subject to appendix A of this part shall report the information required by appendix A of this part for each calendar quarter within 30 days of the end of that calendar quarter unless the Commission notifies the banking entity in writing that it must report on a different basis.

(e) *Additional documentation for covered funds.* Any banking entity that has more than $10 billion in total consolidated assets as reported on December 31 of the previous two calendar years shall maintain records that include:

(1) Documentation of the exclusions or exemptions other than sections 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940 relied on by each fund sponsored by the banking entity (including all subsidiaries and affiliates) in determining that such fund is not a covered fund;

(2) For each fund sponsored by the banking entity (including all subsidiaries and affiliates) for which the banking entity relies on one or more of the exclusions from the definition of covered fund provided by § 75.10(c)(1), (5), (8), (9), or (10), documentation supporting the banking entity's determination that the fund is not a covered fund pursuant to one or more of those exclusions;

(3) For each seeding vehicle described in § 75.10(c)(12)(i) or (iii) that will become a registered investment company or SEC-regulated business development company, a written plan documenting the banking entity's determination that the seeding vehicle will become a registered investment company or SEC-regulated business development company; the period of time during which the vehicle will operate as a seeding vehicle; and the banking entity's plan to market the vehicle to third-party investors and convert it into a registered investment company or SEC-regulated business development company within the time period specified in § 75.12(a)(2)(i)(B);

(4) For any banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State, if the aggregate amount of ownership interests in foreign public funds that are described in § 75.10(c)(1) owned by such banking entity (including ownership interests owned by any affiliate that is controlled directly or indirectly by a banking entity that is located in or organized under the laws of the United States or of any State) exceeds $50 million at the end of two or more consecutive calendar quarters,

beginning with the next succeeding calendar quarter, documentation of the value of the ownership interests owned by the banking entity (and such affiliates) in each foreign public fund and each jurisdiction in which any such foreign public fund is organized, calculated as of the end of each calendar quarter, which documentation must continue until the banking entity's aggregate amount of ownership interests in foreign public funds is below $50 million for two consecutive calendar quarters; and

(5) For purposes of paragraph (e)(4) of this section, a U.S. branch, agency, or subsidiary of a foreign banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(f) *Simplified programs for less active banking entities*—(1) *Banking entities with no covered activities.* A banking entity that does not engage in activities or investments pursuant to subpart B or subpart C of this part (other than trading activities permitted pursuant to § 75.6(a)) may satisfy the requirements of this section by establishing the required compliance program prior to becoming engaged in such activities or making such investments (other than trading activities permitted pursuant to § 75.6(a)).

(2) *Banking entities with modest activities.* A banking entity with total consolidated assets of $10 billion or less as reported on December 31 of the previous two calendar years that engages in activities or investments pursuant to subpart B or subpart C of this part (other than trading activities permitted under § 75.6(a)) may satisfy the requirements of this section by including in its existing compliance policies and procedures appropriate references to the requirements of section 13 of the BHC Act and this part and adjustments as appropriate given the activities, size, scope and complexity of the banking entity.

§ 75.21 Termination of activities or investments; penalties for violations.

(a) Any banking entity that engages in an activity or makes an investment in violation of section 13 of the BHC Act or this part, or acts in a manner that functions as an evasion of the requirements of section 13 of the BHC Act or this part, including through an abuse of any activity or investment permitted under subparts B or C of this part, or otherwise violates the restrictions and requirements of section 13 of the BHC Act or this part, shall, upon discovery, promptly terminate the activity and, as relevant, dispose of the investment.

(b) Whenever the Commission finds reasonable cause to believe any banking entity has engaged in an activity or made an investment in violation of section 13 of the BHC Act or this part, or engaged in any activity or made any investment that functions as an evasion of the requirements of section 13 of the BHC Act or this part, the Commission may take any action permitted by law to enforce compliance with section 13 of the BHC Act and this part, including directing the banking entity to restrict, limit, or terminate any or all activities under this part and dispose of any investment.

Appendix A to Part 75—Reporting and Recordkeeping Requirements for Covered Trading Activities

I. Purpose

a. This appendix sets forth reporting and recordkeeping requirements that certain banking entities must satisfy in connection with the restrictions on proprietary trading set forth in subpart B of this part (''proprietary trading restrictions''). Pursuant to § 75.20(d), this appendix generally applies to a banking entity that, together with its affiliates and subsidiaries, has significant trading assets and liabilities. These entities are required to (i) furnish periodic reports to the Commission regarding a variety of quantitative measurements of their covered trading activities, which vary depending on the scope and size of covered trading activities, and (ii) create and maintain records documenting the preparation and content of these reports. The requirements of this appendix must be incorporated into the banking entity's internal compliance program under § 75.20 and Appendix B of this part.

b. The purpose of this appendix is to assist banking entities and the Commission in:

(i) Better understanding and evaluating the scope, type, and profile of the banking entity's covered trading activities;

(ii) Monitoring the banking entity's covered trading activities;

(iii) Identifying covered trading activities that warrant further review or examination by the banking entity to verify compliance with the proprietary trading restrictions;

(iv) Evaluating whether the covered trading activities of trading desks engaged in market making-related activities subject to § 75.4(b) are consistent with the requirements governing permitted market making-related activities;

(v) Evaluating whether the covered trading activities of trading desks that are engaged in permitted trading activity subject to § 75.4, 75.5, or 75.6(a) and (b) (*i.e.,* underwriting and market making-related related activity, risk-mitigating hedging, or trading in certain government obligations) are consistent with the requirement that such activity not result, directly or indirectly, in a material exposure to high-risk assets or high-risk trading strategies;

(vi) Identifying the profile of particular covered trading activities of the banking entity, and the individual trading desks of the banking entity, to help establish the appropriate frequency and scope of examination by the Commission of such activities; and

(vii) Assessing and addressing the risks associated with the banking entity's covered trading activities.

c. The quantitative measurements that must be furnished pursuant to this appendix are *not* intended to serve as a dispositive tool for the identification of permissible or impermissible activities.

d. In order to allow banking entities and the Agencies to evaluate the effectiveness of these metrics, banking entities must collect and report these metrics for all trading desks beginning on the dates established in § 75.20. The Agencies will review the data collected and revise this collection requirement as appropriate based on a review of the data collected prior to September 30, 2015.

e. In addition to the quantitative measurements required in this appendix, a banking entity may need to develop and implement other quantitative measurements in order to effectively monitor its covered trading activities for compliance with section 13 of the BHC Act and this part and to have an effective compliance program, as required by § 75.20 and Appendix B of this part. The effectiveness of particular quantitative measurements may differ based on the profile of the banking entity's businesses in general and, more specifically, of the particular trading desk, including types of instruments traded, trading activities and strategies, and history and experience (*e.g.,* whether the trading desk is an established, successful market maker or a new entrant to a competitive market). In all cases, banking entities must ensure that they have robust measures in place to identify and monitor the risks taken in their trading activities, to ensure that the activities are within risk tolerances established by the banking entity, and to monitor and examine for compliance with the proprietary trading restrictions in this part.

f. On an ongoing basis, banking entities must carefully monitor, review, and evaluate all furnished quantitative measurements, as well as any others that they choose to utilize in order to maintain compliance with section 13 of the BHC Act and this part. All measurement results that indicate a heightened risk of impermissible proprietary trading, including with respect to otherwise-permitted activities under §§ 75.4 through 75.6(a) and (b), or that result in a material exposure to high-risk assets or high-risk trading strategies, must be escalated within the banking entity for review, further analysis, explanation to the Commission, and remediation, where appropriate. The quantitative measurements discussed in this appendix should be helpful to banking entities in identifying and managing the risks related to their covered trading activities.

II. Definitions

The terms used in this appendix have the same meanings as set forth in §§ 75.2 and 75.3. In addition, for purposes of this appendix, the following definitions apply:

Calculation period means the period of time for which a particular quantitative measurement must be calculated.

Comprehensive profit and loss means the net profit or loss of a trading desk's material sources of trading revenue over a specific period of time, including, for example, any increase or decrease in the market value of a trading desk's holdings, dividend income, and interest income and expense.

Covered trading activity means trading conducted by a trading desk under § 75.4, 75.5, or 75.6(a) or (b). A banking entity may include trading under § 75.3(d) or 75.6(c), (d) or (e).

Measurement frequency means the frequency with which a particular quantitative metric must be calculated and recorded.

Trading desk means the smallest discrete unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof.

III. Reporting and Recordkeeping of Quantitative Measurements

a. Scope of Required Reporting

General scope. Each banking entity made subject to this part by § 75.20 must furnish the following quantitative measurements for each trading desk of the banking entity, calculated in accordance with this appendix:

- Risk and Position Limits and Usage;
- Risk Factor Sensitivities;
- Value-at-Risk and Stress VaR;
- Comprehensive Profit and Loss Attribution;
- Inventory Turnover;
- Inventory Aging; and
- Customer Facing Trade Ratio

b. Frequency of Required Calculation and Reporting

A banking entity must calculate any applicable quantitative measurement for each trading day. A banking entity must report each applicable quantitative measurement to the Commission on the reporting schedule established in § 75.20 unless otherwise requested by the Commission. All quantitative measurements for any calendar month must be reported within the time period required by § 75.20.

c. Recordkeeping

A banking entity must, for any quantitative measurement furnished to the Commission pursuant to this appendix and § 75.20(d), create and maintain records documenting the preparation and content of these reports, as well as such information as is necessary to permit the Commission to verify the accuracy of such reports, for a period of 5 years from the end of the calendar year for which the measurement was taken.

IV. Quantitative Measurements

a. Risk-Management Measurements

1. Risk and Position Limits and Usage

i. *Description:* For purposes of this appendix, Risk and Position Limits are the constraints that define the amount of risk that a trading desk is permitted to take at a point in time, as defined by the banking entity for a specific trading desk. Usage represents the portion of the trading desk's limits that are accounted for by the current activity of the desk. Risk and position limits and their usage are key risk management tools used to control and monitor risk taking and include, but are not limited, to the limits set out in §§ 75.4 and 75.5. A number of the metrics that are described below, including ''Risk Factor Sensitivities'' and ''Value-at-Risk and Stress Value-at-Risk,'' relate to a trading desk's risk and position limits and are useful in evaluating and setting these limits in the broader context of the trading desk's overall activities, particularly for the market making activities under § 75.4(b) and hedging activity under § 75.5. Accordingly, the limits required under §§ 75.4(b)(2)(iii) and 75.5(b)(1)(i) must meet the applicable requirements under §§ 75.4(b)(2)(iii) and 75.5(b)(1)(i) and also must include appropriate metrics for the trading desk limits including, at a minimum, the ''Risk Factor Sensitivities'' and ''Value-at-Risk and Stress Value-at-Risk'' metrics except to the extent any of the ''Risk Factor Sensitivities'' or ''Value-at-Risk and Stress Value-at-Risk'' metrics are demonstrably ineffective for measuring and monitoring the risks of a trading desk based on the types of positions traded by, and risk exposures of, that desk.

ii. *General Calculation Guidance:* Risk and Position Limits must be reported in the format used by the banking entity for the purposes of risk management of each trading desk. Risk and Position Limits are often expressed in terms of risk measures, such as VaR and Risk Factor Sensitivities, but may also be expressed in terms of other observable criteria, such as net open positions. When criteria other than VaR or Risk Factor Sensitivities are used to define the Risk and Position Limits, both the value of the Risk and Position Limits and the value of the variables used to assess whether these limits have been reached must be reported.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

2. Risk Factor Sensitivities

i. *Description:* For purposes of this appendix, Risk Factor Sensitivities are changes in a trading desk's Comprehensive Profit and Loss that are expected to occur in the event of a change in one or more underlying variables that are significant sources of the trading desk's profitability and risk.

ii. *General Calculation Guidance:* A banking entity must report the Risk Factor Sensitivities that are monitored and managed as part of the trading desk's overall risk management policy. The underlying data and methods used to compute a trading desk's Risk Factor Sensitivities will depend on the specific function of the trading desk and the internal risk management models employed. The number and type of Risk Factor Sensitivities that are monitored and managed by a trading desk, and furnished to the Commission, will depend on the explicit risks assumed by the trading desk. In general, however, reported Risk Factor Sensitivities must be sufficiently granular to account for a preponderance of the expected price variation in the trading desk's holdings.

A. Trading desks must take into account any relevant factors in calculating Risk Factor Sensitivities, including, for example, the following with respect to particular asset classes:

- *Commodity derivative positions:* Risk factors with respect to the related commodities set out in § 20.2 of this chapter, the maturity of the positions, volatility and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;
- *Credit positions:* Risk factors with respect to credit spreads that are sufficiently granular to account for specific credit sectors and market segments, the maturity profile of the positions, and risk factors with respect to interest rates of all relevant maturities;
- *Credit-related derivative positions:* Risk factor sensitivities, for example credit spreads, shifts (parallel and non-parallel) in credit spreads—volatility, and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;
- *Equity derivative positions:* Risk factor sensitivities such as equity positions, volatility, and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;
- *Equity positions:* Risk factors for equity prices and risk factors that differentiate between important equity market sectors and segments, such as a small capitalization equities and international equities;
- *Foreign exchange derivative positions:* Risk factors with respect to major currency pairs and maturities, exposure to interest rates at relevant maturities, volatility, and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), as well as the maturity profile of the positions; and
- *Interest rate positions, including interest rate derivative positions:* Risk factors with respect to major interest rate categories and maturities and volatility and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and shifts (parallel and non-parallel) in the interest rate curve, as well as the maturity profile of the positions.

B. The methods used by a banking entity to calculate sensitivities to a common factor shared by multiple trading desks, such as an equity price factor, must be applied consistently across its trading desks so that the sensitivities can be compared from one trading desk to another.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

3. Value-at-Risk and Stress Value-at-Risk

i. *Description:* For purposes of this appendix, Value-at-Risk (''VaR'') is the commonly used percentile measurement of the risk of future financial loss in the value of a given set of aggregated positions over a specified period of time, based on current market conditions. For purposes of this appendix, Stress Value-at-Risk (''Stress VaR'') is the percentile measurement of the risk of future financial loss in the value of a given set of aggregated positions over a specified period of time, based on market conditions during a period of significant financial stress.

ii. *General Calculation Guidance:* Banking entities must compute and report VaR and Stress VaR by employing generally accepted standards and methods of calculation. VaR should reflect a loss in a trading desk that is expected to be exceeded less than one percent of the time over a one-day period. For those banking entities that are subject to regulatory capital requirements imposed by a Federal banking agency, VaR and Stress VaR must be computed and reported in a manner that is consistent with such regulatory capital requirements. In cases where a trading desk does not have a standalone VaR or Stress VaR calculation but is part of a larger aggregation of positions for which a VaR or Stress VaR calculation is performed, a VaR or Stress VaR calculation that includes only the trading desk's holdings must be performed consistent with the VaR or Stress VaR model and methodology used for the larger aggregation of positions.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

b. Source-of-Revenue Measurements

1. Comprehensive Profit and Loss Attribution

i. *Description:* For purposes of this appendix, Comprehensive Profit and Loss Attribution is an analysis that attributes the daily fluctuation in the value of a trading desk's positions to various sources. First, the daily profit and loss of the aggregated positions is divided into three categories: (i) Profit and loss attributable to a trading desk's existing positions that were also positions held by the trading desk as of the end of the prior day (''existing positions''); (ii) profit and loss attributable to new positions resulting from the current day's trading activity (''new positions''); and (iii) residual profit and loss that cannot be specifically attributed to existing positions or new positions. The sum of (i), (ii), and (iii) must equal the trading desk's comprehensive profit and loss at each point in time. In addition, profit and loss measurements must calculate volatility of comprehensive profit and loss (*i.e.,* the standard deviation of the trading desk's one-day profit and loss, in dollar terms) for the reporting period for at least a 30-, 60- and 90-day lag period, from the end of the reporting period, and any other period that the banking entity deems necessary to meet the requirements of the rule.

A. The comprehensive profit and loss associated with existing positions must reflect changes in the value of these positions on the applicable day. The comprehensive profit and loss from existing positions must be further attributed, as applicable, to changes in (i) the specific Risk Factors and other factors that are monitored and managed as part of the trading desk's overall risk management policies and procedures; and (ii) any other applicable elements, such as cash flows, carry, changes in reserves, and the correction, cancellation, or exercise of a trade.

B. The comprehensive profit and loss attributed to new positions must reflect commissions and fee income or expense and market gains or losses associated with transactions executed on the applicable day. New positions include purchases and sales of financial instruments and other assets/liabilities and negotiated amendments to existing positions. The comprehensive profit and loss from new positions may be reported in the aggregate and does not need to be further attributed to specific sources.

C. The portion of comprehensive profit and loss that cannot be specifically attributed to known sources must be allocated to a residual category identified as an unexplained portion of the comprehensive profit and loss. Significant unexplained profit and loss must be escalated for further investigation and analysis.

ii. *General Calculation Guidance:* The specific categories used by a trading desk in the attribution analysis and amount of detail for the analysis should be tailored to the type and amount of trading activities undertaken by the trading desk. The new position attribution must be computed by calculating the difference between the prices at which instruments were bought and/or sold and the prices at which those instruments are marked to market at the close of business on that day multiplied by the notional or principal amount of each purchase or sale. Any fees, commissions, or other payments received (paid) that are associated with transactions executed on that day must be added (subtracted) from such difference. These factors must be measured consistently over time to facilitate historical comparisons.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

c. Customer-Facing Activity Measurements

1. Inventory Turnover

i. *Description:* For purposes of this appendix, Inventory Turnover is a ratio that measures the turnover of a trading desk's inventory. The numerator of the ratio is the absolute value of all transactions over the reporting period. The denominator of the ratio is the value of the trading desk's inventory at the beginning of the reporting period.

ii. *General Calculation Guidance:* For purposes of this appendix, for derivatives, other than options and interest rate derivatives, value means gross notional value, for options, value means delta adjusted notional value, and for interest rate derivatives, value means 10-year bond equivalent value.

iii. *Calculation Period:* 30 days, 60 days, and 90 days.

iv. *Measurement Frequency:* Daily.

2. Inventory Aging

i. *Description:* For purposes of this appendix, Inventory Aging generally describes a schedule of the trading desk's aggregate assets and liabilities and the amount of time that those assets and liabilities have been held. Inventory Aging should measure the age profile of the trading desk's assets and liabilities.

ii. *General Calculation Guidance:* In general, Inventory Aging must be computed using a trading desk's trading activity data and must identify the value of a trading desk's aggregate assets and liabilities. Inventory Aging must include two schedules, an asset-aging schedule and a liability-aging schedule. Each schedule must record the value of assets or liabilities held over all holding periods. For derivatives, other than options, and interest rate derivatives, value means gross notional value, for options, value means delta adjusted notional value and, for interest rate derivatives, value means 10-year bond equivalent value.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

3. Customer-Facing Trade Ratio—Trade Count Based and Value Based

i. *Description:* For purposes of this appendix, the Customer-Facing Trade Ratio is a ratio comparing (i) the transactions involving a counterparty that is a customer of the trading desk to (ii) the transactions involving a counterparty that is not a customer of the trading desk. A trade count based ratio must be computed that records the number of transactions involving a counterparty that is a customer of the trading desk and the number of transactions involving a counterparty that is not a customer of the trading desk. A value based ratio must be computed that records the value of transactions involving a counterparty that is a customer of the trading desk and the value of transactions involving a counterparty that is not a customer of the trading desk.

ii. *General Calculation Guidance:* For purposes of calculating the Customer-Facing Trade Ratio, a counterparty is considered to be a customer of the trading desk if the counterparty is a market participant that makes use of the banking entity's market making-related services by obtaining such services, responding to quotations, or entering into a continuing relationship with respect to such services. However, a trading desk or other organizational unit of another banking entity would not be a client, customer, or counterparty of the trading desk if the other entity has trading assets and liabilities of $50 billion or more as measured in accordance with § 75.20(d)(1) unless the trading desk documents how and why a particular trading desk or other organizational unit of the entity should be treated as a client, customer, or counterparty of the trading desk. Transactions conducted anonymously on an exchange or similar trading facility that permits trading on behalf of a broad range of market participants would be considered transactions with customers of the trading desk. For derivatives, other than options, and interest rate derivatives, value means gross notional value, for options, value means delta adjusted notional value, and for interest rate derivatives, value means 10-year bond equivalent value.

iii. *Calculation Period:* 30 days, 60 days, and 90 days.

iv. *Measurement Frequency:* Daily.

Appendix B to Part 75—Enhanced Minimum Standards for Compliance Programs

I. Overview

Section 75.20(c) requires certain banking entities to establish, maintain, and enforce an enhanced compliance program that includes the requirements and standards in this Appendix as well as the minimum written policies and procedures, internal controls, management framework, independent testing, training, and recordkeeping provisions outlined in § 75.20. This Appendix sets forth additional minimum standards with respect to the establishment, oversight, maintenance, and enforcement by these banking entities of an enhanced internal compliance program for ensuring and monitoring compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part.

a. This compliance program must:

1. Be reasonably designed to identify, document, monitor, and report the permitted trading and covered fund activities and investments of the banking entity; identify, monitor and promptly address the risks of these covered activities and investments and potential areas of noncompliance; and prevent activities or investments prohibited by, or that do not comply with, section 13 of the BHC Act and this part;

2. Establish and enforce appropriate limits on the covered activities and investments of the banking entity, including limits on the size, scope, complexity, and risks of the individual activities or investments consistent with the requirements of section 13 of the BHC Act and this part;

3. Subject the effectiveness of the compliance program to periodic independent review and testing, and ensure that the entity's internal audit, corporate compliance and internal control functions involved in review and testing are effective and independent;

4. Make senior management, and others as appropriate, accountable for the effective implementation of the compliance program, and ensure that the board of directors and chief executive officer (or equivalent) of the banking entity review the effectiveness of the compliance program; and

5. Facilitate supervision and examination by the Agencies of the banking entity's permitted trading and covered fund activities and investments.

II. Enhanced Compliance Program

a. Proprietary Trading Activities

A banking entity must establish, maintain and enforce a compliance program that includes written policies and procedures that are appropriate for the types, size, and complexity of, and risks associated with, its permitted trading activities. The compliance program may be tailored to the types of trading activities conducted by the banking entity, and must include a detailed description of controls established by the banking entity to reasonably ensure that its trading activities are conducted in accordance with the requirements and limitations applicable to those trading activities under section 13 of the BHC Act and this part, and provide for appropriate revision of the compliance program before expansion of the trading activities of the banking entity. A banking entity must devote adequate resources and use knowledgeable personnel in conducting, supervising and managing its trading activities, and promote consistency, independence and rigor in implementing its risk controls and compliance efforts. The compliance program must be updated with a frequency sufficient to account for changes in the activities of the banking entity, results of independent testing of the program, identification of weaknesses in the program, and changes in legal, regulatory or other requirements.

1. *Trading Desks:* The banking entity must have written policies and procedures governing each trading desk that include a description of:

i. The process for identifying, authorizing and documenting financial instruments each trading desk may purchase or sell, with separate documentation for market making-related activities conducted in reliance on § 75.4(b) and for hedging activity conducted in reliance on § 75.5;

ii. A mapping for each trading desk to the division, business line, or other organizational structure that is responsible for managing and overseeing the trading desk's activities;

iii. The mission (*i.e.,* the type of trading activity, such as market-making, trading in sovereign debt, etc.) and strategy (*i.e.,* methods for conducting authorized trading activities) of each trading desk;

iv. The activities that the trading desk is authorized to conduct, including (i) authorized instruments and products, and (ii) authorized hedging strategies, techniques and instruments;

v. The types and amount of risks allocated by the banking entity to each trading desk to implement the mission and strategy of the trading desk, including an enumeration of material risks resulting from the activities in which the trading desk is authorized to engage (including but not limited to price risks, such as basis, volatility and correlation risks, as well as counterparty credit risk). Risk assessments must take into account both the risks inherent in the trading activity and the strength and effectiveness of controls designed to mitigate those risks;

vi. How the risks allocated to each trading desk will be measured;

vii. Why the allocated risks levels are appropriate to the activities authorized for the trading desk;

viii. The limits on the holding period of, and the risk associated with, financial instruments under the responsibility of the trading desk;

ix. The process for setting new or revised limits, as well as escalation procedures for granting exceptions to any limits or to any policies or procedures governing the desk, the analysis that will be required to support revising limits or granting exceptions, and the process for independently reviewing and documenting those exceptions and the underlying analysis;

x. The process for identifying, documenting and approving new products, trading strategies, and hedging strategies;

xi. The types of clients, customers, and counterparties with whom the trading desk may trade; and

xii. The compensation arrangements, including incentive arrangements, for employees associated with the trading desk, which may not be designed to reward or incentivize prohibited proprietary trading or excessive or imprudent risk-taking.

2. *Description of risks and risk management processes:* The compliance program for the banking entity must include a comprehensive description of the risk management program for the trading activity of the banking entity. The compliance program must also include a description of the governance, approval, reporting, escalation, review and other processes the banking entity will use to reasonably ensure that trading activity is conducted in compliance with section 13 of the BHC Act and this part. Trading activity in similar financial instruments should be subject to similar governance, limits, testing, controls, and review, unless the banking entity specifically determines to establish different limits or processes and documents those differences. Descriptions must include, at a minimum, the following elements:

i. A description of the supervisory and risk management structure governing all trading activity, including a description of processes for initial and senior-level review of new products and new strategies;

ii. A description of the process for developing, documenting, testing, approving and reviewing all models used for valuing, identifying and monitoring the risks of trading activity and related positions, including the process for periodic independent testing of the reliability and accuracy of those models;

iii. A description of the process for developing, documenting, testing, approving and reviewing the limits established for each trading desk;

iv. A description of the process by which a security may be purchased or sold pursuant to the liquidity management plan, including the process for authorizing and monitoring such activity to ensure compliance with the banking entity's liquidity management plan and the restrictions on liquidity management activities in this part;

v. A description of the management review process, including escalation procedures, for approving any temporary exceptions or permanent adjustments to limits on the activities, positions, strategies, or risks associated with each trading desk; and

vi. The role of the audit, compliance, risk management and other relevant units for conducting independent testing of trading and hedging activities, techniques and strategies.

3. *Authorized risks, instruments, and products.* The banking entity must implement and enforce limits and internal controls for each trading desk that are reasonably designed to ensure that trading activity is conducted in conformance with section 13 of the BHC Act and this part and with the banking entity's written policies and procedures. The banking entity must establish and enforce risk limits appropriate for the activity of each trading desk. These limits should be based on probabilistic and non-probabilistic measures of potential loss (*e.g.,* Value-at-Risk and notional exposure, respectively), and measured under normal and stress market conditions. At a minimum, these internal controls must monitor, establish and enforce limits on:

i. The financial instruments (including, at a minimum, by type and exposure) that the trading desk may trade;

ii. The types and levels of risks that may be taken by each trading desk; and

iii. The types of hedging instruments used, hedging strategies employed, and the amount of risk effectively hedged.

4. *Hedging policies and procedures.* The banking entity must establish, maintain, and enforce written policies and procedures regarding the use of risk-mitigating hedging instruments and strategies that, at a minimum, describe:

i. The positions, techniques and strategies that each trading desk may use to hedge the risk of its positions;

ii. The manner in which the banking entity will identify the risks arising in connection with and related to the individual or aggregated positions, contracts or other holdings of the banking entity that are to be hedged and determine that those risks have been properly and effectively hedged;

iii. The level of the organization at which hedging activity and management will occur;

iv. The manner in which hedging strategies will be monitored and the personnel responsible for such monitoring;

v. The risk management processes used to control unhedged or residual risks; and

vi. The process for developing, documenting, testing, approving and reviewing all hedging positions, techniques and strategies permitted for each trading desk and for the banking entity in reliance on § 75.5.

5. *Analysis and quantitative measurements.* The banking entity must perform robust analysis and quantitative measurement of its trading activities that is reasonably designed to ensure that the trading activity of each trading desk is consistent with the banking entity's compliance program; monitor and assist in the identification of potential and actual prohibited proprietary trading activity; and prevent the occurrence of prohibited proprietary trading. Analysis and models used to determine, measure and limit risk must be rigorously tested and be reviewed by management responsible for trading activity to ensure that trading activities, limits, strategies, and hedging activities do not understate the risk and exposure to the banking entity or allow prohibited proprietary trading. This review should include periodic and independent back-testing and revision of activities, limits, strategies and hedging as appropriate to contain risk and ensure compliance. In addition to the quantitative measurements reported by any banking entity subject to Appendix A of this part, each banking entity must develop and implement, to the extent appropriate to facilitate compliance with this part, additional quantitative measurements specifically tailored to the particular risks, practices, and strategies of its trading desks. The banking entity's analysis and quantitative measurements must incorporate the quantitative measurements reported by the banking entity pursuant to Appendix A of this part (if applicable) and include, at a minimum, the following:

i. Internal controls and written policies and procedures reasonably designed to ensure the accuracy and integrity of quantitative measurements;

ii. Ongoing, timely monitoring and review of calculated quantitative measurements;

iii. The establishment of numerical thresholds and appropriate trading measures for each trading desk and heightened review of trading activity not consistent with those thresholds to ensure compliance with section 13 of the BHC Act and this part, including analysis of the measurement results or other information, appropriate escalation procedures, and documentation related to the review; and

iv. Immediate review and compliance investigation of the trading desk's activities, escalation to senior management with oversight responsibilities for the applicable trading desk, timely notification to the Commission, appropriate remedial action (*e.g.,* divesting of impermissible positions, cessation of impermissible activity, disciplinary actions), and documentation of the investigation findings and remedial action taken when quantitative measurements or other information, considered together with the facts and circumstances, or findings of internal audit, independent testing or other review suggest a reasonable likelihood that the trading desk has violated any part of section 13 of the BHC Act or this part.

6. *Other Compliance Matters.* In addition to the requirements specified above, the banking entity's compliance program must:

i. Identify activities of each trading desk that will be conducted in reliance on exemptions contained in §§ 75.4 through 75.6, including an explanation of:

A. How and where in the organization the activity occurs; and

B. Which exemption is being relied on and how the activity meets the specific requirements for reliance on the applicable exemption;

ii. Include an explanation of the process for documenting, approving and reviewing actions taken pursuant to the liquidity management plan, where in the organization this activity occurs, the securities permissible for liquidity management, the process for ensuring that liquidity management activities are not conducted for the purpose of prohibited proprietary trading, and the process for ensuring that securities purchased as part of the liquidity management plan are highly liquid and conform to the requirements of this part;

iii. Describe how the banking entity monitors for and prohibits potential or actual material exposure to high-risk assets or high-risk trading strategies presented by each trading desk that relies on the exemptions contained in §§ 75.3(d)(3) and 75.4 through 75.6, which must take into account potential or actual exposure to:

A. Assets whose values cannot be externally priced or, where valuation is reliant on pricing models, whose model inputs cannot be externally validated;

B. Assets whose changes in value cannot be adequately mitigated by effective hedging;

C. New products with rapid growth, including those that do not have a market history;

D. Assets or strategies that include significant embedded leverage;

E. Assets or strategies that have demonstrated significant historical volatility;

F. Assets or strategies for which the application of capital and liquidity standards would not adequately account for the risk; and

G. Assets or strategies that result in large and significant concentrations to sectors, risk factors, or counterparties;

iv. Establish responsibility for compliance with the reporting and recordkeeping requirements of subpart B of this part and § 75.20; and

v. Establish policies for monitoring and prohibiting potential or actual material conflicts of interest between the banking entity and its clients, customers, or counterparties.

7. *Remediation of violations.* The banking entity's compliance program must be reasonably designed and established to effectively monitor and identify for further analysis any trading activity that may indicate potential violations of section 13 of the BHC Act and this part and to prevent actual violations of section 13 of the BHC Act and this part. The compliance program must describe procedures for identifying and remedying violations of section 13 of the BHC Act and this part, and must include, at a minimum, a requirement to promptly document, address and remedy any violation of section 13 of the BHC Act or this part, and document all proposed and actual remediation efforts. The compliance program must include specific written policies and procedures that are reasonably designed to assess the extent to which any activity indicates that modification to the banking entity's compliance program is warranted and to ensure that appropriate modifications are implemented. The written policies and procedures must provide for prompt notification to appropriate management, including senior management and the board of directors, of any material weakness or significant deficiencies in the design or implementation of the compliance program of the banking entity.

b. Covered Fund Activities or Investments

A banking entity must establish, maintain and enforce a compliance program that includes written policies and procedures that are appropriate for the types, size, complexity and risks of the covered fund and related activities conducted and investments made, by the banking entity.

1. *Identification of covered funds.* The banking entity's compliance program must provide a process, which must include appropriate management review and independent testing, for identifying and documenting covered funds that each unit within the banking entity's organization sponsors or organizes and offers, and covered funds in which each such unit invests. In addition to the documentation requirements for covered funds, as specified under § 75.20(e), the documentation must include information that identifies all pools that the banking entity sponsors or has an interest in and the type of exemption from the Commodity Exchange Act (whether or not the pool relies on § 4.7 of the regulations under the Commodity Exchange Act (§ 4.7 of this chapter)), and the amount of ownership interest the banking entity has in those pools.

2. *Identification of covered fund activities and investments.* The banking entity's compliance program must identify, document and map each unit within the organization that is permitted to acquire or hold an interest in any covered fund or sponsor any covered fund and map each unit to the division, business line, or other organizational structure that will be responsible for managing and overseeing that unit's activities and investments.

3. *Explanation of compliance.* The banking entity's compliance program must explain how:

i. The banking entity monitors for and prohibits potential or actual material conflicts of interest between the banking entity and its clients, customers, or counterparties related to its covered fund activities and investments;

ii. The banking entity monitors for and prohibits potential or actual transactions or activities that may threaten the safety and soundness of the banking entity related to its covered fund activities and investments; and

iii. The banking entity monitors for and prohibits potential or actual material exposure to high-risk assets or high-risk trading strategies presented by its covered fund activities and investments, taking into account potential or actual exposure to:

A. Assets whose values cannot be externally priced or, where valuation is reliant on pricing models, whose model inputs cannot be externally validated;

B. Assets whose changes in values cannot be adequately mitigated by effective hedging;

C. New products with rapid growth, including those that do not have a market history;

D. Assets or strategies that include significant embedded leverage;

E. Assets or strategies that have demonstrated significant historical volatility;

F. Assets or strategies for which the application of capital and liquidity standards would not adequately account for the risk; and

G. Assets or strategies that expose the banking entity to large and significant concentrations with respect to sectors, risk factors, or counterparties;

4. *Description and documentation of covered fund activities and investments.* For each organizational unit engaged in covered fund activities and investments, the banking entity's compliance program must document:

i. The covered fund activities and investments that the unit is authorized to conduct;

ii. The banking entity's plan for actively seeking unaffiliated investors to ensure that any investment by the banking entity conforms to the limits contained in § 75.12 or registered in compliance with the securities laws and thereby exempt from those limits within the time periods allotted in § 75.12; and

iii. How it complies with the requirements of subpart C of this part.

5. *Internal Controls.* A banking entity must establish, maintain, and enforce internal controls that are reasonably designed to ensure that its covered fund activities or investments comply with the requirements of section 13 of the BHC Act and this part and are appropriate given the limits on risk established by the banking entity. These written internal controls must be reasonably designed and established to effectively monitor and identify for further analysis any covered fund activity or investment that may indicate potential violations of section 13 of the BHC Act or this part. The internal controls must, at a minimum require:

i. Monitoring and limiting the banking entity's individual and aggregate investments in covered funds;

ii. Monitoring the amount and timing of seed capital investments for compliance with the limitations under subpart C of this part (including but not limited to the redemption, sale or disposition requirements of § 75.12), and the effectiveness of efforts to seek unaffiliated investors to ensure compliance with those limits;

iii. Calculating the individual and aggregate levels of ownership interests in one or more covered fund required by § 75.12;

iv. Attributing the appropriate instruments to the individual and aggregate ownership interest calculations above;

v. Making disclosures to prospective and actual investors in any covered fund organized and offered or sponsored by the banking entity, as provided under § 75.11(a)(8);

vi. Monitoring for and preventing any relationship or transaction between the banking entity and a covered fund that is prohibited under § 75.14, including where the banking entity has been designated as the sponsor, investment manager, investment adviser, or commodity trading advisor to a covered fund by another banking entity; and

vii. Appropriate management review and supervision across legal entities of the banking entity to ensure that services and products provided by all affiliated entities comply with the limitation on services and products contained in § 75.14.

6. *Remediation of violations.* The banking entity's compliance program must be reasonably designed and established to effectively monitor and identify for further analysis any covered fund activity or investment that may indicate potential violations of section 13 of the BHC Act or this part and to prevent actual violations of section 13 of the BHC Act and this part. The banking entity's compliance program must describe procedures for identifying and remedying violations of section 13 of the BHC Act and this part, and must include, at a minimum, a requirement to promptly document, address and remedy any violation of section 13 of the BHC Act or this part, including § 75.21, and document all proposed and actual remediation efforts. The compliance program must include specific written policies and procedures that are reasonably designed to assess the extent to which any activity or investment indicates that modification to the banking entity's compliance program is warranted and to ensure that appropriate modifications are implemented. The written policies and procedures must provide for prompt notification to appropriate management, including senior management and the board of directors, of any material weakness or significant deficiencies in the design or implementation of the compliance program of the banking entity.

III. Responsibility and Accountability for the Compliance Program

a. A banking entity must establish, maintain, and enforce a governance and management framework to manage its business and employees with a view to preventing violations of section 13 of the BHC Act and this part. A banking entity must have an appropriate management framework reasonably designed to ensure that: Appropriate personnel are responsible and accountable for the effective implementation and enforcement of the compliance program; a clear reporting line with a chain of responsibility is delineated; and the compliance program is reviewed periodically by senior management. The board of directors (or equivalent governance body) and senior management should have the appropriate authority and access to personnel and information within the organizations as well as appropriate resources to conduct their oversight activities effectively.

1. *Corporate governance.* The banking entity must adopt a written compliance program approved by the board of directors, an appropriate committee of the board, or equivalent governance body, and senior management.

2. *Management procedures.* The banking entity must establish, maintain, and enforce a governance framework that is reasonably designed to achieve compliance with section 13 of the BHC Act and this part, which, at a minimum, provides for:

i. The designation of appropriate senior management or committee of senior management with authority to carry out the management responsibilities of the banking entity for each trading desk and for each organizational unit engaged in covered fund activities;

ii. Written procedures addressing the management of the activities of the banking entity that are reasonably designed to achieve compliance with section 13 of the BHC Act and this part, including:

A. A description of the management system, including the titles, qualifications, and locations of managers and the specific responsibilities of each person with respect to the banking entity's activities governed by section 13 of the BHC Act and this part; and

B. Procedures for determining compensation arrangements for traders engaged in underwriting or market making-related activities under § 75.4 or risk-mitigating hedging activities under § 75.5 so that such compensation arrangements are designed not to reward or incentivize prohibited proprietary trading and appropriately balance risk and financial results in a manner that does not encourage employees to expose the banking entity to excessive or imprudent risk.

3. *Business line managers.* Managers with responsibility for one or more trading desks of the banking entity are accountable for the effective implementation and enforcement of the compliance program with respect to the applicable trading desk(s).

4. *Board of directors, or similar corporate body, and senior management.* The board of

directors, or similar corporate body, and senior management are responsible for setting and communicating an appropriate culture of compliance with section 13 of the BHC Act and this part and ensuring that appropriate policies regarding the management of trading activities and covered fund activities or investments are adopted to comply with section 13 of the BHC Act and this part. The board of directors or similar corporate body (such as a designated committee of the board or an equivalent governance body) must ensure that senior management is fully capable, qualified, and properly motivated to manage compliance with this part in light of the organization's business activities and the expectations of the board of directors. The board of directors or similar corporate body must also ensure that senior management has established appropriate incentives and adequate resources to support compliance with this part, including the implementation of a compliance program meeting the requirements of this appendix into management goals and compensation structures across the banking entity.

5. *Senior management.* Senior management is responsible for implementing and enforcing the approved compliance program. Senior management must also ensure that effective corrective action is taken when failures in compliance with section 13 of the BHC Act and this part are identified. Senior management and control personnel charged with overseeing compliance with section 13 of the BHC Act and this part should review the compliance program for the banking entity periodically and report to the board, or an appropriate committee thereof, on the effectiveness of the compliance program and compliance matters with a frequency appropriate to the size, scope, and risk profile of the banking entity's trading activities and covered fund activities or investments, which shall be at least annually.

6. *CEO attestation.* Based on a review by the CEO of the banking entity, the CEO of the banking entity must, annually, attest in writing to the Commission that the banking entity has in place processes to establish, maintain, enforce, review, test and modify the compliance program established under this appendix and § 75.20 in a manner reasonably designed to achieve compliance with section 13 of the BHC Act and this part. In the case of a U.S. branch or agency of a foreign banking entity, the attestation may be provided for the entire U.S. operations of the foreign banking entity by the senior management officer of the United States operations of the foreign banking entity who is located in the United States.

IV. Independent Testing

a. Independent testing must occur with a frequency appropriate to the size, scope, and risk profile of the banking entity's trading and covered fund activities or investments, which shall be at least annually. This independent testing must include an evaluation of:

1. The overall adequacy and effectiveness of the banking entity's compliance program, including an analysis of the extent to which the program contains all the required elements of this appendix;

2. The effectiveness of the banking entity's internal controls, including an analysis and documentation of instances in which such internal controls have been breached, and how such breaches were addressed and resolved; and

3. The effectiveness of the banking entity's management procedures.

b. A banking entity must ensure that independent testing regarding the effectiveness of the banking entity's compliance program is conducted by a qualified independent party, such as the banking entity's internal audit department, compliance personnel or risk managers independent of the organizational unit being tested, outside auditors, consultants, or other qualified independent parties. A banking entity must promptly take appropriate action to remedy any significant deficiencies or material weaknesses in its compliance program and to terminate any violations of section 13 of the BHC Act or this part.

V. Training

Banking entities must provide adequate training to personnel and managers of the banking entity engaged in activities or investments governed by section 13 of the BHC Act or this part, as well as other appropriate supervisory, risk, independent testing, and audit personnel, in order to effectively implement and enforce the compliance program. This training should occur with a frequency appropriate to the size and the risk profile of the banking entity's trading activities and covered fund activities or investments.

VI. Recordkeeping

Banking entities must create and retain records sufficient to demonstrate compliance and support the operations and effectiveness of the compliance program. A banking entity must retain these records for a period that is no less than 5 years or such longer period as required by the Commission in a form that allows it to promptly produce such records to the Commission on request.

SECURITIES AND EXCHANGE COMMISSION

17 CFR Chapter II

Authority and Issuance

For the reasons set forth in the Common Preamble, the Securities and Exchange Commission amends part 255 to chapter II of Title 17 of the Code of Federal Regulations as follows:

PART 255—PROPRIETARY TRADING AND CERTAIN INTERESTS IN AND RELATIONSHIPS WITH COVERED FUNDS

■ 60. The authority citation for part 255 continues to read as follows:

Authority: 12 U.S.C. 1851.

Subpart A—Authority and Definitions

■ 61. Section 255.2 is revised to read as follows:

§ 255.2 Definitions.

Unless otherwise specified, for purposes of this part:

(a) *Affiliate* has the same meaning as in section 2(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(k)).

(b) *Bank holding company* has the same meaning as in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

(c) *Banking entity.* (1) Except as provided in paragraph (c)(2) of this section, *banking entity* means:

(i) Any insured depository institution;

(ii) Any company that controls an insured depository institution;

(iii) Any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(iv) Any affiliate or subsidiary of any entity described in paragraph (c)(1)(i), (ii), or (iii) of this section.

(2) Banking entity does not include:

(i) A covered fund that is not itself a banking entity under paragraph (c)(1)(i), (ii), or (iii) of this section;

(ii) A portfolio company held under the authority contained in section 4(k)(4)(H) or (I) of the BHC Act (12 U.S.C. 1843(k)(4)(H), (I)), or any 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), so long as the portfolio company or portfolio concern is not itself a banking entity under paragraph (c)(1)(i), (ii), or (iii) of this section; or

(iii) The FDIC acting in its corporate capacity or as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(d) *Board* means the Board of Governors of the Federal Reserve System.

(e) *CFTC* means the Commodity Futures Trading Commission.

(f) *Dealer* has the same meaning as in section 3(a)(5) of the Exchange Act (15 U.S.C. 78c(a)(5)).

(g) *Depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(h) *Derivative.* (1) Except as provided in paragraph (h)(2) of this section, *derivative* means:

(i) Any swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68));

(ii) Any purchase or sale of a commodity, that is not an excluded commodity, for deferred shipment or delivery that is intended to be physically settled;

(iii) Any foreign exchange forward (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)) or foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25));

(iv) Any agreement, contract, or transaction in foreign currency described in section 2(c)(2)(C)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(C)(i));

(v) Any agreement, contract, or transaction in a commodity other than foreign currency described in section 2(c)(2)(D)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(D)(i)); and

(vi) Any transaction authorized under section 19 of the Commodity Exchange Act (7 U.S.C. 23(a) or (b));

(2) A derivative does not include:

(i) Any consumer, commercial, or other agreement, contract, or transaction that the CFTC and SEC have further defined by joint regulation, interpretation, or other action as not within the definition of swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)); or

(ii) Any identified banking product, as defined in section 402(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b)), that is subject to section 403(a) of that Act (7 U.S.C. 27a(a)).

(i) *Employee* includes a member of the immediate family of the employee.

(j) *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(k) *Excluded commodity* has the same meaning as in section 1a(19) of the Commodity Exchange Act (7 U.S.C. 1a(19)).

(l) *FDIC* means the Federal Deposit Insurance Corporation.

(m) *Federal banking agencies* means the Board, the Office of the Comptroller of the Currency, and the FDIC.

(n) *Foreign banking organization* has the same meaning as in § 211.21(o) of the Board's Regulation K (12 CFR 211.21(o)), but does not include a foreign bank, as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(7)), that is organized under the laws of the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, or the Commonwealth of the Northern Mariana Islands.

(o) *Foreign insurance regulator* means the insurance commissioner, or a similar official or agency, of any country other than the United States that is engaged in the supervision of insurance companies under foreign insurance law.

(p) *General account* means all of the assets of an insurance company except those allocated to one or more separate accounts.

(q) *Insurance company* means a company that is organized as an insurance company, primarily and predominantly engaged in writing insurance or reinsuring risks underwritten by insurance companies, subject to supervision as such by a state insurance regulator or a foreign insurance regulator, and not operated for the purpose of evading the provisions of section 13 of the BHC Act (12 U.S.C. 1851).

(r) *Insured depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)), but does not include:

(1) An insured depository institution that is described in section 2(c)(2)(D) of the BHC Act (12 U.S.C. 1841(c)(2)(D)); or

(2) An insured depository institution if it has, and if every company that controls it has, total consolidated assets of $10 billion or less and total trading assets and trading liabilities, on a consolidated basis, that are 5 percent or less of total consolidated assets.

(s) *Limited trading assets and liabilities* means with respect to a banking entity that:

(1)(i) The banking entity has, together with its affiliates and subsidiaries, trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 255.6(a)(1) and (2) of subpart B) the average gross sum of which over the previous consecutive four quarters, as measured as of the last day of each of the four previous calendar quarters, is less than $1 billion; and

(ii) The SEC has not determined pursuant to § 255.20(g) or (h) of this part that the banking entity should not be treated as having limited trading assets and liabilities.

(2) With respect to a banking entity other than a banking entity described in paragraph (s)(3) of this section, trading assets and liabilities for purposes of this paragraph (s) means trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 255.6(a)(1) and (2) of subpart B) on a worldwide consolidated basis.

(3)(i) With respect to a banking entity that is a foreign banking organization or a subsidiary of a foreign banking organization, trading assets and liabilities for purposes of this paragraph (s) means the trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 255.6(a)(1) and (2) of subpart B) of the combined U.S. operations of the top-tier foreign banking organization (including all subsidiaries, affiliates, branches, and agencies of the foreign banking organization operating, located, or organized in the United States).

(ii) For purposes of paragraph (s)(3)(i) of this section, a U.S. branch, agency, or subsidiary of a banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary. For purposes of paragraph (s)(3)(i) of this section, all foreign operations of a U.S. agency, branch, or subsidiary of a foreign banking organization are considered to be located in the United States, including branches outside the United States that are managed or controlled by a U.S. branch or agency of the foreign banking organization, for purposes of calculating the banking entity's U.S. trading assets and liabilities.

(t) *Loan* means any loan, lease, extension of credit, or secured or unsecured receivable that is not a security or derivative.

(u) *Moderate trading assets and liabilities* means, with respect to a banking entity, that the banking entity does not have significant trading assets and liabilities or limited trading assets and liabilities.

(v) *Primary financial regulatory agency* has the same meaning as in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5301(12)).

(w) *Purchase* includes any contract to buy, purchase, or otherwise acquire. For security futures products, purchase includes any contract, agreement, or transaction for future delivery. With respect to a commodity future, purchase includes any contract, agreement, or transaction for future delivery. With respect to a derivative, purchase includes the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(x) *Qualifying foreign banking organization* means a foreign banking organization that qualifies as such under § 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c), or (e)).

(y) *SEC* means the Securities and Exchange Commission.

(z) *Sale* and *sell* each include any contract to sell or otherwise dispose of. For security futures products, such terms include any contract, agreement, or transaction for future delivery. With respect to a commodity future, such terms include any contract, agreement, or transaction for future delivery. With respect to a derivative, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(aa) *Security* has the meaning specified in section 3(a)(10) of the Exchange Act (15 U.S.C. 78c(a)(10)).

(bb) *Security-based swap dealer* has the same meaning as in section 3(a)(71) of the Exchange Act (15 U.S.C. 78c(a)(71)).

(cc) *Security future* has the meaning specified in section 3(a)(55) of the Exchange Act (15 U.S.C. 78c(a)(55)).

(dd) *Separate account* means an account established and maintained by an insurance company in connection with one or more insurance contracts to hold assets that are legally segregated from the insurance company's other assets, under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(ee) *Significant trading assets and liabilities* means with respect to a banking entity that: (1)(i) The banking entity has, together with its affiliates and subsidiaries, trading assets and liabilities the average gross sum of which over the previous consecutive four quarters, as measured as of the last day of each of the four previous calendar quarters, equals or exceeds $20 billion; or

(ii) The SEC has determined pursuant to § 255.20(h) of this part that the banking entity should be treated as having significant trading assets and liabilities.

(2) With respect to a banking entity, other than a banking entity described in paragraph (ee)(3) of this section, trading assets and liabilities for purposes of this paragraph (ee) means trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 255.6(a)(1) and (2) of subpart B) on a worldwide consolidated basis.

(3)(i) With respect to a banking entity that is a foreign banking organization or a subsidiary of a foreign banking organization, trading assets and liabilities for purposes of this paragraph (ee) means the trading assets and liabilities (excluding trading assets and liabilities attributable to trading activities permitted pursuant to § 255.6(a)(1) and (2) of subpart B) of the combined U.S. operations of the top-tier foreign banking organization (including all subsidiaries, affiliates, branches, and agencies of the foreign banking organization operating, located, or organized in the United States as well as branches outside the United States that are managed or controlled by a branch or agency of the foreign banking entity operating, located or organized in the United States).

(ii) For purposes of paragraph (ee)(3)(i) of this section, a U.S. branch, agency, or subsidiary of a banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary. For purposes of paragraph (ee)(3)(i) of this section, all foreign operations of a U.S. agency, branch, or subsidiary of a foreign banking organization are considered to be located in the United States for purposes of calculating the banking entity's U.S. trading assets and liabilities.

(ff) *State* means any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(gg) *Subsidiary* has the same meaning as in section 2(d) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(d)).

(hh) *State insurance regulator* means the insurance commissioner, or a similar official or agency, of a State that is engaged in the supervision of insurance companies under State insurance law.

(ii) *Swap dealer* has the same meaning as in section 1(a)(49) of the Commodity Exchange Act (7 U.S.C. 1a(49)).

Subpart B—Proprietary Trading

■ 62. Section 255.3 is amended by:
■ a. Revising paragraphs (b) and (d)(3), (8), and (9);
■ b. Adding paragraphs (d)(10) through (13);
■ c. Redesignating paragraphs (e)(5) through (13) as paragraphs (e)(6) through (14);
■ d. Adding new paragraph (e)(5); and
■ e. Revising paragraph (e)(11), (12), and (14).

The revisions and additions read as follows:

§ 255.3 Prohibition on proprietary trading.

* * * * *

(b) *Definition of trading account.* (1) *Trading account.* Trading account means:

(i) Any account that is used by a banking entity to purchase or sell one or more financial instruments principally for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging one or more of the positions resulting from the purchases or sales of financial instruments described in this paragraph;

(ii) Any account that is used by a banking entity to purchase or sell one or more financial instruments that are both market risk capital rule covered positions and trading positions (or hedges of other market risk capital rule covered positions), if the banking entity, or any affiliate with which the banking entity is consolidated for regulatory reporting purposes, calculates risk-based capital ratios under the market risk capital rule; or

(iii) Any account that is used by a banking entity to purchase or sell one or more financial instruments, if the banking entity:

(A) Is licensed or registered, or is required to be licensed or registered, to engage in the business of a dealer, swap dealer, or security-based swap dealer, to the extent the instrument is purchased or sold in connection with the activities that require the banking entity to be licensed or registered as such; or

(B) Is engaged in the business of a dealer, swap dealer, or security-based swap dealer outside of the United States, to the extent the instrument is purchased or sold in connection with the activities of such business.

(2) *Trading account application for certain banking entities.* (i) A banking entity that is subject to paragraph (b)(1)(ii) of this section in determining the scope of its trading account is not subject to paragraph (b)(1)(i) of this section.

(ii) A banking entity that does not calculate risk-based capital ratios under the market risk capital rule and is not a consolidated affiliate for regulatory reporting purposes of a banking entity that calculates risk based capital ratios under the market risk capital rule may elect to apply paragraph (b)(1)(ii) of this section in determining the scope of its trading account as if it were subject to that paragraph. A banking entity that elects under this section to apply paragraph (b)(1)(ii) of this section in determining the scope of its trading account as if it were subject to that paragraph is not required to apply paragraph (b)(1)(i) of this section.

(3) *Consistency of account election for certain banking entities.* (i) Any election or change to an election under paragraph (b)(2)(ii) of this section must apply to the electing banking entity and all of its wholly owned subsidiaries. The primary financial regulatory agency of a banking entity that is affiliated with but is not a wholly owned subsidiary of such electing banking entity may require that the banking entity be subject to this uniform application requirement if the primary financial regulatory agency determines that it is necessary to prevent evasion of the requirements of this part after notice and opportunity for response as provided in subpart D.

(ii) A banking entity that does not elect under paragraph (b)(2)(ii) of this section to be subject to the trading account definition in (b)(1)(ii) may continue to apply the trading account definition in paragraph (b)(1)(i) of this section for one year from the date on which it becomes, or becomes a consolidated affiliate for regulatory reporting purposes with, a banking entity that calculates risk-based capital ratios under the market risk capital rule.

(4) *Rebuttable presumption for certain purchases and sales.* The purchase (or sale) of a financial instrument by a banking entity shall be presumed not to be for the trading account of the banking entity under paragraph (b)(1)(i) of this section if the banking entity holds the financial instrument for sixty days or longer and does not transfer substantially all of the risk of the financial instrument within sixty days of the purchase (or sale).

* * * * *

(d) * * *

(3) Any purchase or sale of a security, foreign exchange forward (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)), foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25)), or cross-currency swap by a banking entity for the purpose of liquidity management in accordance with a documented liquidity management plan of the banking entity that:

(i) Specifically contemplates and authorizes the particular financial instruments to be used for liquidity management purposes, the amount, types, and risks of these financial instruments that are consistent with liquidity management, and the liquidity circumstances in which the particular financial instruments may or must be used;

(ii) Requires that any purchase or sale of financial instruments contemplated and authorized by the plan be principally for the purpose of managing the liquidity of the banking entity, and not for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging a position taken for such short-term purposes;

(iii) Requires that any financial instruments purchased or sold for liquidity management purposes be highly liquid and limited to financial instruments the market, credit, and other risks of which the banking entity does not reasonably expect to give rise to appreciable profits or losses as a result of short-term price movements;

(iv) Limits any financial instruments purchased or sold for liquidity management purposes, together with any other financial instruments purchased or sold for such purposes, to an amount that is consistent with the banking entity's near-term funding needs, including deviations from normal operations of the banking entity or any affiliate thereof, as estimated and documented pursuant to methods specified in the plan;

(v) Includes written policies and procedures, internal controls, analysis, and independent testing to ensure that the purchase and sale of financial instruments that are not permitted under § 255.6(a) or (b) of this subpart are for the purpose of liquidity management and in accordance with the liquidity management plan described in this paragraph (d)(3); and

(vi) Is consistent with the SEC's regulatory requirements regarding liquidity management;

* * * * *

(8) Any purchase or sale of one or more financial instruments by a banking entity through a deferred compensation, stock-bonus, profit-sharing, or pension plan of the banking entity that is established and administered in accordance with the law of the United States or a foreign sovereign, if the purchase or sale is made directly or indirectly by the banking entity as trustee for the benefit of persons who are or were employees of the banking entity;

(9) Any purchase or sale of one or more financial instruments by a banking entity in the ordinary course of collecting a debt previously contracted in good faith, provided that the banking entity divests the financial instrument as soon as practicable, and in no event may the banking entity retain such instrument for longer than such period permitted by the SEC;

(10) Any purchase or sale of one or more financial instruments that was made in error by a banking entity in the course of conducting a permitted or excluded activity or is a subsequent transaction to correct such an error;

(11) Contemporaneously entering into a customer-driven swap or customer-driven security-based swap and a matched swap or security-based swap if:

(i) The banking entity retains no more than minimal price risk; and

(ii) The banking entity is not a registered dealer, swap dealer, or security-based swap dealer;

(12) Any purchase or sale of one or more financial instruments that the banking entity uses to hedge mortgage servicing rights or mortgage servicing assets in accordance with a documented hedging strategy; or

(13) Any purchase or sale of a financial instrument that does not meet the definition of trading asset or trading liability under the applicable reporting form for a banking entity as of January 1, 2020.

(e) * * *

(5) *Cross-currency swap* means a swap in which one party exchanges with another party principal and interest rate payments in one currency for principal and interest rate payments in another currency, and the exchange of principal occurs on the date the swap is entered into, with a reversal of the exchange of principal at a later date that is agreed upon when the swap is entered into.

* * * * *

(11) *Market risk capital rule covered position and trading position* means a financial instrument that meets the criteria to be a covered position and a trading position, as those terms are respectively defined, without regard to whether the financial instrument is reported as a covered position or trading position on any applicable regulatory reporting forms:

(i) In the case of a banking entity that is a bank holding company, savings and loan holding company, or insured depository institution, under the market risk capital rule that is applicable to the banking entity; and

(ii) In the case of a banking entity that is affiliated with a bank holding company or savings and loan holding company, other than a banking entity to which a market risk capital rule is applicable, under the market risk capital rule that is applicable to the affiliated bank holding company or savings and loan holding company.

(12) *Market risk capital rule* means the market risk capital rule that is contained in 12 CFR part 3, subpart F, with respect to a banking entity for which the OCC is the primary financial regulatory agency, 12 CFR part 217 with respect to a banking entity for which the Board is the primary financial regulatory agency, or 12 CFR part 324 with respect to a banking entity for which the FDIC is the primary financial regulatory agency.

* * * * *

(14) *Trading desk* means a unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof that is:

(i)(A) Structured by the banking entity to implement a well-defined business strategy;

(B) Organized to ensure appropriate setting, monitoring, and management review of the desk's trading and hedging limits, current and potential future loss exposures, and strategies; and

(C) Characterized by a clearly defined unit that:

(*1*) Engages in coordinated trading activity with a unified approach to its key elements;

(*2*) Operates subject to a common and calibrated set of risk metrics, risk levels, and joint trading limits;

(*3*) Submits compliance reports and other information as a unit for monitoring by management; and

(*4*) Books its trades together; or

(ii) For a banking entity that calculates risk-based capital ratios under the market risk capital rule, or a consolidated affiliate for regulatory reporting purposes of a banking entity that calculates risk-based capital ratios under the market risk capital rule, established by the banking entity or its affiliate for purposes of market risk capital calculations under the market risk capital rule.

■ 63. Section 255.4 is revised to read as follows:

§ 255.4 Permitted underwriting and market making-related activities.

(a) *Underwriting activities*—(1) *Permitted underwriting activities.* The prohibition contained in § 255.3(a) does not apply to a banking entity's underwriting activities conducted in accordance with this paragraph (a).

(2) *Requirements.* The underwriting activities of a banking entity are permitted under paragraph (a)(1) of this section only if:

(i) The banking entity is acting as an underwriter for a distribution of securities and the trading desk's underwriting position is related to such distribution;

(ii)(A) The amount and type of the securities in the trading desk's underwriting position are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, taking into account the liquidity, maturity, and depth of the market for the relevant types of securities; and

(B) Reasonable efforts are made to sell or otherwise reduce the underwriting position within a reasonable period, taking into account the liquidity, maturity, and depth of the market for the relevant types of securities;

(iii) In the case of a banking entity with significant trading assets and liabilities, the banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of paragraph (a) of this section, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The products, instruments or exposures each trading desk may purchase, sell, or manage as part of its underwriting activities;

(B) Limits for each trading desk, in accordance with paragraph (a)(2)(ii)(A) of this section;

(C) Written authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval; and

(D) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits.

(iv) A banking entity with significant trading assets and liabilities may satisfy the requirements in paragraphs (a)(2)(iii)(B) and (C) of this section by complying with the requirements set forth below in paragraph (c) of this section;

(v) The compensation arrangements of persons performing the activities described in this paragraph (a) are designed not to reward or incentivize prohibited proprietary trading; and

(vi) The banking entity is licensed or registered to engage in the activity described in this paragraph (a) in accordance with applicable law.

(3) *Definition of distribution.* For purposes of this paragraph (a), a distribution of securities means:

(i) An offering of securities, whether or not subject to registration under the Securities Act of 1933, that is distinguished from ordinary trading transactions by the presence of special selling efforts and selling methods; or

(ii) An offering of securities made pursuant to an effective registration statement under the Securities Act of 1933.

(4) *Definition of underwriter.* For purposes of this paragraph (a), *underwriter* means:

(i) A person who has agreed with an issuer or selling security holder to:

(A) Purchase securities from the issuer or selling security holder for distribution;

(B) Engage in a distribution of securities for or on behalf of the issuer or selling security holder; or

(C) Manage a distribution of securities for or on behalf of the issuer or selling security holder; or

(ii) A person who has agreed to participate or is participating in a distribution of such securities for or on behalf of the issuer or selling security holder.

(5) *Definition of selling security holder.* For purposes of this paragraph (a), *selling security holder* means any person, other than an issuer, on whose behalf a distribution is made.

(6) *Definition of underwriting position.* For purposes of this section, *underwriting position* means the long or short positions in one or more securities held by a banking entity or its affiliate, and managed by a particular trading desk, in connection with a particular distribution of securities for which such banking entity or affiliate is acting as an underwriter.

(7) *Definition of client, customer, and counterparty.* For purposes of this paragraph (a), the terms *client, customer, and counterparty,* on a collective or individual basis, refer to market participants that may transact with the banking entity in connection with a particular distribution for which the banking entity is acting as underwriter.

(b) *Market making-related activities*—(1) *Permitted market making-related activities.* The prohibition contained in § 255.3(a) does not apply to a banking entity's market making-related activities conducted in accordance with this paragraph (b).

(2) *Requirements.* The market making-related activities of a banking entity are permitted under paragraph (b)(1) of this section only if:

(i) The trading desk that establishes and manages the financial exposure, routinely stands ready to purchase and sell one or more types of financial instruments related to its financial exposure, and is willing and available to quote, purchase and sell, or otherwise enter into long and short positions in those types of financial instruments for its own account, in commercially reasonable amounts and throughout market cycles on a basis appropriate for the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(ii) The trading desk's market-making related activities are designed not to exceed, on an ongoing basis, the reasonably expected near term demands of clients, customers, or counterparties, taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(iii) In the case of a banking entity with significant trading assets and liabilities, the banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of paragraph (b) of this section, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The financial instruments each trading desk stands ready to purchase and sell in accordance with paragraph (b)(2)(i) of this section;

(B) The actions the trading desk will take to demonstrably reduce or otherwise significantly mitigate promptly the risks of its financial exposure consistent with the limits required under paragraph (b)(2)(iii)(C) of this section; the products, instruments, and exposures each trading desk may use for risk management purposes; the techniques and strategies each trading desk may use to manage the risks of its market making-related activities and positions; and the process, strategies, and personnel responsible for ensuring that the actions taken by the trading desk to mitigate these risks are and continue to be effective;

(C) Limits for each trading desk, in accordance with paragraph (b)(2)(ii) of this section;

(D) Written authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval; and

(E) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits.

(iv) A banking entity with significant trading assets and liabilities may satisfy the requirements in paragraphs (b)(2)(iii)(C) and (D) of this section by complying with the requirements set forth below in paragraph (c) of this section;

(v) The compensation arrangements of persons performing the activities described in this paragraph (b) are designed not to reward or incentivize prohibited proprietary trading; and

(vi) The banking entity is licensed or registered to engage in activity described in this paragraph (b) in accordance with applicable law.

(3) *Definition of client, customer, and counterparty.* For purposes of paragraph (b) of this section, the terms *client, customer, and counterparty,* on a collective or individual basis refer to market participants that make use of the banking entity's market making-related services by obtaining such services, responding to quotations, or entering into a continuing relationship with respect to such services, provided that:

(i) A trading desk or other organizational unit of another banking entity is not a client, customer, or counterparty of the trading desk if that other entity has trading assets and liabilities of $50 billion or more as measured in accordance with the methodology described in § 255.2(ee) of this part, unless:

(A) The trading desk documents how and why a particular trading desk or other organizational unit of the entity should be treated as a client, customer, or counterparty of the trading desk for purposes of paragraph (b)(2) of this section; or

(B) The purchase or sale by the trading desk is conducted anonymously on an exchange or similar trading facility that permits trading on behalf of a broad range of market participants.

(ii) [Reserved]

(4) *Definition of financial exposure.* For purposes of this section, *financial exposure* means the aggregate risks of one or more financial instruments and any associated loans, commodities, or foreign exchange or currency, held by a banking entity or its affiliate and managed by a particular trading desk as part of the trading desk's market making-related activities.

(5) *Definition of market-maker positions.* For the purposes of this section, *market-maker positions* means all of the positions in the financial instruments for which the trading desk stands ready to make a market in accordance with paragraph (b)(2)(i) of this section, that are managed by the trading desk, including the trading desk's open positions or exposures arising from open transactions.

(c) *Rebuttable presumption of compliance*—(1) *Internal limits.* (i) A banking entity shall be presumed to meet the requirement in paragraph (a)(2)(ii)(A) or (b)(2)(ii) of this section with respect to the purchase or sale of a financial instrument if the banking entity has established and implements, maintains, and enforces the internal limits for the relevant trading desk as described in paragraph (c)(1)(ii) of this section.

(ii)(A) With respect to underwriting activities conducted pursuant to paragraph (a) of this section, the presumption described in paragraph (c)(1)(i) of this section shall be available to each trading desk that establishes, implements, maintains, and enforces internal limits that should take into account the liquidity, maturity, and depth of the market for the relevant types of securities and are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, based on the nature and amount of the trading desk's underwriting activities, on the:

(*1*) Amount, types, and risk of its underwriting position;

(*2*) Level of exposures to relevant risk factors arising from its underwriting position; and

(*3*) Period of time a security may be held.

(B) With respect to market making-related activities conducted pursuant to paragraph (b) of this section, the presumption described in paragraph (c)(1)(i) of this section shall be available to each trading desk that establishes, implements, maintains, and enforces internal limits that should take into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments and are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, based on the nature and amount of the trading desk's market-making related activities, that address the:

(*1*) Amount, types, and risks of its market-maker positions;

(*2*) Amount, types, and risks of the products, instruments, and exposures the trading desk may use for risk management purposes;

(*3*) Level of exposures to relevant risk factors arising from its financial exposure; and

(*4*) Period of time a financial instrument may be held.

(2) *Supervisory review and oversight.* The limits described in paragraph (c)(1) of this section shall be subject to supervisory review and oversight by the SEC on an ongoing basis.

(3) *Limit breaches and increases.* (i) With respect to any limit set pursuant to paragraphs (c)(1)(ii)(A) or (c)(1)(ii)(B) of this section, a banking entity shall maintain and make available to the SEC upon request records regarding any limit that is exceeded and any temporary or permanent increase to any limit(s), in each case in the form and manner as directed by the SEC.

(ii) In the event of a breach or increase of any limit set pursuant to paragraph (c)(1)(ii)(A) or (B) of this section, the presumption described in paragraph (c)(1)(i) of this section shall continue to be available only if the banking entity:

(A) Takes action as promptly as possible after a breach to bring the trading desk into compliance; and

(B) Follows established written authorization procedures, including escalation procedures that require review and approval of any trade that exceeds a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval.

(4) *Rebutting the presumption.* The presumption in paragraph (c)(1)(i) of this section may be rebutted by the SEC if the SEC determines, taking into account the liquidity, maturity, and depth of the market for the relevant types of financial instruments and based on all relevant facts and circumstances, that a trading desk is engaging in activity that is not based on the reasonably expected near term demands of clients, customers, or counterparties. The SEC's rebuttal of the presumption in paragraph (c)(1)(i) must be made in accordance with the notice and response procedures in subpart D of this part.

■ 64. Section 255.5 is amended by revising paragraphs (b) and (c)(1) introductory text and adding paragraph (c)(4) to read as follows:

§ 255.5 Permitted risk-mitigating hedging activities.

* * * * *

(b) *Requirements.* (1) The risk-mitigating hedging activities of a banking entity that has significant trading assets and liabilities are permitted under paragraph (a) of this section only if:

(i) The banking entity has established and implements, maintains and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(A) Reasonably designed written policies and procedures regarding the positions, techniques and strategies that may be used for hedging, including documentation indicating what positions, contracts or other holdings a particular trading desk may use in its risk-mitigating hedging activities, as well as position and aging limits with respect to such positions, contracts or other holdings;

(B) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(C) The conduct of analysis and independent testing designed to ensure that the positions, techniques and strategies that may be used for hedging may reasonably be expected to reduce or otherwise significantly mitigate the specific, identifiable risk(s) being hedged;

(ii) The risk-mitigating hedging activity:

(A) Is conducted in accordance with the written policies, procedures, and internal controls required under this section;

(B) At the inception of the hedging activity, including, without limitation, any adjustments to the hedging activity, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, commodity price risk, basis risk, or similar risks, arising in connection with and related to identified positions, contracts, or other holdings of the banking entity, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof;

(C) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section;

(D) Is subject to continuing review, monitoring and management by the banking entity that:

(*1*) Is consistent with the written hedging policies and procedures required under paragraph (b)(1)(i) of this section;

(*2*) Is designed to reduce or otherwise significantly mitigate the specific, identifiable risks that develop over time from the risk-mitigating hedging activities undertaken under this section and the underlying positions, contracts, and other holdings of the banking entity, based upon the facts and circumstances of the underlying and hedging positions, contracts and other holdings of the banking entity and the risks and liquidity thereof; and

(*3*) Requires ongoing recalibration of the hedging activity by the banking entity to ensure that the hedging activity satisfies the requirements set out in paragraph (b)(1)(ii) of this section and is not prohibited proprietary trading; and

(iii) The compensation arrangements of persons performing risk-mitigating hedging activities are designed not to reward or incentivize prohibited proprietary trading.

(2) The risk-mitigating hedging activities of a banking entity that does not have significant trading assets and liabilities are permitted under paragraph (a) of this section only if the risk-mitigating hedging activity:

(i) At the inception of the hedging activity, including, without limitation, any adjustments to the hedging activity, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, commodity price risk, basis risk, or similar risks, arising in connection with and related to identified positions, contracts, or other holdings of the banking entity, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof; and

(ii) Is subject, as appropriate, to ongoing recalibration by the banking entity to ensure that the hedging activity satisfies the requirements set out in paragraph (b)(2) of this section and is not prohibited proprietary trading.

(c) * * *

(1) A banking entity that has significant trading assets and liabilities must comply with the requirements of paragraphs (c)(2) and (3) of this section, unless the requirements of paragraph (c)(4) of this section are met, with respect to any purchase or sale of financial instruments made in reliance on this section for risk-mitigating hedging purposes that is:

* * * * *

(4) The requirements of paragraphs (c)(2) and (3) of this section do not apply to the purchase or sale of a financial instrument described in paragraph (c)(1) of this section if:

(i) The financial instrument purchased or sold is identified on a written list of pre-approved financial instruments that are commonly used by the trading desk for the specific type of hedging activity for which the financial instrument is being purchased or sold; and

(ii) At the time the financial instrument is purchased or sold, the hedging activity (including the purchase or sale of the financial instrument) complies with written, pre-approved limits for the trading desk purchasing or selling the financial instrument for hedging activities undertaken for one or more other trading desks. The limits shall be appropriate for the:

(A) Size, types, and risks of the hedging activities commonly undertaken by the trading desk;

(B) Financial instruments purchased and sold for hedging activities by the trading desk; and

(C) Levels and duration of the risk exposures being hedged.

■ 65. Section 255.6 is amended by revising paragraph (e)(3); removing paragraphs (e)(4) and (6); and redesignating paragraph (e)(5) as paragraph (e)(4).

The revision reads as follows:

§ 255.6 Other permitted proprietary trading activities.

* * * * *

(e) * * *

(3) A purchase or sale by a banking entity is permitted for purposes of this paragraph (e) if:

(i) The banking entity engaging as principal in the purchase or sale (including relevant personnel) is not located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to purchase or sell as principal is not located in the United States or organized under the laws of the United States or of any State; and

(iii) The purchase or sale, including any transaction arising from risk-mitigating hedging related to the instruments purchased or sold, is not accounted for as principal directly or on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State.

* * * * *

Subpart C—Covered Funds Activities and Investments

■ 66. Section 255.10 is amended by revising paragraphs (c)(7)(ii) and (c)(8)(i)(A) to read as follows:

§ 255.10 Prohibition on Acquiring or Retaining an Ownership Interest in and Having Certain Relationships with a Covered Fund.

* * * * *

(c) * * *

(7) * * *

(ii) Participates in the profits and losses of the separate account other than in compliance with applicable requirements regarding bank owned life insurance.

(8) * * *

(i) * * *

(A) Loans as defined in § 255.2(t) of subpart A;

* * * * *

■ 67. Section 255.11 is amended by revising paragraph (c) to read as follows:

§ 255.11 Permitted organizing and offering, underwriting, and market making with respect to a covered fund.

* * * * *

(c) *Underwriting and market making in ownership interests of a covered fund.* The prohibition contained in § 255.10(a) of this subpart does not apply to a banking entity's underwriting activities or market making-related activities involving a covered fund so long as:

(1) Those activities are conducted in accordance with the requirements of § 255.4(a) or § 255.4(b) of subpart B, respectively; and

(2) With respect to any banking entity (or any affiliate thereof) that: Acts as a sponsor, investment adviser or commodity trading advisor to a particular covered fund or otherwise acquires and retains an ownership interest in such covered fund in reliance on paragraph (a) of this section; or acquires and retains an ownership interest in such covered fund and is either a securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78*o*–11(a)(3)), or is acquiring and retaining an ownership interest in such covered fund in compliance with section 15G of that Act (15 U.S.C.78*o*–11) and the implementing regulations issued thereunder each as permitted by paragraph (b) of this section, then in each such case any ownership interests acquired or retained by the banking entity and its affiliates in connection with underwriting and market making related activities for that particular covered fund are included in the calculation of ownership interests permitted to be held by the banking entity and its affiliates under the limitations of § 255.12(a)(2)(ii); § 255.12(a)(2)(iii), and § 255.12(d) of this subpart.

§ 255.12 [Amended]

■ 68. Section 255.12 is amended by redesignating the second instance of paragraph (e)(2)(vi) as paragraph (e)(2)(vii).

■ 69. Section 255.13 is amended by revising paragraphs (a), (b)(3) and (4), and (c) to read as follows:

§ 255.13 Other permitted covered fund activities and investments.

(a) *Permitted risk-mitigating hedging activities.* (1) The prohibition contained in § 255.10(a) of this subpart does not apply with respect to an ownership interest in a covered fund acquired or retained by a banking entity that is designed to reduce or otherwise significantly mitigate the specific, identifiable risks to the banking entity in connection with:

(i) A compensation arrangement with an employee of the banking entity or an affiliate thereof that directly provides investment advisory, commodity trading advisory or other services to the covered fund; or

(ii) A position taken by the banking entity when acting as intermediary on behalf of a customer that is not itself a banking entity to facilitate the exposure by the customer to the profits and losses of the covered fund.

(2) The risk-mitigating hedging activities of a banking entity are permitted under this paragraph (a) only if:

(i) The banking entity has established and implements, maintains and enforces an internal compliance program in accordance with subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(A) Reasonably designed written policies and procedures; and

(B) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(ii) The acquisition or retention of the ownership interest:

(A) Is made in accordance with the written policies, procedures, and internal controls required under this section;

(B) At the inception of the hedge, is designed to reduce or otherwise significantly mitigate one or more specific, identifiable risks arising:

(*1*) Out of a transaction conducted solely to accommodate a specific customer request with respect to the covered fund; or

(*2*) In connection with the compensation arrangement with the employee that directly provides investment advisory, commodity trading advisory, or other services to the covered fund;

(C) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section; and

(D) Is subject to continuing review, monitoring and management by the banking entity.

(iii) With respect to risk-mitigating hedging activity conducted pursuant to paragraph (a)(1)(i) of this section, the compensation arrangement relates solely to the covered fund in which the banking entity or any affiliate has acquired an ownership interest pursuant to paragraph (a)(1)(i) and such compensation arrangement provides that any losses incurred by the banking entity on such ownership interest will be offset by corresponding decreases in amounts payable under such compensation arrangement.

(b) * * *

(3) An ownership interest in a covered fund is not offered for sale or sold to a resident of the United States for purposes of paragraph (b)(1)(iii) of this section only if it is not sold and has not been sold pursuant to an offering that targets residents of the United States in which the banking entity or any affiliate of the banking entity participates. If the banking entity or an affiliate sponsors or serves, directly or indirectly, as the investment manager, investment adviser, commodity pool operator or commodity trading advisor to a covered fund, then the banking entity or affiliate will be deemed for purposes of this paragraph (b)(3) to participate in any offer or sale by the covered fund of ownership interests in the covered fund.

(4) An activity or investment occurs solely outside of the United States for purposes of paragraph (b)(1)(iv) of this section only if:

(i) The banking entity acting as sponsor, or engaging as principal in the acquisition or retention of an ownership interest in the covered fund, is not itself, and is not controlled directly or indirectly by, a banking entity that is located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to acquire or retain the ownership interest or act as sponsor to the covered fund is not located in the United States or organized under the laws of the United States or of any State; and

(iii) The investment or sponsorship, including any transaction arising from risk-mitigating hedging related to an ownership interest, is not accounted for as principal directly or indirectly on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State.

* * * * *

(c) Permitted covered fund interests and activities by a regulated insurance company. The prohibition contained in § 255.10(a) of this subpart does not apply to the acquisition or retention by an insurance company, or an affiliate thereof, of any ownership interest in, or the sponsorship of, a covered fund only if:

(1) The insurance company or its affiliate acquires and retains the ownership interest solely for the general account of the insurance company or for one or more separate accounts established by the insurance company;

(2) The acquisition and retention of the ownership interest is conducted in compliance with, and subject to, the insurance company investment laws and regulations of the State or jurisdiction in which such insurance company is domiciled; and

(3) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and foreign jurisdictions, as appropriate, have not jointly determined, after notice and comment, that a particular law or regulation described in paragraph (c)(2) of this section is insufficient to protect the safety and soundness of the banking entity, or the financial stability of the United States.

■ 70. Section 255.14 is amended by revising paragraph (a)(2)(ii)(B) to read as follows:

§ 255.14 Limitations on relationships with a covered fund.

(a) * * *

(2) * * *

(ii) * * *

(B) The chief executive officer (or equivalent officer) of the banking entity certifies in writing annually no later than March 31 to the SEC (with a duty to update the certification if the information in the certification materially changes) that the banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests; and

* * * * *

Subpart D—Compliance Program Requirement; Violations

■ 71. Section 255.20 is amended by eevising paragraphs (a), (b) introductory text, (c), (d), (e) introductory text, and (f)(2) and adding paragraphs (g), (h) and (i) to read as follows:

§ 255.20 Program for compliance; reporting.

(a) *Program requirement.* Each banking entity (other than a banking entity with limited trading assets and liabilities) shall develop and provide for the continued administration of a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part. The terms, scope, and detail of the compliance program shall be appropriate for the types, size, scope, and complexity of activities and business structure of the banking entity.

(b) *Banking entities with significant trading assets and liabilities.* With respect to a banking entity with significant trading assets and liabilities, the compliance program required by paragraph (a) of this section, at a minimum, shall include:

* * * * *

(c) *CEO attestation.* The CEO of a banking entity that has significant trading assets and liabilities must, based on a review by the CEO of the banking entity, attest in writing to the SEC, each year no later than March 31, that the banking entity has in place processes to establish, maintain, enforce, review, test and modify the compliance program required by paragraph (b) of this section in a manner reasonably designed to achieve compliance with section 13 of the BHC Act and this part. In the case of a U.S. branch or agency of a foreign banking entity, the attestation may be provided for the entire U.S. operations of the foreign banking entity by the senior management officer of the U.S. operations of the foreign banking entity who is located in the United States.

(d) *Reporting requirements under appendix A to this part.* (1) A banking entity engaged in proprietary trading activity permitted under subpart B of this part shall comply with the reporting requirements described in appendix A to this part, if:

(i) The banking entity has significant trading assets and liabilities; or

(ii) The SEC notifies the banking entity in writing that it must satisfy the reporting requirements contained in appendix A to this part.

(2) Frequency of reporting: Unless the SEC notifies the banking entity in writing that it must report on a different basis, a banking entity subject to appendix A to this part shall report the information required by appendix A for each quarter within 30 days of the end of the quarter.

(e) *Additional documentation for covered funds.* A banking entity with significant trading assets and liabilities shall maintain records that include:

* * * * *

(f) * * *

(2) *Banking entities with moderate trading assets and liabilities.* A banking entity with moderate trading assets and liabilities may satisfy the requirements of this section by including in its existing compliance policies and procedures appropriate references to the requirements of section 13 of the BHC Act and this part and adjustments as appropriate given the activities, size, scope, and complexity of the banking entity.

(g) *Rebuttable presumption of compliance for banking entities with limited trading assets and liabilities*—(1) *Rebuttable presumption.* Except as otherwise provided in this paragraph, a banking entity with limited trading assets and liabilities shall be presumed to be compliant with subpart B and subpart C of this part and shall have no obligation to demonstrate compliance with this part on an ongoing basis.

(2) *Rebuttal of presumption.* If upon examination or audit, the SEC determines that the banking entity has engaged in proprietary trading or covered fund activities that are otherwise prohibited under subpart B or subpart C of this part, the SEC may require the banking entity to be treated under this part as if it did not have limited trading assets and liabilities. The SEC's rebuttal of the presumption in this paragraph must be made in accordance with the notice and response procedures in paragraph (i) of this section.

(h) *Reservation of authority.* Notwithstanding any other provision of this part, the SEC retains its authority to require a banking entity without significant trading assets and liabilities to apply any requirements of this part that would otherwise apply if the banking entity had significant or moderate trading assets and liabilities if the SEC determines that the size or complexity of the banking entity's trading or investment activities, or the risk of evasion of subpart B or subpart C of this part, does not warrant a presumption of compliance under paragraph (g) of this section or treatment as a banking entity with moderate trading assets and liabilities, as applicable. The SEC's exercise of this reservation of authority must be made in accordance with the notice and response procedures in paragraph (i) of this section.

(i) *Notice and response procedures*—(1) *Notice.* The SEC will notify the banking entity in writing of any determination requiring notice under this part and will provide an explanation of the determination.

(2) *Response.* The banking entity may respond to any or all items in the notice described in paragraph (i)(1) of this section. The response should include any matters that the banking entity would have the SEC consider in deciding whether to make the determination. The response must be in writing and delivered to the designated SEC official within 30 days after the date on which the banking entity received the notice. The SEC may shorten the time period when, in the opinion of the SEC, the activities or condition of the banking entity so requires, provided that the banking entity is informed of the time period at the time of notice, or with the consent of the banking entity. In its discretion, the SEC may extend the time period for good cause.

(3) *Waiver.* Failure to respond within 30 days or such other time period as may be specified by the SEC shall constitute a waiver of any objections to the SEC's determination.

(4) *Decision.* The SEC will notify the banking entity of the decision in writing. The notice will include an explanation of the decision.

■ 72. Revise appendix A to part 255 to read as follows:

Appendix A to Part 255—Reporting and Recordkeeping Requirements for Covered Trading Activities

I. Purpose

a. This appendix sets forth reporting and recordkeeping requirements that certain banking entities must satisfy in connection with the restrictions on proprietary trading set forth in subpart B (''proprietary trading restrictions''). Pursuant to § 255.20(d), this appendix applies to a banking entity that, together with its affiliates and subsidiaries, has significant trading assets and liabilities. These entities are required to (i) furnish periodic reports to the SEC regarding a variety of quantitative measurements of their covered trading activities, which vary depending on the scope and size of covered trading activities, and (ii) create and maintain records documenting the preparation and content of these reports. The requirements of this appendix must be incorporated into the banking entity's internal compliance program under § 255.20.

b. The purpose of this appendix is to assist banking entities and the SEC in:

(1) Better understanding and evaluating the scope, type, and profile of the banking entity's covered trading activities;

(2) Monitoring the banking entity's covered trading activities;

(3) Identifying covered trading activities that warrant further review or examination by the banking entity to verify compliance with the proprietary trading restrictions;

(4) Evaluating whether the covered trading activities of trading desks engaged in market making-related activities subject to § 255.4(b) are consistent with the requirements governing permitted market making-related activities;

(5) Evaluating whether the covered trading activities of trading desks that are engaged in permitted trading activity subject to § 255.4, § 255.5, or § 255.6(a) and (b) (*i.e.,* underwriting and market making-related activity, risk-mitigating hedging, or trading in certain government obligations) are consistent with the requirement that such activity not result, directly or indirectly, in a material exposure to high-risk assets or high-risk trading strategies;

(6) Identifying the profile of particular covered trading activities of the banking entity, and the individual trading desks of the banking entity, to help establish the appropriate frequency and scope of examination by SEC of such activities; and

(7) Assessing and addressing the risks associated with the banking entity's covered trading activities.

c. Information that must be furnished pursuant to this appendix is not intended to serve as a dispositive tool for the identification of permissible or impermissible activities.

d. In addition to the quantitative measurements required in this appendix, a banking entity may need to develop and implement other quantitative measurements in order to effectively monitor its covered trading activities for compliance with section 13 of the BHC Act and this part and to have an effective compliance program, as required by § 255.20. The effectiveness of particular quantitative measurements may differ based on the profile of the banking entity's businesses in general and, more specifically, of the particular trading desk, including types of instruments traded, trading activities and strategies, and history and experience (*e.g.,* whether the trading desk is an established, successful market maker or a new entrant to a competitive market). In all cases, banking entities must ensure that they have robust measures in place to identify and monitor the risks taken in their trading activities, to ensure that the activities are within risk tolerances established by the banking entity, and to monitor and examine for compliance with the proprietary trading restrictions in this part.

e. On an ongoing basis, banking entities must carefully monitor, review, and evaluate all furnished quantitative measurements, as well as any others that they choose to utilize in order to maintain compliance with section 13 of the BHC Act and this part. All measurement results that indicate a heightened risk of impermissible proprietary trading, including with respect to otherwise-permitted activities under §§ 255.4 through 255.6(a) and (b), or that result in a material exposure to high-risk assets or high-risk trading strategies, must be escalated within the banking entity for review, further analysis, explanation to SEC, and remediation, where appropriate. The quantitative measurements discussed in this appendix should be helpful to banking entities in identifying and managing the risks related to their covered trading activities.

II. Definitions

The terms used in this appendix have the same meanings as set forth in §§ 255.2 and 255.3. In addition, for purposes of this appendix, the following definitions apply:

Applicability identifies the trading desks for which a banking entity is required to calculate and report a particular quantitative measurement based on the type of covered trading activity conducted by the trading desk.

Calculation period means the period of time for which a particular quantitative measurement must be calculated.

Comprehensive profit and loss means the net profit or loss of a trading desk's material sources of trading revenue over a specific period of time, including, for example, any increase or decrease in the market value of a trading desk's holdings, dividend income, and interest income and expense.

Covered trading activity means trading conducted by a trading desk under § 255.4, § 255.5, § 255.6(a), or § 255.6(b). A banking entity may include in its covered trading activity trading conducted under § 255.3(d), § 255.6(c), § 255.6(d), or § 255.6(e).

Measurement frequency means the frequency with which a particular quantitative metric must be calculated and recorded.

Trading day means a calendar day on which a trading desk is open for trading.

III. Reporting and Recordkeeping

a. Scope of Required Reporting

1. Quantitative measurements. Each banking entity made subject to this appendix by § 255.20 must furnish the following quantitative measurements, as applicable, for each trading desk of the banking entity engaged in covered trading activities and calculate these quantitative measurements in accordance with this appendix:

i. Internal Limits and Usage;

ii. Value-at-Risk;

iii. Comprehensive Profit and Loss Attribution;

iv. Positions; and

v. Transaction Volumes.

2. Trading desk information. Each banking entity made subject to this appendix by § 255.20 must provide certain descriptive information, as further described in this appendix, regarding each trading desk engaged in covered trading activities.

3. Quantitative measurements identifying information. Each banking entity made subject to this appendix by § 255.20 must provide certain identifying and descriptive information, as further described in this appendix, regarding its quantitative measurements.

4. Narrative statement. Each banking entity made subject to this appendix by § 255.20 may provide an optional narrative statement, as further described in this appendix.

5. File identifying information. Each banking entity made subject to this appendix by § 255.20 must provide file identifying information in each submission to the SEC pursuant to this appendix, including the name of the banking entity, the RSSD ID assigned to the top-tier banking entity by the Board, and identification of the reporting period and creation date and time.

b. Trading Desk Information

1. Each banking entity must provide descriptive information regarding each trading desk engaged in covered trading activities, including:

i. Name of the trading desk used internally by the banking entity and a unique identification label for the trading desk;

ii. Identification of each type of covered trading activity in which the trading desk is engaged;

iii. Brief description of the general strategy of the trading desk;

v. A list identifying each Agency receiving the submission of the trading desk;

2. Indication of whether each calendar date is a trading day or not a trading day for the trading desk; and

3. Currency reported and daily currency conversion rate.

c. Quantitative Measurements Identifying Information

Each banking entity must provide the following information regarding the quantitative measurements:

1. An Internal Limits Information Schedule that provides identifying and descriptive information for each limit reported pursuant to the Internal Limits and Usage quantitative measurement, including the name of the limit, a unique identification label for the limit, a description of the limit, the unit of measurement for the limit, the type of limit, and identification of the corresponding risk factor attribution in the particular case that the limit type is a limit on a risk factor sensitivity and profit and loss attribution to the same risk factor is reported; and

2. A Risk Factor Attribution Information Schedule that provides identifying and descriptive information for each risk factor attribution reported pursuant to the Comprehensive Profit and Loss Attribution quantitative measurement, including the name of the risk factor or other factor, a unique identification label for the risk factor or other factor, a description of the risk factor or other factor, and the risk factor or other factor's change unit.

d. Narrative Statement

Each banking entity made subject to this appendix by § 255.20 may submit in a separate electronic document a Narrative Statement to the SEC with any information the banking entity views as relevant for assessing the information reported. The Narrative Statement may include further description of or changes to calculation methods, identification of material events, description of and reasons for changes in the banking entity's trading desk structure or trading desk strategies, and when any such changes occurred.

e. Frequency and Method of Required Calculation and Reporting

A banking entity must calculate any applicable quantitative measurement for each trading day. A banking entity must report the Trading Desk Information, the Quantitative Measurements Identifying Information, and each applicable quantitative measurement electronically to the SEC on the reporting schedule established in § 255.20 unless otherwise requested by the SEC. A banking entity must report the Trading Desk Information, the Quantitative Measurements Identifying Information, and each applicable quantitative measurement to the SEC in accordance with the XML Schema specified and published on the SEC's website.

f. Recordkeeping

A banking entity must, for any quantitative measurement furnished to the SEC pursuant to this appendix and § 255.20(d), create and maintain records documenting the preparation and content of these reports, as well as such information as is necessary to permit the SEC to verify the accuracy of such reports, for a period of five years from the end of the calendar year for which the measurement was taken. A banking entity must retain the Narrative Statement, the Trading Desk Information, and the Quantitative Measurements Identifying Information for a period of five years from the end of the calendar year for which the information was reported to the SEC.

IV. Quantitative Measurements

a. Risk-Management Measurements

1. Internal Limits and Usage

i. *Description:* For purposes of this appendix, Internal Limits are the constraints that define the amount of risk and the positions that a trading desk is permitted to take at a point in time, as defined by the banking entity for a specific trading desk. Usage represents the value of the trading desk's risk or positions that are accounted for by the current activity of the desk. Internal limits and their usage are key compliance and risk management tools used to control and monitor risk taking and include, but are not limited to, the limits set out in §§ 255.4 and 255.5. A trading desk's risk limits, commonly including a limit on ''Value-at-Risk,'' are useful in the broader context of the trading desk's overall activities, particularly for the market making activities under § 255.4(b) and hedging activity under § 255.5. Accordingly, the limits required under §§ 255.4(b)(2)(iii)(C) and 255.5(b)(1)(i)(A) must meet the applicable requirements under §§ 255.4(b)(2)(iii)(C) and 255.5(b)(1)(i)(A) and also must include appropriate metrics for the trading desk limits including, at a minimum, ''Value-at-Risk'' except to the extent the ''Value-at-Risk'' metric is demonstrably ineffective for measuring and monitoring the risks of a trading desk based on the types of positions traded by, and risk exposures of, that desk.

A. A banking entity must provide the following information for each limit reported pursuant to this quantitative measurement: The unique identification label for the limit reported in the Internal Limits Information Schedule, the limit size (distinguishing between an upper and a lower limit), and the value of usage of the limit.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks engaged in covered trading activities.

2. Value-at-Risk

i. *Description:* For purposes of this appendix, Value-at-Risk (''VaR'') is the measurement of the risk of future financial loss in the value of a trading desk's aggregated positions at the ninety-nine percent confidence level over a one-day period, based on current market conditions.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks engaged in covered trading activities.

b. Source-of-Revenue Measurements

1. Comprehensive Profit and Loss Attribution

i. *Description:* For purposes of this appendix, Comprehensive Profit and Loss Attribution is an analysis that attributes the daily fluctuation in the value of a trading desk's positions to various sources. First, the daily profit and loss of the aggregated positions is divided into two categories: (i) Profit and loss attributable to a trading desk's existing positions that were also positions held by the trading desk as of the end of the prior day (''existing positions''); and (ii) profit and loss attributable to new positions resulting from the current day's trading activity (''new positions'').

A. The comprehensive profit and loss associated with existing positions must reflect changes in the value of these positions on the applicable day. The comprehensive profit and loss from existing positions must be further attributed, as applicable, to (i) changes in the specific risk factors and other factors that are monitored and managed as part of the trading desk's overall risk management policies and procedures; and (ii) any other applicable elements, such as cash flows, carry, changes in reserves, and the correction, cancellation, or exercise of a trade.

B. For the attribution of comprehensive profit and loss from existing positions to specific risk factors and other factors, a banking entity must provide the following information for the factors that explain the preponderance of the profit or loss changes due to risk factor changes: The unique identification label for the risk factor or other factor listed in the Risk Factor Attribution Information Schedule, and the profit or loss due to the risk factor or other factor change.

C. The comprehensive profit and loss attributed to new positions must reflect commissions and fee income or expense and market gains or losses associated with transactions executed on the applicable day. New positions include purchases and sales of financial instruments and other assets/liabilities and negotiated amendments to existing positions. The comprehensive profit and loss from new positions may be reported in the aggregate and does not need to be further attributed to specific sources.

D. The portion of comprehensive profit and loss from existing positions that is not attributed to changes in specific risk factors and other factors must be allocated to a residual category. Significant unexplained profit and loss must be escalated for further investigation and analysis.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks engaged in covered trading activities.

c. Positions and Transaction Volumes Measurements

1. Positions

i. *Description:* For purposes of this appendix, Positions is the value of securities and derivatives positions managed by the trading desk. For purposes of the Positions quantitative measurement, do not include in the Positions calculation for ''securities'' those securities that are also ''derivatives,'' as those terms are defined under subpart A; instead, report those securities that are also derivatives as ''derivatives.''[1] A banking entity must separately report the trading desk's market value of long securities positions, short securities positions, derivatives receivables, and derivatives payables.

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks that rely on § 255.4(a) or (b) to conduct underwriting activity or market-making-related activity, respectively.

2. Transaction Volumes

i. *Description:* For purposes of this appendix, Transaction Volumes measures three exclusive categories of covered trading activity conducted by a trading desk. A banking entity is required to report the value and number of security and derivative transactions conducted by the trading desk with: (i) Customers, excluding internal transactions; (ii) non-customers, excluding internal transactions; and (iii) trading desks and other organizational units where the transaction is booked into either the same banking entity or an affiliated banking entity. For securities, value means gross market value. For derivatives, value means gross notional value. For purposes of calculating the Transaction Volumes quantitative measurement, do not include in the Transaction Volumes calculation for ''securities'' those securities that are also ''derivatives,'' as those terms are defined under subpart A; instead, report those securities that are also derivatives as ''derivatives.''[2] Further, for purposes of the Transaction Volumes quantitative measurement, a customer of a trading desk that relies on § 255.4(a) to conduct underwriting activity is a market participant identified in § 255.4(a)(7), and a customer of a trading desk that relies on § 255.4(b) to conduct market making-related activity is a market participant identified in § 255.4(b)(3).

ii. *Calculation Period:* One trading day.

iii. *Measurement Frequency:* Daily.

iv. *Applicability:* All trading desks that rely on § 255.4(a) or (b) to conduct underwriting activity or market-making-related activity, respectively.

Appendix B to Part 255 [Removed]

■ 73. Appendix B to part 255 is removed.

[1] *See* § 255.2(h), (aa). For example, under this part, a security-based swap is both a ''security'' and a ''derivative.'' For purposes of the Positions quantitative measurement, security-based swaps are reported as derivatives rather than securities.

[2] *See* § 255.2(h), (aa).

■ 74. Effective January 1, 2020, until December 31, 2020, appendix Z to part 255 is added to read as follows:

Appendix Z to Part 255—Proprietary Trading and Certain Interests in and Relationships With Covered Funds (Alternative Compliance)

Note: The content of this appendix reproduces the regulation implementing Section 13 of the Bank Holding Company Act as of November 13, 2019.

Subpart A—Authority and Definitions

§ 255.1 Authority, purpose, scope, and relationship to other authorities.

(a) *Authority.* This part is issued by the SEC under section 13 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1851).

(b) *Purpose.* Section 13 of the Bank Holding Company Act establishes prohibitions and restrictions on proprietary trading and investments in or relationships with covered funds by certain banking entities, including registered broker-dealers, registered investment advisers, and registered security-based swap dealers, among others identified in section 2(12)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (12 U.S.C. 5301(12)(B)). This part implements section 13 of the Bank Holding Company Act by defining terms used in the statute and related terms, establishing prohibitions and restrictions on proprietary trading and investments in or relationships with covered funds, and explaining the statute's requirements.

(c) *Scope.* This part implements section 13 of the Bank Holding Company Act with respect to banking entities for which the SEC is the primary financial regulatory agency, as defined in this part, but does not include such entities to the extent they are not within the definition of banking entity in § 255.2(c).

(d) *Relationship to other authorities.* Except as otherwise provided under section 13 of the Bank Holding Company Act, and notwithstanding any other provision of law, the prohibitions and restrictions under section 13 of Bank Holding Company Act shall apply to the activities and investments of a banking entity identified in paragraph (c) of this section, even if such activities and investments are authorized for the banking entity under other applicable provisions of law.

(e) *Preservation of authority.* Nothing in this part limits in any way the authority of the SEC to impose on a banking entity identified in paragraph (c) of this section additional requirements or restrictions with respect to any activity, investment, or relationship covered under section 13 of the Bank Holding Company Act or this part, or additional penalties for violation of this part provided under any other applicable provision of law.

§ 255.2 Definitions.

Unless otherwise specified, for purposes of this part:

(a) *Affiliate* has the same meaning as in section 2(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(k)).

(b) *Bank holding company* has the same meaning as in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).

(c) *Banking entity.* (1) Except as provided in paragraph (c)(2) of this section, *banking entity* means:

(i) Any insured depository institution;

(ii) Any company that controls an insured depository institution;

(iii) Any company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(iv) Any affiliate or subsidiary of any entity described in paragraphs (c)(1)(i), (ii), or (iii) of this section.

(2) Banking entity does not include:

(i) A covered fund that is not itself a banking entity under paragraphs (c)(1)(i), (ii), or (iii) of this section;

(ii) A portfolio company held under the authority contained in section 4(k)(4)(H) or (I) of the BHC Act (12 U.S.C. 1843(k)(4)(H), (I)), or any 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), so long as the portfolio company or portfolio concern is not itself a banking entity under paragraphs (c)(1)(i), (ii), or (iii) of this section; or

(iii) The FDIC acting in its corporate capacity or as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(d) *Board* means the Board of Governors of the Federal Reserve System.

(e) *CFTC* means the Commodity Futures Trading Commission.

(f) *Dealer* has the same meaning as in section 3(a)(5) of the Exchange Act (15 U.S.C. 78c(a)(5)).

(g) *Depository institution* has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(h) *Derivative.* (1) Except as provided in paragraph (h)(2) of this section, *derivative* means:

(i) Any swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68));

(ii) Any purchase or sale of a commodity, that is not an excluded commodity, for deferred shipment or delivery that is intended to be physically settled;

(iii) Any foreign exchange forward (as that term is defined in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)) or foreign exchange swap (as that term is defined in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25));

(iv) Any agreement, contract, or transaction in foreign currency described in section 2(c)(2)(C)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(C)(i));

(v) Any agreement, contract, or transaction in a commodity other than foreign currency described in section 2(c)(2)(D)(i) of the Commodity Exchange Act (7 U.S.C. 2(c)(2)(D)(i)); and

(vi) Any transaction authorized under section 19 of the Commodity Exchange Act (7 U.S.C. 23(a) or (b));

(2) A derivative does not include:

(i) Any consumer, commercial, or other agreement, contract, or transaction that the CFTC and the SEC have further defined by joint regulation, interpretation, guidance, or other action as not within the definition of swap, as that term is defined in section 1a(47) of the Commodity Exchange Act (7 U.S.C. 1a(47)), or security-based swap, as that term is defined in section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)); or

(ii) Any identified banking product, as defined in section 402(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b)), that is subject to section 403(a) of that Act (7 U.S.C. 27a(a)).

(i) *Employee* includes a member of the immediate family of the employee.

(j) *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(k) *Excluded commodity* has the same meaning as in section 1a(19) of the Commodity Exchange Act (7 U.S.C. 1a(19)).

(l) *FDIC* means the Federal Deposit Insurance Corporation.

(m) *Federal banking agencies* means the Board, the Office of the Comptroller of the Currency, and the FDIC.

(n) *Foreign banking organization* has the same meaning as in section 211.21(o) of the Board's Regulation K (12 CFR 211.21(o)), but does not include a foreign bank, as defined in section 1(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(7)), that is organized under the laws of the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, or the Commonwealth of the Northern Mariana Islands.

(o) *Foreign insurance regulator* means the insurance commissioner, or a similar official or agency, of any country other than the United States that is engaged in the supervision of insurance companies under foreign insurance law.

(p) *General account* means all of the assets of an insurance company except those allocated to one or more separate accounts.

(q) *Insurance company* means a company that is organized as an insurance company, primarily and predominantly engaged in writing insurance or reinsuring risks underwritten by insurance companies, subject to supervision as such by a state insurance regulator or a foreign insurance regulator, and not operated for the purpose of evading the provisions of section 13 of the BHC Act (12 U.S.C. 1851).

(r) *Insured depository institution,* unless otherwise indicated, has the same meaning as in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)), but does not include:

(1) An insured depository institution that is described in section 2(c)(2)(D) of the BHC Act (12 U.S.C. 1841(c)(2)(D)); or

(2) An insured depository institution if it has, and if every company that controls it has, total consolidated assets of $10 billion or less and total trading assets and trading liabilities, on a consolidated basis, that are 5 percent or less of total consolidated assets.

(s) *Loan* means any loan, lease, extension of credit, or secured or unsecured receivable that is not a security or derivative.

(t) *Primary financial regulatory agency* has the same meaning as in section 2(12) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5301(12)).

(u) *Purchase* includes any contract to buy, purchase, or otherwise acquire. For security futures products, purchase includes any contract, agreement, or transaction for future delivery. With respect to a commodity future, purchase includes any contract, agreement, or transaction for future delivery. With respect to a derivative, purchase includes the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(v) *Qualifying foreign banking organization* means a foreign banking organization that qualifies as such under section 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c), or (e)).

(w) *SEC* means the Securities and Exchange Commission.

(x) *Sale* and *sell* each include any contract to sell or otherwise dispose of. For security futures products, such terms include any contract, agreement, or transaction for future delivery. With respect to a commodity future, such terms include any contract, agreement, or transaction for future delivery. With respect to a derivative, such terms include the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a derivative, as the context may require.

(y) *Security* has the meaning specified in section 3(a)(10) of the Exchange Act (15 U.S.C. 78c(a)(10)).

(z) *Security-based swap dealer* has the same meaning as in section 3(a)(71) of the Exchange Act (15 U.S.C. 78c(a)(71)).

(aa) *Security future* has the meaning specified in section 3(a)(55) of the Exchange Act (15 U.S.C. 78c(a)(55)).

(bb) *Separate account* means an account established and maintained by an insurance company in connection with one or more insurance contracts to hold assets that are legally segregated from the insurance company's other assets, under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(cc) *State* means any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

(dd) *Subsidiary* has the same meaning as in section 2(d) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(d)).

(ee) *State insurance regulator* means the insurance commissioner, or a similar official or agency, of a State that is engaged in the supervision of insurance companies under State insurance law.

(ff) *Swap dealer* has the same meaning as in section 1(a)(49) of the Commodity Exchange Act (7 U.S.C. 1a(49)).

Subpart B—Proprietary Trading

§ 255.3 Prohibition on proprietary trading.

(a) *Prohibition.* Except as otherwise provided in this subpart, a banking entity may not engage in proprietary trading. *Proprietary trading* means engaging as principal for the trading account of the banking entity in any purchase or sale of one or more financial instruments.

(b) *Definition of trading account.* (1) Trading account means any account that is used by a banking entity to:

(i) Purchase or sell one or more financial instruments principally for the purpose of:

(A) Short-term resale;

(B) Benefitting from actual or expected short-term price movements;

(C) Realizing short-term arbitrage profits; or

(D) Hedging one or more positions resulting from the purchases or sales of financial instruments described in paragraphs (b)(1)(i)(A), (B), or (C) of this section;

(ii) Purchase or sell one or more financial instruments that are both market risk capital rule covered positions and trading positions (or hedges of other market risk capital rule covered positions), if the banking entity, or any affiliate of the banking entity, is an insured depository institution, bank holding company, or savings and loan holding company, and calculates risk-based capital ratios under the market risk capital rule; or

(iii) Purchase or sell one or more financial instruments for any purpose, if the banking entity:

(A) Is licensed or registered, or is required to be licensed or registered, to engage in the business of a dealer, swap dealer, or security-based swap dealer, to the extent the instrument is purchased or sold in connection with the activities that require the banking entity to be licensed or registered as such; or

(B) Is engaged in the business of a dealer, swap dealer, or security-based swap dealer outside of the United States, to the extent the instrument is purchased or sold in connection with the activities of such business.

(2) *Rebuttable presumption for certain purchases and sales.* The purchase (or sale) of a financial instrument by a banking entity shall be presumed to be for the trading account of the banking entity under paragraph (b)(1)(i) of this section if the banking entity holds the financial instrument for fewer than sixty days or substantially transfers the risk of the financial instrument within sixty days of the purchase (or sale), unless the banking entity can demonstrate, based on all relevant facts and circumstances, that the banking entity did not purchase (or sell) the financial instrument principally for any of the purposes described in paragraph (b)(1)(i) of this section.

(c) *Financial instrument.* (1) *Financial instrument* means:

(i) A security, including an option on a security;

(ii) A derivative, including an option on a derivative; or

(iii) A contract of sale of a commodity for future delivery, or option on a contract of sale of a commodity for future delivery.

(2) A financial instrument does not include:

(i) A loan;

(ii) A commodity that is not:

(A) An excluded commodity (other than foreign exchange or currency);

(B) A derivative;

(C) A contract of sale of a commodity for future delivery; or

(D) An option on a contract of sale of a commodity for future delivery; or

(iii) Foreign exchange or currency.

(d) *Proprietary trading.* Proprietary trading does not include:

(1) Any purchase or sale of one or more financial instruments by a banking entity that arises under a repurchase or reverse repurchase agreement pursuant to which the banking entity has simultaneously agreed, in writing, to both purchase and sell a stated asset, at stated prices, and on stated dates or on demand with the same counterparty;

(2) Any purchase or sale of one or more financial instruments by a banking entity that arises under a transaction in which the banking entity lends or borrows a security temporarily to or from another party pursuant to a written securities lending agreement under which the lender retains the economic interests of an owner of such security, and has the right to terminate the transaction and to recall the loaned security on terms agreed by the parties;

(3) Any purchase or sale of a security by a banking entity for the purpose of liquidity management in accordance with a documented liquidity management plan of the banking entity that:

(i) Specifically contemplates and authorizes the particular securities to be used for liquidity management purposes, the amount, types, and risks of these securities that are consistent with liquidity management, and the liquidity circumstances in which the particular securities may or must be used;

(ii) Requires that any purchase or sale of securities contemplated and authorized by the plan be principally for the purpose of managing the liquidity of the banking entity, and not for the purpose of short-term resale, benefitting from actual or expected short-term price movements, realizing short-term arbitrage profits, or hedging a position taken for such short-term purposes;

(iii) Requires that any securities purchased or sold for liquidity management purposes be highly liquid and limited to securities the market, credit, and other risks of which the banking entity does not reasonably expect to give rise to appreciable profits or losses as a result of short-term price movements;

(iv) Limits any securities purchased or sold for liquidity management purposes, together with any other instruments purchased or sold for such purposes, to an amount that is consistent with the banking entity's near-term funding needs, including deviations from normal operations of the banking entity or any affiliate thereof, as estimated and documented pursuant to methods specified in the plan;

(v) Includes written policies and procedures, internal controls, analysis, and independent testing to ensure that the purchase and sale of securities that are not permitted under §§ 255.6(a) or (b) of this subpart are for the purpose of liquidity management and in accordance with the liquidity management plan described in paragraph (d)(3) of this section; and

(vi) Is consistent with the SEC's supervisory requirements, guidance, and expectations regarding liquidity management;

(4) Any purchase or sale of one or more financial instruments by a banking entity that is a derivatives clearing organization or a clearing agency in connection with clearing financial instruments;

(5) Any excluded clearing activities by a banking entity that is a member of a clearing agency, a member of a derivatives clearing organization, or a member of a designated financial market utility;

(6) Any purchase or sale of one or more financial instruments by a banking entity, so long as:

(i) The purchase (or sale) satisfies an existing delivery obligation of the banking entity or its customers, including to prevent or close out a failure to deliver, in connection with delivery, clearing, or settlement activity; or

(ii) The purchase (or sale) satisfies an obligation of the banking entity in connection with a judicial, administrative, self-regulatory organization, or arbitration proceeding;

(7) Any purchase or sale of one or more financial instruments by a banking entity that is acting solely as agent, broker, or custodian;

(8) Any purchase or sale of one or more financial instruments by a banking entity through a deferred compensation, stock-bonus, profit-sharing, or pension plan of the banking entity that is established and administered in accordance with the law of the United States or a foreign sovereign, if the purchase or sale is made directly or indirectly by the banking entity as trustee for the benefit of persons who are or were employees of the banking entity; or

(9) Any purchase or sale of one or more financial instruments by a banking entity in the ordinary course of collecting a debt previously contracted in good faith, provided that the banking entity divests the financial instrument as soon as practicable, and in no event may the banking entity retain such instrument for longer than such period permitted by the SEC.

(e) *Definition of other terms related to proprietary trading.* For purposes of this subpart:

(1) *Anonymous* means that each party to a purchase or sale is unaware of the identity of the other party(ies) to the purchase or sale.

(2) *Clearing agency* has the same meaning as in section 3(a)(23) of the Exchange Act (15 U.S.C. 78c(a)(23)).

(3) *Commodity* has the same meaning as in section 1a(9) of the Commodity Exchange Act (7 U.S.C. 1a(9)), except that a commodity does not include any security;

(4) *Contract of sale of a commodity for future delivery* means a contract of sale (as that term is defined in section 1a(13) of the Commodity Exchange Act (7 U.S.C. 1a(13)) for future delivery (as that term is defined in section 1a(27) of the Commodity Exchange Act (7 U.S.C. 1a(27))).

(5) *Derivatives clearing organization* means:

(i) A derivatives clearing organization registered under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1);

(ii) A derivatives clearing organization that, pursuant to CFTC regulation, is exempt from the registration requirements under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1); or

(iii) A foreign derivatives clearing organization that, pursuant to CFTC regulation, is permitted to clear for a foreign board of trade that is registered with the CFTC.

(6) *Exchange,* unless the context otherwise requires, means any designated contract market, swap execution facility, or foreign board of trade registered with the CFTC, or, for purposes of securities or security-based swaps, an exchange, as defined under section 3(a)(1) of the Exchange Act (15 U.S.C. 78c(a)(1)), or security-based swap execution facility, as defined under section 3(a)(77) of the Exchange Act (15 U.S.C. 78c(a)(77)).

(7) *Excluded clearing activities* means:

(i) With respect to customer transactions cleared on a derivatives clearing organization, a clearing agency, or a designated financial market utility, any purchase or sale necessary to correct trading errors made by or on behalf of a customer provided that such purchase or sale is conducted in accordance with, for transactions cleared on a derivatives clearing organization, the Commodity Exchange Act, CFTC regulations, and the rules or procedures of the derivatives clearing organization, or, for transactions cleared on a clearing agency, the rules or procedures of the clearing agency, or, for transactions cleared on a designated financial market utility that is neither a derivatives clearing organization nor a clearing agency, the rules or procedures of the designated financial market utility;

(ii) Any purchase or sale in connection with and related to the management of a default or threatened imminent default of a customer provided that such purchase or sale is conducted in accordance with, for transactions cleared on a derivatives clearing organization, the Commodity Exchange Act, CFTC regulations, and the rules or procedures of the derivatives clearing organization, or, for transactions cleared on a clearing agency, the rules or procedures of the clearing agency, or, for transactions cleared on a designated financial market utility that is neither a derivatives clearing organization nor a clearing agency, the rules or procedures of the designated financial market utility;

(iii) Any purchase or sale in connection with and related to the management of a default or threatened imminent default of a member of a clearing agency, a member of a derivatives clearing organization, or a member of a designated financial market utility;

(iv) Any purchase or sale in connection with and related to the management of the default or threatened default of a clearing agency, a derivatives clearing organization, or a designated financial market utility; and

(v) Any purchase or sale that is required by the rules or procedures of a clearing agency, a derivatives clearing organization, or a designated financial market utility to mitigate the risk to the clearing agency, derivatives clearing organization, or designated financial market utility that would result from the clearing by a member of security-based swaps that reference the member or an affiliate of the member.

(8) *Designated financial market utility* has the same meaning as in section 803(4) of the Dodd-Frank Act (12 U.S.C. 5462(4)).

(9) *Issuer* has the same meaning as in section 2(a)(4) of the Securities Act of 1933 (15 U.S.C. 77b(a)(4)).

(10) *Market risk capital rule covered position and trading position* means a financial instrument that is both a covered position and a trading position, as those terms are respectively defined:

(i) In the case of a banking entity that is a bank holding company, savings and loan holding company, or insured depository institution, under the market risk capital rule that is applicable to the banking entity; and

(ii) In the case of a banking entity that is affiliated with a bank holding company or savings and loan holding company, other than a banking entity to which a market risk capital rule is applicable, under the market risk capital rule that is applicable to the affiliated bank holding company or savings and loan holding company.

(11) *Market risk capital rule* means the market risk capital rule that is contained in subpart F of 12 CFR part 3, 12 CFR parts 208 and 225, or 12 CFR part 324, as applicable.

(12) *Municipal security* means a security that is a direct obligation of or issued by, or an obligation guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, or any municipal corporate instrumentality of one or more States or political subdivisions thereof.

(13) *Trading desk* means the smallest discrete unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof.

§ 255.4 Permitted underwriting and market making-related activities.

(a) *Underwriting activities*—(1) *Permitted underwriting activities.* The prohibition contained in § 255.3(a) does not apply to a banking entity's underwriting activities conducted in accordance with this paragraph (a).

(2) *Requirements.* The underwriting activities of a banking entity are permitted under paragraph (a)(1) of this section only if:

(i) The banking entity is acting as an underwriter for a distribution of securities and the trading desk's underwriting position is related to such distribution;

(ii) The amount and type of the securities in the trading desk's underwriting position are designed not to exceed the reasonably expected near term demands of clients, customers, or counterparties, and reasonable efforts are made to sell or otherwise reduce the underwriting position within a reasonable period, taking into account the liquidity, maturity, and depth of the market for the relevant type of security;

(iii) The banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of paragraph (a) of this section, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The products, instruments or exposures each trading desk may purchase, sell, or manage as part of its underwriting activities;

(B) Limits for each trading desk, based on the nature and amount of the trading desk's underwriting activities, including the reasonably expected near term demands of clients, customers, or counterparties, on the:

(*1*) Amount, types, and risk of its underwriting position;

(*2*) Level of exposures to relevant risk factors arising from its underwriting position; and

(*3*) Period of time a security may be held;

(C) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits; and

(D) Authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis of the basis for any temporary or permanent increase to a trading desk's limit(s), and independent review of such demonstrable analysis and approval;

(iv) The compensation arrangements of persons performing the activities described in this paragraph (a) are designed not to reward or incentivize prohibited proprietary trading; and

(v) The banking entity is licensed or registered to engage in the activity described in this paragraph (a) in accordance with applicable law.

(3) *Definition of distribution.* For purposes of this paragraph (a), a *distribution* of securities means:

(i) An offering of securities, whether or not subject to registration under the Securities Act of 1933, that is distinguished from ordinary trading transactions by the presence of special selling efforts and selling methods; or

(ii) An offering of securities made pursuant to an effective registration statement under the Securities Act of 1933.

(4) *Definition of underwriter.* For purposes of this paragraph (a), *underwriter* means:

(i) A person who has agreed with an issuer or selling security holder to:

(A) Purchase securities from the issuer or selling security holder for distribution;

(B) Engage in a distribution of securities for or on behalf of the issuer or selling security holder; or

(C) Manage a distribution of securities for or on behalf of the issuer or selling security holder; or

(ii) A person who has agreed to participate or is participating in a distribution of such securities for or on behalf of the issuer or selling security holder.

(5) *Definition of selling security holder.* For purposes of this paragraph (a), *selling security holder* means any person, other than an issuer, on whose behalf a distribution is made.

(6) *Definition of underwriting position.* For purposes of this paragraph (a), *underwriting position* means the long or short positions in one or more securities held by a banking entity or its affiliate, and managed by a particular trading desk, in connection with a particular distribution of securities for which such banking entity or affiliate is acting as an underwriter.

(7) *Definition of client, customer, and counterparty.* For purposes of this paragraph (a), the terms *client, customer, and counterparty,* on a collective or individual basis, refer to market participants that may transact with the banking entity in connection with a particular distribution for which the banking entity is acting as underwriter.

(b) *Market making-related activities*—(1) *Permitted market making-related activities.* The prohibition contained in § 255.3(a) does not apply to a banking entity's market making-related activities conducted in accordance with this paragraph (b).

(2) *Requirements.* The market making-related activities of a banking entity are permitted under paragraph (b)(1) of this section only if:

(i) The trading desk that establishes and manages the financial exposure routinely stands ready to purchase and sell one or more types of financial instruments related to its financial exposure and is willing and available to quote, purchase and sell, or otherwise enter into long and short positions in those types of financial instruments for its own account, in commercially reasonable amounts and throughout market cycles on a basis appropriate for the liquidity, maturity, and depth of the market for the relevant types of financial instruments;

(ii) The amount, types, and risks of the financial instruments in the trading desk's market-maker inventory are designed not to exceed, on an ongoing basis, the reasonably expected near term demands of clients, customers, or counterparties, based on:

(A) The liquidity, maturity, and depth of the market for the relevant types of financial instrument(s); and

(B) Demonstrable analysis of historical customer demand, current inventory of financial instruments, and market and other factors regarding the amount, types, and risks, of or associated with financial instruments in which the trading desk makes a market, including through block trades;

(iii) The banking entity has established and implements, maintains, and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of paragraph (b) of this section, including reasonably designed written policies and procedures, internal controls, analysis and independent testing identifying and addressing:

(A) The financial instruments each trading desk stands ready to purchase and sell in accordance with paragraph (b)(2)(i) of this section;

(B) The actions the trading desk will take to demonstrably reduce or otherwise significantly mitigate promptly the risks of its financial exposure consistent with the limits required under paragraph (b)(2)(iii)(C) of this section; the products, instruments, and exposures each trading desk may use for risk management purposes; the techniques and strategies each trading desk may use to manage the risks of its market making-related activities and inventory; and the process, strategies, and personnel responsible for ensuring that the actions taken by the trading desk to mitigate these risks are and continue to be effective;

(C) Limits for each trading desk, based on the nature and amount of the trading desk's market making-related activities, that address the factors prescribed by paragraph (b)(2)(ii) of this section, on:

(*1*) The amount, types, and risks of its market-maker inventory;

(*2*) The amount, types, and risks of the products, instruments, and exposures the trading desk may use for risk management purposes;

(*3*) The level of exposures to relevant risk factors arising from its financial exposure; and

(*4*) The period of time a financial instrument may be held;

(D) Internal controls and ongoing monitoring and analysis of each trading desk's compliance with its limits; and

(E) Authorization procedures, including escalation procedures that require review and approval of any trade that would exceed a trading desk's limit(s), demonstrable analysis that the basis for any temporary or permanent increase to a trading desk's limit(s) is consistent with the requirements of this paragraph (b), and independent review of such demonstrable analysis and approval;

(iv) To the extent that any limit identified pursuant to paragraph (b)(2)(iii)(C) of this section is exceeded, the trading desk takes action to bring the trading desk into compliance with the limits as promptly as possible after the limit is exceeded;

(v) The compensation arrangements of persons performing the activities described in this paragraph (b) are designed not to reward or incentivize prohibited proprietary trading; and

(vi) The banking entity is licensed or registered to engage in activity described in this paragraph (b) in accordance with applicable law.

(3) *Definition of client, customer, and counterparty.* For purposes of paragraph (b) of this section, the terms *client, customer, and counterparty,* on a collective or individual basis refer to market participants that make use of the banking entity's market making-related services by obtaining such services, responding to quotations, or entering into a continuing relationship with respect to such services, provided that:

(i) A trading desk or other organizational unit of another banking entity is not a client, customer, or counterparty of the trading desk if that other entity has trading assets and liabilities of $50 billion or more as measured in accordance with § 255.20(d)(1) of subpart D, unless:

(A) The trading desk documents how and why a particular trading desk or other organizational unit of the entity should be treated as a client, customer, or counterparty of the trading desk for purposes of paragraph (b)(2) of this section; or

(B) The purchase or sale by the trading desk is conducted anonymously on an exchange or similar trading facility that permits trading on behalf of a broad range of market participants.

(4) *Definition of financial exposure.* For purposes of this paragraph (b), *financial exposure* means the aggregate risks of one or more financial instruments and any associated loans, commodities, or foreign exchange or currency, held by a banking entity or its affiliate and managed by a particular trading desk as part of the trading desk's market making-related activities.

(5) *Definition of market-maker inventory.* For the purposes of this paragraph (b), *market-maker inventory* means all of the positions in the financial instruments for which the trading desk stands ready to make a market in accordance with paragraph (b)(2)(i) of this section, that are managed by the trading desk, including the trading desk's open positions or exposures arising from open transactions.

§ 255.5 Permitted risk-mitigating hedging activities.

(a) *Permitted risk-mitigating hedging activities.* The prohibition contained in § 255.3(a) does not apply to the risk-mitigating hedging activities of a banking entity in connection with and related to individual or aggregated positions, contracts, or other holdings of the banking entity and designed to reduce the specific risks to the banking entity in connection with and related to such positions, contracts, or other holdings.

(b) *Requirements.* The risk-mitigating hedging activities of a banking entity are permitted under paragraph (a) of this section only if:

(1) The banking entity has established and implements, maintains and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(i) Reasonably designed written policies and procedures regarding the positions, techniques and strategies that may be used for hedging, including documentation indicating what positions, contracts or other holdings a particular trading desk may use in its risk-mitigating hedging activities, as well as position and aging limits with respect to such positions, contracts or other holdings;

(ii) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(iii) The conduct of analysis, including correlation analysis, and independent testing designed to ensure that the positions, techniques and strategies that may be used for hedging may reasonably be expected to demonstrably reduce or otherwise significantly mitigate the specific, identifiable risk(s) being hedged, and such correlation analysis demonstrates that the hedging activity demonstrably reduces or otherwise significantly mitigates the specific, identifiable risk(s) being hedged;

(2) The risk-mitigating hedging activity:

(i) Is conducted in accordance with the written policies, procedures, and internal controls required under this section;

(ii) At the inception of the hedging activity, including, without limitation, any adjustments to the hedging activity, is designed to reduce or otherwise significantly mitigate and demonstrably reduces or otherwise significantly mitigates one or more specific, identifiable risks, including market risk, counterparty or other credit risk, currency or foreign exchange risk, interest rate risk, commodity price risk, basis risk, or similar risks, arising in connection with and related to identified positions, contracts, or other holdings of the banking entity, based upon the facts and circumstances of the identified underlying and hedging positions, contracts or other holdings and the risks and liquidity thereof;

(iii) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section;

(iv) Is subject to continuing review, monitoring and management by the banking entity that:

(A) Is consistent with the written hedging policies and procedures required under paragraph (b)(1) of this section;

(B) Is designed to reduce or otherwise significantly mitigate and demonstrably reduces or otherwise significantly mitigates the specific, identifiable risks that develop over time from the risk-mitigating hedging activities undertaken under this section and the underlying positions, contracts, and other holdings of the banking entity, based upon the facts and circumstances of the underlying and hedging positions, contracts and other holdings of the banking entity and the risks and liquidity thereof; and

(C) Requires ongoing recalibration of the hedging activity by the banking entity to ensure that the hedging activity satisfies the requirements set out in paragraph (b)(2) of this section and is not prohibited proprietary trading; and

(3) The compensation arrangements of persons performing risk-mitigating hedging activities are designed not to reward or incentivize prohibited proprietary trading.

(c) *Documentation requirement*—(1) A banking entity must comply with the requirements of paragraphs (c)(2) and (3) of this section with respect to any purchase or sale of financial instruments made in reliance on this section for risk-mitigating hedging purposes that is:

(i) Not established by the specific trading desk establishing or responsible for the underlying positions, contracts, or other holdings the risks of which the hedging activity is designed to reduce;

(ii) Established by the specific trading desk establishing or responsible for the underlying positions, contracts, or other holdings the risks of which the purchases or sales are designed to reduce, but that is effected through a financial instrument, exposure, technique, or strategy that is not specifically identified in the trading desk's written policies and procedures established under paragraph (b)(1) of this section or under § 255.4(b)(2)(iii)(B) of this subpart as a product, instrument, exposure, technique, or strategy such trading desk may use for hedging; or

(iii) Established to hedge aggregated positions across two or more trading desks.

(2) In connection with any purchase or sale identified in paragraph (c)(1) of this section, a banking entity must, at a minimum, and contemporaneously with the purchase or sale, document:

(i) The specific, identifiable risk(s) of the identified positions, contracts, or other holdings of the banking entity that the purchase or sale is designed to reduce;

(ii) The specific risk-mitigating strategy that the purchase or sale is designed to fulfill; and

(iii) The trading desk or other business unit that is establishing and responsible for the hedge.

(3) A banking entity must create and retain records sufficient to demonstrate compliance with the requirements of this paragraph (c) for a period that is no less than five years in a form that allows the banking entity to promptly produce such records to the SEC on request, or such longer period as required under other law or this part.

§ 255.6 Other permitted proprietary trading activities.

(a) *Permitted trading in domestic government obligations.* The prohibition contained in § 255.3(a) does not apply to the purchase or sale by a banking entity of a financial instrument that is:

(1) An obligation of, or issued or guaranteed by, the United States;

(2) An obligation, participation, or other instrument of, or issued or guaranteed by, an agency of the United States, the Government National Mortgage Association, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, a Federal Home Loan Bank, the Federal Agricultural Mortgage Corporation or a Farm Credit System institution chartered under and subject to the provisions of the Farm Credit Act of 1971 (12 U.S.C. 2001 *et seq.*);

(3) An obligation of any State or any political subdivision thereof, including any municipal security; or

(4) An obligation of the FDIC, or any entity formed by or on behalf of the FDIC for purpose of facilitating the disposal of assets acquired or held by the FDIC in its corporate capacity or as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(b) *Permitted trading in foreign government obligations*—(1) *Affiliates of foreign banking entities in the United States.* The prohibition contained in § 255.3(a) does not apply to the purchase or sale of a financial instrument that is an obligation of, or issued or guaranteed by, a foreign sovereign (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of such foreign sovereign, by a banking entity, so long as:

(i) The banking entity is organized under or is directly or indirectly controlled by a banking entity that is organized under the laws of a foreign sovereign and is not directly or indirectly controlled by a top-tier banking entity that is organized under the laws of the United States;

(ii) The financial instrument is an obligation of, or issued or guaranteed by, the foreign sovereign under the laws of which the foreign banking entity referred to in paragraph (b)(1)(i) of this section is organized (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of that foreign sovereign; and

(iii) The purchase or sale as principal is not made by an insured depository institution.

(2) *Foreign affiliates of a U.S. banking entity.* The prohibition contained in § 255.3(a) does not apply to the purchase or sale of a financial instrument that is an obligation of, or issued or guaranteed by, a foreign sovereign (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of that foreign sovereign, by a foreign entity that is

owned or controlled by a banking entity organized or established under the laws of the United States or any State, so long as:

(i) The foreign entity is a foreign bank, as defined in section 211.2(j) of the Board's Regulation K (12 CFR 211.2(j)), or is regulated by the foreign sovereign as a securities dealer;

(ii) The financial instrument is an obligation of, or issued or guaranteed by, the foreign sovereign under the laws of which the foreign entity is organized (including any multinational central bank of which the foreign sovereign is a member), or any agency or political subdivision of that foreign sovereign; and

(iii) The financial instrument is owned by the foreign entity and is not financed by an affiliate that is located in the United States or organized under the laws of the United States or of any State.

(c) *Permitted trading on behalf of customers*—(1) *Fiduciary transactions.* The prohibition contained in § 255.3(a) does not apply to the purchase or sale of financial instruments by a banking entity acting as trustee or in a similar fiduciary capacity, so long as:

(i) The transaction is conducted for the account of, or on behalf of, a customer; and

(ii) The banking entity does not have or retain beneficial ownership of the financial instruments.

(2) *Riskless principal transactions.* The prohibition contained in § 255.3(a) does not apply to the purchase or sale of financial instruments by a banking entity acting as riskless principal in a transaction in which the banking entity, after receiving an order to purchase (or sell) a financial instrument from a customer, purchases (or sells) the financial instrument for its own account to offset a contemporaneous sale to (or purchase from) the customer.

(d) *Permitted trading by a regulated insurance company.* The prohibition contained in § 255.3(a) does not apply to the purchase or sale of financial instruments by a banking entity that is an insurance company or an affiliate of an insurance company if:

(1) The insurance company or its affiliate purchases or sells the financial instruments solely for:

(i) The general account of the insurance company; or

(ii) A separate account established by the insurance company;

(2) The purchase or sale is conducted in compliance with, and subject to, the insurance company investment laws, regulations, and written guidance of the State or jurisdiction in which such insurance company is domiciled; and

(3) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and foreign jurisdictions, as appropriate, have not jointly determined, after notice and comment, that a particular law, regulation, or written guidance described in paragraph (d)(2) of this section is insufficient to protect the safety and soundness of the covered banking entity, or the financial stability of the United States.

(e) *Permitted trading activities of foreign banking entities.* (1) The prohibition contained in § 255.3(a) does not apply to the purchase or sale of financial instruments by a banking entity if:

(i) The banking entity is not organized or directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of any State;

(ii) The purchase or sale by the banking entity is made pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act; and

(iii) The purchase or sale meets the requirements of paragraph (e)(3) of this section.

(2) A purchase or sale of financial instruments by a banking entity is made pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act for purposes of paragraph (e)(1)(ii) of this section only if:

(i) The purchase or sale is conducted in accordance with the requirements of paragraph (e) of this section; and

(ii)(A) With respect to a banking entity that is a foreign banking organization, the banking entity meets the qualifying foreign banking organization requirements of section 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c) or (e)), as applicable; or

(B) With respect to a banking entity that is not a foreign banking organization, the banking entity is not organized under the laws of the United States or of any State and the banking entity, on a fully-consolidated basis, meets at least two of the following requirements:

(*1*) Total assets of the banking entity held outside of the United States exceed total assets of the banking entity held in the United States;

(*2*) Total revenues derived from the business of the banking entity outside of the United States exceed total revenues derived from the business of the banking entity in the United States; or

(*3*) Total net income derived from the business of the banking entity outside of the United States exceeds total net income derived from the business of the banking entity in the United States.

(3) A purchase or sale by a banking entity is permitted for purposes of this paragraph (e) if:

(i) The banking entity engaging as principal in the purchase or sale (including any personnel of the banking entity or its affiliate that arrange, negotiate or execute such purchase or sale) is not located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to purchase or sell as principal is not located in the United States or organized under the laws of the United States or of any State;

(iii) The purchase or sale, including any transaction arising from risk-mitigating hedging related to the instruments purchased or sold, is not accounted for as principal directly or on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State;

(iv) No financing for the banking entity's purchases or sales is provided, directly or indirectly, by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State; and

(v) The purchase or sale is not conducted with or through any U.S. entity, other than:

(A) A purchase or sale with the foreign operations of a U.S. entity if no personnel of such U.S. entity that are located in the United States are involved in the arrangement, negotiation, or execution of such purchase or sale;

(B) A purchase or sale with an unaffiliated market intermediary acting as principal, provided the purchase or sale is promptly cleared and settled through a clearing agency or derivatives clearing organization acting as a central counterparty; or

(C) A purchase or sale through an unaffiliated market intermediary acting as agent, provided the purchase or sale is conducted anonymously on an exchange or similar trading facility and is promptly cleared and settled through a clearing agency or derivatives clearing organization acting as a central counterparty.

(4) For purposes of this paragraph (e), a U.S. entity is any entity that is, or is controlled by, or is acting on behalf of, or at the direction of, any other entity that is, located in the United States or organized under the laws of the United States or of any State.

(5) For purposes of this paragraph (e), a U.S. branch, agency, or subsidiary of

a foreign banking entity is considered to be located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(6) For purposes of this paragraph (e), *unaffiliated market intermediary* means an unaffiliated entity, acting as an intermediary, that is:

(i) A broker or dealer registered with the SEC under section 15 of the Exchange Act or exempt from registration or excluded from regulation as such;

(ii) A swap dealer registered with the CFTC under section 4s of the Commodity Exchange Act or exempt from registration or excluded from regulation as such;

(iii) A security-based swap dealer registered with the SEC under section 15F of the Exchange Act or exempt from registration or excluded from regulation as such; or

(iv) A futures commission merchant registered with the CFTC under section 4f of the Commodity Exchange Act or exempt from registration or excluded from regulation as such.

§ 255.7 Limitations on permitted proprietary trading activities.

(a) No transaction, class of transactions, or activity may be deemed permissible under §§ 255.4 through 255.6 if the transaction, class of transactions, or activity would:

(1) Involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties;

(2) Result, directly or indirectly, in a material exposure by the banking entity to a high-risk asset or a high-risk trading strategy; or

(3) Pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.

(b) *Definition of material conflict of interest.* (1) For purposes of this section, a material conflict of interest between a banking entity and its clients, customers, or counterparties exists if the banking entity engages in any transaction, class of transactions, or activity that would involve or result in the banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, and the banking entity has not taken at least one of the actions in paragraph (b)(2) of this section.

(2) Prior to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, the banking entity:

(i) *Timely and effective disclosure.* (A) Has made clear, timely, and effective disclosure of the conflict of interest, together with other necessary information, in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest; and

(B) Such disclosure is made in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty created by the conflict of interest; or

(ii) *Information barriers.* Has established, maintained, and enforced information barriers that are memorialized in written policies and procedures, such as physical separation of personnel, or functions, or limitations on types of activity, that are reasonably designed, taking into consideration the nature of the banking entity's business, to prevent the conflict of interest from involving or resulting in a materially adverse effect on a client, customer, or counterparty. A banking entity may not rely on such information barriers if, in the case of any specific transaction, class or type of transactions or activity, the banking entity knows or should reasonably know that, notwithstanding the banking entity's establishment of information barriers, the conflict of interest may involve or result in a materially adverse effect on a client, customer, or counterparty.

(c) *Definition of high-risk asset and high-risk trading strategy.* For purposes of this section:

(1) *High-risk asset* means an asset or group of related assets that would, if held by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

(2) *High-risk trading strategy* means a trading strategy that would, if engaged in by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

§§ 255.8–255.9 [Reserved]

Subpart C—Covered Funds Activities and Investments

§ 255.10 Prohibition on acquiring or retaining an ownership interest in and having certain relationships with a covered fund.

(a) *Prohibition.* (1) Except as otherwise provided in this subpart, a banking entity may not, as principal, directly or indirectly, acquire or retain any ownership interest in or sponsor a covered fund.

(2) Paragraph (a)(1) of this section does not include acquiring or retaining an ownership interest in a covered fund by a banking entity:

(i) Acting solely as agent, broker, or custodian, so long as;

(A) The activity is conducted for the account of, or on behalf of, a customer; and

(B) The banking entity and its affiliates do not have or retain beneficial ownership of such ownership interest;

(ii) Through a deferred compensation, stock-bonus, profit-sharing, or pension plan of the banking entity (or an affiliate thereof) that is established and administered in accordance with the law of the United States or a foreign sovereign, if the ownership interest is held or controlled directly or indirectly by the banking entity as trustee for the benefit of persons who are or were employees of the banking entity (or an affiliate thereof);

(iii) In the ordinary course of collecting a debt previously contracted in good faith, provided that the banking entity divests the ownership interest as soon as practicable, and in no event may the banking entity retain such ownership interest for longer than such period permitted by the SEC; or

(iv) On behalf of customers as trustee or in a similar fiduciary capacity for a customer that is not a covered fund, so long as:

(A) The activity is conducted for the account of, or on behalf of, the customer; and

(B) The banking entity and its affiliates do not have or retain beneficial ownership of such ownership interest.

(b) *Definition of covered fund.* (1) Except as provided in paragraph (c) of this section, covered fund means:

(i) An issuer that would be an investment company, as defined in the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), *but for* section 3(c)(1) or 3(c)(7) of that Act (15 U.S.C. 80a–3(c)(1) or (7));

(ii) Any commodity pool under section 1a(10) of the Commodity Exchange Act (7 U.S.C. 1a(10)) for which:

(A) The commodity pool operator has claimed an exemption under 17 CFR 4.7; or

(B)(*1*) A commodity pool operator is registered with the CFTC as a commodity pool operator in connection with the operation of the commodity pool;

(*2*) Substantially all participation units of the commodity pool are owned by qualified eligible persons under 17 CFR 4.7(a)(2) and (3); and

(*3*) Participation units of the commodity pool have not been publicly offered to persons who are not qualified eligible persons under 17 CFR 4.7(a)(2) and (3); or

(iii) For any banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State, an entity that:

(A) Is organized or established outside the United States and the ownership interests of which are offered and sold solely outside the United States;

(B) Is, or holds itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities; and

(C)(*1*) Has as its sponsor that banking entity (or an affiliate thereof); or

(*2*) Has issued an ownership interest that is owned directly or indirectly by that banking entity (or an affiliate thereof).

(2) An issuer shall not be deemed to be a covered fund under paragraph (b)(1)(iii) of this section if, were the issuer subject to U.S. securities laws, the issuer could rely on an exclusion or exemption from the definition of ''investment company'' under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) other than the exclusions contained in section 3(c)(1) and 3(c)(7) of that Act.

(3) For purposes of paragraph (b)(1)(iii) of this section, a U.S. branch, agency, or subsidiary of a foreign banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(c) Notwithstanding paragraph (b) of this section, unless the appropriate Federal banking agencies, the SEC, and the CFTC jointly determine otherwise, a covered fund does not include:

(1) *Foreign public funds.* (i) Subject to paragraphs (ii) and (iii) below, an issuer that:

(A) Is organized or established outside of the United States;

(B) Is authorized to offer and sell ownership interests to retail investors in the issuer's home jurisdiction; and

(C) Sells ownership interests predominantly through one or more public offerings outside of the United States.

(ii) With respect to a banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State and any issuer for which such banking entity acts as sponsor, the sponsoring banking entity may not rely on the exemption in paragraph (c)(1)(i) of this section for such issuer unless ownership interests in the issuer are sold predominantly to persons other than:

(A) Such sponsoring banking entity;

(B) Such issuer;

(C) Affiliates of such sponsoring banking entity or such issuer; and

(D) Directors and employees of such entities.

(iii) For purposes of paragraph (c)(1)(i)(C) of this section, the term ''public offering'' means a distribution (as defined in § 255.4(a)(3) of subpart B) of securities in any jurisdiction outside the United States to investors, including retail investors, provided that:

(A) The distribution complies with all applicable requirements in the jurisdiction in which such distribution is being made;

(B) The distribution does not restrict availability to investors having a minimum level of net worth or net investment assets; and

(C) The issuer has filed or submitted, with the appropriate regulatory authority in such jurisdiction, offering disclosure documents that are publicly available.

(2) *Wholly-owned subsidiaries.* An entity, all of the outstanding ownership interests of which are owned directly or indirectly by the banking entity (or an affiliate thereof), except that:

(i) Up to five percent of the entity's outstanding ownership interests, less any amounts outstanding under paragraph (c)(2)(ii) of this section, may be held by employees or directors of the banking entity or such affiliate (including former employees or directors if their ownership interest was acquired while employed by or in the service of the banking entity); and

(ii) Up to 0.5 percent of the entity's outstanding ownership interests may be held by a third party if the ownership interest is acquired or retained by the third party for the purpose of establishing corporate separateness or addressing bankruptcy, insolvency, or similar concerns.

(3) *Joint ventures.* A joint venture between a banking entity or any of its affiliates and one or more unaffiliated persons, provided that the joint venture:

(i) Is comprised of no more than 10 unaffiliated co-venturers;

(ii) Is in the business of engaging in activities that are permissible for the banking entity or affiliate, other than investing in securities for resale or other disposition; and

(iii) Is not, and does not hold itself out as being, an entity or arrangement that raises money from investors primarily for the purpose of investing in securities for resale or other disposition or otherwise trading in securities.

(4) *Acquisition vehicles.* An issuer:

(i) Formed solely for the purpose of engaging in a *bona fide* merger or acquisition transaction; and

(ii) That exists only for such period as necessary to effectuate the transaction.

(5) *Foreign pension or retirement funds.* A plan, fund, or program providing pension, retirement, or similar benefits that is:

(i) Organized and administered outside the United States;

(ii) A broad-based plan for employees or citizens that is subject to regulation as a pension, retirement, or similar plan under the laws of the jurisdiction in which the plan, fund, or program is organized and administered; and

(iii) Established for the benefit of citizens or residents of one or more foreign sovereigns or any political subdivision thereof.

(6) *Insurance company separate accounts.* A separate account, provided that no banking entity other than the insurance company participates in the account's profits and losses.

(7) *Bank owned life insurance.* A separate account that is used solely for the purpose of allowing one or more banking entities to purchase a life insurance policy for which the banking entity or entities is beneficiary, provided that no banking entity that purchases the policy:

(i) Controls the investment decisions regarding the underlying assets or holdings of the separate account; or

(ii) Participates in the profits and losses of the separate account other than in compliance with applicable supervisory guidance regarding bank owned life insurance.

(8) *Loan securitizations.* (i) *Scope.* An issuing entity for asset-backed securities that satisfies all the conditions of this paragraph (c)(8) and the assets or holdings of which are comprised solely of:

(A) Loans as defined in § 255.2(s) of subpart A;

(B) Rights or other assets designed to assure the servicing or timely distribution of proceeds to holders of such securities and rights or other assets that are related or incidental to purchasing or otherwise acquiring and holding the loans, provided that each asset meets the requirements of paragraph (c)(8)(iii) of this section;

(C) Interest rate or foreign exchange derivatives that meet the requirements of paragraph (c)(8)(iv) of this section; and

(D) Special units of beneficial interest and collateral certificates that meet the requirements of paragraph (c)(8)(v) of this section.

(ii) *Impermissible assets.* For purposes of this paragraph (c)(8), the assets or holdings of the issuing entity shall not include any of the following:

(A) A security, including an asset-backed security, or an interest in an equity or debt security other than as permitted in paragraph (c)(8)(iii) of this section;

(B) A derivative, other than a derivative that meets the requirements of paragraph (c)(8)(iv) of this section; or

(C) A commodity forward contract.

(iii) *Permitted securities.* Notwithstanding paragraph (c)(8)(ii)(A) of this section, the issuing entity may hold securities if those securities are:

(A) Cash equivalents for purposes of the rights and assets in paragraph (c)(8)(i)(B) of this section; or

(B) Securities received in lieu of debts previously contracted with respect to the loans supporting the asset-backed securities.

(iv) *Derivatives.* The holdings of derivatives by the issuing entity shall be limited to interest rate or foreign exchange derivatives that satisfy all of the following conditions:

(A) The written terms of the derivative directly relate to the loans, the asset-backed securities, or the contractual rights of other assets described in paragraph (c)(8)(i)(B) of this section; and

(B) The derivatives reduce the interest rate and/or foreign exchange risks related to the loans, the asset-backed securities, or the contractual rights or other assets described in paragraph (c)(8)(i)(B) of this section.

(v) *Special units of beneficial interest and collateral certificates.* The assets or holdings of the issuing entity may include collateral certificates and special units of beneficial interest issued by a special purpose vehicle, provided that:

(A) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate meets the requirements in this paragraph (c)(8);

(B) The special unit of beneficial interest or collateral certificate is used for the sole purpose of transferring to the issuing entity for the loan securitization the economic risks and benefits of the assets that are permissible for loan securitizations under this paragraph (c)(8) and does not directly or indirectly transfer any interest in any other economic or financial exposure;

(C) The special unit of beneficial interest or collateral certificate is created solely to satisfy legal requirements or otherwise facilitate the structuring of the loan securitization; and

(D) The special purpose vehicle that issues the special unit of beneficial interest or collateral certificate and the issuing entity are established under the direction of the same entity that initiated the loan securitization.

(9) *Qualifying asset-backed commercial paper conduits.* (i) An issuing entity for asset-backed commercial paper that satisfies all of the following requirements:

(A) The asset-backed commercial paper conduit holds only:

(*1*) Loans and other assets permissible for a loan securitization under paragraph (c)(8)(i) of this section; and

(*2*) Asset-backed securities supported solely by assets that are permissible for loan securitizations under paragraph (c)(8)(i) of this section and acquired by the asset-backed commercial paper conduit as part of an initial issuance either directly from the issuing entity of the asset-backed securities or directly from an underwriter in the distribution of the asset-backed securities;

(B) The asset-backed commercial paper conduit issues only asset-backed securities, comprised of a residual interest and securities with a legal maturity of 397 days or less; and

(C) A regulated liquidity provider has entered into a legally binding commitment to provide full and unconditional liquidity coverage with respect to all of the outstanding asset-backed securities issued by the asset-backed commercial paper conduit (other than any residual interest) in the event that funds are required to redeem maturing asset-backed securities.

(ii) For purposes of this paragraph (c)(9), a regulated liquidity provider means:

(A) A depository institution, as defined in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c));

(B) A bank holding company, as defined in section 2(a) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(a)), or a subsidiary thereof;

(C) A savings and loan holding company, as defined in section 10a of the Home Owners' Loan Act (12 U.S.C. 1467a), provided all or substantially all of the holding company's activities are permissible for a financial holding company under section 4(k) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(k)), or a subsidiary thereof;

(D) A foreign bank whose home country supervisor, as defined in § 211.21(q) of the Board's Regulation K (12 CFR 211.21(q)), has adopted capital standards consistent with the Capital Accord for the Basel Committee on banking Supervision, as amended, and that is subject to such standards, or a subsidiary thereof; or

(E) The United States or a foreign sovereign.

(10) *Qualifying covered bonds*—(i) *Scope.* An entity owning or holding a dynamic or fixed pool of loans or other assets as provided in paragraph (c)(8) of this section for the benefit of the holders of covered bonds, provided that the assets in the pool are comprised solely of assets that meet the conditions in paragraph (c)(8)(i) of this section.

(ii) *Covered bond.* For purposes of this paragraph (c)(10), a covered bond means:

(A) A debt obligation issued by an entity that meets the definition of foreign banking organization, the payment obligations of which are fully and unconditionally guaranteed by an entity that meets the conditions set forth in paragraph (c)(10)(i) of this section; or

(B) A debt obligation of an entity that meets the conditions set forth in paragraph (c)(10)(i) of this section, provided that the payment obligations are fully and unconditionally guaranteed by an entity that meets the definition of foreign banking organization and the entity is a wholly-owned subsidiary, as defined in paragraph (c)(2) of this section, of such foreign banking organization.

(11) *SBICs and public welfare investment funds.* An issuer:

(i) That is a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662), or that has received from the Small Business Administration notice to proceed to qualify for a license as a small business investment company, which notice or license has not been revoked; or

(ii) The business of which is to make investments that are:

(A) Designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs); or

(B) Qualified rehabilitation expenditures with respect to a qualified rehabilitated building or certified historic structure, as such terms are defined in section 47 of the Internal Revenue Code of 1986 or a similar State historic tax credit program.

(12) *Registered investment companies and excluded entities.* An issuer:

(i) That is registered as an investment company under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8), or that is formed and operated pursuant to a written plan to become a registered investment company as described in § 255.20(e)(3) of subpart D and that complies with the requirements of section 18 of the Investment Company Act of 1940 (15 U.S.C. 80a–18);

(ii) That may rely on an exclusion or exemption from the definition of ''investment company'' under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) other than the exclusions contained in section 3(c)(1) and 3(c)(7) of that Act; or

(iii) That has elected to be regulated as a business development company pursuant to section 54(a) of that Act (15 U.S.C. 80a–53) and has not withdrawn its election, or that is formed and operated pursuant to a written plan to become a business development company as described in § 255.20(e)(3) of subpart D and that complies with the requirements of section 61 of the Investment Company Act of 1940 (15 U.S.C. 80a–60).

(13) *Issuers in conjunction with the FDIC's receivership or conservatorship operations.* An issuer that is an entity formed by or on behalf of the FDIC for the purpose of facilitating the disposal of assets acquired in the FDIC's capacity as conservator or receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(14) *Other excluded issuers.* (i) Any issuer that the appropriate Federal banking agencies, the SEC, and the CFTC jointly determine the exclusion of which is consistent with the purposes of section 13 of the BHC Act.

(ii) A determination made under paragraph (c)(14)(i) of this section will be promptly made public.

(d) *Definition of other terms related to covered funds.* For purposes of this subpart:

(1) *Applicable accounting standards* means U.S. generally accepted accounting principles, or such other accounting standards applicable to a banking entity that the SEC determines are appropriate and that the banking entity uses in the ordinary course of its business in preparing its consolidated financial statements.

(2) *Asset-backed security* has the meaning specified in Section 3(a)(79) of the Exchange Act (15 U.S.C. 78c(a)(79)).

(3) *Director* has the same meaning as provided in section 215.2(d)(1) of the Board's Regulation O (12 CFR 215.2(d)(1)).

(4) *Issuer* has the same meaning as in section 2(a)(22) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(22)).

(5) *Issuing entity* means with respect to asset-backed securities the special purpose vehicle that owns or holds the pool assets underlying asset-backed securities and in whose name the asset-backed securities supported or serviced by the pool assets are issued.

(6) *Ownership interest*—(i) *Ownership interest* means any equity, partnership, or other similar interest. An ''other similar interest'' means an interest that:

(A) Has the right to participate in the selection or removal of a general partner, managing member, member of the board of directors or trustees, investment manager, investment adviser, or commodity trading advisor of the covered fund (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event);

(B) Has the right under the terms of the interest to receive a share of the income, gains or profits of the covered fund;

(C) Has the right to receive the underlying assets of the covered fund after all other interests have been redeemed and/or paid in full (excluding the rights of a creditor to exercise remedies upon the occurrence of an event of default or an acceleration event);

(D) Has the right to receive all or a portion of excess spread (the positive difference, if any, between the aggregate interest payments received from the underlying assets of the covered fund and the aggregate interest paid to the holders of other outstanding interests);

(E) Provides under the terms of the interest that the amounts payable by the covered fund with respect to the interest could be reduced based on losses arising from the underlying assets of the covered fund, such as allocation of losses, write-downs or charge-offs of the outstanding principal balance, or reductions in the amount of interest due and payable on the interest;

(F) Receives income on a pass-through basis from the covered fund, or has a rate of return that is determined by reference to the performance of the underlying assets of the covered fund; or

(G) Any synthetic right to have, receive, or be allocated any of the rights in paragraphs (d)(6)(i)(A) through (F) of this section.

(ii) *Ownership interest* does not include: *Restricted profit interest.* An interest held by an entity (or an employee or former employee thereof) in a covered fund for which the entity (or employee thereof) serves as investment manager, investment adviser, commodity trading advisor, or other service provider so long as:

(A) The sole purpose and effect of the interest is to allow the entity (or employee or former employee thereof) to share in the profits of the covered fund as performance compensation for the investment management, investment advisory, commodity trading advisory, or other services provided to the covered fund by the entity (or employee or former employee thereof), provided that the entity (or employee or former employee thereof) may be obligated under the terms of such interest to return profits previously received;

(B) All such profit, once allocated, is distributed to the entity (or employee or former employee thereof) promptly after being earned or, if not so distributed, is retained by the covered fund for the sole purpose of establishing a reserve amount to satisfy contractual obligations with respect to subsequent losses of the covered fund and such undistributed profit of the entity (or employee or former employee thereof) does not share in the subsequent investment gains of the covered fund;

(C) Any amounts invested in the covered fund, including any amounts paid by the entity (or employee or former employee thereof) in connection with obtaining the restricted profit interest, are within the limits of § 255.12 of this subpart; and

(D) The interest is not transferable by the entity (or employee or former employee thereof) except to an affiliate thereof (or an employee of the banking entity or affiliate), to immediate family members, or through the intestacy, of the employee or former employee, or in connection with a sale of the business that gave rise to the restricted profit interest by the entity (or employee or former employee thereof) to an unaffiliated party that provides investment management, investment advisory, commodity trading advisory, or other services to the fund.

(7) *Prime brokerage transaction* means any transaction that would be a covered transaction, as defined in section 23A(b)(7) of the Federal Reserve Act (12 U.S.C. 371c(b)(7)), that is provided in

connection with custody, clearance and settlement, securities borrowing or lending services, trade execution, financing, or data, operational, and administrative support.

(8) *Resident of the United States* means a person that is a ''U.S. person'' as defined in rule 902(k) of the SEC's Regulation S (17 CFR 230.902(k)).

(9) *Sponsor* means, with respect to a covered fund:

(i) To serve as a general partner, managing member, or trustee of a covered fund, or to serve as a commodity pool operator with respect to a covered fund as defined in (b)(1)(ii) of this section;

(ii) In any manner to select or to control (or to have employees, officers, or directors, or agents who constitute) a majority of the directors, trustees, or management of a covered fund; or

(iii) To share with a covered fund, for corporate, marketing, promotional, or other purposes, the same name or a variation of the same name, except as permitted under § 255.11(a)(6).

(10) *Trustee.* (i) For purposes of paragraph (d)(9) of this section and § 255.11 of subpart C, a trustee does not include:

(A) A trustee that does not exercise investment discretion with respect to a covered fund, including a trustee that is subject to the direction of an unaffiliated named fiduciary who is not a trustee pursuant to section 403(a)(1) of the Employee's Retirement Income Security Act (29 U.S.C. 1103(a)(1)); or

(B) A trustee that is subject to fiduciary standards imposed under foreign law that are substantially equivalent to those described in paragraph (d)(10)(i)(A) of this section;

(ii) Any entity that directs a person described in paragraph (d)(10)(i) of this section, or that possesses authority and discretion to manage and control the investment decisions of a covered fund for which such person serves as trustee, shall be considered to be a trustee of such covered fund.

§ 255.11 Permitted organizing and offering, underwriting, and market making with respect to a covered fund.

(a) *Organizing and offering a covered fund in general.* Notwithstanding § 255.10(a) of this subpart, a banking entity is not prohibited from acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund in connection with, directly or indirectly, organizing and offering a covered fund, including serving as a general partner, managing member, trustee, or commodity pool operator of the covered fund and in any manner selecting or controlling (or having employees, officers, directors, or agents who constitute) a majority of the directors, trustees, or management of the covered fund, including any necessary expenses for the foregoing, only if:

(1) The banking entity (or an affiliate thereof) provides *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services;

(2) The covered fund is organized and offered only in connection with the provision of *bona fide* trust, fiduciary, investment advisory, or commodity trading advisory services and only to persons that are customers of such services of the banking entity (or an affiliate thereof), pursuant to a written plan or similar documentation outlining how the banking entity or such affiliate intends to provide advisory or similar services to its customers through organizing and offering such fund;

(3) The banking entity and its affiliates do not acquire or retain an ownership interest in the covered fund except as permitted under § 255.12 of this subpart;

(4) The banking entity and its affiliates comply with the requirements of § 255.14 of this subpart;

(5) The banking entity and its affiliates do not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests;

(6) The covered fund, for corporate, marketing, promotional, or other purposes:

(i) Does not share the same name or a variation of the same name with the banking entity (or an affiliate thereof) except that a covered fund may share the same name or a variation of the same name with a banking entity that is an investment adviser to the covered fund if:

(A) The investment adviser is not an insured depository institution, a company that controls an insured depository institution, or a company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(B) The investment adviser does not share the same name or a variation of the same name as an insured depository institution, a company that controls an insured depository institution, or a company that is treated as a bank holding company for purposes of section 8 of the International Banking Act of 1978 (12 U.S.C. 3106); and

(ii) Does not use the word ''bank'' in its name;

(7) No director or employee of the banking entity (or an affiliate thereof) takes or retains an ownership interest in the covered fund, except for any director or employee of the banking entity or such affiliate who is directly engaged in providing investment advisory, commodity trading advisory, or other services to the covered fund at the time the director or employee takes the ownership interest; and

(8) The banking entity:

(i) Clearly and conspicuously discloses, in writing, to any prospective and actual investor in the covered fund (such as through disclosure in the covered fund's offering documents):

(A) That ''any losses in [such covered fund] will be borne solely by investors in [the covered fund] and not by [the banking entity] or its affiliates; therefore, [the banking entity's] losses in [such covered fund] will be limited to losses attributable to the ownership interests in the covered fund held by [the banking entity] and any affiliate in its capacity as investor in the [covered fund] or as beneficiary of a restricted profit interest held by [the banking entity] or any affiliate'';

(B) That such investor should read the fund offering documents before investing in the covered fund;

(C) That the ''ownership interests in the covered fund are not insured by the FDIC, and are not deposits, obligations of, or endorsed or guaranteed in any way, by any banking entity'' (unless that happens to be the case); and

(D) The role of the banking entity and its affiliates and employees in sponsoring or providing any services to the covered fund; and

(ii) Complies with any additional rules of the appropriate Federal banking agencies, the SEC, or the CFTC, as provided in section 13(b)(2) of the BHC Act, designed to ensure that losses in such covered fund are borne solely by investors in the covered fund and not by the covered banking entity and its affiliates.

(b) *Organizing and offering an issuing entity of asset-backed securities.* (1) Notwithstanding § 255.10(a) of this subpart, a banking entity is not prohibited from acquiring or retaining an ownership interest in, or acting as sponsor to, a covered fund that is an issuing entity of asset-backed securities in connection with, directly or indirectly, organizing and offering that issuing entity, so long as the banking entity and its affiliates comply with all of the requirements of paragraph (a)(3) through (8) of this section.

(2) For purposes of this paragraph (b), organizing and offering a covered fund that is an issuing entity of asset-backed securities means acting as the securitizer, as that term is used in section 15G(a)(3) of the Exchange Act

(15 U.S.C. 78*o*–11(a)(3)) of the issuing entity, or acquiring or retaining an ownership interest in the issuing entity as required by section 15G of that Act (15 U.S.C.78*o*–11) and the implementing regulations issued thereunder.

(c) *Underwriting and market making in ownership interests of a covered fund.* The prohibition contained in § 255.10(a) of this subpart does not apply to a banking entity's underwriting activities or market making-related activities involving a covered fund so long as:

(1) Those activities are conducted in accordance with the requirements of § 255.4(a) or § 255.4(b) of subpart B, respectively;

(2) With respect to any banking entity (or any affiliate thereof) that: Acts as a sponsor, investment adviser or commodity trading advisor to a particular covered fund or otherwise acquires and retains an ownership interest in such covered fund in reliance on paragraph (a) of this section; acquires and retains an ownership interest in such covered fund and is either a securitizer, as that term is used in section 15G(a)(3) of the Exchange Act (15 U.S.C. 78o–11(a)(3)), or is acquiring and retaining an ownership interest in such covered fund in compliance with section 15G of that Act (15 U.S.C.78o–11) and the implementing regulations issued thereunder each as permitted by paragraph (b) of this section; or, directly or indirectly, guarantees, assumes, or otherwise insures the obligations or performance of the covered fund or of any covered fund in which such fund invests, then in each such case any ownership interests acquired or retained by the banking entity and its affiliates in connection with underwriting and market making related activities for that particular covered fund are included in the calculation of ownership interests permitted to be held by the banking entity and its affiliates under the limitations of § 255.12(a)(2)(ii) and § 255.12(d) of this subpart; and

(3) With respect to any banking entity, the aggregate value of all ownership interests of the banking entity and its affiliates in all covered funds acquired and retained under § 255.11 of this subpart, including all covered funds in which the banking entity holds an ownership interest in connection with underwriting and market making related activities permitted under this paragraph (c), are included in the calculation of all ownership interests under § 255.12(a)(2)(iii) and § 255.12(d) of this subpart.

§ 255.12 Permitted investment in a covered fund.

(a) *Authority and limitations on permitted investments in covered funds.* (1) Notwithstanding the prohibition contained in § 255.10(a) of this subpart, a banking entity may acquire and retain an ownership interest in a covered fund that the banking entity or an affiliate thereof organizes and offers pursuant to § 255.11, for the purposes of:

(i) *Establishment.* Establishing the fund and providing the fund with sufficient initial equity for investment to permit the fund to attract unaffiliated investors, subject to the limits contained in paragraphs (a)(2)(i) and (iii) of this section; or

(ii) *De minimis investment.* Making and retaining an investment in the covered fund subject to the limits contained in paragraphs (a)(2)(ii) and (iii) of this section.

(2) *Investment limits*—(i) *Seeding period.* With respect to an investment in any covered fund made or held pursuant to paragraph (a)(1)(i) of this section, the banking entity and its affiliates:

(A) Must actively seek unaffiliated investors to reduce, through redemption, sale, dilution, or other methods, the aggregate amount of all ownership interests of the banking entity in the covered fund to the amount permitted in paragraph (a)(2)(i)(B) of this section; and

(B) Must, no later than 1 year after the date of establishment of the fund (or such longer period as may be provided by the Board pursuant to paragraph (e) of this section), conform its ownership interest in the covered fund to the limits in paragraph (a)(2)(ii) of this section;

(ii) *Per-fund limits.* (A) Except as provided in paragraph (a)(2)(ii)(B) of this section, an investment by a banking entity and its affiliates in any covered fund made or held pursuant to paragraph (a)(1)(ii) of this section may not exceed 3 percent of the total number or value of the outstanding ownership interests of the fund.

(B) An investment by a banking entity and its affiliates in a covered fund that is an issuing entity of asset-backed securities may not exceed 3 percent of the total fair market value of the ownership interests of the fund measured in accordance with paragraph (b)(3) of this section, unless a greater percentage is retained by the banking entity and its affiliates in compliance with the requirements of section 15G of the Exchange Act (15 U.S.C. 78*o*–11) and the implementing regulations issued thereunder, in which case the investment by the banking entity and its affiliates in the covered fund may not exceed the amount, number, or value of ownership interests of the fund required under section 15G of the Exchange Act and the implementing regulations issued thereunder.

(iii) *Aggregate limit.* The aggregate value of all ownership interests of the banking entity and its affiliates in all covered funds acquired or retained under this section may not exceed 3 percent of the tier 1 capital of the banking entity, as provided under paragraph (c) of this section, and shall be calculated as of the last day of each calendar quarter.

(iv) *Date of establishment.* For purposes of this section, the date of establishment of a covered fund shall be:

(A) *In general.* The date on which the investment adviser or similar entity to the covered fund begins making investments pursuant to the written investment strategy for the fund;

(B) *Issuing entities of asset-backed securities.* In the case of an issuing entity of asset-backed securities, the date on which the assets are initially transferred into the issuing entity of asset-backed securities.

(b) *Rules of construction*—(1) *Attribution of ownership interests to a covered banking entity.* (i) For purposes of paragraph (a)(2) of this section, the amount and value of a banking entity's permitted investment in any single covered fund shall include any ownership interest held under § 255____.12 directly by the banking entity, including any affiliate of the banking entity.

(ii) *Treatment of registered investment companies, SEC-regulated business development companies and foreign public funds.* For purposes of paragraph (b)(1)(i) of this section, a registered investment company, SEC-regulated business development companies or foreign public fund as described in § 255____.10(c)(1) of this subpart will not be considered to be an affiliate of the banking entity so long as the banking entity:

(A) Does not own, control, or hold with the power to vote 25 percent or more of the voting shares of the company or fund; and

(B) Provides investment advisory, commodity trading advisory, administrative, and other services to the company or fund in compliance with the limitations under applicable regulation, order, or other authority.

(iii) *Covered funds.* For purposes of paragraph (b)(1)(i) of this section, a covered fund will not be considered to be an affiliate of a banking entity so long as the covered fund is held in compliance with the requirements of this subpart.

(iv) *Treatment of employee and director investments financed by the banking entity.* For purposes of paragraph (b)(1)(i) of this section, an investment by a director or employee of a banking entity who acquires an ownership interest in his or her personal capacity in a covered fund sponsored by the banking entity will be attributed to the banking entity if the banking entity, directly or indirectly, extends financing for the purpose of enabling the director or employee to acquire the ownership interest in the fund and the financing is used to acquire such ownership interest in the covered fund.

(2) *Calculation of permitted ownership interests in a single covered fund.* Except as provided in paragraph (b)(3) or (4), for purposes of determining whether an investment in a single covered fund complies with the restrictions on ownership interests under paragraphs (a)(2)(i)(B) and (a)(2)(ii)(A) of this section:

(i) The aggregate number of the outstanding ownership interests held by the banking entity shall be the total number of ownership interests held under this section by the banking entity in a covered fund divided by the total number of ownership interests held by all entities in that covered fund, as of the last day of each calendar quarter (both measured without regard to committed funds not yet called for investment);

(ii) The aggregate value of the outstanding ownership interests held by the banking entity shall be the aggregate fair market value of all investments in and capital contributions made to the covered fund by the banking entity, divided by the value of all investments in and capital contributions made to that covered fund by all entities, as of the last day of each calendar quarter (all measured without regard to committed funds not yet called for investment). If fair market value cannot be determined, then the value shall be the historical cost basis of all investments in and contributions made by the banking entity to the covered fund;

(iii) For purposes of the calculation under paragraph (b)(2)(ii) of this section, once a valuation methodology is chosen, the banking entity must calculate the value of its investment and the investments of all others in the covered fund in the same manner and according to the same standards.

(3) *Issuing entities of asset-backed securities.* In the case of an ownership interest in an issuing entity of asset-backed securities, for purposes of determining whether an investment in a single covered fund complies with the restrictions on ownership interests under paragraphs (a)(2)(i)(B) and (a)(2)(ii)(B) of this section:

(i) For securitizations subject to the requirements of section 15G of the Exchange Act (15 U.S.C. 78o–11), the calculations shall be made as of the date and according to the valuation methodology applicable pursuant to the requirements of section 15G of the Exchange Act (15 U.S.C. 78o–11) and the implementing regulations issued thereunder; or

(ii) For securitization transactions completed prior to the compliance date of such implementing regulations (or as to which such implementing regulations do not apply), the calculations shall be made as of the date of establishment as defined in paragraph (a)(2)(iv)(B) of this section or such earlier date on which the transferred assets have been valued for purposes of transfer to the covered fund, and thereafter only upon the date on which additional securities of the issuing entity of asset-backed securities are priced for purposes of the sales of ownership interests to unaffiliated investors.

(iii) For securitization transactions completed prior to the compliance date of such implementing regulations (or as to which such implementing regulations do not apply), the aggregate value of the outstanding ownership interests in the covered fund shall be the fair market value of the assets transferred to the issuing entity of the securitization and any other assets otherwise held by the issuing entity at such time, determined in a manner that is consistent with its determination of the fair market value of those assets for financial statement purposes.

(iv) For purposes of the calculation under paragraph (b)(3)(iii) of this section, the valuation methodology used to calculate the fair market value of the ownership interests must be the same for both the ownership interests held by a banking entity and the ownership interests held by all others in the covered fund in the same manner and according to the same standards.

(4) *Multi-tier fund investments*—(i) *Master-feeder fund investments.* If the principal investment strategy of a covered fund (the ''feeder fund'') is to invest substantially all of its assets in another single covered fund (the ''master fund''), then for purposes of the investment limitations in paragraphs (a)(2)(i)(B) and (a)(2)(ii) of this section, the banking entity's permitted investment in such funds shall be measured only by reference to the value of the master fund. The banking entity's permitted investment in the master fund shall include any investment by the banking entity in the master fund, as well as the banking entity's pro-rata share of any ownership interest of the master fund that is held through the feeder fund; and

(ii) *Fund-of-funds investments.* If a banking entity organizes and offers a covered fund pursuant to § 255.11 of this subpart for the purpose of investing in other covered funds (a ''fund of funds'') and that fund of funds itself invests in another covered fund that the banking entity is permitted to own, then the banking entity's permitted investment in that other fund shall include any investment by the banking entity in that other fund, as well as the banking entity's pro-rata share of any ownership interest of the fund that is held through the fund of funds. The investment of the banking entity may not represent more than 3 percent of the amount or value of any single covered fund.

(c) *Aggregate permitted investments in all covered funds.* (1) For purposes of paragraph (a)(2)(iii) of this section, the aggregate value of all ownership interests held by a banking entity shall be the sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest in covered funds (together with any amounts paid by the entity (or employee thereof) in connection with obtaining a restricted profit interest under § 255____ .10(d)(6)(ii) of this subpart), on a historical cost basis.

(2) *Calculation of tier 1 capital.* For purposes of paragraph (a)(2)(iii) of this section:

(i) *Entities that are required to hold and report tier 1 capital.* If a banking entity is required to calculate and report tier 1 capital, the banking entity's tier 1 capital shall be equal to the amount of tier 1 capital of the banking entity as of the last day of the most recent calendar quarter, as reported to its primary financial regulatory agency; and

(ii) If a banking entity is not required to calculate and report tier 1 capital, the banking entity's tier 1 capital shall be determined to be equal to:

(A) In the case of a banking entity that is controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital, be equal to the amount of tier 1 capital reported by such controlling depository institution in the manner described in paragraph (c)(2)(i) of this section;

(B) In the case of a banking entity that is not controlled, directly or indirectly, by a depository institution that calculates and reports tier 1 capital:

(*1*) *Bank holding company subsidiaries.* If the banking entity is a subsidiary of a bank holding company or company that is treated as a bank holding company, be equal to the amount of tier 1 capital reported by the top-tier affiliate of such covered banking entity that calculates and reports tier 1 capital in the manner described in paragraph (c)(2)(i) of this section; and

(*2*) *Other holding companies and any subsidiary or affiliate thereof.* If the banking entity is not a subsidiary of a bank holding company or a company that is treated as a bank holding company, be equal to the total amount of shareholders' equity of the top-tier affiliate within such organization as of the last day of the most recent calendar quarter that has ended, as determined under applicable accounting standards.

(iii) *Treatment of foreign banking entities*—(A) *Foreign banking entities.* Except as provided in paragraph (c)(2)(iii)(B) of this section, with respect to a banking entity that is not itself, and is not controlled directly or indirectly by, a banking entity that is located or organized under the laws of the United States or of any State, the tier 1 capital of the banking entity shall be the consolidated tier 1 capital of the entity as calculated under applicable home country standards.

(B) *U.S. affiliates of foreign banking entities.* With respect to a banking entity that is located or organized under the laws of the United States or of any State and is controlled by a foreign banking entity identified under paragraph (c)(2)(iii)(A) of this section, the banking entity's tier 1 capital shall be as calculated under paragraphs (c)(2)(i) or (ii) of this section.

(d) *Capital treatment for a permitted investment in a covered fund.* For purposes of calculating compliance with the applicable regulatory capital requirements, a banking entity shall deduct from the banking entity's tier 1 capital (as determined under paragraph (c)(2) of this section) the greater of:

(1) The sum of all amounts paid or contributed by the banking entity in connection with acquiring or retaining an ownership interest (together with any amounts paid by the entity (or employee thereof) in connection with obtaining a restricted profit interest under § 255____.10(d)(6)(ii) of subpart C), on a historical cost basis, plus any earnings received; and

(2) The fair market value of the banking entity's ownership interests in the covered fund as determined under paragraph (b)(2)(ii) or (b)(3) of this section (together with any amounts paid by the entity (or employee thereof) in connection with obtaining a restricted profit interest under § 255____.10(d)(6)(ii) of subpart C), if the banking entity accounts for the profits (or losses) of the fund investment in its financial statements.

(e) *Extension of time to divest an ownership interest.* (1) Upon application by a banking entity, the Board may extend the period under paragraph (a)(2)(i) of this section for up to 2 additional years if the Board finds that an extension would be consistent with safety and soundness and not detrimental to the public interest. An application for extension must:

(i) Be submitted to the Board at least 90 days prior to the expiration of the applicable time period;

(ii) Provide the reasons for application, including information that addresses the factors in paragraph (e)(2) of this section; and

(iii) Explain the banking entity's plan for reducing the permitted investment in a covered fund through redemption, sale, dilution or other methods as required in paragraph (a)(2) of this section.

(2) *Factors governing Board determinations.* In reviewing any application under paragraph (e)(1) of this section, the Board may consider all the facts and circumstances related to the permitted investment in a covered fund, including:

(i) Whether the investment would result, directly or indirectly, in a material exposure by the banking entity to high-risk assets or high-risk trading strategies;

(ii) The contractual terms governing the banking entity's interest in the covered fund;

(iii) The date on which the covered fund is expected to have attracted sufficient investments from investors unaffiliated with the banking entity to enable the banking entity to comply with the limitations in paragraph (a)(2)(i) of this section;

(iv) The total exposure of the covered banking entity to the investment and the risks that disposing of, or maintaining, the investment in the covered fund may pose to the banking entity and the financial stability of the United States;

(v) The cost to the banking entity of divesting or disposing of the investment within the applicable period;

(vi) Whether the investment or the divestiture or conformance of the investment would involve or result in a material conflict of interest between the banking entity and unaffiliated parties, including clients, customers or counterparties to which it owes a duty;

(vi) The banking entity's prior efforts to reduce through redemption, sale, dilution, or other methods its ownership interests in the covered fund, including activities related to the marketing of interests in such covered fund;

(viii) Market conditions; and

(ix) Any other factor that the Board believes appropriate.

(3) *Authority to impose restrictions on activities or investment during any extension period.* The Board may impose such conditions on any extension approved under paragraph (e)(1) of this section as the Board determines are necessary or appropriate to protect the safety and soundness of the banking entity or the financial stability of the United States, address material conflicts of interest or other unsound banking practices, or otherwise further the purposes of section 13 of the BHC Act and this part.

(4) *Consultation.* In the case of a banking entity that is primarily regulated by another Federal banking agency, the SEC, or the CFTC, the Board will consult with such agency prior to acting on an application by the banking entity for an extension under paragraph (e)(1) of this section.

§ 255.13 Other permitted covered fund activities and investments.

(a) *Permitted risk-mitigating hedging activities.* (1) The prohibition contained in § 255.10(a) of this subpart does not apply with respect to an ownership interest in a covered fund acquired or retained by a banking entity that is designed to demonstrably reduce or otherwise significantly mitigate the specific, identifiable risks to the banking entity in connection with a compensation arrangement with an employee of the banking entity or an affiliate thereof that directly provides investment advisory, commodity trading advisory or other services to the covered fund.

(2) *Requirements.* The risk-mitigating hedging activities of a banking entity are permitted under this paragraph (a) only if:

(i) The banking entity has established and implements, maintains and enforces an internal compliance program required by subpart D of this part that is reasonably designed to ensure the banking entity's compliance with the requirements of this section, including:

(A) Reasonably designed written policies and procedures; and

(B) Internal controls and ongoing monitoring, management, and authorization procedures, including relevant escalation procedures; and

(ii) The acquisition or retention of the ownership interest:

(A) Is made in accordance with the written policies, procedures and internal controls required under this section;

(B) At the inception of the hedge, is designed to reduce or otherwise significantly mitigate and demonstrably reduces or otherwise significantly mitigates one or more specific, identifiable risks arising in connection with the compensation arrangement with the employee that directly provides investment advisory, commodity trading advisory, or other services to the covered fund;

(C) Does not give rise, at the inception of the hedge, to any significant new or additional risk that is not itself hedged contemporaneously in accordance with this section; and

(D) Is subject to continuing review, monitoring and management by the banking entity.

(iii) The compensation arrangement relates solely to the covered fund in which the banking entity or any affiliate has acquired an ownership interest pursuant to this paragraph and such compensation arrangement provides that any losses incurred by the banking entity on such ownership interest will be offset by corresponding decreases in amounts payable under such compensation arrangement.

(b) *Certain permitted covered fund activities and investments outside of the United States.* (1) The prohibition contained in § 255.10(a) of this subpart does not apply to the acquisition or retention of any ownership interest in, or the sponsorship of, a covered fund by a banking entity only if:

(i) The banking entity is not organized or directly or indirectly controlled by a banking entity that is organized under the laws of the United States or of one or more States;

(ii) The activity or investment by the banking entity is pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act;

(iii) No ownership interest in the covered fund is offered for sale or sold to a resident of the United States; and

(iv) The activity or investment occurs solely outside of the United States.

(2) An activity or investment by the banking entity is pursuant to paragraph (9) or (13) of section 4(c) of the BHC Act for purposes of paragraph (b)(1)(ii) of this section only if:

(i) The activity or investment is conducted in accordance with the requirements of this section; and

(ii)(A) With respect to a banking entity that is a foreign banking organization, the banking entity meets the qualifying foreign banking organization requirements of section 211.23(a), (c) or (e) of the Board's Regulation K (12 CFR 211.23(a), (c) or (e)), as applicable; or

(B) With respect to a banking entity that is not a foreign banking organization, the banking entity is not organized under the laws of the United States or of one or more States and the banking entity, on a fully-consolidated basis, meets at least two of the following requirements:

(*1*) Total assets of the banking entity held outside of the United States exceed total assets of the banking entity held in the United States;

(*2*) Total revenues derived from the business of the banking entity outside of the United States exceed total revenues derived from the business of the banking entity in the United States; or

(*3*) Total net income derived from the business of the banking entity outside of the United States exceeds total net income derived from the business of the banking entity in the United States.

(3) An ownership interest in a covered fund is not offered for sale or sold to a resident of the United States for purposes of paragraph (b)(1)(iii) of this section only if it is sold or has been sold pursuant to an offering that does not target residents of the United States.

(4) An activity or investment occurs solely outside of the United States for purposes of paragraph (b)(1)(iv) of this section only if:

(i) The banking entity acting as sponsor, or engaging as principal in the acquisition or retention of an ownership interest in the covered fund, is not itself, and is not controlled directly or indirectly by, a banking entity that is located in the United States or organized under the laws of the United States or of any State;

(ii) The banking entity (including relevant personnel) that makes the decision to acquire or retain the ownership interest or act as sponsor to the covered fund is not located in the United States or organized under the laws of the United States or of any State;

(iii) The investment or sponsorship, including any transaction arising from risk-mitigating hedging related to an ownership interest, is not accounted for as principal directly or indirectly on a consolidated basis by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State; and

(iv) No financing for the banking entity's ownership or sponsorship is provided, directly or indirectly, by any branch or affiliate that is located in the United States or organized under the laws of the United States or of any State.

(5) For purposes of this section, a U.S. branch, agency, or subsidiary of a foreign bank, or any subsidiary thereof, is located in the United States; however, a foreign bank of which that branch, agency, or subsidiary is a part is not considered to be located in the United States solely by virtue of operation of the U.S. branch, agency, or subsidiary.

(c) *Permitted covered fund interests and activities by a regulated insurance company.* The prohibition contained in § 255.10(a) of this subpart does not apply to the acquisition or retention by an insurance company, or an affiliate thereof, of any ownership interest in, or the sponsorship of, a covered fund only if:

(1) The insurance company or its affiliate acquires and retains the ownership interest solely for the general account of the insurance company or for one or more separate accounts established by the insurance company;

(2) The acquisition and retention of the ownership interest is conducted in compliance with, and subject to, the insurance company investment laws, regulations, and written guidance of the State or jurisdiction in which such insurance company is domiciled; and

(3) The appropriate Federal banking agencies, after consultation with the Financial Stability Oversight Council and the relevant insurance commissioners of the States and foreign jurisdictions, as appropriate, have not jointly determined, after notice and comment, that a particular law, regulation, or written guidance described in paragraph (c)(2) of this section is insufficient to protect the safety and soundness of the banking entity, or the financial stability of the United States.

§ 255.14 Limitations on relationships with a covered fund.

(a) *Relationships with a covered fund.* (1) Except as provided for in paragraph (a)(2) of this section, no banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, that organizes and offers a covered fund pursuant to § 255.11 of this subpart, or that continues to hold an ownership interest in accordance with § 255.11(b) of this subpart, and no affiliate of such entity, may enter into a transaction with the covered fund, or with any other covered fund that is controlled by such covered fund, that would be a covered transaction as defined in section 23A of the Federal Reserve Act (12 U.S.C. 371c(b)(7)), as if such banking entity and the affiliate thereof were a member bank and the covered fund were an affiliate thereof.

(2) Notwithstanding paragraph (a)(1) of this section, a banking entity may:

(i) Acquire and retain any ownership interest in a covered fund in accordance with the requirements of § 255.11, § 255.12, or § 255.13 of this subpart; and

(ii) Enter into any prime brokerage transaction with any covered fund in which a covered fund managed, sponsored, or advised by such banking entity (or an affiliate thereof) has taken an ownership interest, if:

(A) The banking entity is in compliance with each of the limitations set forth in § 255.11 of this subpart with respect to a covered fund organized and offered by such banking entity (or an affiliate thereof);

(B) The chief executive officer (or equivalent officer) of the banking entity certifies in writing annually to the SEC (with a duty to update the certification if the information in the certification materially changes) that the banking entity does not, directly or indirectly, guarantee, assume, or otherwise insure the obligations or performance of the covered fund or of any covered fund in which such covered fund invests; and

(C) The Board has not determined that such transaction is inconsistent with the safe and sound operation and condition of the banking entity.

(b) *Restrictions on transactions with covered funds.* A banking entity that serves, directly or indirectly, as the investment manager, investment adviser, commodity trading advisor, or sponsor to a covered fund, or that organizes and offers a covered fund pursuant to § 255.11 of this subpart, or that continues to hold an ownership interest in accordance with § 255.11(b) of this subpart, shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1), as if such banking entity were a member bank and such covered fund were an affiliate thereof.

(c) *Restrictions on prime brokerage transactions.* A prime brokerage transaction permitted under paragraph (a)(2)(ii) of this section shall be subject to section 23B of the Federal Reserve Act (12 U.S.C. 371c–1) as if the counterparty were an affiliate of the banking entity.

§ 255.15 Other limitations on permitted covered fund activities.

(a) No transaction, class of transactions, or activity may be deemed permissible under §§ 255.11 through 255.13 of this subpart if the transaction, class of transactions, or activity would:

(1) Involve or result in a material conflict of interest between the banking entity and its clients, customers, or counterparties;

(2) Result, directly or indirectly, in a material exposure by the banking entity to a high-risk asset or a high-risk trading strategy; or

(3) Pose a threat to the safety and soundness of the banking entity or to the financial stability of the United States.

(b) *Definition of material conflict of interest.* (1) For purposes of this section, a material conflict of interest between a banking entity and its clients, customers, or counterparties exists if the banking entity engages in any transaction, class of transactions, or activity that would involve or result in the banking entity's interests being materially adverse to the interests of its client, customer, or counterparty with respect to such transaction, class of transactions, or activity, and the banking entity has not taken at least one of the actions in paragraph (b)(2) of this section.

(2) Prior to effecting the specific transaction or class or type of transactions, or engaging in the specific activity, the banking entity:

(i) *Timely and effective disclosure.* (A) Has made clear, timely, and effective disclosure of the conflict of interest, together with other necessary information, in reasonable detail and in a manner sufficient to permit a reasonable client, customer, or counterparty to meaningfully understand the conflict of interest; and

(B) Such disclosure is made in a manner that provides the client, customer, or counterparty the opportunity to negate, or substantially mitigate, any materially adverse effect on the client, customer, or counterparty created by the conflict of interest; or

(ii) *Information barriers.* Has established, maintained, and enforced information barriers that are memorialized in written policies and procedures, such as physical separation of personnel, or functions, or limitations on types of activity, that are reasonably designed, taking into consideration the nature of the banking entity's business, to prevent the conflict of interest from involving or resulting in a materially adverse effect on a client, customer, or counterparty. A banking entity may not rely on such information barriers if, in the case of any specific transaction, class or type of transactions or activity, the banking entity knows or should reasonably know that, notwithstanding the banking entity's establishment of information barriers, the conflict of interest may involve or result in a materially adverse effect on a client, customer, or counterparty.

(c) *Definition of high-risk asset and high-risk trading strategy.* For purposes of this section:

(1) *High-risk asset* means an asset or group of related assets that would, if held by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

(2) *High-risk trading strategy* means a trading strategy that would, if engaged in by a banking entity, significantly increase the likelihood that the banking entity would incur a substantial financial loss or would pose a threat to the financial stability of the United States.

§ 255.16 Ownership of interests in and sponsorship of issuers of certain collateralized debt obligations backed by trust-preferred securities.

(a) The prohibition contained in § 255.10(a)(1) does not apply to the ownership by a banking entity of an interest in, or sponsorship of, any issuer if:

(1) The issuer was established, and the interest was issued, before May 19, 2010;

(2) The banking entity reasonably believes that the offering proceeds received by the issuer were invested primarily in Qualifying TruPS Collateral; and

(3) The banking entity acquired such interest on or before December 10, 2013 (or acquired such interest in connection with a merger with or acquisition of a banking entity that acquired the interest on or before December 10, 2013).

(b) For purposes of this § 255.16, *Qualifying TruPS Collateral* shall mean any trust preferred security or subordinated debt instrument issued prior to May 19, 2010 by a depository institution holding company that, as of the end of any reporting period within 12 months immediately preceding the issuance of such trust preferred security or subordinated debt instrument, had total consolidated assets of less than $15,000,000,000 or issued prior to May 19, 2010 by a mutual holding company.

(c) Notwithstanding paragraph (a)(3) of this section, a banking entity may act as a market maker with respect to the interests of an issuer described in paragraph (a) of this section in accordance with the applicable provisions of §§ 255.4 and 255.11.

(d) Without limiting the applicability of paragraph (a) of this section, the Board, the FDIC and the OCC will make public a non-exclusive list of issuers that meet the requirements of paragraph (a). A banking entity may rely on the list published by the Board, the FDIC and the OCC.

§§ 255.17–255.19 [Reserved]

Subpart D—Compliance Program Requirement; Violations

§ 255.20 Program for compliance; reporting.

(a) *Program requirement.* Each banking entity shall develop and provide for the continued administration of a compliance program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part. The terms, scope and detail of the compliance program shall be appropriate for the types, size, scope and complexity of activities and business structure of the banking entity.

(b) *Contents of compliance program.* Except as provided in paragraph (f) of this section, the compliance program required by paragraph (a) of this section, at a minimum, shall include:

(1) Written policies and procedures reasonably designed to document, describe, monitor and limit trading activities subject to subpart B (including those permitted under §§ 255.3 to 255.6 of subpart B), including setting, monitoring and managing required limits set out in § 2554 and § 2555, and activities and investments with respect to a covered fund subject to subpart C (including those permitted under §§ 255.11 through 255.14 of subpart C) conducted by the banking entity to ensure that all activities and investments conducted by the banking entity that are subject to section 13 of the BHC Act and this part comply with section 13 of the BHC Act and this part;

(2) A system of internal controls reasonably designed to monitor compliance with section 13 of the BHC Act and this part and to prevent the occurrence of activities or investments that are prohibited by section 13 of the BHC Act and this part;

(3) A management framework that clearly delineates responsibility and accountability for compliance with section 13 of the BHC Act and this part and includes appropriate management review of trading limits, strategies, hedging activities, investments, incentive compensation and other matters identified in this part or by management as requiring attention;

(4) Independent testing and audit of the effectiveness of the compliance program conducted periodically by qualified personnel of the banking entity or by a qualified outside party;

(5) Training for trading personnel and managers, as well as other appropriate personnel, to effectively implement and enforce the compliance program; and

(6) Records sufficient to demonstrate compliance with section 13 of the BHC Act and this part, which a banking entity must promptly provide to the SEC upon request and retain for a period of no less than 5 years or such longer period as required by the SEC.

(c) *Additional standards.* In addition to the requirements in paragraph (b) of this section, the compliance program of a banking entity must satisfy the requirements and other standards contained in Appendix B, if:

(1) The banking entity engages in proprietary trading permitted under subpart B and is required to comply with the reporting requirements of paragraph (d) of this section;

(2) The banking entity has reported total consolidated assets as of the previous calendar year end of $50 billion or more or, in the case of a foreign banking entity, has total U.S. assets as of the previous calendar year end of $50 billion or more (including all subsidiaries, affiliates, branches and agencies of the foreign banking entity operating, located or organized in the United States); or

(3) The SEC notifies the banking entity in writing that it must satisfy the requirements and other standards contained in Appendix B to this part.

(d) *Reporting requirements under Appendix A to this part.* (1) A banking entity engaged in proprietary trading activity permitted under subpart B shall comply with the reporting requirements described in Appendix A, if:

(i) The banking entity (other than a foreign banking entity as provided in paragraph (d)(1)(ii of this section) has, together with its affiliates and subsidiaries, trading assets and liabilities (excluding trading assets and liabilities involving obligations of or guaranteed by the United States or any agency of the United States) the average gross sum of which (on a worldwide consolidated basis) over the previous consecutive four quarters, as measured as of the last day of each of the four prior calendar quarters, equals or exceeds the threshold established in paragraph (d)(2) of this section;

(ii) In the case of a foreign banking entity, the average gross sum of the trading assets and liabilities of the combined U.S. operations of the foreign banking entity (including all subsidiaries, affiliates, branches and agencies of the foreign banking entity operating, located or organized in the United States and excluding trading assets and liabilities involving obligations of or guaranteed by the United States or any agency of the United States) over the previous consecutive four quarters, as measured as of the last day of each of the four prior calendar quarters, equals or exceeds the threshold established in paragraph (d)(2) of this section; or

(iii) The SEC notifies the banking entity in writing that it must satisfy the reporting requirements contained in Appendix A.

(2) The threshold for reporting under paragraph (d)(1) of this section shall be $50 billion beginning on June 30, 2014; $25 billion beginning on April 30, 2016; and $10 billion beginning on December 31, 2016.

(3) Frequency of reporting: Unless the SEC notifies the banking entity in writing that it must report on a different basis, a banking entity with $50 billion or more in trading assets and liabilities (as calculated in accordance with paragraph (d)(1) of this section) shall report the information required by Appendix A for each calendar month within 30 days of the end of the relevant calendar month; beginning with information for the month of January 2015, such information shall be reported within 10 days of the end of each calendar month. Any other banking entity subject to Appendix A shall report the information required by Appendix A for each calendar quarter within 30 days of the end of that calendar quarter unless the SEC notifies the banking entity in writing that it must report on a different basis.

(e) *Additional documentation for covered funds.* Any banking entity that has more than $10 billion in total consolidated assets as reported on December 31 of the previous two calendar years shall maintain records that include:

(1) Documentation of the exclusions or exemptions other than sections 3(c)(1) and 3(c)(7) of the Investment Company Act of 1940 relied on by each fund sponsored by the banking entity (including all subsidiaries and affiliates) in determining that such fund is not a covered fund;

(2) For each fund sponsored by the banking entity (including all subsidiaries and affiliates) for which the banking entity relies on one or more of the exclusions from the definition of covered fund provided by §§ 255.10(c)(1), 255.10(c)(5), 255.10(c)(8), 255.10(c)(9), or 255.10(c)(10) of subpart C, documentation supporting the banking entity's determination that the fund is not a covered fund pursuant to one or more of those exclusions;

(3) For each seeding vehicle described in § 255.10(c)(12)(i) or (iii) of subpart C that will become a registered investment

company or SEC-regulated business development company, a written plan documenting the banking entity's determination that the seeding vehicle will become a registered investment company or SEC-regulated business development company; the period of time during which the vehicle will operate as a seeding vehicle; and the banking entity's plan to market the vehicle to third-party investors and convert it into a registered investment company or SEC-regulated business development company within the time period specified in § 255.12(a)(2)(i)(B) of subpart C;

(4) For any banking entity that is, or is controlled directly or indirectly by a banking entity that is, located in or organized under the laws of the United States or of any State, if the aggregate amount of ownership interests in foreign public funds that are described in § 255.10(c)(1) of subpart C owned by such banking entity (including ownership interests owned by any affiliate that is controlled directly or indirectly by a banking entity that is located in or organized under the laws of the United States or of any State) exceeds $50 million at the end of two or more consecutive calendar quarters, beginning with the next succeeding calendar quarter, documentation of the value of the ownership interests owned by the banking entity (and such affiliates) in each foreign public fund and each jurisdiction in which any such foreign public fund is organized, calculated as of the end of each calendar quarter, which documentation must continue until the banking entity's aggregate amount of ownership interests in foreign public funds is below $50 million for two consecutive calendar quarters; and

(5) For purposes of paragraph (e)(4) of this section, a U.S. branch, agency, or subsidiary of a foreign banking entity is located in the United States; however, the foreign bank that operates or controls that branch, agency, or subsidiary is not considered to be located in the United States solely by virtue of operating or controlling the U.S. branch, agency, or subsidiary.

(f) *Simplified programs for less active banking entities*—(1) *Banking entities with no covered activities.* A banking entity that does not engage in activities or investments pursuant to subpart B or subpart C (other than trading activities permitted pursuant to § 255.6(a) of subpart B) may satisfy the requirements of this section by establishing the required compliance program prior to becoming engaged in such activities or making such investments (other than trading activities permitted pursuant to § 255.6(a) of subpart B).

(2) *Banking entities with modest activities.* A banking entity with total consolidated assets of $10 billion or less as reported on December 31 of the previous two calendar years that engages in activities or investments pursuant to subpart B or subpart C (other than trading activities permitted under § 255.6(a) of subpart B) may satisfy the requirements of this section by including in its existing compliance policies and procedures appropriate references to the requirements of section 13 of the BHC Act and this part and adjustments as appropriate given the activities, size, scope and complexity of the banking entity.

§ 255.21 Termination of activities or investments; penalties for violations.

(a) Any banking entity that engages in an activity or makes an investment in violation of section 13 of the BHC Act or this part, or acts in a manner that functions as an evasion of the requirements of section 13 of the BHC Act or this part, including through an abuse of any activity or investment permitted under subparts B or C, or otherwise violates the restrictions and requirements of section 13 of the BHC Act or this part, shall, upon discovery, promptly terminate the activity and, as relevant, dispose of the investment.

(b) Whenever the SEC finds reasonable cause to believe any banking entity has engaged in an activity or made an investment in violation of section 13 of the BHC Act or this part, or engaged in any activity or made any investment that functions as an evasion of the requirements of section 13 of the BHC Act or this part, the SEC may take any action permitted by law to enforce compliance with section 13 of the BHC Act and this part, including directing the banking entity to restrict, limit, or terminate any or all activities under this part and dispose of any investment.

Appendix A to Part 255—Reporting and Recordkeeping Requirements for Covered Trading Activities

I. Purpose

a. This appendix sets forth reporting and recordkeeping requirements that certain banking entities must satisfy in connection with the restrictions on proprietary trading set forth in subpart B (''proprietary trading restrictions''). Pursuant to § 255.20(d), this appendix generally applies to a banking entity that, together with its affiliates and subsidiaries, has significant trading assets and liabilities. These entities are required to (i) furnish periodic reports to the SEC regarding a variety of quantitative measurements of their covered trading activities, which vary depending on the scope and size of covered trading activities, and (ii) create and maintain records documenting the preparation and content of these reports. The requirements of this appendix must be incorporated into the banking entity's internal compliance program under § 255.20 and Appendix B.

b. The purpose of this appendix is to assist banking entities and the SEC in:

(i) Better understanding and evaluating the scope, type, and profile of the banking entity's covered trading activities;

(ii) Monitoring the banking entity's covered trading activities;

(iii) Identifying covered trading activities that warrant further review or examination by the banking entity to verify compliance with the proprietary trading restrictions;

(iv) Evaluating whether the covered trading activities of trading desks engaged in market making-related activities subject to § 255.4(b) are consistent with the requirements governing permitted market making-related activities;

(v) Evaluating whether the covered trading activities of trading desks that are engaged in permitted trading activity subject to §§ 255.4, 255.5, or 255.6(a)–(b) (*i.e.,* underwriting and market making-related related activity, risk-mitigating hedging, or trading in certain government obligations) are consistent with the requirement that such activity not result, directly or indirectly, in a material exposure to high-risk assets or high-risk trading strategies;

(vi) Identifying the profile of particular covered trading activities of the banking entity, and the individual trading desks of the banking entity, to help establish the appropriate frequency and scope of examination by the SEC of such activities; and

(vii) Assessing and addressing the risks associated with the banking entity's covered trading activities.

c. The quantitative measurements that must be furnished pursuant to this appendix are *not* intended to serve as a dispositive tool for the identification of permissible or impermissible activities.

d. In order to allow banking entities and the Agencies to evaluate the effectiveness of these metrics, banking entities must collect and report these metrics for all trading desks beginning on the dates established in § 255.20 of the final rule. The Agencies will review the data collected and revise this collection requirement as appropriate based on a review of the data collected prior to September 30, 2015.

e. In addition to the quantitative measurements required in this appendix, a banking entity may need to develop and implement other quantitative measurements in order to effectively monitor its covered trading activities for compliance with section 13 of the BHC Act and this part and to have an effective compliance program, as required by § 255.20 and Appendix B to this part. The effectiveness of particular quantitative measurements may differ based on the profile of the banking entity's businesses in general and, more specifically, of the particular trading desk, including types of instruments traded, trading activities and strategies, and history and experience (*e.g.,* whether the trading desk is an established, successful market maker or a new entrant to a competitive market). In all cases, banking entities must ensure that they have robust measures in place to identify and monitor the risks taken in their trading activities, to ensure that the activities are within risk tolerances established by the banking entity, and to monitor and examine for compliance with the proprietary trading restrictions in this part.

f. On an ongoing basis, banking entities must carefully monitor, review, and evaluate all furnished quantitative measurements, as well as any others that they choose to utilize in order to maintain compliance with section 13 of the BHC Act and this part. All measurement results that indicate a heightened risk of impermissible proprietary trading, including with respect to otherwise-permitted activities under §§ 255.4 through 255.6(a) and (b), or that result in a material exposure to high-risk assets or high-risk trading strategies, must be escalated within the banking entity for review, further analysis, explanation to the SEC, and remediation, where appropriate. The quantitative measurements discussed in this appendix should be helpful to banking entities in identifying and managing the risks related to their covered trading activities.

II. Definitions

The terms used in this appendix have the same meanings as set forth in §§ 255.2 and 255.3. In addition, for purposes of this appendix, the following definitions apply:

Calculation period means the period of time for which a particular quantitative measurement must be calculated.

Comprehensive profit and loss means the net profit or loss of a trading desk's material sources of trading revenue over a specific period of time, including, for example, any increase or decrease in the market value of a trading desk's holdings, dividend income, and interest income and expense.

Covered trading activity means trading conducted by a trading desk under §§ 255.4, 255.5, 255.6(a), or 255.6(b). A banking entity may include trading under §§ 255.3(d), 255.6(c), 255.6(d) or 255.6(e).

Measurement frequency means the frequency with which a particular quantitative metric must be calculated and recorded.

Trading desk means the smallest discrete unit of organization of a banking entity that purchases or sells financial instruments for the trading account of the banking entity or an affiliate thereof.

III. Reporting and Recordkeeping of Quantitative Measurements

a. Scope of Required Reporting

General scope. Each banking entity made subject to this part by § 255.20 must furnish the following quantitative measurements for each trading desk of the banking entity, calculated in accordance with this appendix:

- Risk and Position Limits and Usage;
- Risk Factor Sensitivities;
- Value-at-Risk and Stress VaR;
- Comprehensive Profit and Loss Attribution;
- Inventory Turnover;
- Inventory Aging; and
- Customer-Facing Trade Ratio

b. Frequency of Required Calculation and Reporting

A banking entity must calculate any applicable quantitative measurement for each trading day. A banking entity must report each applicable quantitative measurement to the SEC on the reporting schedule established in § 255.20 unless otherwise requested by the SEC. All quantitative measurements for any calendar month must be reported within the time period required by § 255.20.

c. Recordkeeping

A banking entity must, for any quantitative measurement furnished to the SEC pursuant to this appendix and § 255.20(d), create and maintain records documenting the preparation and content of these reports, as well as such information as is necessary to permit the SEC to verify the accuracy of such reports, for a period of 5 years from the end of the calendar year for which the measurement was taken.

IV. Quantitative Measurements

a. Risk-Management Measurements

1. Risk and Position Limits and Usage

i. *Description:* For purposes of this appendix, Risk and Position Limits are the constraints that define the amount of risk that a trading desk is permitted to take at a point in time, as defined by the banking entity for a specific trading desk. Usage represents the portion of the trading desk's limits that are accounted for by the current activity of the desk. Risk and position limits and their usage are key risk management tools used to control and monitor risk taking and include, but are not limited, to the limits set out in § 255.4 and § 255.5. A number of the metrics that are described below, including ''Risk Factor Sensitivities'' and ''Value-at-Risk and Stress Value-at-Risk,'' relate to a trading desk's risk and position limits and are useful in evaluating and setting these limits in the broader context of the trading desk's overall activities, particularly for the market making activities under § 255.4(b) and hedging activity under § 255.5. Accordingly, the limits required under § 255.4(b)(2)(iii) and § 255.5(b)(1)(i) must meet the applicable requirements under § 255.4(b)(2)(iii) and § 255.5(b)(1)(i) and also must include appropriate metrics for the trading desk limits including, at a minimum, the ''Risk Factor Sensitivities'' and ''Value-at-Risk and Stress Value-at-Risk'' metrics except to the extent any of the ''Risk Factor Sensitivities'' or ''Value-at-Risk and Stress Value-at-Risk'' metrics are demonstrably ineffective for measuring and monitoring the risks of a trading desk based on the types of positions traded by, and risk exposures of, that desk.

ii. *General Calculation Guidance:* Risk and Position Limits must be reported in the format used by the banking entity for the purposes of risk management of each trading desk. Risk and Position Limits are often expressed in terms of risk measures, such as VaR and Risk Factor Sensitivities, but may also be expressed in terms of other observable criteria, such as net open positions. When criteria other than VaR or Risk Factor Sensitivities are used to define the Risk and Position Limits, both the value of the Risk and Position Limits and the value of the variables used to assess whether these limits have been reached must be reported.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

2. Risk Factor Sensitivities

i. *Description:* For purposes of this appendix, Risk Factor Sensitivities are changes in a trading desk's Comprehensive Profit and Loss that are expected to occur in the event of a change in one or more underlying variables that are significant sources of the trading desk's profitability and risk.

ii. *General Calculation Guidance:* A banking entity must report the Risk Factor Sensitivities that are monitored and managed as part of the trading desk's overall risk management policy. The underlying data and methods used to compute a trading desk's Risk Factor Sensitivities will depend on the specific function of the trading desk and the internal risk management models employed. The number and type of Risk Factor Sensitivities that are monitored and managed by a trading desk, and furnished to the SEC, will depend on the explicit risks assumed by the trading desk. In general, however, reported Risk Factor Sensitivities must be sufficiently granular to account for a preponderance of the expected price variation in the trading desk's holdings.

A. Trading desks must take into account any relevant factors in calculating Risk Factor Sensitivities, including, for example, the following with respect to particular asset classes:

- *Commodity derivative positions:* Risk factors with respect to the related commodities set out in 17 CFR 20.2, the maturity of the positions, volatility and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;
- *Credit positions:* Risk factors with respect to credit spreads that are sufficiently granular to account for specific credit sectors and market segments, the maturity profile of the positions, and risk factors with respect to interest rates of all relevant maturities;
- *Credit-related derivative positions:* Risk factor sensitivities, for example credit spreads, shifts (parallel and non-parallel) in credit spreads—volatility, and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;
- *Equity derivative positions:* Risk factor sensitivities such as equity positions, volatility, and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and the maturity profile of the positions;
- *Equity positions:* Risk factors for equity prices and risk factors that differentiate between important equity market sectors and segments, such as a small capitalization equities and international equities;
- *Foreign exchange derivative positions:* Risk factors with respect to major currency pairs and maturities, exposure to interest rates at relevant maturities, volatility, and/or

correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), as well as the maturity profile of the positions; and

• *Interest rate positions, including interest rate derivative positions:* Risk factors with respect to major interest rate categories and maturities and volatility and/or correlation sensitivities (expressed in a manner that demonstrates any significant non-linearities), and shifts (parallel and non-parallel) in the interest rate curve, as well as the maturity profile of the positions.

B. The methods used by a banking entity to calculate sensitivities to a common factor shared by multiple trading desks, such as an equity price factor, must be applied consistently across its trading desks so that the sensitivities can be compared from one trading desk to another.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

3. Value-at-Risk and Stress Value-at-Risk

i. *Description:* For purposes of this appendix, Value-at-Risk (''VaR'') is the commonly used percentile measurement of the risk of future financial loss in the value of a given set of aggregated positions over a specified period of time, based on current market conditions. For purposes of this appendix, Stress Value-at-Risk (''Stress VaR'') is the percentile measurement of the risk of future financial loss in the value of a given set of aggregated positions over a specified period of time, based on market conditions during a period of significant financial stress.

ii. *General Calculation Guidance:* Banking entities must compute and report VaR and Stress VaR by employing generally accepted standards and methods of calculation. VaR should reflect a loss in a trading desk that is expected to be exceeded less than one percent of the time over a one-day period. For those banking entities that are subject to regulatory capital requirements imposed by a Federal banking agency, VaR and Stress VaR must be computed and reported in a manner that is consistent with such regulatory capital requirements. In cases where a trading desk does not have a standalone VaR or Stress VaR calculation but is part of a larger aggregation of positions for which a VaR or Stress VaR calculation is performed, a VaR or Stress VaR calculation that includes only the trading desk's holdings must be performed consistent with the VaR or Stress VaR model and methodology used for the larger aggregation of positions.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

b. Source-of-Revenue Measurements

1. Comprehensive Profit and Loss Attribution

i. *Description:* For purposes of this appendix, Comprehensive Profit and Loss Attribution is an analysis that attributes the daily fluctuation in the value of a trading desk's positions to various sources. First, the daily profit and loss of the aggregated positions is divided into three categories: (i) Profit and loss attributable to a trading desk's existing positions that were also positions held by the trading desk as of the end of the prior day (''existing positions''); (ii) profit and loss attributable to new positions resulting from the current day's trading activity (''new positions''); and (iii) residual profit and loss that cannot be specifically attributed to existing positions or new positions. The sum of (i), (ii), and (iii) must equal the trading desk's comprehensive profit and loss at each point in time. In addition, profit and loss measurements must calculate volatility of comprehensive profit and loss (*i.e.,* the standard deviation of the trading desk's one-day profit and loss, in dollar terms) for the reporting period for at least a 30-, 60- and 90-day lag period, from the end of the reporting period, and any other period that the banking entity deems necessary to meet the requirements of the rule.

A. The comprehensive profit and loss associated with existing positions must reflect changes in the value of these positions on the applicable day. The comprehensive profit and loss from existing positions must be further attributed, as applicable, to changes in (i) the specific Risk Factors and other factors that are monitored and managed as part of the trading desk's overall risk management policies and procedures; and (ii) any other applicable elements, such as cash flows, carry, changes in reserves, and the correction, cancellation, or exercise of a trade.

B. The comprehensive profit and loss attributed to new positions must reflect commissions and fee income or expense and market gains or losses associated with transactions executed on the applicable day. New positions include purchases and sales of financial instruments and other assets/liabilities and negotiated amendments to existing positions. The comprehensive profit and loss from new positions may be reported in the aggregate and does not need to be further attributed to specific sources.

C. The portion of comprehensive profit and loss that cannot be specifically attributed to known sources must be allocated to a residual category identified as an unexplained portion of the comprehensive profit and loss. Significant unexplained profit and loss must be escalated for further investigation and analysis.

ii. *General Calculation Guidance:* The specific categories used by a trading desk in the attribution analysis and amount of detail for the analysis should be tailored to the type and amount of trading activities undertaken by the trading desk. The new position attribution must be computed by calculating the difference between the prices at which instruments were bought and/or sold and the prices at which those instruments are marked to market at the close of business on that day multiplied by the notional or principal amount of each purchase or sale. Any fees, commissions, or other payments received (paid) that are associated with transactions executed on that day must be added (subtracted) from such difference. These factors must be measured consistently over time to facilitate historical comparisons.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

c. Customer-Facing Activity Measurements

1. Inventory Turnover

i. *Description:* For purposes of this appendix, Inventory Turnover is a ratio that measures the turnover of a trading desk's inventory. The numerator of the ratio is the absolute value of all transactions over the reporting period. The denominator of the ratio is the value of the trading desk's inventory at the beginning of the reporting period.

ii. *General Calculation Guidance:* For purposes of this appendix, for derivatives, other than options and interest rate derivatives, value means gross notional value, for options, value means delta adjusted notional value, and for interest rate derivatives, value means 10-year bond equivalent value.

iii. *Calculation Period:* 30 days, 60 days, and 90 days.

iv. *Measurement Frequency:* Daily.

2. Inventory Aging

i. *Description:* For purposes of this appendix, Inventory Aging generally describes a schedule of the trading desk's aggregate assets and liabilities and the amount of time that those assets and liabilities have been held. Inventory Aging should measure the age profile of the trading desk's assets and liabilities.

ii. *General Calculation Guidance:* In general, Inventory Aging must be computed using a trading desk's trading activity data and must identify the value of a trading desk's aggregate assets and liabilities. Inventory Aging must include two schedules, an asset-aging schedule and a liability-aging schedule. Each schedule must record the value of assets or liabilities held over all holding periods. For derivatives, other than options, and interest rate derivatives, value means gross notional value, for options, value means delta adjusted notional value and, for interest rate derivatives, value means 10-year bond equivalent value.

iii. *Calculation Period:* One trading day.

iv. *Measurement Frequency:* Daily.

3. Customer-Facing Trade Ratio—Trade Count Based and Value Based

i. *Description:* For purposes of this appendix, the Customer-Facing Trade Ratio is a ratio comparing (i) the transactions involving a counterparty that is a customer of the trading desk to (ii) the transactions involving a counterparty that is not a customer of the trading desk. A trade count based ratio must be computed that records the number of transactions involving a counterparty that is a customer of the trading desk and the number of transactions involving a counterparty that is not a customer of the trading desk. A value based ratio must be computed that records the value of transactions involving a counterparty that is a customer of the trading desk and the value of transactions involving a counterparty that is not a customer of the trading desk.

ii. *General Calculation Guidance:* For purposes of calculating the Customer-Facing Trade Ratio, a counterparty is considered to be a customer of the trading desk if the counterparty is a market participant that makes use of the banking entity's market making-related services by obtaining such services, responding to quotations, or entering into a continuing relationship with respect to such services. However, a trading desk or other organizational unit of another banking entity would not be a client, customer, or counterparty of the trading desk if the other entity has trading assets and liabilities of $50 billion or more as measured in accordance with § 255.20(d)(1) unless the trading desk documents how and why a particular trading desk or other organizational unit of the entity should be treated as a client, customer, or counterparty of the trading desk. Transactions conducted anonymously on an exchange or similar trading facility that permits trading on behalf of a broad range of market participants would be considered transactions with customers of the trading desk. For derivatives, other than options, and interest rate derivatives, value means gross notional value, for options, value means delta adjusted notional value, and for interest rate derivatives, value means 10-year bond equivalent value.

iii. *Calculation Period:* 30 days, 60 days, and 90 days.

iv. *Measurement Frequency:* Daily.

Appendix B to Part 255—Enhanced Minimum Standards for Compliance Programs

I. Overview

Section 255.20(c) requires certain banking entities to establish, maintain, and enforce an enhanced compliance program that includes the requirements and standards in this Appendix as well as the minimum written policies and procedures, internal controls, management framework, independent testing, training, and recordkeeping provisions outlined in § 255.20. This Appendix sets forth additional minimum standards with respect to the establishment, oversight, maintenance, and enforcement by these banking entities of an enhanced internal compliance program for ensuring and monitoring compliance with the prohibitions and restrictions on proprietary trading and covered fund activities and investments set forth in section 13 of the BHC Act and this part.

a. This compliance program must:

1. Be reasonably designed to identify, document, monitor, and report the permitted trading and covered fund activities and investments of the banking entity; identify, monitor and promptly address the risks of these covered activities and investments and potential areas of noncompliance; and prevent activities or investments prohibited by, or that do not comply with, section 13 of the BHC Act and this part;

2. Establish and enforce appropriate limits on the covered activities and investments of the banking entity, including limits on the size, scope, complexity, and risks of the individual activities or investments consistent with the requirements of section 13 of the BHC Act and this part;

3. Subject the effectiveness of the compliance program to periodic independent review and testing, and ensure that the entity's internal audit, corporate compliance and internal control functions involved in review and testing are effective and independent;

4. Make senior management, and others as appropriate, accountable for the effective implementation of the compliance program, and ensure that the board of directors and chief executive officer (or equivalent) of the banking entity review the effectiveness of the compliance program; and

5. Facilitate supervision and examination by the Agencies of the banking entity's permitted trading and covered fund activities and investments.

II. Enhanced Compliance Program

a. *Proprietary Trading Activities.* A banking entity must establish, maintain and enforce a compliance program that includes written policies and procedures that are appropriate for the types, size, and complexity of, and risks associated with, its permitted trading activities. The compliance program may be tailored to the types of trading activities conducted by the banking entity, and must include a detailed description of controls established by the banking entity to reasonably ensure that its trading activities are conducted in accordance with the requirements and limitations applicable to those trading activities under section 13 of the BHC Act and this part, and provide for appropriate revision of the compliance program before expansion of the trading activities of the banking entity. A banking entity must devote adequate resources and use knowledgeable personnel in conducting, supervising and managing its trading activities, and promote consistency, independence and rigor in implementing its risk controls and compliance efforts. The compliance program must be updated with a frequency sufficient to account for changes in the activities of the banking entity, results of independent testing of the program, identification of weaknesses in the program, and changes in legal, regulatory or other requirements.

1. *Trading Desks:* The banking entity must have written policies and procedures governing each trading desk that include a description of:

i. The process for identifying, authorizing and documenting financial instruments each trading desk may purchase or sell, with separate documentation for market making-related activities conducted in reliance on § 255.4(b) and for hedging activity conducted in reliance on § 255.5;

ii. A mapping for each trading desk to the division, business line, or other organizational structure that is responsible for managing and overseeing the trading desk's activities;

iii. The mission (*i.e.,* the type of trading activity, such as market-making, trading in sovereign debt, etc.) and strategy (*i.e.,* methods for conducting authorized trading activities) of each trading desk;

iv. The activities that the trading desk is authorized to conduct, including (i) authorized instruments and products, and (ii) authorized hedging strategies, techniques and instruments;

v. The types and amount of risks allocated by the banking entity to each trading desk to implement the mission and strategy of the trading desk, including an enumeration of material risks resulting from the activities in which the trading desk is authorized to engage (including but not limited to price risks, such as basis, volatility and correlation risks, as well as counterparty credit risk). Risk assessments must take into account both the risks inherent in the trading activity and the strength and effectiveness of controls designed to mitigate those risks;

vi. How the risks allocated to each trading desk will be measured;

vii. Why the allocated risks levels are appropriate to the activities authorized for the trading desk;

viii. The limits on the holding period of, and the risk associated with, financial instruments under the responsibility of the trading desk;

ix. The process for setting new or revised limits, as well as escalation procedures for granting exceptions to any limits or to any policies or procedures governing the desk, the analysis that will be required to support revising limits or granting exceptions, and the process for independently reviewing and documenting those exceptions and the underlying analysis;

x. The process for identifying, documenting and approving new products, trading strategies, and hedging strategies;

xi. The types of clients, customers, and counterparties with whom the trading desk may trade; and

xii. The compensation arrangements, including incentive arrangements, for employees associated with the trading desk, which may not be designed to reward or incentivize prohibited proprietary trading or excessive or imprudent risk-taking.

2. *Description of risks and risk management processes:* The compliance program for the banking entity must include a comprehensive description of the risk management program for the trading activity of the banking entity. The compliance program must also include a description of the governance, approval, reporting, escalation, review and other processes the banking entity will use to reasonably ensure that trading activity is conducted in compliance with section 13 of the BHC Act and this part. Trading activity in similar financial instruments should be subject to similar governance, limits, testing, controls, and review, unless the banking entity specifically determines to establish different limits or processes and documents those differences. Descriptions must include, at a minimum, the following elements:

i. A description of the supervisory and risk management structure governing all trading activity, including a description of processes for initial and senior-level review of new products and new strategies;

ii. A description of the process for developing, documenting, testing, approving and reviewing all models used for valuing, identifying and monitoring the risks of trading activity and related positions, including the process for periodic independent testing of the reliability and accuracy of those models;

iii. A description of the process for developing, documenting, testing, approving and reviewing the limits established for each trading desk;

iv. A description of the process by which a security may be purchased or sold pursuant to the liquidity management plan, including the process for authorizing and monitoring such activity to ensure compliance with the banking entity's liquidity management plan and the restrictions on liquidity management activities in this part;

v. A description of the management review process, including escalation procedures, for approving any temporary exceptions or permanent adjustments to limits on the activities, positions, strategies, or risks associated with each trading desk; and

vi. The role of the audit, compliance, risk management and other relevant units for conducting independent testing of trading and hedging activities, techniques and strategies.

3. Authorized risks, instruments, and products. The banking entity must implement and enforce limits and internal controls for each trading desk that are reasonably designed to ensure that trading activity is conducted in conformance with section 13 of the BHC Act and this part and with the banking entity's written policies and procedures. The banking entity must establish and enforce risk limits appropriate for the activity of each trading desk. These limits should be based on probabilistic and non-probabilistic measures of potential loss (*e.g.,* Value-at-Risk and notional exposure, respectively), and measured under normal and stress market conditions. At a minimum, these internal controls must monitor, establish and enforce limits on:

i. The financial instruments (including, at a minimum, by type and exposure) that the trading desk may trade;

ii. The types and levels of risks that may be taken by each trading desk; and

iii. The types of hedging instruments used, hedging strategies employed, and the amount of risk effectively hedged.

4. Hedging policies and procedures. The banking entity must establish, maintain, and enforce written policies and procedures regarding the use of risk-mitigating hedging instruments and strategies that, at a minimum, describe:

i. The positions, techniques and strategies that each trading desk may use to hedge the risk of its positions;

ii. The manner in which the banking entity will identify the risks arising in connection with and related to the individual or aggregated positions, contracts or other holdings of the banking entity that are to be hedged and determine that those risks have been properly and effectively hedged;

iii. The level of the organization at which hedging activity and management will occur;

iv. The manner in which hedging strategies will be monitored and the personnel responsible for such monitoring;

v. The risk management processes used to control unhedged or residual risks; and

vi. The process for developing, documenting, testing, approving and reviewing all hedging positions, techniques and strategies permitted for each trading desk and for the banking entity in reliance on § 255.5.

5. Analysis and quantitative measurements. The banking entity must perform robust analysis and quantitative measurement of its trading activities that is reasonably designed to ensure that the trading activity of each trading desk is consistent with the banking entity's compliance program; monitor and assist in the identification of potential and actual prohibited proprietary trading activity; and prevent the occurrence of prohibited proprietary trading. Analysis and models used to determine, measure and limit risk must be rigorously tested and be reviewed by management responsible for trading activity to ensure that trading activities, limits, strategies, and hedging activities do not understate the risk and exposure to the banking entity or allow prohibited proprietary trading. This review should include periodic and independent back-testing and revision of activities, limits, strategies and hedging as appropriate to contain risk and ensure compliance. In addition to the quantitative measurements reported by any banking entity subject to Appendix A to this part, each banking entity must develop and implement, to the extent appropriate to facilitate compliance with this part, additional quantitative measurements specifically tailored to the particular risks, practices, and strategies of its trading desks. The banking entity's analysis and quantitative measurements must incorporate the quantitative measurements reported by the banking entity pursuant to Appendix A (if applicable) and include, at a minimum, the following:

i. Internal controls and written policies and procedures reasonably designed to ensure the accuracy and integrity of quantitative measurements;

ii. Ongoing, timely monitoring and review of calculated quantitative measurements;

iii. The establishment of numerical thresholds and appropriate trading measures for each trading desk and heightened review of trading activity not consistent with those thresholds to ensure compliance with section 13 of the BHC Act and this part, including analysis of the measurement results or other information, appropriate escalation procedures, and documentation related to the review; and

iv. Immediate review and compliance investigation of the trading desk's activities, escalation to senior management with oversight responsibilities for the applicable trading desk, timely notification to the SEC, appropriate remedial action (*e.g.,* divesting of impermissible positions, cessation of impermissible activity, disciplinary actions), and documentation of the investigation findings and remedial action taken when quantitative measurements or other information, considered together with the facts and circumstances, or findings of internal audit, independent testing or other review suggest a reasonable likelihood that the trading desk has violated any part of section 13 of the BHC Act or this part.

6. Other Compliance Matters. In addition to the requirements specified above, the banking entity's compliance program must:

i. Identify activities of each trading desk that will be conducted in reliance on exemptions contained in §§ 255.4 through 255.6, including an explanation of:

A. How and where in the organization the activity occurs; and

B. Which exemption is being relied on and how the activity meets the specific requirements for reliance on the applicable exemption;

ii. Include an explanation of the process for documenting, approving and reviewing actions taken pursuant to the liquidity management plan, where in the organization this activity occurs, the securities permissible for liquidity management, the process for ensuring that liquidity management activities are not conducted for the purpose of prohibited proprietary trading, and the process for ensuring that securities purchased as part of the liquidity management plan are highly liquid and conform to the requirements of this part;

iii. Describe how the banking entity monitors for and prohibits potential or actual material exposure to high-risk assets or high-risk trading strategies presented by each trading desk that relies on the exemptions contained in §§ 255.3(d)(3), and 255.4 through 255.6, which must take into account potential or actual exposure to:

A. Assets whose values cannot be externally priced or, where valuation is reliant on pricing models, whose model inputs cannot be externally validated;

B. Assets whose changes in value cannot be adequately mitigated by effective hedging;

C. New products with rapid growth, including those that do not have a market history;

D. Assets or strategies that include significant embedded leverage;

E. Assets or strategies that have demonstrated significant historical volatility;

F. Assets or strategies for which the application of capital and liquidity standards would not adequately account for the risk; and

G. Assets or strategies that result in large and significant concentrations to sectors, risk factors, or counterparties;

iv. Establish responsibility for compliance with the reporting and recordkeeping requirements of subpart B and § 255.20; and

v. Establish policies for monitoring and prohibiting potential or actual material conflicts of interest between the banking entity and its clients, customers, or counterparties.

7. Remediation of violations. The banking entity's compliance program must be reasonably designed and established to effectively monitor and identify for further analysis any trading activity that may indicate potential violations of section 13 of the BHC Act and this part and to prevent actual violations of section 13 of the BHC Act and this part. The compliance program must describe procedures for identifying and remedying violations of section 13 of the BHC Act and this part, and must include, at a minimum, a requirement to promptly document, address and remedy any violation of section 13 of the BHC Act or this part, and document all proposed and actual remediation efforts. The compliance program must include specific written policies and procedures that are reasonably designed to assess the extent to which any activity indicates that modification to the banking entity's compliance program is warranted and to ensure that appropriate modifications are implemented. The written policies and procedures must provide for prompt notification to appropriate management, including senior management and the board of directors, of any material weakness or significant deficiencies in the design or implementation of the compliance program of the banking entity.

b. *Covered Fund Activities or Investments.* A banking entity must establish, maintain and enforce a compliance program that includes written policies and procedures that are appropriate for the types, size, complexity and risks of the covered fund and related activities conducted and investments made, by the banking entity.

1. Identification of covered funds. The banking entity's compliance program must provide a process, which must include appropriate management review and independent testing, for identifying and documenting covered funds that each unit within the banking entity's organization sponsors or organizes and offers, and covered funds in which each such unit invests. In addition to the documentation requirements for covered funds, as specified under § 255.20(e), the documentation must include information that identifies all pools that the banking entity sponsors or has an interest in and the type of exemption from the Commodity Exchange Act (whether or not the pool relies on section 4.7 of the regulations under the Commodity Exchange Act), and the amount of ownership interest the banking entity has in those pools.

2. Identification of covered fund activities and investments. The banking entity's compliance program must identify, document and map each unit within the organization that is permitted to acquire or hold an interest in any covered fund or sponsor any covered fund and map each unit to the division, business line, or other organizational structure that will be responsible for managing and overseeing that unit's activities and investments.

3. Explanation of compliance. The banking entity's compliance program must explain how:

i. The banking entity monitors for and prohibits potential or actual material conflicts of interest between the banking entity and its clients, customers, or counterparties related to its covered fund activities and investments;

ii. The banking entity monitors for and prohibits potential or actual transactions or activities that may threaten the safety and soundness of the banking entity related to its covered fund activities and investments; and

iii. The banking entity monitors for and prohibits potential or actual material exposure to high-risk assets or high-risk trading strategies presented by its covered fund activities and investments, taking into account potential or actual exposure to:

A. Assets whose values cannot be externally priced or, where valuation is reliant on pricing models, whose model inputs cannot be externally validated;

B. Assets whose changes in values cannot be adequately mitigated by effective hedging;

C. New products with rapid growth, including those that do not have a market history;

D. Assets or strategies that include significant embedded leverage;

E. Assets or strategies that have demonstrated significant historical volatility;

F. Assets or strategies for which the application of capital and liquidity standards would not adequately account for the risk; and

G. Assets or strategies that expose the banking entity to large and significant concentrations with respect to sectors, risk factors, or counterparties;

4. Description and documentation of covered fund activities and investments. For each organizational unit engaged in covered fund activities and investments, the banking entity's compliance program must document:

i. The covered fund activities and investments that the unit is authorized to conduct;

ii. The banking entity's plan for actively seeking unaffiliated investors to ensure that any investment by the banking entity conforms to the limits contained in § 255.12 or registered in compliance with the securities laws and thereby exempt from those limits within the time periods allotted in§ 255.12; and

iii. How it complies with the requirements of subpart C.

5. Internal Controls. A banking entity must establish, maintain, and enforce internal controls that are reasonably designed to ensure that its covered fund activities or investments comply with the requirements of section 13 of the BHC Act and this part and are appropriate given the limits on risk established by the banking entity. These written internal controls must be reasonably designed and established to effectively monitor and identify for further analysis any covered fund activity or investment that may indicate potential violations of section 13 of the BHC Act or this part. The internal controls must, at a minimum require:

i. Monitoring and limiting the banking entity's individual and aggregate investments in covered funds;

ii. Monitoring the amount and timing of seed capital investments for compliance with the limitations under subpart C (including but not limited to the redemption, sale or disposition requirements) of § 255.12, and the effectiveness of efforts to seek unaffiliated investors to ensure compliance with those limits;

iii. Calculating the individual and aggregate levels of ownership interests in one or more covered fund required by § 255.12;

iv. Attributing the appropriate instruments to the individual and aggregate ownership interest calculations above;

v. Making disclosures to prospective and actual investors in any covered fund organized and offered or sponsored by the banking entity, as provided under § 255.11(a)(8);

vi. Monitoring for and preventing any relationship or transaction between the banking entity and a covered fund that is prohibited under § 255.14, including where the banking entity has been designated as the sponsor, investment manager, investment adviser, or commodity trading advisor to a covered fund by another banking entity; and

vii. Appropriate management review and supervision across legal entities of the banking entity to ensure that services and products provided by all affiliated entities comply with the limitation on services and products contained in § 255.14.

6. Remediation of violations. The banking entity's compliance program must be reasonably designed and established to effectively monitor and identify for further analysis any covered fund activity or investment that may indicate potential violations of section 13 of the BHC Act or this part and to prevent actual violations of section 13 of the BHC Act and this part. The banking entity's compliance program must describe procedures for identifying and remedying violations of section 13 of the BHC Act and this part, and must include, at a minimum, a requirement to promptly document, address and remedy any violation of section 13 of the BHC Act or this part, including § 255.21, and document all proposed and actual remediation efforts. The compliance program must include specific written policies and procedures that are reasonably designed to assess the extent to which any activity or investment indicates that modification to the banking entity's compliance program is warranted and to ensure that appropriate modifications are implemented. The written policies and procedures must provide for prompt notification to appropriate management, including senior management and the board of directors, of any material weakness or significant deficiencies in the design or implementation of the compliance program of the banking entity.

III. Responsibility and Accountability for the Compliance Program

a. A banking entity must establish, maintain, and enforce a governance and management framework to manage its business and employees with a view to preventing violations of section 13 of the BHC Act and this part. A banking entity must have an appropriate management framework reasonably designed to ensure that: Appropriate personnel are responsible and accountable for the effective implementation and enforcement of the compliance program; a clear reporting line with a chain of responsibility is delineated; and the compliance program is reviewed periodically by senior management. The board of directors (or equivalent governance body) and senior management should have the appropriate authority and access to personnel and information within the organizations as well as appropriate resources to conduct their oversight activities effectively.

1. Corporate governance. The banking entity must adopt a written compliance program approved by the board of directors, an appropriate committee of the board, or equivalent governance body, and senior management.

2. Management procedures. The banking entity must establish, maintain, and enforce a governance framework that is reasonably designed to achieve compliance with section 13 of the BHC Act and this part, which, at a minimum, provides for:

i. The designation of appropriate senior management or committee of senior management with authority to carry out the management responsibilities of the banking entity for each trading desk and for each organizational unit engaged in covered fund activities;

ii. Written procedures addressing the management of the activities of the banking entity that are reasonably designed to achieve compliance with section 13 of the BHC Act and this part, including:

A. A description of the management system, including the titles, qualifications, and locations of managers and the specific responsibilities of each person with respect to the banking entity's activities governed by section 13 of the BHC Act and this part; and

B. Procedures for determining compensation arrangements for traders engaged in underwriting or market making-related activities under § 255.4 or risk-mitigating hedging activities under § 255.5 so that such compensation arrangements are designed not to reward or incentivize prohibited proprietary trading and appropriately balance risk and financial results in a manner that does not encourage employees to expose the banking entity to excessive or imprudent risk.

3. Business line managers. Managers with responsibility for one or more trading desks of the banking entity are accountable for the effective implementation and enforcement of the compliance program with respect to the applicable trading desk(s).

4. Board of directors, or similar corporate body, and senior management. The board of directors, or similar corporate body, and senior management are responsible for setting and communicating an appropriate culture of compliance with section 13 of the BHC Act and this part and ensuring that appropriate policies regarding the management of trading activities and covered fund activities or investments are adopted to comply with section 13 of the BHC Act and this part. The board of directors or similar corporate body (such as a designated committee of the board or an equivalent governance body) must ensure that senior management is fully capable, qualified, and properly motivated to manage compliance with this part in light of the organization's business activities and the expectations of the board of directors. The board of directors or similar corporate body must also ensure that senior management has established appropriate incentives and adequate resources to support compliance with this part, including the implementation of a compliance program meeting the requirements of this appendix into management goals and compensation structures across the banking entity.

5. Senior management. Senior management is responsible for implementing and enforcing the approved compliance program. Senior management must also ensure that effective corrective action is taken when failures in compliance with section 13 of the BHC Act and this part are identified. Senior management and control personnel charged with overseeing compliance with section 13 of the BHC Act and this part should review the compliance program for the banking entity periodically and report to the board, or an appropriate committee thereof, on the effectiveness of the compliance program and compliance matters with a frequency appropriate to the size, scope, and risk profile of the banking entity's trading activities and covered fund activities or investments, which shall be at least annually.

6. CEO attestation. Based on a review by the CEO of the banking entity, the CEO of the banking entity must, annually, attest in writing to the SEC that the banking entity has in place processes to establish, maintain, enforce, review, test and modify the compliance program established under this Appendix and § 255.20 of this part in a manner reasonably designed to achieve compliance with section 13 of the BHC Act and this part. In the case of a U.S. branch or agency of a foreign banking entity, the attestation may be provided for the entire U.S. operations of the foreign banking entity by the senior management officer of the United States operations of the foreign banking entity who is located in the United States.

IV. Independent Testing

a. Independent testing must occur with a frequency appropriate to the size, scope, and risk profile of the banking entity's trading and covered fund activities or investments, which shall be at least annually. This independent testing must include an evaluation of:

1. The overall adequacy and effectiveness of the banking entity's compliance program, including an analysis of the extent to which the program contains all the required elements of this appendix;

2. The effectiveness of the banking entity's internal controls, including an analysis and documentation of instances in which such internal controls have been breached, and how such breaches were addressed and resolved; and

3. The effectiveness of the banking entity's management procedures.

b. A banking entity must ensure that independent testing regarding the effectiveness of the banking entity's compliance program is conducted by a qualified independent party, such as the banking entity's internal audit department, compliance personnel or risk managers independent of the organizational unit being tested, outside auditors, consultants, or other qualified independent parties. A banking entity must promptly take appropriate action to remedy any significant deficiencies or material weaknesses in its compliance program and to terminate any violations of section 13 of the BHC Act or this part.

V. Training

Banking entities must provide adequate training to personnel and managers of the banking entity engaged in activities or investments governed by section 13 of the BHC Act or this part, as well as other appropriate supervisory, risk, independent testing, and audit personnel, in order to effectively implement and enforce the compliance program. This training should occur with a frequency appropriate to the size and the risk profile of the banking entity's trading activities and covered fund activities or investments.

VI. Recordkeeping

Banking entities must create and retain records sufficient to demonstrate compliance and support the operations and effectiveness of the compliance program. A banking entity must retain these records for a period that is no less than 5 years or such longer period as required by the SEC in a form that allows it to promptly produce such records to the SEC on request.

Dated: August 19, 2019.

Joseph M. Otting,

Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, October 9, 2019.

Ann E. Misback,

Secretary of the Board.

Dated at Washington, DC, on August 20, 2019.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Valerie Jean Best,

Assistant Executive Secretary.

By the Securities and Exchange Commission.

Dated: September 18, 2019.

Vanessa A. Countryman.

Issued in Washington, DC, on October 11, 2019, by the Commodity Futures Trading Commission.

Christopher Kirkpatrick,

Secretary of the Commodity Futures Trading Commission.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds—Commission Voting Summary and Commissioners' Statements

Appendix 1—CFTC Voting Summary

On this matter, Chairman Tarbert and Commissioners Quintenz and Stump voted in the affirmative. Commissioners Behnam and Berkovitz voted in the negative. The document submitted to the CFTC Commissioners for a vote did not include Section V.F. SEC Economic Analysis or Section V.G. Congressional Review Act.

Appendix 2—Statement of CFTC Chairman Heath Tarbert in Support of Revisions to the Volcker Rule

I have voted to approve revisions to the Volcker Rule, among the most well-intentioned but poorly designed regulations in the history of American finance. My involvement with the Volcker Rule started nearly a decade ago when I served as special counsel to the Senate Banking Committee before the passage of the Dodd-Frank Act. In fact, I was the staff member responsible for arranging for former Federal Reserve Chairman Paul Volcker to testify before the committee on the original version of the rule that now bears his name. Having had the opportunity to interact with Chairman Volcker at various points throughout my career, I have always had immense respect for him. He had a clear-cut vision: Banks should be barred from speculating in the markets (a practice known as proprietary trading) and from running hedge funds and private-equity firms. ''If you are doing this stuff,'' he would say, ''you should not be a commercial bank.''

Five federal agencies—the Federal Reserve, the FDIC, the OCC, the SEC, and the CFTC (together, the ''Agencies'')—issued final regulations in December 2013 to implement the statutory language of the Volcker Rule in Title VI of the Dodd-Frank Act. The basic premise of this law is to restrict financial institutions with deposits insured by the Federal Government from engaging in proprietary trading, but permit trading for market making, hedging, and other traditional financial services activities.

We now have five years of experience with the initial version of the regulations implementing the Volcker Rule, and over that time, a number of legitimate concerns have arisen. In my view, the initial regulations adopted by the Agencies have metastasized from Mr. Volcker's original, simple vision to the degree where his distinction between proprietary and non-proprietary trading is hardly recognizable. I agree with Mr. Volcker that the rule has become overly complex and hard to understand; [1] at this point it is also nearly unadministrable. Among other things, the regulations create confusion over what is acceptable activity for banking entities.[2] Indeed, the Agencies have had to issue 21 sets of frequently asked questions (''FAQs'') in the first three years since the regulations were adopted.[3] This is not a model of clear rulemaking. Furthermore, the Volcker Rule imposes highly intensive compliance burdens that unfairly benefit large Wall Street banks over smaller regional ones. No one ever intended these results.

In addition, the Volcker Rule has an extraterritorial reach that is breathtaking in its expansiveness, something I witnessed personally several years ago in Australia. There I met with a senior executive at a local, Australian financial institution. He handed me his business card, and it listed his title as ''Head of Volcker Rule Compliance.'' In Australia! We have created a mess not just for the United States, but for the whole world.

I do not doubt the good intentions of the original drafters of both the Volcker Rule and its implementing regulations. I continue to affirm that deposit insurance underwritten by the FDIC and discount window access provided by the Federal Reserve—both ultimately backstopped by U.S. taxpayers—should not subsidize non-banking activities.[4] I will not raise the related question whether non-banks affiliated with insured depository institutions should be allowed to engage in proprietary trading. I recognize that this is a decision for Congress, not me.[5]

As Chairman of the CFTC, my job is to ensure that the derivatives markets are liquid, resilient, and vibrant so they can serve the price discovery and risk management functions critical to our real economy. I have seen reports that liquidity in bond markets may have been adversely affected by the Volcker Rule.[6] I am concerned that the Volcker Rule may also affect liquidity in the derivatives markets. This could negatively impact the ability of agricultural, energy, manufacturing, and other companies in the real economy to engage in risk mitigation activities.

I am happy to say that the amended regulations we have now adopted help to simplify the Volcker Rule and include a number of important amendments that lessen the burden on smaller regional banks and benefit end users of derivatives. The amendments seek to tailor the Volcker Rule to increase efficiency, right-size firms' compliance obligations, and allow banking entities—especially smaller ones—to provide services to clients more efficiently.

The amended regulations adopt a risk-based approach that relies on a set of clearly articulated standards for prohibited and permitted activities and investments. In particular, the new regulations revise elements of the prohibition on proprietary trading to provide banking entities—including CFTC-registered swap dealers and futures commission merchants (''FCMs'')—with greater flexibility in their trading activities and simplified compliance procedures.

The final regulations also expand existing, and include additional, exclusions from the definition of proprietary trading. For example, the amended regulations add an exclusion for matched derivatives transactions to facilitate customer-driven swaps, especially by customers of small regional banks, which should benefit end users who rely on derivatives to hedge their commercial risks. The amended final regulations also expand the list of permissible products for the liquidity management exclusion to include FX forwards/swaps and cross-currency swaps. Banking entities commonly purchase and sell these instruments for the purpose of managing their liquidity and funding needs. This can ultimately benefit commercial firms who use banks for loans and other products to hedge their foreign exchange risks arising from import and export transactions.

In addition, the final regulations tailor the compliance and metrics reporting requirements of the Volcker Rule to focus on entities with relatively large trading operations. As a result, financial institutions on Wall Street will retain their reporting procedures, while smaller and more traditional commercial banks without major trading operations will get some relief. What

[1] *See, e.g.,* ''Why Paul Volcker Soured on His Own Rule,'' Time (Oct. 25, 2011), available at: *http://business.time.com/2011/10/25/why-paul-volcker-soured-on-the-volcker-rule;* ''Paul Volcker Says Volcker Rule Too Complicated,'' Reuters (Nov. 9, 2011), available at *https://www.reuters.com/article/us-regulation-volcker/paul-volcker-says-volcker-rule-too-complicated.* This is not to suggest that Mr. Volcker agrees with the proposed changes now before the interagency process. See ''Volcker the Man Blasts Volcker the Rule in Letter to Fed Chair,'' Bloomberg (Sept. 10, 2019), available at *https://www.bloomberg.com/news/articles/2019-09-10/volcker-the-man-blasts-volcker-the-rule-in-letter-to-fed-chair* (describing a private letter purportedly criticizing the proposed amendments to the current regulations).

[2] I have written a number of legal articles over the years to help market participants make sense of the Volcker Rule and how it might apply to them. See, *e.g., The Vagaries of the Volcker Rule,* Int'l Fin. L. Rev. (Sept. 2010); *The Volcker Rule and the Future of Private Equity* (co-author), Rev. of Banking & Fin. Serv. (May 2011); and *CLOs and the Volcker Rule* (co-author), Rev. of Banking & Fin. Serv. (Aug. 2015).

[3] *See* FAQ on Conformance Period (June 10, 2014); FAQ on Foreign Public Fund Seeding Vehicles (June 10, 2014); FAQ on Loan Securitization Servicing Assets (June 10, 2014); FAQ on Namesharing Prohibition (June 10, 2014); FAQ on Metrics Reporting Date (June 10, 2014); FAQ on Trading Desk (June 10, 2014); FAQ on Mortgage-Backed Securities of Government-Sponsored Enterprises (November 12, 2014); FAQ on Metrics Reporting During the Conformance Period (Nov. 13, 2014); FAQ on Annual CEO Attestation (Sept. 10, 2014); FAQ on Metrics Reporting and Confidentiality (Dec. 23, 2014); FAQ on Treasury STRIPS (Jan. 29, 2015); FAQ on 30-Day Metrics Reporting During the Conformance Period (Jan. 29, 2015); FAQ on SOTUS Covered Fund Exemption: Marketing Restriction (Feb. 27, 2015); FAQ on Foreign Public Funds Sponsored by Banking Entities (June 12, 2015); FAQ on Joint Venture Exclusion for Covered Funds (June 12, 2015); FAQ on Seeding Period Treatment of Registered Investment Companies and Foreign Public Funds (June 16, 2015); FAQ on CEO Certification for Prime Brokerage Transactions (Sept. 25, 2015); FAQ on Compliance for Market Making and the Identification of Covered Funds (Sept. 25, 2015); FAQ on Termination of Market-making Activity (Nov. 20, 2015); FAQ on Applicability of the Restrictions in Section 13(f) of the BHC Act (Nov. 20, 2015); FAQ on Capital Treatment of Banking Entity Investments in TruPS CDOs (Mar. 4, 2016).

[4] See Hearing Before the Committee on Banking, Housing, and Urban Affairs, United States Senate, 150th Congress, Session 1 (May 17, 2017) at 22 (''I [Heath Tarbert] believe that Federal deposit insurance should not subsidize nonbanking activities. . . . [This] should not be controversial.'').

[5] It is worth noting that the Dodd-Frank Act of 2010 contained a provision addressing the specific issue of insured banks engaging in trading activities perceived to go beyond traditional banking services. The ''push-out'' rule of Section 716, also known as the Lincoln Amendment, would have confined an insured depository institution's trading of swaps to those used for hedging or otherwise related to the well-known list of eligible (and appropriately conservative) investments permissible for national banks. Exotic and non-traditional products such as credit default swaps, equity swaps, and most physical commodity swaps would have been effectively ''pushed out'' out of insured banks and into non-bank affiliates not directly backstopped by U.S. taxpayers. Whatever the merits of the Lincoln Amendment, no one can deny that it was a clear rule aimed at an equally clear and widely-shared policy objective. But it was not to last. In December 2014, a bipartisan Congress passed—and President Obama signed into law—a budget bill containing a provision that largely gutted the original push-out rule of the Dodd-Frank Act. See Consolidated and Further Continuing Appropriations Act, 2015, Public Law 113–235, 128 Stat. 2130 at section 630 (2014).

[6] *See, e.g.,* M. Allahrakha & J. Cetina, et al., ''The Effects of the Volcker Rule on Corporate Bond Trading: Evidence from the Underwriting Exemption,'' OFR Working Paper (Aug. 6, 2019); J. Bao, & M. O'Hara, et al., *The Volcker Rule and Market-Making in Times of Stress,* J. of Fin. Econ. (2018); H. Bessembinder & S. Jacobsen, et al., *Capital Commitment and Illiquidity in Corporate Bonds,* J. of Fin. (Aug. 2018).

is more, the new regulations simplify requirements by clarifying prohibited and permissible activities, so that all institutions—including those headquartered abroad but who lend and deploy capital in the United States—have a better understanding of how to comply with our laws.

I believe laws should be as clear and concise as possible. The point of having laws is for people to follow them, but before they can follow them they first have to understand them. As Judge Learned Hand put it 90 years ago, ''The language of the law must not be foreign to the ears of those who are to obey it.'' [7] For too long the Volcker Rule has been just that—very peculiar and virtually unintelligible to market participants and regulators alike.

In short, the amended regulations will provide banking entities and their affiliates (including a number of swap dealers, FCMs, and commodity pools subject to CFTC oversight) with greater clarity and certainty about what activities are permitted under the Volcker Rule. The revised regulations will also generally reduce the compliance burden for these entities, which will benefit those end users of derivatives who are critical to our real economy. These changes, which will make the Volcker Rule simpler without reducing its fundamental benefits, are something we should all support.

Appendix 3—Supporting Statement of CFTC Commissioner Brian Quintenz

I support today's targeted amendments to the Volcker Rule, which I believe will simplify firms' compliance with the statutory ban on proprietary trading and improve the agencies' supervision of banking entities. Based upon the agencies' implementation experience since 2013, it has become apparent that the rule as originally adopted has resulted in ambiguity over permissible activities, an overbroad application, and unnecessarily complex compliance processes. The revised rule before us today tailors and simplifies the rule to enable banking entities to effectively provide traditional banking services to their clients in a manner that is consistent with the statute.

Adopting a risk-based approach, the revised rule tailors the scale of a banking entity's compliance program to be commensurate with the firm's size and level of trading activities. Under the final rule, the most stringent compliance requirements apply to those entities with the most significant amount of trading activities, while banks with simpler business models and more limited trading operations would be subject to tiered compliance requirements tailored to the complexity and scope of their activities. As a result, firms with little or no activity subject to the Volcker Rule's prohibitions will face lower compliance costs and reduced regulatory burdens. However, because activity implicated by the Volcker Rule is concentrated in a small number of banks, the agencies estimate that, even under this tiered approach, approximately 93% of the trading assets and liabilities in the U.S. banking system would continue to be held by firms subject to the strictest compliance standards.

The final rule also clarifies and simplifies the application of the short-term intent prong. Under the 2013 rule, the purchase (or sale) of a financial instrument by a banking entity was presumed to be for the trading account if the banking entity held the financial instrument for fewer than sixty days (or substantially transferred the risk of the financial instrument within 60 days of purchase or sale). In practice, firms have found it difficult to rebut the presumption, with the result that the short term intent prong has captured many activities that should not be included in the definition of proprietary trading. The final rule addresses this issue by reversing the rebuttable presumption, providing that the purchase or sale of a financial instrument presumptively lacks short-term trading intent if the banking entity holds the financial instrument for 60 days or longer. In addition, the final rule includes new or expanded exclusions from the definition of proprietary trading for liquidity management programs, certain customer-driven swaps, error trades, and certain traditional banking activities, such as the hedging of mortgage servicing rights. These modifications clarify the scope of permissible activities and ensure that the application of the proprietary trading ban is not overbroad.

I believe today's final rule serves as an example of effective cooperation among five regulators: The CFTC; the Securities and Exchange Commission; the Federal Reserve Board; the Office of the Comptroller of the Currency; and the Federal Deposit Insurance Corporation. The agencies have come together to address many of the unintended consequences of the prior rule, while continuing to comply with statutory requirements. Finally, I would like to thank the staff of the Division of Swap Dealer and Intermediary Oversight for their efforts on this matter.

Appendix 4—Dissenting Statement of CFTC Commissioner Rostin Behnam

I respectfully dissent as to the Commission's decision to approve revisions to the Volcker Rule. In June 2018, when I voted against the proposed rule, I expressed that my biggest concern was that our action would encourage a return to the risky activities that led to the financial crisis, and perhaps further consolidate trading activity into a few institutions.[1] My concern last June was that we were weakening the Volcker Rule around the edges, and I raised specific issues regarding unnecessary complexity, lack of clarity, and a flawed process that chilled dissent. Unfortunately, today's final rule does not do anything to assuage these concerns. To make matters worse, while the proposal merely threatened to kill Volcker through a thousand little cuts, the final rule goes for the throat. It significantly weakens the prohibition on proprietary trading by narrowing the scope of financial instruments subject to the Volcker Rule. What remains is so watered down that it leaves one questioning whether it should be called the Volcker rule at all. To that point, Paul Volcker himself recently sent a letter to the Chairman of the Federal Reserve criticizing the rule and stating that the rule ''amplifies risk in the financial system, increases moral hazard and erodes protections against conflicts of interest that were so glaringly on display during the last crisis.'' [2]

In my dissent last June, I pointed out that the proposal further complicated the Volcker rule while calling it simplification. We do the same thing in the final rule. Where once there was one set of rules for all banking entities, there will now be three categories of banking entities with different rules for each: Banking entities with Significant trading assets and liabilities, banking entities with Limited trading assets and liabilities, banking entities in between with Moderate trading assets and liabilities. While numerous commenters expressed concerns with this three-tiered compliance framework, we nonetheless are finalizing this needlessly complex system. In addition, the majority today makes ''targeted adjustments'' that further complicate matters. In some instances, these adjustments are at least requested by the commenters. In others, they are invented seemingly out of whole cloth.

The most troubling aspect of today's rule, though, is something new. The final rule includes changes to the definition of ''trading account'' that will significantly reduce the scope of financial instruments subject to the Volcker Rule's prohibition on proprietary trading. This change is described in the preamble to the final rule as avoiding having the trading account definition ''inappropriately scope in'' certain financial instruments, almost as if they were included in the proposal's scope by mistake. However, these financial instruments were within the scope of the 2013 rule, and they were within the scope of the proposal. Removing them now limits the scope of the Volcker rule so significantly that it no longer will provide meaningful constraints on speculative proprietary trading by banks. As such, I cannot vote for the rule.

Appendix 5—Dissenting Statement of CFTC Commissioner Dan M. Berkovitz

Congress adopted the statute commonly known as the ''Volcker Rule'' in the wake of the 2008 financial crisis to prevent banks that benefit from federal depository insurance or other government support from taking excessive risks that could lead to future taxpayer bailouts. The Volcker Rule prohibits proprietary trading and the owning of hedge funds and private equity funds by banks and their subsidiaries (''banking entities''), with certain exceptions and exemptions. In 2013 the Commission and other financial regulators adopted regulations to implement

[7] Hand, L. *Is There a Common Will?* in The Spirit of Liberty: Papers and Addresses of Learned Hand 56 (I. Dilliard, 3d ed. 1960) (quoting from address before the American Law Institute in 1929).

[1] Opening Statement of Commissioner Rostin Behnam Before the Open Commission Meeting on June 4, 2018 (Jun. 4, 2018), *https://www.cftc.gov/PressRoom/SpeechesTestimony/behnamstatement060418.*

[2] Jesse Hamilton and Yalman Onaran, ''Vocker the Man Blasts Volcker the Rule in Letter to Fed Chair,'' Bloomberg (Sep. 10, 2019), *https://www.bloomberg.com/news/articles/2019-09-10/volcker-the-man-blasts-volcker-the-rule-in-letter-to-fed-chair.*

the Volcker Rule. The final rule before the Commission today (''revised Volcker Rule'') substantially weakens these implementing regulations.

The revised Volcker Rule eliminates or reduces a variety of substantive standards in the current rule. The revised Volcker Rule will render enforcement of the rule difficult if not impossible by leaving implementation of significant requirements to the discretion of the banking entities, creating presumptions of compliance that would be nearly impossible to overcome, and eliminating numerous reporting requirements. The revised Volcker Rule also substantially reduces the bank trading activity covered by the rule. Finally, the revised Volcker Rule includes a number of changes and additions not contemplated or adequately discussed in the notice of proposed rulemaking (NPRM) in violation of the Administrative Procedure Act (''APA'') requirements for public notice and comment for rulemakings.

For these reasons, I dissent.

Weak Regulation and Enforceability Concerns

Nearly every amending provision of the revised Volcker Rule adopts the weakened provisions from the NPRM, further weakens the proposed changes, or makes new changes that weaken or eliminate existing requirements and standards. New presumptions of compliance favoring the banking entities, regulatory determinations left to the banking entities, and reductions in reporting requirements by the banking entities will make the revised Volcker Rule more difficult to enforce. The cumulative effect of this myriad of changes is a set of regulations that is ineffective and unenforceable. Although a single chip off a sculpture, by itself, may not create a noticeable blemish, widespread chiseling will disfigure the object. Such is the result here.

The ''trading account'' definition and related regulatory exclusions in the 2013 rule determine which financial transactions are subject to the restrictions on proprietary trading. Financial transactions of banking entities are subject to the Volcker regulations if they fall within certain ''prongs'' established in the trading account provision. The revised Volcker Rule rejects the ''accounting prong'' proposed in the NPRM and effectively jettisons the existing ''short-term intent prong'' for most entities.[1] In addition, there are a number of newly created outright exclusions of whole types of transactions and broadening of existing exclusions under the revised Volcker Rule.

FDIC Commissioner Martin Gruenberg provided an analysis of how these changes will significantly reduce the banking activity subject to Volcker oversight. ''By excluding these financial instruments from the Volcker Rule, the final rule . . . opens up vast new opportunity—hundreds of billions of dollars of financial instruments—at both the bank and bank holding company level, for speculative proprietary trading funded by the public safety net.'' [2]

The 2013 Volcker rules define the ''trading desk'' as the ''smallest discrete unit of organization'' that purchases and sells financial instruments. The revised Volcker Rule removes the quoted text, and instead provides four broad criteria for designating a trading desk. The rule then allows the banking entities to designate the trading desks for purposes of Volcker.

The new trading desk designation criteria appear to be broad enough that a ''trading desk'' could include whole business lines, divisions, or an entire swap dealer. The opportunities for undertaking greater amounts of proprietary trading expand significantly when the limits (which are set by the banking entities themselves), the desk-specific positions being hedged, and reporting requirements are applied to much larger trading portfolios. Because the revised Volcker Rule effectively presumes that these trading desk designations by the banking entities are valid, it will be more difficult for the applicable regulator to reign in proprietary trading undertaken by more expansively designated trading desks.

How much proprietary trading can occur under the market making exemption in the revised Volcker Rule will be determined by the risk limits set for each trading desk. The risk limits are to be established at the discretion of each banking entity and, as noted above, the scope of a trading desk also will be determined by the banking entity within broad criteria. ''Reasonably expected near-term demand'' (''RENTD'') of customers is included in the Volcker statute to establish the level of market making permissible. While the RENTD concept is still in the revised Volcker Rule, a presumption has been added that the RENTD levels set by each banking entity are correct.

Because these determinations will be established by the banking entity and presumed to be compliant, it will be difficult for any regulator to challenge them or take any enforcement action—even if a banking entity experiences large losses from proprietary trading—so long as the trading is found to be within the set limits.

These concerns about enforcement and oversight are exacerbated by the reduced metrics and other reporting, documentation, and compliance requirements. Numerous changes are made both as proposed and added on in this final rule. To name a few, stressed value at risk, daily risk factor sensitivities, and risk limit breaches need not be reported. In some cases, changes to reporting requirements make sense if experience shows a metric has little or no regulatory value. But most of these changes in the revised Volcker Rule are purportedly justified because they reduce the burden on banking entities and the cumulative effect on the ability of a regulator to monitor for compliance and potential significant issues is not addressed.

Logical Outgrowth Concerns

The revised Volcker Rule includes a number of new rules and amendments that were not mentioned or adequately described in the NPRM. The APA requires that a proposed rulemaking be published in the **Federal Register** and that interested persons be given an opportunity to comment.[3] A ''notice of proposed rulemaking must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.'' [4]

In comparing the revised Volcker Rule to the NPRM, there are a number of changes that were either not addressed in the NPRM or at best are based on comments received in response to general questions. For example, the NPRM included a proposal to replace the short-term intent prong with what is commonly referred to as the ''accounting prong.'' In the revised Volcker Rule, the accounting prong was rejected, but the short-term interest prong also is eliminated for most banking entities.[5] While replacing the short-term intent prong was discussed in the proposal, effectively eliminating the prong without a replacement was not proposed. Similarly the option for certain banking entities to now elect to comply with the market risk capital rule prong rather than the short-term intent prong was not discussed as an alternative. Nor was the replacement of the rebuttable presumption of proprietary trading for positions held shorter than 60 days with the opposite presumption that positions held longer than 60 days are not proprietary trading for purposes of the Volcker Rule. Agencies cannot ''pull a surprise switcheroo'' in the rulemaking process.[6]

Furthermore, the NPRM appears to not even contemplate excluding government bond assets and liabilities, mortgage servicing rights hedges, or financial instruments that are not trading assets or trading liabilities from counting as proprietary trading. Other changes, such as the elimination of incentive compensation limits, the matched derivatives transaction exclusion, and elimination of risk factor sensitivity metrics reporting appear to be based on general questions in the NPRM. In each case, no draft rule text or adequate discussion of such amendments was provided that would allow the public to have anticipated those amendments. Rather, many of these changes appear to be based on de novo comments made by banks or their trade organizations. ''[I]f the final rule 'substantially departs from the terms or substance of the proposed rule,' the notice is inadequate.'' [7]

---

[1] While the short-term intent prong remains for a limited number of banks not subject to the market risk capital rules in banking regulations, compliance with the short-term intent prong is now optional if those banking entities instead elect to comply with the market risk capital rules for Volcker compliance.

[2] Statement by Martin J. Gruenberg, Member, FDIC Board of Directors, *The Volcker Rule* (Aug. 20, 2019) at 3, available at *https://www.fdic.gov/news/news/speeches/spaug2019b.pdf.*

[3] 5 U.S.C. 553(b) and (c).

[4] *Honeywell Int'l, Inc.* v. *EPA,* 372 F.3d 441, 445 (D.C. Cir. 2004) (internal quotation marks omitted).

[5] Firms subject to, or which elect to be subject to, the market risk capital rule prong are no longer subject to the short-term intent prong.

[6] *Environmental Integrity Project* v. *EPA,* 425 F.3d 992, 996 (D.C. Cir. 2005).

[7] *Chocolate Manufacturers Assoc. of the United States* v. *Block,* 755 F.2d 1098, 1105 (4th Cir. 1985) (*quoting Rowell* v. *Andrus,* 631 F.2d 699, 702 n.2 (10th Cir. 1980).

Conclusion

Self-regulation failed us in the early part of this century. Dodd-Frank, including the Volcker Rule, has helped this country rebuild a strong and better managed financial sector. To maintain a robust financial sector that benefits the American people, we must maintain strong standards and vigorous oversight. Otherwise, it is only a matter of time before the memory of the huge losses and resulting pressures for a taxpayer bailout fades and excessive risk taking comes home to roost. While the Dodd-Frank regulations may not be perfect and modest adjustments may be appropriate, the wholesale revision of regulations that greatly weaken the enforceability of those regulations such as we have before us today will, in the long run, weaken the financial sector and pose risks to the American public.

[FR Doc. 2019–22695 Filed 11–13–19; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 84 Thursday,

No. 220 November 14, 2019

Part III

Department of Homeland Security

8 CFR Parts 103, 106, 204, et al.

U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements; Proposed Rule

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 103, 106, 204, 211, 212, 214, 216, 223, 235, 236, 240, 244, 245, 245a, 248, 264, 274a, 301, 319, 320, 322, 324, 334, 341, 343a, 343b, and 392

[CIS No. 2627–18; DHS Docket No. USCIS–2019–0010]

RIN 1615–AC18

U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Proposed rule.

SUMMARY: The Department of Homeland Security (DHS) proposes to adjust certain immigration and naturalization benefit request fees charged by U.S. Citizenship and Immigration Services (USCIS). USCIS conducted a comprehensive biennial fee review and determined that current fees do not recover the full costs of providing adjudication and naturalization services. DHS proposes to adjust USCIS fees by a weighted average increase of 21 percent, add new fees for certain benefit requests, establish multiple fees for petitions for nonimmigrant workers, and limit the number of beneficiaries on certain forms to ensure that USCIS has the resources it needs to provide adequate service to applicants and petitioners. Adjustments to the fee schedule are necessary to recover the full operating costs associated with administering the nation's immigration benefits system, safeguarding its integrity, and efficiently and fairly adjudicating immigration benefit requests, while protecting Americans, securing the homeland, and honoring our country's values. USCIS also is proposing changes to certain other immigration benefit request requirements.

DATES: Written comments must be submitted on or before December 16, 2019.

ADDRESSES: You may submit comments, identified by DHS Docket No. USCIS–2019–0010, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow this site's instructions for submitting comments.
- *Mail:* Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW, Mailstop #2140, Washington, DC 20529–2140. To ensure proper handling, please reference DHS Docket No. USCIS–2019–0010 in your correspondence. Mail must be postmarked by the comment submission deadline. Please note that USCIS cannot accept any comments that are hand delivered or couriered. In addition, USCIS cannot accept mailed comments contained on any form of digital media storage devices, such as CDs/DVDs and USB drives.

FOR FURTHER INFORMATION CONTACT: Kika M. Scott, Deputy Chief Financial Officer, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW, Washington, DC 20529–2130, telephone (202) 272–8377.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Public Participation
II. Executive Summary
A. Effective Date
III. Basis for the Fee Review
A. Legal Authority and Guidance
B. Full Cost Recovery
C. Immigration Examinations Fee Account
D. Fee Review History
IV. FY 2019/2020 Immigration Examinations Fee Account Fee Review
A. USCIS Projected Costs and Revenue
1. Cost Projections
a. Use IEFA Fee Collections To Fund Immigration Adjudication Services Performed by ICE
2. Revenue Projections
3. Cost and Revenue Differential
B. Methodology
1. Volume
a. Workload Volume and Volume Projection Committee
b. Fee-Paying Volume
2. Completion Rates
3. Assessing Proposed Fees
C. Fee-Related Issues Noted for Consideration
1. Accommodating E-Filing and Form Flexibility
2. Processing Time Outlook
V. Proposed Changes in the FY 2019/2020 Fee Schedule
A. Clarify Dishonored Fee Check Re-Presentment Requirement
B. Eliminate $30 Returned Check Fee
C. Fee Waivers
1. Background
2. Cost of Fee Waivers
3. Proposed Fee Waiver Changes
a. Limits on Eligible Forms and Categories
b. Eligibility Requirements
c. Income Requirements
d. Subject to INA Section 212(a)(4) and Affidavit of Support Requirements
e. USCIS Director's Discretionary Fee Waivers and Emergency and Disaster Relief
f. Conforming Edits and Request for Comments
D. Fee Exemptions
1. Form I–765 Exemption Related to Asylees and Refugees
2. Exemptions Related to International Organization Officers and to Agreement Between the U.S. Government and Other Nations
3. Exemptions Related to VAWA and to T and U Nonimmigrant Status Categories
E. Changes to Biometric Services Fee
1. Incorporating Biometric Activities Into Immigration Benefit Request Fees
2. Retaining a Separate Biometric Services Fee for Temporary Protective Status
3. Executive Office for Immigration Review (EOIR) Biometric Services Fee
F. Form I–485, Application To Register Permanent Residence or Adjust Status
1. Interim Benefits
2. Form I–485 Fee for Child Under 14, Filing With Parent
G. Continuing To Hold Refugee Travel Document Fee to the Department of State Passport Fee
H. Form I–131A, Carrier Documentation
I. Separating Form I–129, Petition for a Nonimmigrant Worker, Into Different Forms
1. Form I–129H1, Petition for Nonimmigrant Worker: H–1B or H–1B1 Classifications
2. Forms I–129H2A and I–129H2B, Petitions for H–2A and H–2B Workers
3. Form I–129L, Petition for Nonimmigrant Worker: L Classification
4. Form I–129O Petition for Nonimmigrant Worker: O Classification
5. Form I–129E&TN, Application for Nonimmigrant Worker: E and TN Classification
6. Form I–129MISC, Petition for Nonimmigrant Worker: H–3, P, Q, or R Classification
7. Commonwealth of the Northern Mariana Islands (CNMI) Fees
J. Premium Processing
1. Change Premium Processing Fee by Guidance
2. Change Calendar Days to Business Days
3. Actions That End or Restart the 15-Day Period
4. Expedited Processing for Other Requests
K. Regional Centers
L. Secure Mail Initiative
M. Intercountry Adoptions
1. Adjustment to Proposed Fees for Certain Intercountry Adoption-Specific Forms
2. Clarification of Fee Exception for Birth Siblings
3. Suitability and Eligibility Approval Validity Period
4. Form I–600A/I–600 Supplement 3, Request for Action on Approved Form I–600A/I–600
a. Suitability & Eligibility Extensions
b. New Approval Notices
c. Change of Country
d. Hague Adoption Convention Transition Cases
5. Form I–800A, Supplement 3, Request for Action on Approved Form I–800A
N. Changes to Genealogy Search and Records Requests
O. Naturalization and Citizenship Related Forms
1. No Longer Limit the Form N–400 Fee
2. Remove Form N–400 Reduced Fee
3. Military Naturalization and Certificates of Citizenship

4. Proposed Changes to Other Naturalization-Related Application and Certificate of Citizenship Application Fees
P. Asylum Fees
1. Fee for Form I–589, Application for Asylum and for Withholding of Removal
2. Fee for the Initial Application for Employment Authorization While an Asylum Claim Is Pending
Q. DACA Renewal Fees
R. Fees Shared by CBP and USCIS
S. 9–11 Response and Biometric Entry-Exit Fee for H–1B and L–1 Visas
T. Form I–881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Pub. L. 105–100 (NACARA))
U. Miscellaneous Technical and Procedural Changes
VI. Proposed Fee Adjustments to IEFA Immigration Benefits
VII. Other Possible Fee Scenarios
A. Fee Schedule With DACA Renewal Fees
B. Fee Schedule Without DACA Fees
C. Fee Schedule With Both DACA Initial and Renewal Fees
VIII. Statutory and Regulatory Requirements
A. Executive Orders 12866 and 13563
B. Regulatory Flexibility Act
C. Unfunded Mandates Reform Act
D. Congressional Review Act
E. Executive Order 13132 (Federalism)
F. Executive Order 12988 (Civil Justice Reform)
G. Paperwork Reduction Act
H. National Environmental Policy Act

List of Acronyms and Abbreviations

ABC Activity-Based Costing
ASC Application Support Center
BLS Bureau of Labor Statistics
CAT Convention Against Torture and Other Cruel, Unusual or Degrading Treatment or Punishment
CBP U.S. Customs and Border Protection
CEQ Council on Environmental Quality
CFO Chief Financial Officer
CNMI Commonwealth of the Northern Mariana Islands
CPI Consumer Price Index
CPI–U Consumer Price Index for All Urban Consumers
DACA Deferred Action for Childhood Arrivals
DHS Department of Homeland Security
DOD Department of Defense
DOJ Department of Justice
DOL Department of Labor
DOS Department of State
EAD Employment Authorization Document
EB–5 Employment-Based Immigrant Visa, Fifth Preference
EIN Employer Identification Number
EOIR Executive Office for Immigration Review
FBI Federal Bureau of Investigation
FY Fiscal Year
GAO Government Accountability Office
HHS U.S. Department of Health and Human Services
IEFA Immigration Examinations Fee Account
INA Immigration and Nationality Act of 1952
INS Immigration and Naturalization Service
IPO Investor Program Office
IOAA Independent Offices Appropriations Act
LIFE Act Legal Immigration Family Equity Act
LPR Lawful Permanent Resident
NACARA Nicaraguan Adjustment and Central American Relief Act
NAICS North American Industry Classification System
NBC National Benefits Center
NEPA National Environmental Policy Act
NOID Notice of Intent to Deny
NPRM Notice of Proposed Rulemaking
OIG DHS Office of the Inspector General
OMB Office of Management and Budget
OPQ Office of Performance and Quality
PRC Permanent Resident Card
RAIO Refugee, Asylum, and International Operations Directorate
RFE Request for Evidence
RFA Regulatory Flexibility Act
SAVE Systematic Alien Verification for Entitlements
SBA Small Business Administration
TPS Temporary Protected Status
TVPRA William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008
UAC Unaccompanied Alien Child
UMRA Unfunded Mandates Reform Act
USCIS U.S. Citizenship and Immigration Services
VPC Volume Projection Committee

I. Public Participation

DHS invites you to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this proposed rule. Comments providing the most assistance to DHS will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that supports the recommended change.

Instructions: All submissions should include the agency name and DHS Docket No. USCIS–2019–0010 for this rulemaking. Providing comments is entirely voluntary. Regardless of how you submit your comment, DHS will post all submissions, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov* and will include any personal information you provide. Because the information you submit will be publicly available, you should consider limiting the amount of personal information in your submission. DHS may withhold information provided in comments from public viewing if it determines that such information is offensive or may affect the privacy of an individual. For additional information, please read the Privacy Act notice available through the link in the footer of *http://www.regulations.gov.*

Docket: For access to the docket, go to *http://www.regulations.gov* and enter this rulemaking's eDocket number: USCIS–2019–0010. The docket includes additional documents that support the analysis contained in this proposed rule to determine the specific fees that are proposed. These documents include:

- Fiscal Year (FY) 2019/2020 Immigration Examinations Fee Account Fee Review Supporting Documentation;
- Regulatory Impact Analysis: U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements; and
- Small Entity Analysis for Adjustment of the U.S. Citizenship and Immigration Services Fee Schedule notice of proposed rulemaking (NPRM).

You may review these documents on the electronic docket. The software [1] used to compute the immigration benefit request fees [2] and biometric fees [3] is a commercial product licensed to USCIS that may be accessed on-site, by appointment, by calling (202) 272–1969.[4]

II. Executive Summary

DHS proposes to adjust the USCIS fee schedule, which specifies the fee amount charged for each immigration and naturalization benefit request.[5] DHS last adjusted the fee schedule on December 23, 2016, by a weighted average increase of 21 percent. *See* 81 FR 73292 (Oct. 24, 2016) (final rule) (FY 2016/2017 fee rule).

USCIS is primarily funded by immigration and naturalization benefit request fees charged to applicants and

[1] USCIS uses commercially available activity-based costing (ABC) software, SAP Business Objects Profitability and Cost Management, to create financial models as described in the supporting documentation.

[2] Benefit request means any application, petition, motion, appeal, or other request relating to an immigration or naturalization benefit, whether such request is filed on a paper form or submitted in an electronic format, provided such request is submitted in a manner prescribed by DHS for such purpose. *See* 8 CFR 1.2.

[3] DHS uses the terms biometric fees, biometric services fees, and biometric fee synonymously in this rule to describe the cost and process for capturing, storing, or using biometrics.

[4] This proposed rule describes key inputs to the ABC model (for example, budget, workload forecasts, staffing, and completion rates), both here and in the supporting documentation.

[5] For the purposes of this rulemaking, DHS is including all requests funded from the IEFA in the term ''benefit request'' or ''immigration benefit request'' although the form or request may not be to request an immigration benefit. For example, Deferred Action for Childhood Arrivals (DACA) is solely an exercise of prosecutorial discretion by DHS. It is not an immigration benefit and would fit under the definition of ''benefit request'' solely for purpose of this rule. For historic receipts and completion information, see USCIS immigration and citizenship data available at *https://www.uscis.gov/tools/reports-studies/immigration-forms-data.*

petitioners. Fees collected from individuals and entities filing immigration benefit requests are deposited into the Immigration Examinations Fee Account (IEFA). These fee collections fund the cost of fairly and efficiently adjudicating immigration benefit requests, including those provided without charge to refugee, asylum, and certain other applicants. The focus of this fee review is the IEFA, which comprised approximately 95 percent of USCIS' total FY 2018 enacted spending authority.

In accordance with the requirements and principles of the Chief Financial Officers Act of 1990 (CFO Act), 31 U.S.C. 901–03 and Office of Management and Budget (OMB) Circular A–25, USCIS conducts biennial reviews of the non-statutory fees deposited into the IEFA. If necessary, DHS proposes fee adjustments to ensure full cost recovery. USCIS completed a fee review for the FY 2019/2020 biennial period. The primary objective of the fee review is to determine whether current immigration and naturalization benefit fees will generate sufficient revenue to fund the anticipated operating costs associated with administering the nation's legal immigration system. The results indicate that current fee levels are insufficient to recover the full cost of operations funded by the IEFA. Therefore, DHS proposes to adjust USCIS fees by a weighted average increase of 21 percent.

In addition to the requirements of the CFO Act, there are other important reasons for conducting the FY 2019/2020 fee review. The fee review:

- Allows for an assessment of USCIS policy changes, staffing levels, costs, revenue, etc. USCIS evaluates operational requirements and makes informed decisions concerning program scaling, resource planning, and staffing allocations; and
- Provides those served by USCIS with an opportunity to assess the effect of fee changes.

USCIS calculates its fees to recover the full cost of operations funded by the IEFA. These costs do not include limited appropriations provided by Congress. If USCIS continues to operate at current fee levels, it would experience an average annual shortfall (the amount by which expenses exceed revenue) of $1,262.3 million. This projected shortfall poses a risk of degrading USCIS operations funded by the IEFA. As such, DHS proposes to adjust USCIS fees by a 21 percent weighted average increase to ensure full cost recovery. The weighted average increase is the percentage difference between the current and proposed fees by immigration benefit request.[6] This rule refers to weighted average instead of straight average because the figure represents a more accurate depiction of the overall effect that the proposed fee increase would have on total fee revenue.

The proposed fees would ensure that IEFA revenue covers USCIS' costs associated with adjudicating the immigration benefit requests. The proposed fee schedule accounts for increased costs to adjudicate immigration benefit requests, detect and deter immigration fraud, and thoroughly vet applicants, petitioners, and beneficiaries. DHS also proposes to change fee waiver and fee exemption policies to limit some fee increases. Additionally, DHS proposes to establish multiple fees for different categories of petitions for nonimmigrant workers in response to DHS Office of Inspector General (OIG) audit recommendations to USCIS. DHS proposes a range of fees that vary by the nonimmigrant classification and to limit petitions for nonimmigrant workers to 25 named beneficiaries. DHS believes the proposed fees more accurately reflect the differing burdens of adjudication and enable USCIS to adjudicate these petitions more effectively.

In addition to fee changes, this proposed rule would also make changes in the forms and fee structures used by USCIS. Some of these changes would result in cost savings, and others would result in costs or transfers. For the 10-year implementation period of the proposed rule, DHS estimates the total cost of the rule to applicants/petitioners is $4,730,732,250 undiscounted, $4,035,410,566 discounted at 3-percent, and $3,322,668,371 discounted at 7-percent. DHS estimates the total cost savings (benefits) to the applicants/petitioners is $220,187,510 undiscounted, $187,824,412 discounted at 3-percent, and $154,650,493 discounted at 7-percent. Much of this total is expected to be transfers between applicants and the federal government or between groups of applicants, rather than new, real resource costs to the U.S. economy.

A. Effective Date

The FY 2019/2020 fee review assumes these changes may affect the second year of the biennial period, as FY 2020 began on October 1, 2019.

III. Basis for the Fee Review

A. Legal Authority and Guidance

DHS issues this proposed rule consistent with INA section 286(m), 8 U.S.C. 1356(m) (authorizing DHS to charge fees for adjudication and naturalization services at a level to ''ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants'') [7] and the CFO Act, 31 U.S.C. 901–03 (requiring each agency's Chief Financial Officer (CFO) to review, on a biennial basis, the fees imposed by the agency for services it provides, and to recommend changes to the agency's fees).

This proposed rule is also consistent with non-statutory guidance on fees, the budget process, and federal accounting principles. *See* OMB Circular A–25, available at *https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-025.pdf,* 58 FR 38142 (July 15, 1993) (establishing federal policy guidance regarding fees assessed by federal agencies for government services); Federal Accounting Standards Advisory Board Handbook, Version 17 (06/18), Statement of Federal Financial Accounting Standards 4: Managerial Cost Accounting Standards and Concepts, SFFAS 4, available at *http://files.fasab.gov/pdffiles/handbook_sffas_4.pdf* (generally describing cost accounting concepts and standards, and defining ''full cost'' to mean the sum of direct and indirect costs that contribute to the output, including the costs of supporting services provided by other segments and entities.); *id.* at 49–66 (identifying various classifications of costs to be included and recommending various methods of cost assignment); *see also* OMB Circular A–11, Preparation, Submission, and Execution of the

[6] USCIS uses weighted average instead of a straight average because of the difference in volume by immigration benefit type and the resulting effect on fee revenue. The 21 percent weighted average increase is a change in the average fee for a form that currently requires a fee compared to the average proposed fee per form. The sum of the current fees multiplied by the projected FY 2019/2020 fee-paying receipts for each immigration benefit type, divided by the total fee-paying receipts = $530. The sum of the proposed fees multiplied by the projected FY 2019/2020 receipts for each immigration benefit type, divided by the fee-paying receipts = $640. There is a $110, or approximately 21 percent difference between the two averages. These averages exclude fees that do not receive cost reallocation, such as the separate biometric services fee and the proposed Form I–821D fee.

[7] The longstanding interpretation of DHS is that the ''including'' clause in section 286(m) does not constrain DHS's fee authority under the statute. The ''including'' clause offers only a non-exhaustive list of some of the costs that DHS may consider part of the full costs of providing adjudication and naturalization services. See 8 U.S.C. 1356(m); 84 FR 23930, 23932 n.1 (May 23, 2019); 81 FR 26903, 26906 n.10 (May 4, 2016).

Budget, section 20.7(d), (g) (June 29, 2018)), available at *https://www.whitehouse.gov/wp-content/uploads/2018/06/a11_2018.pdf* (providing guidance on the FY 2020 budget and instructions on budget execution, offsetting collections, and user fees). DHS uses OMB Circular A–25 as general policy guidance for determining user fees for immigration benefit requests, with exceptions as outlined in section III.B. of this preamble. DHS also follows the annual guidance in OMB Circular A–11 if it requests appropriations to offset a portion of IEFA costs.[8]

Finally, this rule accounts for, and is consistent with, congressional appropriations for specific USCIS programs. FY 2018 appropriations for USCIS provided funding for only the E-Verify employment eligibility verification program. Congress provided E-Verify with $108.9 million for operations and support and $22.7 million for procurement, construction, and improvements. *See* Consolidated Appropriations Act, 2018, Public Law 115–66, div. F, tit. IV (Mar. 21, 2018) (DHS Appropriations Act 2018). The total E-Verify appropriation was $131.5 million in FY 2018. FY 2019 E-Verify appropriations are $109.7 million for operations and support, plus $22.8 million for procurement, construction, and improvements; the latter sum remains available until the end of FY 2021. *See* Consolidated Appropriations Act, 2019, Public Law 116–6, div. A, tit. IV (Feb. 15, 2019). DHS provides this information only for comparison to the IEFA. E-Verify is not included in this fee review budget because, generally, appropriations, not fees, fund E-Verify. In addition, Congress appropriated $10 million for the Citizenship and Integration Grant Program. *Id.* Together, the total FY 2019 appropriations for USCIS are $142.5 million. For the last several years, USCIS has had the authority to spend no more than $10 million for citizenship grants. The funding for the grant program came from the IEFA fee revenue or a mix of appropriations and fee revenue since 2013.[9] While Congress appropriated funds for grants in FY 2019, it did not reduce authorized IEFA spending to offset the change. As such, the $10 million previously budgeted for citizenship grants remains in the FY 2019/2020 IEFA fee review budget.

B. Full Cost Recovery

Consistent with these authorities and sources, this proposed rule would ensure that USCIS recovers its full operating costs and maintains an adequate level of service in two ways:

First, where possible, the proposed rule would set fees at levels sufficient to cover the full cost of the corresponding services associated with fairly and efficiently adjudicating immigration benefit requests.[10] DHS generally follows OMB Circular A–25, which ''establishes federal policy regarding fees assessed for Government services and for sale or use of Government goods or resources.'' OMB Circular A–25, *User Charges* (Revised), para. 6, 58 FR 38142 (July 15, 1993). A primary objective of OMB Circular A–25 is to ensure that federal agencies recover the full cost of providing specific services to users and associated costs. *See id.,* para. 5. Full costs include, but are not limited to, an appropriate share of:

- Direct and indirect personnel costs, including salaries and fringe benefits, such as medical insurance and retirement;
- Physical overhead, consulting, and other indirect costs, including material and supply costs, utilities, insurance, travel, and rents or imputed rents on land, buildings, and equipment;
- Management and supervisory costs; and
- Costs of enforcement, collection, research, establishment of standards, and regulation.

Id.

Secondly, this proposed rule would set fees at a level sufficient to fund overall requirements and general operations related to USCIS IEFA programs that are not associated with specific statutory fees or funded by annual appropriations, benefit requests fees that are statutorily set at a level below full cost, or benefit requests that are fee exempt, in whole or in part. As noted, Congress has provided that USCIS may set fees for providing adjudication and naturalization services at a level that will ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants. *See* INA section 286(m), 8 U.S.C. 1356(m).[11] DHS interprets this statutory fee-setting authority, including the authorization to collect ''full costs'' for providing ''adjudication and naturalization services,'' as granting DHS broad discretion to include costs other than OMB Circular A–25 generally provides. *See OMB Circular A–25,* para. 6d1; INA section 286(m), 8 U.S.C. 1356(m). In short, DHS may charge fees at a level that will ensure recovery of all direct and indirect costs associated with providing immigration adjudication and naturalization services.[12]

Consistent with the historical position, this proposed rule would set fees at a level that ensures recovery of the full operating costs of USCIS, the entity within DHS that provides almost all immigration adjudication and naturalization services. *See* Homeland Security Act of 2002, Public Law 107–

[8] OMB Circulars A–25 and A–11 provide nonbinding internal Executive Branch direction for the development of fee schedules under the Independent Offices Appropriations Act (IOAA) and appropriations requests, respectively. *See* 5 CFR 1310.1. Although DHS is not required to strictly adhere to these OMB circulars in setting USCIS fees, DHS used the activity-based costing (ABC) methodology supported in Circulars A–25 and A–11 to develop the proposed fee schedule.

[9] USCIS received $2.5 million for the immigrant integration grants program in FY 2013 (Pub. L. 113–6) and FY 2014 (Pub. L. 113–76). USCIS did not receive appropriations for the immigrant integration grants program in FY 2015, FY 2016, FY 2017, and FY 2018.

[10] Section 286(m) of the Act, 8 U.S.C. 1356(m), provides broader fee-setting authority and is an exception from the stricter costs-for-services-rendered requirements of the Independent Offices Appropriations Act, 1952, 31 U.S.C. 9701(c) (IOAA). *See Seafarers Int'l Union of N. Am.* v. *U.S. Coast Guard,* 81 F.3d 179 (D.C. Cir. 1996) (IOAA provides that expenses incurred by agency to serve some independent public interest cannot be included in cost basis for a user fee, although agency is not prohibited from charging applicant full cost of services rendered to applicant, which also results in some incidental public benefits). Congress initially enacted immigration fee authority under the IOAA. *See Ayuda, Inc.* v. *Attorney General,* 848 F.2d 1297 (D.C. Cir. 1988). Congress thereafter amended the relevant provision of law to require deposit of the receipts into the separate Immigration Examinations Fee Account of the Treasury as offsetting receipts to fund operations, and broadened the fee-setting authority. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1991, Public law 101–515, sec. 210(d), 104 Stat. 2101, 2111 (Nov. 5, 1990). Additional values are considered in setting IEFA fees that would not be considered in setting fees under the IOAA. *See* 72 FR at 29866–7.

[11] Congress has provided separate, but similar, authority for establishing USCIS genealogy program fees. *See* section 286(t) of the Act, 8 U.S.C. 1356(t). The statute requires that genealogy program fees be deposited into the Immigration Examinations Fee Account and that the fees for such research and information services may be set at a level that will ensure the recovery of the full costs of providing all such services. *Id.* The methodology for calculating the genealogy program fees is discussed in a separate section later in this preamble.

[12] Congress has not defined either term with any degree of specificity for purposes of subsections (m) and (n). *See, e.g., Barahona* v. *Napolitano,* No. 10–1574, 2011 WL 4840716, at **6–8 (S.D.N.Y. Oct. 11, 2011) (''While the term 'full costs' appears self-explanatory, section 286(m) contains both silence and ambiguity concerning the precise scope that 'full costs' entails in this context.''); *see also King* v. *Burwell,* 135 S. Ct. 2480, 2489 (2015) (''[O]ftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.' So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.' '' (quoting *FDA* v. *Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132–33 (2000))).

296, sec. 451, 116 Stat. 2142 (Nov. 26, 2002) (6 U.S.C. 271). The statute authorizes recovery of the full costs of providing immigration adjudication and naturalization services. Congress has historically relied on this authority to support the vast majority of USCIS programs and operations conducted as part of adjudication and naturalization service delivery. This conclusion is supported by Congress' historical appropriations to USCIS. The agency receives only a small annual appropriation. USCIS must use other means to fund, as a matter of both discretion and necessity, all other operations.

Certain functions, including the Systematic Alien Verification for Entitlements (SAVE) program [13] and the Office of Citizenship,[14] which USCIS has administered since DHS's inception, are integral parts of fulfilling USCIS' statutory responsibility to provide immigration adjudication and naturalization services. They are not associated with specific fees examined during the biennial fee review, but may be funded by the IEFA. Similarly, when a filing fee for an immigration benefit request such as Temporary Protected Status (TPS) is capped by statute at $50 and does not cover the cost of adjudicating these benefit requests, DHS may recover the difference with fees charged to other immigration benefit requests. *See* INA section 244(c)(1)(B), 8 U.S.C. 1254a(c)(1)(B); 8 CFR 103.7(b)(1)(i)(NN); proposed 8 CFR 106.2(a)(37)(i). Finally, when DHS exempts certain benefit requests from filing or visa fees, such as, for example, applications or petitions from victims who assist law enforcement in the investigation or prosecution of acts of human trafficking (T nonimmigrant status) or certain other crimes (U nonimmigrant status), USCIS recovers the cost of processing those fee-exempt visas with fees charged to other applicants and petitioners. *See, e.g.,* 8 CFR 103.7(b)(1)(i)(UU)–(VV); proposed 8 CFR 106.2(a)(46)–(47).

In short, the full cost of USCIS operations cannot be as directly correlated or connected to a specific fee as OMB Circular A–25 advises. Nonetheless, DHS follows OMB Circular A–25 to the extent appropriate, including directing that fees should be set to recover the costs of an agency's services in their entirety and that full costs are determined based upon the best available records of the agency. *Id.* DHS applies the discretion provided in INA section 286(m), 8 U.S.C. 1356(m), to: (1) Use Activity-Based Costing (ABC) to establish a model for assigning costs to specific benefit requests in a manner reasonably consistent with OMB Circular A–25; (2) distribute costs that are not attributed to, or driven by, specific adjudication and naturalization services; [15] and (3) make additional adjustments to effectuate specific policy objectives.[16]

By approving DHS's annual appropriations, which provide limited appropriated funds to USCIS, Congress has consistently recognized that the ''full'' costs of operating USCIS, including SAVE and the Office of Citizenship, less any appropriated funding, is the appropriate cost basis for establishing IEFA fees. Nevertheless, in each biennial fee review, DHS adds refinements to its determination of immigration benefit fees, including the level by which fees match directly assignable, associated, and indirect costs.

C. Immigration Examinations Fee Account

USCIS manages three fee accounts:

- The IEFA (includes premium processing revenues),[17]
- The Fraud Prevention and Detection Account,[18] and
- The H–1B Nonimmigrant Petitioner Account.[19]

In 1988, Congress established the IEFA in the Treasury of the United States. *See* Public Law 100–459, sec. 209, 102 Stat. 2186 (Oct. 1, 1988) (codified as amended at INA sections 286(m) and (n), 8 U.S.C. 1356(m) and (n)). Fees deposited into the IEFA fund the provision of immigration adjudication and naturalization services. In subsequent legislation, Congress directed that the IEFA also fund the full costs of providing all such services, including services provided to immigrants at no charge. *See* Public Law 101–515, sec. 210(d)(1) and (2), 104 Stat. 2101, 2121 (Nov. 5, 1990). Consequently, the immigration benefit fees were increased to recover these additional costs. *See* 59 FR 30520 (June 14, 1994). The IEFA comprised approximately 95 percent of total funding for USCIS in FY 2018 and is the focus of this proposed rule.

The Fraud Prevention and Detection Account and H–1B Nonimmigrant Petitioner Account are both funded by statutorily set fees. DHS has no authority to adjust fees for these accounts.

D. Fee Review History

Most recently, DHS published a revised USCIS fee schedule in its FY 2016/2017 fee rule. *See* 81 FR 73292 (Oct. 24, 2016).[20] The rule and associated fees became effective on December 23, 2016. DHS adjusted the USCIS immigration benefits fee schedule for the first time in more than 6 years, increasing fees by a weighted average of 21 percent. The fee schedule adjustment recovered all projected costs for FY 2016–2017, including the Refugee, Asylum, and International Operations Directorate (RAIO), SAVE, and the Office of Citizenship. *See* 81 FR 26911 and 73293.

The fee schedule had been adjusted previously as well. Before the creation of DHS, the Department of Justice (DOJ) Immigration and Naturalization Service (INS) [21] adjusted fees incrementally in 1994. *See* 59 FR 30520 (June 14, 1994).

---

[13] USCIS funds the SAVE program by user fees and IEFA funds, as Congress has not provided any direct appropriated funds for the program since FY 2007. SAVE provides an ''immigration adjudication . . . service'' under INA sections 286(m) and (n) to Federal, state and local agencies who require immigration adjudication information in administering their benefits.

[14] The Homeland Security Act created the Office of Citizenship at the same time as several other mission essential USCIS offices, such as those for legal, budget, and policy. Like those offices, the Office of Citizenship has always been considered an essential part of the ''adjudication and naturalization services'' USCIS provides under sections 286(m) and (n) of the INA. An integral part of providing such services, as Congress recognized in creating the Citizenship office in section 451(f) of the Homeland Security Act (6 U.S.C. 271(f)), includes providing information to potential applicants for naturalization regarding the process of naturalization and related activities.

[15] The ABC model distributes indirect costs. Costs that are not assigned to specific fee-paying immigration benefit requests are reallocated to other fee-paying immigration benefit requests outside the model. For example, the model determines the direct and indirect costs for refugee workload. The costs associated with processing the refugee workload are reallocated outside the model to fee-paying immigration benefit requests.

[16] DHS may reasonably adjust fees based on value judgments and public policy reasons where a rational basis for the methodology is propounded in the rulemaking. *See FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29 (1983).

[17] INA sec. 286(m), (n) & (u); 8 U.S.C. 1356(m), (n) & (u).

[18] INA secs. 214(c)(12)–(13), 286(v); 8 U.S.C. 1184(c)(12)–(13) 1356(v).

[19] INA secs. 214(c)(9), (11), 286(s); 8 U.S.C. 1184(c)(9), (11), 1356(s).

[20] The phrase ''FY 2016/2017 fee rule,'' as used in this proposed rule, encompasses the proposed rule, final rule, fee review, and all supporting documentation associated with the regulations effective as of December 23, 2016.

[21] The Homeland Security Act of 2002 abolished the INS and transferred the INS's immigration administration and enforcement responsibilities from DOJ to DHS. The INS's immigration and citizenship services functions were specifically transferred to the Bureau of Citizenship and Immigration Services, later renamed U.S. Citizenship and Immigration Services. *See* Public Law 107–296, 451 (6 U.S.C. 271).

DOJ conducted a comprehensive fee review using activity-based costing (ABC) and adjusted most IEFA fees in 1998. *See* 63 FR 1775 (Jan. 12, 1998) (proposed rule); 63 FR 43604 (Aug. 14, 1998) (final rule). DOJ adjusted fees for small volume workloads in 2000. *See* 64 FR 26698 (May 17, 1999) (proposed rule); 64 FR 69883 (Dec. 15, 1999) (final rule). DOJ adjusted fees by inflation in 2002. *See* 66 FR 65811 (Dec. 21, 2001). Following the creation of DHS, it adjusted fees in 2004 and 2005. *See* 69 FR 20528 (Apr. 15, 2004); 70 FR 56182 (Sept. 26, 2005). After those incremental changes, DHS published a comprehensive FY 2007 fee rule. *See* 72 FR 29851 (May 30, 2007). DHS further amended USCIS fees in the FY 2010/2011 fee rule. *See* 75 CFR 58962 (Sept. 24, 2010). This rule removed the costs of the RAIO Directorate, SAVE, and the Office of Citizenship from the fee schedule, in anticipation of appropriations from Congress that DHS requested. *See* 75 FR 58961, 58966. These resources did not fully materialize, requiring USCIS to use other fee revenue to support the programs in the FY 2016/2017 fee rule. *See* 81 FR 26910–12.

The supporting documentation accompanying this proposed rule in the rulemaking docket at *www.regulations.gov* contains a historical fee schedule that shows the immigration benefit fee history since October 2005.

Table 1 summarizes the IEFA and biometric services fee schedule that took effect on December 23, 2016. DHS is proposing to change the current fee schedule as a result of the FY 2019/2020 fee review. The table excludes statutory fees that DHS cannot adjust or can only adjust by inflation.

TABLE 1—NON-STATUTORY IEFA IMMIGRATION BENEFIT REQUEST FEES

Form No.[22]	Title	Fee
G–1041	Genealogy Index Search Request	$65
G–1041A	Genealogy Records Request	65
I–90	Application to Replace Permanent Resident Card	455
I–102	Application for Replacement/Initial Nonimmigrant Arrival-Departure Document	445
I–129/129CW	Petition for a Nonimmigrant Worker	460
I–129F	Petition for Alien Fiancé(e)	535
I–130	Petition for Alien Relative	535
I–131[23]	Application for Travel Document	575
I–131A	Application for Carrier Documentation	575
I–140	Immigrant Petition for Alien Worker	700
I–191	Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA)[24]	930
I–192	Application for Advance Permission to Enter as Nonimmigrant	[25] 930/585
I–193	Application for Waiver of Passport and/or Visa	585
I–212	Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal	930
I–290B	Notice of Appeal or Motion	675
I–360	Petition for Amerasian, Widow(er), or Special Immigrant	435
I–485	Application to Register Permanent Residence or Adjust Status	1,140
I–485	Application to Register Permanent Residence or Adjust Status (certain applicants under the age of 14 years)[26].	750
I–526	Immigrant Petition by Alien Entrepreneur	3,675
I–539	Application to Extend/Change Nonimmigrant Status	370
I–600	Petition to Classify Orphan as an Immediate Relative	775
I–600A	Application for Advance Processing of an Orphan Petition	775
I–601	Application for Waiver of Grounds of Inadmissibility	930
I–601A	Application for Provisional Unlawful Presence Waiver	630
I–612	Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended).	930
I–687	Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act	1,130
I–690	Application for Waiver of Grounds of Inadmissibility	715
I–694	Notice of Appeal of Decision under Section 210 or 245A	890
I–698	Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA)[27]	1,670
I–751	Petition to Remove the Conditions of Residence	595
I–765	Application for Employment Authorization	410
I–800	Petition to Classify Convention Adoptee as an Immediate Relative	775
I–800A	Application for Determination of Suitability to Adopt a Child from a Convention Country	775
I–800A Supp. 3	Request for Action on Approved Form I–800A	385
I–817	Application for Family Unity Benefits	600
I–824	Application for Action on an Approved Application or Petition	465
I–829	Petition by Entrepreneur to Remove Conditions on Permanent Resident Status	3,750
I–881	Application for Suspension of Deportation or Special Rule Cancellation of Removal[28]	285/570
I–910	Application for Civil Surgeon Designation	785
I–924	Application for Regional Center Designation Under the Immigrant Investor Program	17,795
I–924A	Annual Certification of Regional Center	3,035
I–929	Petition for Qualifying Family Member of a U–1 Nonimmigrant	230
I–941	Application for Entrepreneur Parole[29]	1,200
N–300	Application to File Declaration of Intention	270
N–336	Request for a Hearing on a Decision in Naturalization Proceedings	700
N–400	Application for Naturalization	640
N–400	Application for Naturalization (Reduced Fee)	320
N–470	Application to Preserve Residence for Naturalization Purposes	355
N–565	Application for Replacement Naturalization/Citizenship Document	555
N–600	Application for Certification of Citizenship	1,170
N–600K	Application for Citizenship and Issuance of Certificate Under Section 322	1,170
	USCIS Immigrant Fee	220

TABLE 1—NON-STATUTORY IEFA IMMIGRATION BENEFIT REQUEST FEES—Continued

Form No.[22]	Title	Fee
	Biometric Services Fee	85

IV. FY 2019/2020 Immigration Examinations Fee Account Fee Review

A. USCIS Projected Costs and Revenue

The primary objective of the fee review is to determine whether current immigration and naturalization benefit fees will generate sufficient revenue to fund anticipated operating costs associated with administering USCIS' role in the nation's legal immigration system. USCIS examines its recent budget history, service levels, and immigration trends to forecast costs, revenue, and operational metrics. This data helps USCIS identify the difference between anticipated costs and revenue as well as calculate proposed fees. The FY 2019/2020 fee review encompasses three core elements:

- Cost projections;
- Revenue projections; and
- Cost and revenue differential (the difference between cost and revenue projections).

1. Cost Projections

USCIS' FY 2018 annual operating plan (AOP) is the basis for the FY 2019/2020 cost projections. These estimates reflect the funding necessary to maintain an adequate level of operations and do not include program increases for new development, modernization, or acquisition. Cost projections also include funding for enhancements that facilitate the processing of additional workload. Examples of items in the cost projections include:

- *Transfer of funding to U.S. Immigration and Customs Enforcement ($207.6 million in FY 2019 and FY 2020).* This item is explained in section IV.A.1.a., Use IEFA Fee Collections to Fund Immigration Adjudication Services Performed by ICE.
- *Pay and benefits adjustments for on-board staff ($280.2 million in FY 2019 and $89.8 million in FY 2020).* Pay adjustments account for cost of living adjustments, within-grade pay increases, and the annualization of prior-year vacancies. The government-wide cost of living adjustment rate assumption is 2.0 percent for both FY 2019 and FY 2020. Within-grade pay increases are routine raises awarded to general schedule employees, based on length of service and performance at an acceptable level of competence. Annualization of prior-year vacancies account for a full-year cost of salaries and benefits for positions that were on-board for only a portion of FY 2018.
- *Pay and benefits for new staff ($116.7 million in FY 2019 and $128.8 million in FY 2020).* Projected FY 2019 and FY 2020 workloads exceed current workload capacity, thereby requiring additional staff. The FY 2018 Staffing Allocation Model[30] and new staff enhancement requests yield an additional 2,098 positions necessary to meet adjudicative processing goals and other USCIS mission objectives, including administrative functions. In total, the FY 2016/2017 fee rule assumed a total authorized staffing level of 14,543, whereas estimates used for this proposed rule reflect 20,958. This represents an increase of 6,415 or 44 percent. This additional staffing requirement reflects the facts that it takes USCIS longer to adjudicate many workloads than was planned for in the FY 2016/2017 fee rule and that workload volumes, particularly for work types that do not currently generate fee revenue, have grown.
- *Net additional costs ($150.8 million in FY 2019 and $6.2 million in FY 2020).* In addition to non-pay general expenses associated with on-boarding the new staff described above, these costs include other enhancement requests such as secure mail shipping for permanent resident cards, increased background investigations, headquarters consolidation, etc. The additional resources are to sustain current operations necessary for achieving USCIS' strategic goals. USCIS considered all cost data that was available at the time it conducted this fee review, including data on cost-saving measures. It does not account for recent cost-savings initiatives for which data were not yet available at the time of this fee review. However, USCIS intends to fully evaluate and capture any relevant cost-savings data during its next biennial fee review.

Table 2 is a crosswalk summary of the FY 2018 AOP to the FY 2019/2020 cost projections. It accounts for pay and non-pay general expenses for on-board and new staff, other resource requirements or adjustments, and the removal of costs associated with temporary programs such as TPS. FY 2019 cost projections are 20 percent higher than FY 2018 costs. FY 2020 cost projections are 5 percent higher than FY 2019 cost projections. The FY 2019/2020 average annual budget is $4,670.5 million. This represents a $1,632.5 million, or 54 percent, increase over the FY 2016/2017 fee rule average annual budget of $3,038.0 million. The primary cost driver is payroll, which accounts for 30.9 percent of the increase from the prior fee rule average annual budget.

[22] Form, when used in connection with a benefit or other request to be filed with DHS to request an immigration benefit, means a device for the collection of information in a standard format that may be submitted in a paper format or an electronic format as prescribed by USCIS on its official internet website. The term ''Form'' followed by an immigration form number includes an approved electronic equivalent of such form as made available by USCIS on its official internet website. *See* 8 CFR 1.2 and 299.1. The word ''form'' is used in this final rule in both the specific and general sense.

[23] As described in the NPRM, the United States' obligations under the 1967 Protocol relating to the Status of Refugees (incorporating by reference Article 28 of the 1951 Convention relating to the Status of Refugees) guide the Application for Travel Document fees for a Refugee Travel Document. The USCIS ABC model does not set these fees. *See* 8 CFR 103.7(b)(1)(i)(M)(*2*) and (*3*).

[24] Form I–191 was previously titled Application for Advance Permission to Return to Unrelinquished Domicile. *See* 8 CFR 103.7(b)(1)(i)(O).

[25] The Form I–192 fee remained $585 when filed with and processed by CBP. *See* 8 CFR 103.7(b)(1)(i)(P).

[26] This reduced fee is applied to ''an applicant under the age of 14 years when [the application] is (i) submitted concurrently with the Form I–485 of a parent, (ii) the applicant is seeking to adjust status as a derivative of his or her parent, and (iii) the child's application is based on a relationship to the same individual who is the basis for the child's parent's adjustment of status, or under the same legal authority as the parent.'' 8 CFR 103.7(b)(1)(i)(U)(*2*).

[27] The form's name in the current fee provision at 8 CFR 103.7(b)(1)(i)(GG) is ''Application to Adjust Status from Temporary to Permanent Resident (Under section 245A of Public Law 99–603).''

[28] Currently there are two USCIS fees for Form I–881: $285 for individuals and $570 for families. *See* 8 CFR 103.7(b)(1)(i)(QQ)(*1*). DOJ's Executive Office for Immigration Review (EOIR) has a separate $165 fee.

[29] USCIS excluded Form I–941, Application for Entrepreneur Parole, from the FY 2019/2020 fee review. As such, it will not appear in tables for workload, fee-paying volume, or elsewhere in this NPRM. DHS published a separate NPRM that proposed to terminate the program. *See* 83 FR 24415 (June 28, 2018). DHS does not propose any changes to this fee.

[30] The Staffing Allocation Model is a Microsoft Excel-based workforce planning tool that estimates the staffing requirements necessary to adjudicate workload receipt (for example, applications and petitions) forecasts at target processing times.

The funding transfer to ICE accounts for about 6 percentage points (*i.e.,* 28.5 percent) of the 21 percent total weighted average fee increase.

TABLE 2—COST PROJECTIONS

[FY 2019/2020 fee review IEFA non-premium budget (in millions)]

Total Base FY 2018 IEFA Non-Premium Budget	$3,585.6
Plus: Spending Adjustments	217.2
Total Adjusted FY 2018 IEFA Non-Premium Budget	3,802.8
Plus: Transfer to ICE	207.6
Plus: Pay Inflation and Promotions/Within Grade Increases	280.2
Plus: Net Additional Costs	267.5
Total Adjusted FY 2019 IEFA Non-Premium Budget	4,558.1
Plus: Pay Inflation and Promotions/Within Grade Increases	218.6
Plus: Net Additional Costs	6.2
Total Adjusted FY 2020 IEFA Non-Premium Budget	4,782.9
FY 2019/2020 Average Non-Premium Budget	4,670.5

a. Use IEFA Fee Collections To Fund Immigration Adjudication Services Performed by ICE

The President's FY 2019 and FY 2020 budget requests include a $207.6 million transfer of IEFA funds to ICE. DHS proposes to use USCIS fees to recover the full amount of this proposed transfer.[31]

DHS may use fees deposited into the IEFA to fund the expenses of providing immigration adjudication and naturalization services and the cost of collection, safeguarding, and accounting for the IEFA funds. *See* INA section 286(m), 8 U.S.C. 1356(m). Funds deposited into the IEFA are primarily used by USCIS, but they may also be used to reimburse other DHS components, including ICE, for qualifying costs. DHS proposes to recover, via USCIS' fee schedule, the full amount of the proposed transfer from past budget requests. *See* INA section 286(n); 8 U.S.C. 1356(n). DHS will transfer funds annually from the IEFA to ICE's appropriations so as to reimburse those appropriations for the cost of providing qualifying services, which will increase the level of service provided beyond current levels.

DHS "immigration adjudication and naturalization services" do not end with a decision to approve or deny a request. USCIS and ICE, as components of DHS, share a responsibility to ensure the integrity of the U.S. immigration system beyond the moment of adjudication. DHS believes that ICE investigations of potential immigration fraud perpetrated by individuals and entities who have sought immigration benefits before USCIS and efforts to enforce applicable immigration law and regulations with regard to such individuals and entities constitute direct support of immigration adjudication and naturalization services. Thus, the IEFA may fund ICE enforcement and support positions, as well as ancillary costs, to the extent that such positions and costs support immigration adjudication and naturalization services. ICE HSI could use funds transferred from the IEFA to support investigations of immigration benefit fraud via Document and Benefit Fraud Task Forces (DBFTFs), Operation Janus, and the HSI National Lead Development Center. DBFTFs facilitate information sharing and coordination among ICE, USCIS, other federal entities, as well as state and local law enforcement for the purpose of investigating document and benefit fraud in support of immigration and naturalization services. Operation Janus is a joint initiative including USCIS and ICE to ensure that individuals who have a previous order of removal have not and will not be able to fraudulently obtain immigration benefits under an alternate identity, thus ensuring the integrity of the immigration adjudication and naturalization services provided by USCIS. The HSI National Lead Development Center will receive referrals and review investigative leads as part of investigations into immigration fraud. Considering what constitutes immigration adjudication and naturalization services and collection, safeguarding, and accounting expenses under INA sections 286(m), (n), 8 U.S.C. 1356(m), (n), adjudication and naturalization services includes all costs for work related to determining or adjudicating whether applicants may receive such services. The cost of the services provided includes the cost of any investigatory work necessary to adjudicate applications or provide services, including investigations of fraud. Therefore, these activities constitute support of immigration adjudication and naturalization services.

Moreover, while transfers between appropriations are generally prohibited absent statutory authority, INA section 286(n), 8 U.S.C. 1356(n), expressly authorizes the use of the fees deposited in the IEFA to reimburse any appropriation for expenses in providing immigration adjudication and naturalization services. DHS has determined that the IEFA may be used to reimburse appropriations that fund enforcement and support positions to the extent that such positions support adjudication and naturalization services. Therefore, DHS proposes to recover the costs through the USCIS fee schedule. To see how the ICE transfer affects proposed fees, see section VII. Other Possible Fee Scenarios in this preamble.[32]

The aforementioned cost projections serve as the basis for the additional ICE revenue of $207.6 million covered by this rule. DHS recognizes that the

[31] For additional information on ICE's FY 2019 costs, see pages 46 and 254–263 (called ICE—O&S–20 and ICE—IEFA–1–10, respectively, in the presentation) of the DHS ICE FY 2019 Congressional Justification located at *https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf.* For information of ICE's FY 2020 costs, see pages 261–270 (called ICE—IEFA–3) of the DHS ICE FY 2020 Congressional Justification located at *https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_CBJ-Immigration-Customs-Enforcement_0.pdf.*

[32] The Administration has notified Congress of its intention to shift the cost of these ICE activities from annual appropriations to IEFA. See previous footnotes. If Congress rejects the Administration's proposal, or if DHS does not ultimately shift these costs from annual appropriations to IEFA, USCIS will not include this use of these funds in its fee model for the final rule.

$207.6 million previously identified in budget requests may propose to transfer more funding to ICE than is needed to fund activities that are reimbursable through the IEFA. DHS continues to study which ICE costs would be reimbursable through the IEFA, and may announce more precise cost estimates prior to publication of a final rule. To the extent that such cost estimates are lower than the $207.6 million figure currently accounted for in the rule, fee levels would be revised downward.[33]

DHS proposes to establish all USCIS fees at a level necessary to recover the full amount of this proposed transfer. However, in the final rule, DHS may establish a separate surcharge for the amount necessary to recover the estimated funds to be transferred to ICE. The surcharge would be separately codified, but collected along with the fee for each benefit request for which a fee is established in the final rule. DHS encourages comments on the method used to recover the ICE adjudication and naturalization service costs.

2. Revenue Projections

USCIS' revenue projections are informed by internal immigration benefit request receipt forecasts and 12 months of historical actual fee-paying receipts to account for fee-waiver/fee-exemption trends. USCIS uses actual revenue collections from June 2016 to May 2017 as a basis for the fee-paying assumptions in the FY 2019/2020 revenue projections.

USCIS' current fee schedule is expected to yield $3.41 billion of average annual revenue during the FY 2019/2020 biennial period. This represents a $0.93 billion, or 38 percent, increase from the FY 2016/2017 fee rule projection of $2.48 billion. *See* 81 FR 26911. The projected revenue increase is due to higher fees as a result of the FY 2016/2017 fee rule and more anticipated fee-paying receipts. The FY 2016/2017 fee rule forecasted 5,870,989 total workload receipts and 5,140,415 fee-paying receipts. *See* 81 FR 26923–4. However, the FY 2019/2020 fee review forecasts 9,336,015 total workload receipts and 7,789,861 fee-paying receipts. This represents a 59 percent increase to workload and 52 percent increase to fee-paying receipt volume assumptions. Despite the increase in projected revenue above the FY 2016/2017 fee rule projection, this additional revenue is insufficient to recover USCIS' increased costs, as discussed in the next section.

3. Cost and Revenue Differential

USCIS identifies the difference between anticipated costs and revenue, assuming no changes in fees, to determine whether the existing fee schedule is sufficient to recover full costs or whether a fee adjustment is necessary. Table 3 summarizes the projected cost and revenue differential. Summary values may vary due to rounding.

TABLE 3—IEFA NON-PREMIUM COST AND REVENUE COMPARISON

[Dollars in millions]

Fiscal year	FY 2019	FY 2020	FY 2019/2020 average
Non-Premium Revenue	$3,408.2	$3,408.2	$3,408.2
Non-Premium Budget	4,558.1	4,782.9	4,670.5
Difference	−1,149.9	−1,374.7	−1,262.3

Historically, and for the purpose of the fee review, USCIS reports costs and revenue as an average over the 2-year period. In Table 3, FY 2019 and 2020 costs and revenue are averaged to determine the projected amounts to be recovered through this rule. Based on current immigration benefit and biometric services fees and projected volumes, USCIS expects fees to generate $3.41 billion in average annual revenue in FY 2019 and FY 2020. For the same period, the average annual cost of processing those immigration benefit requests and providing biometric services is $4.67 billion. This yields an average annual deficit of $1.26 billion. In other words, USCIS expects projected FY 2019/2020 total operating costs to exceed projected total revenue.

Because projected costs are higher than projected revenue, USCIS has several options to address the shortfall:

1. Reduce projected costs;
2. Use carryover funds or revenue from the recovery of prior year obligations; or
3. Adjust fees with notice and comment rulemaking.

DHS believes that reducing the projected costs to equal the projected revenue would risk degrading USCIS operations funded by the IEFA. However, DHS did assess several possible fee review budgets. For example, the effect of the $207.6 million transfer from USCIS to ICE is shown below in section VII. Other Possible Fee Scenarios. Projected carryover is negative in both FY 2019 and FY 2020 and thus eliminating this transfer is insufficient to bridge the gap between projected costs and revenue.[34] Likewise, USCIS estimates that recovered revenue from prior year obligations will be insufficient. USCIS estimates that it may recover $91.9 million in FY 2019 and $94.2 million in FY 2020 for the non-premium IEFA. Therefore, DHS proposes to increase revenue through the fee adjustments described in detail throughout this rule.

B. Methodology

When conducting a fee review, USCIS reviews its recent operating environment to determine the appropriate method to assign costs to immigration benefit requests, including biometric services. USCIS uses activity-based costing (ABC), a business management tool that assigns resource costs to operational activities and then to products and/or services. USCIS uses commercially available ABC software to create financial models. These models determine the cost of each major step towards processing immigration benefit requests and providing biometric services. This is the same methodology that USCIS used in the last five fee reviews, and it is the basis for the current fee structure. Following the FY 2016/2017 fee rule, USCIS identified several key methodology changes to improve the accuracy of its ABC model.

[33] The possible effects of a different level of ICE costs to be funded by USCIS benefit request fees is discussed further in VII. Other Possible Fee Scenarios.

[34] In the docket for this proposed rule, the FY 2019/2020 Immigration Examinations Fee Account Fee Review Supporting Documentation has more information. See the section titled IEFA Non-Premium Carryover Projections & Targets.

Please refer to the Methodology Changes Implemented in the FY 2019/2020 Fee Review section of the Supporting Documentation located in the docket of this rule.

1. Volume

USCIS uses two types of volume data in the fee review: Workload and fee-paying volume. Workload volume is a projection of the total number of immigration benefit requests that USCIS will receive in a fiscal year. Fee-paying volume is a projection of the number of applicants, petitioners, and requestors that will pay a fee when filing requests for immigration benefits. Not all applicants, petitioners, or requestors pay a fee. Those applicants, petitioners, and requestors for whom USCIS grants a fee waiver or to whom an exemption applies are represented in the workload volume, but not the fee-paying volume. Applicants, petitioners, and requestors who pay a fee fund the cost of processing requests for fee-waived or fee-exempt immigration benefit requests.

a. Workload Volume and Volume Projection Committee

USCIS uses statistical modeling, immigration receipt data from the last 15 years, and internal assessments of future developments (such as annualized data prepared by the USCIS Office of Performance and Quality) to develop workload volume projections. All relevant USCIS directorates and program offices are represented on the USCIS Volume Projection Committee (VPC). The VPC forecasts USCIS workload volume using subject matter expertise from various directorates and program offices, including the Service Centers, National Benefits Center, RAIO, and regional, district, and field offices. Input from these offices helps refine the volume projections. The VPC reviews short- and long-term volume trends. In most cases, time series models provide volume projections by form type. Time series models use historical receipts data to determine patterns (such as level, trend, and seasonality) or correlations with historical events to forecast receipts. When possible, models are also used to determine relationships between different benefit request types. Workload volume is a key element used to determine the USCIS resources needed to process benefit requests within established adjudicative processing goals. It is also the primary cost driver for assigning activity costs to immigration benefits and biometric services[35] in the USCIS ABC model.

TABLE 4—WORKLOAD VOLUME COMPARISON

Immigration benefit request	Average annual FY 2016/2017 projected workload receipts	Average annual FY 2019/2020 projected workload receipts	Difference
I–90 Application to Replace Permanent Resident Card	810,707	767,020	−43,687
I–102 Application for Replacement/Initial Nonimmigrant Arrival-Departure Document	10,143	7,700	−2,443
I–129 Petition for a Nonimmigrant Worker Subtotal	432,156	553,266	121,110
I–129H1	N/A	423,304	N/A
I–129H2A—Named Beneficiaries	N/A	3,962	N/A
I–129H2B—Named Beneficiaries	N/A	2,256	N/A
I–129L	N/A	41,502	N/A
I–129O	N/A	25,456	N/A
I–129CW, I–129E&TN, and I–129MISC	N/A	43,491	N/A
I–129H2A—Unnamed Beneficiaries	N/A	8,981	N/A
I–129H2B—Unnamed Beneficiaries	N/A	4,315	N/A
I–129F Petition for Alien Fiancé(e)	45,351	52,000	6,649
I–130 Petition for Alien Relative	911,349	984,107	72,758
I–131/I–131A Application for Travel Document Subtotal	256,622	480,834	224,212
I–131 Application for Travel Document	N/A	449,073	N/A
I–131 Refugee Travel Document for an individual age 16 or older	N/A	20,714	N/A
I–131 Refugee Travel Document for a child under the age of 16	N/A	1,248	N/A
I–131A Application for Carrier Documentation	N/A	9,799	N/A
I–140 Immigrant Petition for Alien Worker	88,602	161,000	72,398
I–290B Notice of Appeal or Motion	24,706	24,050	−656
I–360 Petition for Amerasian, Widow(er) or Special Immigrant	26,428	42,873	16,445
I–485 Application to Register Permanent Residence or Adjust Status	593,717	632,500	38,783
I–526 Immigrant Petition by Alien Entrepreneur	14,673	14,000	−673
I–539 Application to Extend/Change Nonimmigrant Status	172,001	231,000	58,999
I–589 Application for Asylum and for Withholding of Removal	N/A	163,000	N/A
I–600/600A; I–800/800A Intercountry Adoption-Related Petitions and Applications	15,781	11,776	−4,005
I–600A/I–600 Supplement 3 Request for Action on Approved Form I–600A/I–600	N/A	1,500	N/A
I–601A Provisional Unlawful Presence Waiver	42,724	67,000	24,276
I–687 Application for Status as a Temporary Resident	18	0	−18
I–690 Application for Waiver of Grounds of Inadmissibility	21	30	9
I–694 Notice of Appeal of Decision	39	10	−29
I–698 Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA)	91	100	9
I–751 Petition to Remove Conditions on Residence on Permanent Resident Status	173,000	156,000	−17,000
I–765 Application for Employment Authorization	747,825	2,851,000	2,103,175
I–800A Supplement 3 Request for Action on Approved Form I–800A	1,585	1,500	−85
I–817 Application for Family Unity Benefits	2,069	1,400	−669
I–821D Consideration of Deferred Action for Childhood Arrivals (Renewal)	N/A	396,000	N/A
I–824 Application for Action on an Approved Application or Petition	10,921	11,303	382
I–829 Petition by Entrepreneur to Remove Conditions on Permanent Resident Status	3,562	3,500	−62
I–881 Application for Suspension of Deportation or Special Rule Cancellation of Removal	N/A	340	N/A
I–910 Application for Civil Surgeon Designation	609	530	−79

[35] As fully explained later in this preamble, DHS is removing biometric services as a separate fee in this rule, except as associated with an Application for Temporary Protected Status and certain other programs. Accordingly, N/A is included in the average annual FY 2019/2020 projected workload receipts and difference columns for biometrics in Table 4.

TABLE 4—WORKLOAD VOLUME COMPARISON—Continued

Immigration benefit request	Average annual FY 2016/2017 projected workload receipts	Average annual FY 2019/2020 projected workload receipts	Difference
I–924 Application For Regional Center Designation Under the Immigrant Investor Program	400	520	120
I–924A Annual Certification of Regional Center	882	950	68
I–929 Petition for Qualifying Family Member of a U–1 Nonimmigrant	575	2,200	1,625
N–300 Application to File Declaration of Intention	41	4	−37
N–336 Request for a Hearing on a Decision in Naturalization Proceedings	4,666	4,700	34
N–400 Application for Naturalization	830,673	913,500	82,827
N–470 Application to Preserve Residence for Naturalization Purposes	362	110	−252
N–565 Application for Replacement Naturalization/Citizenship Document	28,914	28,000	−914
N–600/600K Application for Certificate of Citizenship Subtotal	69,723	64,000	−5,723
N–600 Application for Certificate of Citizenship	N/A	61,000	N/A
N–600K Application for Citizenship and Issuance of Certificate Under Section 322	N/A	3,000	N/A
Inadmissibility Waiver Subtotal	71,527	105,492	33,965
I–191 Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA)	N/A	260	N/A
I–192 Application for Advance Permission to Enter as Nonimmigrant	N/A	69,557	N/A
I–193 Application for Waiver of Passport and/or Visa	N/A	7,763	N/A
I–212 Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal	N/A	6,132	N/A
I–601 Application for Waiver of Ground of Excludability	N/A	21,000	N/A
I–612 Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended)	N/A	780	N/A
USCIS Immigrant Fee	472,511	594,000	121,489
G–1041 Genealogy Index Search Request	3,605	4,650	1,045
G–1041A Genealogy Records Request	2,410	2,550	140
Subtotal	5,870,989	9,336,015	3,508,026
Biometric Services	3,028,254	N/A	N/A
Total	8,899,243	9,336,015	479,772

b. Fee-Paying Volume

USCIS uses historical revenue and receipt data to determine the number of individuals who paid a fee for each immigration benefit request. Total revenue for an immigration benefit request is divided by its fee to determine the number of fee-paying immigration benefit requests. Fee-paying receipts are compared to the total number of receipts (workload volume) to determine a fee-paying percentage for each immigration benefit request. When appropriate, projected fee-paying volume is adjusted to reflect filing trends and anticipated policy changes. These projections include the effects of changes that DHS is proposing in this rule to fee waiver policies, the discontinuation of free interim benefits while an Application to Register Permanent Residence or Adjust Status is pending, as well as the introduction of fees for Form I–589, Application for Asylum and for Withholding of Removal and Form I–182D, Consideration of Deferred Action for Childhood Arrivals (Renewal).[36] Some immigration benefit request volumes include estimated fee-paying volumes from CBP.[37]

TABLE 5—FEE-PAYING PROJECTION COMPARISON

Immigration benefit request	Average annual FY 2016/2017 fee-paying projection	Average annual FY 2019/2020 fee-paying projection	Difference
I–90 Application to Replace Permanent Resident Card	718,163	682,722	−35,442
I–102 Application for Replacement/Initial Nonimmigrant Arrival-Departure Document	9,499	7,155	−2,344
I–129 Petition for a Nonimmigrant Worker Subtotal	427,778	553,266	125,488
I–129H1	N/A	423,304	N/A
I–129H2A— Named Beneficiaries	N/A	3,962	N/A
I–129H2B—Named Beneficiaries	N/A	2,256	N/A
I–129L	N/A	41,502	N/A
I–129O	N/A	25,456	N/A
I–129CW, I–129E&TN, and I–129MISC	N/A	43,491	N/A
I–129H2A—Unnamed Beneficiaries	N/A	8,981	N/A
I–129H2B—Unnamed Beneficiaries	N/A	4,315	N/A
I–129F Petition for Alien Fiancé(e)	39,277	47,923	8,646
I–130 Petition for Alien Relative	907,512	976,398	68,886
I–131/I–131A Application for Travel Document Subtotal	194,461	322,829	128,368
I–131 Application for Travel Document	N/A	291,068	N/A
I–131 Refugee Travel Document for an individual age 16 or older	N/A	20,714	N/A
I–131 Refugee Travel Document for a child under the age of 16	N/A	1,248	N/A
I–131A Application for Carrier Documentation	N/A	9,799	N/A
I–140 Immigrant Petition for Alien Worker	88,602	161,000	72,398
I–290B Notice of Appeal or Motion	20,955	20,705	−250

[36] See section V.C. Fee Waivers of this preamble for more information on the proposed changes.

[37] See section V.R. Fees Shared by CBP and USCIS of this preamble for more information.

TABLE 5—FEE-PAYING PROJECTION COMPARISON—Continued

Immigration benefit request	Average annual FY 2016/2017 fee-paying projection	Average annual FY 2019/2020 fee-paying projection	Difference
I–360 Petition for Amerasian, Widow(er) or Special Immigrant	8,961	4,224	−4,737
I–485 Application to Register Permanent Residence or Adjust Status	473,336	510,926	37,590
I–526 Immigrant Petition by Alien Entrepreneur	14,673	14,000	−673
I–539 Application to Extend/Change Nonimmigrant Status	171,616	223,903	52,287
I–589 Application for Asylum and for Withholding of Removal	N/A	163,000	N/A
I–600/600A; I–800/800A Orphan Petitions and Applications	5,811	6,142	331
I–600A/I–600 Supplement 3 Request for Action on Approved Form I–600A/I–600	N/A	768	N/A
I–601A Provisional Unlawful Presence Waiver	42,724	67,000	24,276
I–687 Application for Status as a Temporary Resident	0	0	0
I–690 Application for Waiver of Grounds of Inadmissibility	17	25	8
I–694 Notice of Appeal of Decision	39	10	−29
I–698 Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA)	91	100	9
I–751 Petition to Remove Conditions on Residence	162,533	148,918	−13,615
I–765 Application for Employment Authorization	397,954	1,846,491	1,448,537
I–800A Supplement 3 Request for Action on Approved Form I–800A	746	768	22
I–817 Application for Family Unity Benefits	1,988	1,368	−620
I–821D Consideration of Deferred Action for Childhood Arrivals (Renewal)	N/A	396,000	N/A
I–824 Application for Action on an Approved Application or Petition	10,828	11,147	319
I–829 Petition by Entrepreneur to Remove Conditions on Permanent Resident Status	3,562	3,500	−62
I–881 Application for Suspension of Deportation or Special Rule Cancellation of Removal	N/A	340	N/A
I–910 Application for Civil Surgeon Designation	609	530	−79
I–924 Application For Regional Center Designation Under the Immigrant Investor Program	400	520	120
I–924A Annual Certification of Regional Center	882	950	68
I–929 Petition for Qualifying Family Member of a U–1 Nonimmigrant	257	1012.5	756
N–300 Application to File Declaration of Intention	36	4	−32
N–336 Request for a Hearing on a Decision in Naturalization Proceedings	3,593	3,873	280
N–400 Application for Naturalization	631,655	811,730	180,075
N–470 Application to Preserve Residence for Naturalization purposes	360	107	−253
N–565 Application for Replacement Naturalization/Citizenship Document	23,491	23,458	−34
N–600/600K Naturalization Certificate Application Subtotal	46,870	49,826	2,956
N–600 Application for Certificate of Citizenship	N/A	46,857	N/A
N–600K Application for Citizenship and Issuance of Certificate Under Section 322	N/A	2,970	N/A
Inadmissibility Waiver Subtotal	41,902	58,098	16,196
I–191 Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA)	N/A	260	N/A
I–192 Application for Advance Permission to Enter as Nonimmigrant	N/A	22,780	N/A
I–193 Application for Waiver of Passport and/or Visa	N/A	7,672	N/A
I–212 Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal	N/A	6,085	N/A
I–601 Application for Waiver of Ground of Excludability	N/A	20,711	N/A
I–612 Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended)	N/A	590	N/A
USCIS Immigrant Fee	472,511	572,425	99,914
G–1041 Genealogy Index Search Request	3,605	4,650	1,045
G–1041A Genealogy Records Request	2,410	2,550	140
Subtotal	4,929,707	7,789,861	2,860,154
Biometric Services	2,598,639	N/A	N/A
Grand Totals	7,528,346	7,789,861	261,515

2. Completion Rates

USCIS completion rates are the average hours per adjudication of an immigration benefit request. They identify the adjudicative time required to complete (render a decision on) specific immigration benefit requests. The completion rate for each benefit type represents an average. Completion rates reflect what is termed "touch time," or the time an employee with adjudicative responsibilities actually handles the case. This does not reflect "queue time," or time spent waiting, for example, for additional evidence or supervisory approval. Completion rates do not reflect the total processing time applicants, petitioners, and requestors can expect to wait for a decision on their case after USCIS accepts it.

USCIS requires employees who adjudicate immigration benefit requests to report adjudication hours and case completions by benefit type. Adjudication hours are divided by the number of completions for the same time period to determine an average completion rate. In addition to using this data to determine fees, completion rates help determine appropriate staffing allocations to handle projected workload. The USCIS Office of Performance and Quality (OPQ), field offices, and regional management scrutinize the data to ensure accuracy. When data is inconsistent and/or anomalies are identified, the OPQ contacts the reporting office to resolve and make necessary adjustments. USCIS has confidence in the data, given the consistency of reporting over the last several years. The continual availability of the information enables USCIS to update cost information for each fee review.

TABLE 6—COMPLETION RATES PER BENEFIT REQUEST

[Projected adjudication hours/completion]

Immigration benefit request	Service-wide completion rate
I–90 Application to Replace Permanent Resident Card	0.19
I–102 Application for Replacement/Initial Nonimmigrant Arrival-Departure Document	0.77
I–129H1	1.10
I–129H2A—Named Beneficiaries	1.92
I–129H2B—Named Beneficiaries	2.00
I–129L	2.23
I–129O	1.90
I–129CW, I–129E&TN, and I–129MISC	1.62
I–129H2A—Unnamed Beneficiaries	0.50
I–129H2B—Unnamed Beneficiaries	0.58
I–129F Petition for Alien Fiancé(e)	0.67
I–130 Petition for Alien Relative	0.86
I–131 Application for Travel Document	0.25
I–131 Refugee Travel Document for an individual age 16 or older	0.27
I–131 Refugee Travel Document for a child under the age of 16	0.25
I–131A Application for Carrier Documentation	1.01
I–140 Immigrant Petition for Alien Worker	1.46
I–290B Notice of Appeal or Motion	1.32
I–360 Petition for Amerasian, Widow(er) or Special Immigrant	1.65
I–485 Application to Register Permanent Residence or Adjust Status	1.63
I–526 Immigrant Petition by Alien Entrepreneur	8.65
I–539 Application to Extend/Change Nonimmigrant Status	0.51
I–589 Application for Asylum and for Withholding of Removal	4.10
I–600/600A; I–800/800A Orphan Petitions and Applications	2.22
I–600A/I–600 Supplement 3 Request for Action on Approved Form I–600A/I–600	1.90
I–601A Provisional Unlawful Presence Waiver	2.64
I–687 Application for Status as a Temporary Resident	N/A
I–690 Application for Waiver of Grounds of Inadmissibility	1.05
I–694 Notice of Appeal of Decision	1.10
I–698 Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA)	3.76
I–751 Petition to Remove Conditions on Residence	1.30
I–765 Application for Employment Authorization	0.20
I–800A Supplement 3 Request for Action on Approved Form I–800A	1.90
I–821D Consideration of Deferred Action for Childhood Arrivals (Renewal)	0.12
I–817 Application for Family Unity Benefits	0.91
I–824 Application for Action on an Approved Application or Petition	0.78
I–829 Petition by Entrepreneur to Remove Conditions on Permanent Resident Status	8.15
I–881 Application for Suspension of Deportation or Special Rule Cancellation of Removal	2.00
I–910 Application for Civil Surgeon Designation	1.81
I–924 Application For Regional Center Designation Under the Immigrant Investor Program	34.95
I–924A Annual Certification of Regional Center	10.00
I–929 Petition for Qualifying Family Member of a U–1 Nonimmigrant	2.60
N–300 Application to File Declaration of Intention	2.68
N–336 Request for a Hearing on a Decision in Naturalization Proceedings (Under Section 336 of the INA)	3.05
N–400 Application for Naturalization	1.57
N–470 Application to Preserve Residence for Naturalization purposes	4.02
N–565 Application for Replacement Naturalization/Citizenship Document	0.89
N–600 Application for Certificate of Citizenship	1.08
N–600K Application for Citizenship and Issuance of Certificate Under Section 322	1.57
I–191 Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA)	2.10
I–192 Application for Advance Permission to Enter as Nonimmigrant	0.97
I–193 Application for Waiver of Passport and/or Visa	0.30
I–212 Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal	2.71
I–601 Application for Waiver of Ground of Excludability	3.29
I–612 Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended)	0.53
USCIS Immigrant Fee	N/A

USCIS does not list completion rates for the following immigration benefit requests, forms, or other services, due to the special nature of their processing as explained below:

• *USCIS Immigrant Fees.* USCIS does not adjudicate applications for an immigrant visa. Rather, individuals located outside of the United States apply with a Department of State (DOS) overseas consular officer for an immigrant visa. If DOS issues the immigrant visa, the individual may apply with a U.S. Customs and Border Protection (CBP) officer at a port of entry for admission to the United States as an immigrant. This fee represents USCIS' costs to create and maintain files and to issue permanent resident cards to individuals who go through this process. *See* 8 CFR 103.7(b)(1)(i)(D), proposed 8 CFR 106.2(c)(3).

• *Refugee Processing and Other Forms Exempt from Fees.* These immigration benefit requests may use completion rates to determine staffing levels. However, USCIS does not list completion rates for these workloads because these are exempt from paying a fee:

◦ Credible Fear;
◦ Reasonable Fear;
◦ Registration for Classification as a Refugee, Form I–590;
◦ Application By Refugee For Waiver of Grounds of Excludability, Form I–602;
◦ Refugee/Asylee Relative Petition, Form I–730;
◦ Application for T Nonimmigrant Status, Form I–914;
◦ Petition for U Nonimmigrant Status, Form I–918; and
◦ Application for Posthumous Citizenship, Form N–644.

• *Temporary Protected Status (TPS).* DHS proposes not to rely on TPS fee revenue for recovering USCIS' operational expenses, consistent with previous fee rules. *See* 81 FR 73312–3. TPS designations may be terminated under current law or may cease due to a reduction in the eligible population. Termination of the program, in whole or in part, after the fees are set would result in unrealized revenue and a commensurate budgetary shortfall. After the fee schedule is effective, fees cannot be adjusted until the next fee schedule notice and comment rulemaking. Thus, temporary programs subject to termination based on changed circumstances are generally not included in the fee setting model. As such, USCIS excludes the completion rate for Form I–821, Application for Temporary Protected Status, from discussion in this rule because DHS cannot change the initial statutory registration fee permitted under section 244(c)(1)(B) of the INA or establish a re-registration fee for TPS. USCIS will continue to charge the biometric services fee, where required, and the fee for an employment authorization document, as permitted under 8 U.S.C. 1254b.

3. Assessing Proposed Fees

Historically, as a matter of policy, DHS uses its discretion to limit fee increases for certain immigration benefit request fees that would be overly burdensome on applicants, petitioners, and requestors if set at recommended ABC model output levels.[38] Previous proposed IEFA fee schedules referred to limited fee increases as ''low volume reallocation'' or ''cost reallocation.''[39] Despite the two separate phrases, the calculation for both is the same. In the FY 2016/2017 fee rule, USCIS calculated an 8 percent limited fee increase for certain immigration benefit request fees.[40] For this proposed rule, USCIS calculated a limited fee increase of 5 percent using the same methodology as the previous rule.[41]

As such, DHS proposes that the following immigration benefit request fees are limited to a 5 percent increase above the current fees:

• Form I–290B, Notice of Appeal or Motion.
• Form I–360, Petition for Amerasian, Widow(er) or Special Immigrant.
• Form I–600, Petition to Classify Orphan as an Immediate Relative.
• Form I–600A, Application for Advance Processing of an Orphan Petition.
• Form I–600A/I–600, Supplement 3, Request for Action on Approved Form I–600A/I–600.[42]
• Form I–800, Petition to Classify Convention Adoptee as an Immediate Relative.
• Form I–800A, Application for Determination of Suitability to Adopt a Child from a Convention Country.
• Form I–800A, Supplement 3, Request for Action on Approved Form I–800A.

The proposed increase of approximately 5 percent may vary slightly due to rounding. DHS rounds all IEFA fees to the nearest $5 increment.

In order for the proposed fee schedule to recover full cost, DHS proposes that other fees be increased to offset the projected cost of the 5 percent limited fee increase. Similarly, DHS proposes that other fees increase to offset a projected increase in workloads that are exempt from paying fees or that are capped at a fee less than what the ABC model indicates that they should pay. In this proposed rule, DHS refers to the process of recovering full cost for workloads without fees or the shifting of cost burdens among benefit request fees as a result of other policy decisions as cost reallocation.

Some proposed fees are significantly higher than the current fees. In some cases, this is because DHS proposes to not limit those fee increases, as it has done in the past, for policy reasons. Previous fee schedules limited the increase for certain immigration benefit requests, such as most naturalization related forms.[43] *See* 81 FR 26915–6. In this proposed rule, DHS proposes to not limit the fee increase to 5 percent for the following immigration benefit requests:

• Form I–601A, Provisional Unlawful Presence Waiver.
• Form I–765, Application for Employment Authorization.
• Form I–929, Petition for Qualifying Family Member of a U–1 Nonimmigrant.
• Form N–300, Application to File Declaration of Intention.
• Form N–336, Request for a Hearing on a Decision in Naturalization Proceedings.
• Form N–400, Application for Naturalization.
• Form N–470, Application to Preserve Residence for Naturalization Purposes.

If DHS were to propose limited fee increases for these immigration benefit requests, then other proposed fees would have to increase to recover full cost. For example, if DHS were to propose limited fee increases for all of the immigration benefit request fees that were limited in the previous fee rule, then some proposed fees could increase by as much as $1,185, with the average of those changes being an increase of $12 per immigration benefit request. The rationale for some of these proposed changes is further discussed later in the preamble. See section V. Proposed Changes in the FY 2019/2020 Fee Schedule.

Public commenters generally do not support fee increases. A fee decrease may be more popular. Generally, there are several potential ways to reduce IEFA fees:

1. Reduce projected costs or use other funding sources (such as appropriations, other fee accounts, carryover, or recoveries of prior year obligations);
2. Increase projected fee-paying receipts; or
3. Reduce completion rates.

As discussed earlier, reducing the projected costs to equal the projected revenue would risk degrading USCIS

[38] See footnotes 15 and 16.

[39] The FY 2016/2017 proposed fee schedule used both phrases. *See* 81 FR 26915. The FY 2010/2011 and FY 2008/2009 proposed fee schedules used the phrase ''low volume reallocation.'' *See* 75 FR 33461 and 72 FR 4910, respectively.

[40] The 8 percent increase was the percentage difference between the current fees and the model output before reallocation, weighted by fee-paying volume. *See* 81 FR 73296. The model output is a projected fee-paying unit cost from the ABC model. It is projected total cost divided by projected fee-paying receipts. While each fee review may calculate a different percentage, the formula for the calculation remains the same.

[41] In the docket for this proposed rule, the FY 2019/2020 Immigration Examinations Fee Account Fee Review Supporting Documentation has more information. See the Cost Reallocation column of Appendix Table 3: Proposed Fees by Immigration Benefit Request.

[42] DHS explains the purpose of this new proposed form in section V.M.3 of this preamble. Request for Action on Approved Application for Advance Processing of an Orphan Petition or Petition to Classify Orphan as an Immediate Relative, Form I–600A/I–600 Supplement 3.

[43] *See* V.O. Naturalization (discussion on the proposed naturalization fees).

operations funded by the IEFA.[44] Likewise, other funding sources are insufficient or unavailable.[45] Some of the proposed fees would be even higher without an increase to projected fee-paying receipts.[46] As discussed in the previous section, completion rates are based on reported adjudication hours and completions. USCIS does not believe the level of effort for future adjudications will decrease.

C. Fee-Related Issues Noted for Consideration

DHS identifies a number of issues that do not affect the FY 2019/2020 fee review but do merit some discussion. DHS does not propose any changes related to the issues discussed in this section. USCIS may discuss these issues in future biennial fee reviews or in conjunction with other USCIS fee rules. DHS welcomes comments on all facets of the FY 2019/2020 fee review, this proposed rule, and USCIS fees in general, regardless of whether changes have been proposed here.

1. Accommodating E-Filing and Form Flexibility

DHS attempts, as it did in the FY 2016/2017 fee rule, to propose fees based on form titles instead of form numbers to avoid prescribing fees in a manner that could undermine the conversion of USCIS to electronic processing. *See* proposed 8 CFR 106. Form numbers are included for informational purposes, but are not intended to restrict the ability of USCIS to collect a fee for a benefit request that falls within the parameters of the adjudication for which the fee is published. As USCIS modernizes its processes and systems to allow more applicants, petitioners, and requestors to file applications online, the agency may collect fees for immigration benefit requests that do not have a form number or do not have the same form number as described in regulations. This could occur, for example, if USCIS developed an online version of a request that individuals often submit with applications for employment authorization. In this situation, USCIS may find it best to consolidate the two requests without separately labelling the different sections related to the relevant form numbers. DHS would still collect the required fee for the underlying immigration benefit request as well as the request for employment authorization, but the actual online request would not necessarily contain form numbers corresponding to each separate request.

Similarly, USCIS may determine that efficiency would be improved by breaking a paper form into separate paper forms. For instance, USCIS could separate Form I–131, Application for Travel Document, into a separate form and form number for advance parole, humanitarian parole, refugee travel documents, or reentry permits. In this example, USCIS could continue to charge the current Form I–131 fee. This structure permits USCIS to change forms more easily without having to perform a new fee review each time the agency chooses to do so.

2. Processing Time Outlook

As discussed in the Cost and Revenue Differential section of this preamble, USCIS anticipates having insufficient resources to process its projected workload. USCIS estimates that it will take several years before USCIS backlogs decrease measurably. USCIS experienced an unexpectedly high volume of immigration benefit requests in FY 2016 and FY 2017. In FY 2018, USCIS implemented measures to reduce the backlog, such as adjudicating asylum workload on a last-in-first out basis.[47] As explained in the Cost Projections section of this preamble, projected workloads for FY 2019 and FY 2020 exceed current workload capacity, thereby requiring additional staff.

A number of uncertainties remain that impede efficient case processing and timely decision making. One uncertainty is how to define the specific elements of the screening and national security vetting that USCIS will employ. This new framework will likely involve greater use of social media screenings and more in-person interviews of applicants for certain immigration benefits.[48] In addition, USCIS believes that the growing complexity of the case adjudication process over the past few years has also contributed to higher completion rates. For example, it takes more time for officers to adjudicate each case. (See section IV.B.2. Completion Rates.)

Through this rule, USCIS expects to collect sufficient fee revenue to fund additional staff that will support FY 2019/2020 workload projections as well as perform more national security vetting and screening. While USCIS is committed to ensuring the integrity of the immigration system and safeguarding national security, it is also committed to reducing processing times and the current backlog, without sacrificing proper vetting checks, by identifying ways to increase efficiency, ensuring the successful transition from paper-based to electronic processing, and increasing adjudicative resources. For example, USCIS is transitioning non-adjudicative work from adjudicators to other staff, centralizing the delivery of information services through the USCIS Contact Center, and leveraging electronic processing and automation.

Applicants, petitioners, and requestors can track the status of their immigration benefit requests online by using their receipt number or by creating an online account at *https://uscis.gov/casestatus*. They may also make an ''outside normal processing time'' case inquiry for any benefit request pending longer than the time listed for the high end of the range by submitting a service request online at *https://egov.uscis.gov/e-request/Intro.do* or calling the USCIS Contact Center at 1–800–375–5283.

USCIS also expects to improve the user experience as it continues to transition to online filing and electronic processing of immigration applications and petitions. With the new person-centric electronic case processing environment, USCIS will possess the data necessary to provide near-real-time processing updates on the status and time period lapsed between actions for each individual case. This enables greater transparency to the public on how long it will take to process each case as it moves from stage to stage (for example, biometrics collection, interview, and decision).

USCIS is committed to providing applicants, petitioners, and requestors with relevant information when they need it. As a result, USCIS is transforming how it calculates and posts processing time information in an effort to improve the timeliness of such postings, but more importantly to achieve greater transparency. USCIS will continue to provide processing times in an accurate and transparent fashion.

[44] See section IV.A.3., Costs and Revenue Differential, of this preamble.

[45] See *id.* and section III. Basis for the Fee Review.

[46] See section V.C.3., Proposed Fee Waiver Changes, for more information.

[47] U.S. Citizenship and Immigration Services, *USCIS to Take Action to Address Asylum Backlog,* available at *https://www.uscis.gov/news/news-releases/uscis-take-action-address-asylum-backlog* (last reviewed/updated Feb. 2, 2018).

[48] USCIS, *USCIS to Expand In-Person Interview Requirements for Certain Permanent Residency Applicants, https://www.uscis.gov/news/news-releases/uscis-to-expand-in-person-interview-requirements-for-certain-permanent-residency-applicants* (last reviewed/updated Aug. 28, 2017).

V. Proposed Changes in the FY 2019/2020 Fee Schedule

A. Clarify Dishonored Fee Check Re-Presentment Requirement and Fee Payment Method

In the FY 2016/2017 fee rule, DHS amended the regulations regarding how USCIS treats a benefit request accompanied by fee payment (in the form of check or other financial instrument) that is subsequently returned as not payable. *See* 81 FR 73313–15 (Oct. 24, 2016); 8 CFR 103.2(a)(7)(ii) and 8 CFR 103.7(a)(2). If a financial instrument used to pay a fee is returned as unpayable after one re-presentment, USCIS rejects the filing and imposes a standard $30 charge. *See id.* In the preamble to the FY 2016/2017 fee rule, DHS stated that, to make sure a payment rejection is the result of insufficient funds and not due to USCIS error or network outages, USCIS (through the U.S. Department of the Treasury (Treasury)) will resubmit rejected payment instruments to the appropriate financial institution one time. *See* 8 CFR 103.2(a)(7)(ii)(D). While DHS's intent was to submit only checks that were dishonored due to insufficient funds, some stakeholders have interpreted the re-presentment as applying to any check DHS has deposited that is returned as unpayable. Although the Treasury check clearance regulations permit an agency to re-deposit a check dishonored due to insufficient funds, they prohibit submitting checks dishonored for other reasons for clearance a second time. *See* 31 CFR 210.3(b); 2016 NACHA Operating Rules & Guidelines: A Complete Guide to Rules Governing the ACH Network, Subsection 2.5.13.3 (limiting re-depositing a check to those that are returned due to ''Not Sufficient Funds,'' ''NSF,'' ''Uncollected Funds,'' or comparable). To comply with the Treasury regulations, DHS is proposing in this rule that if a check or other financial instrument used to pay a fee is returned as unpayable *because of insufficient funds,* USCIS will resubmit the payment to the remitter institution one time. If the remitter institution returns the instrument used to pay a fee as unpayable a second time, USCIS will reject the filing. USCIS will not re-deposit financial instruments returned as unpayable for a reason other than insufficient funds. Proposed 8 CFR 103.2(a)(7)(ii)(D).

In addition, DHS proposes that it may reject a request that is accompanied by a check that is dated more than 365 days before the receipt date. Currently, USCIS policy is to reject a check that is dated more than a year before it is submitted. However, that policy is not codified, and DHS has been sued or threatened with litigation multiple times when a check that was dated more than a year before it was submitted was the basis of a rejection that caused the requestor to miss an important deadline. For example, USCIS has permitted an applicant to submit Form I–821 after the deadline [49] and adjudicated a Form I–485 filed after the applicant's U nonimmigrant status had expired because his initial, timely filing was rejected because it contained a check that was more than one year old. *See* 8 CFR 245.24(b)(2)(ii) (requiring the applicant to hold U nonimmigrant status at the time of application.). While most personal and business checks do not expire, they become what is known as ''stale dated'' six months after they are written. This is because many things may change in six months that may affect the check's validity or the original reason that it was written. Accordingly, the Uniform Commercial Code [50] provides that a bank may delay access to the funds from or is not obligated to deposit, cash, honor, or pay a stale check. USCIS projects that it will receive an average 7,789,861 fee payments per year.[51] It is important that its requirements for payment instruments provide certainty and minimize the likelihood of a payment being dishonored. Although commercial banks use a guideline of six months, DHS proposes to reject only year-old checks to provide requestors with more flexibility in case there are delays with their filing. Rejecting a check that is dated more than a year earlier is also consistent with the time limit for a check issued by the U.S. Treasury. *See* 31 CFR 245.3(a) (''Any claim on account of a Treasury check must be presented to the agency that authorized the issuance of such check within one year after the date of issuance of the check or within one year after October 1, 1989, whichever is later.''). Rejection of a stale check will not be mandatory, so USCIS will still have the authority to waive the check date requirement in exigent circumstances.

DHS also proposes that USCIS may require that certain fees be paid using a certain payment method or that certain fees cannot be paid using a particular method. Proposed 8 CFR 106.1(b). For example, USCIS may require that a request be submitted by using *Pay.gov*, a secure portal which transmits an applicant's payment information directly to the U.S. Treasury for processing, or may preclude the use of certain payment types such as cashier's check and money orders for the payment of a particular form or when payments are made at certain offices. The proposed change provides that payment method will be provided in the form instructions (including for online filing) or by individual notice (a bill, invoice, appointment confirmation, etc.); therefore, requestors will be clearly notified of any limitations on the payment method for the request they are filing. About 80 percent of all USCIS filings are received via a Lockbox that is well versed in intake and depositing of multiple payment types. However, the requirements and circumstances for the filing of some requests do not permit lockbox submission and intake, and the request must be filed at a particular office or in person. Various offices, such as field offices, embassies, and consulates, are limited in the method of payment that they can receive or process. Additionally, certain payment methods such as checks or cash require time-intensive procedures for cashiers and their supervisors to input, reconcile, and verify their daily receipts and deposits. Generally, federal agency offices must deposit money that they receive on the same day that it is received. *See* 31 U.S.C. 3720(a); 31 CFR 206.5; Treasury Financial Manual Vol. 1, Part 5, Chapter 2000, Section 2055.[52] There are additional requirements and guidance for timely record keeping and redundancy in personnel that similarly increase workload and processing costs. *See* 31 U.S.C. 3302(e); Treasury Financial Manual Vol. 1, Part 5, Chapter 2000, Section 2030; *see also* U.S. Government and Accountability Office (GAO) GAO–14–704G Standards for Internal Control in the Federal Government (2014).[53] The time that USCIS spends complying with payment processing requirements can be used to adjudicate cases. This proposed change would also permit USCIS to reduce

[49] *See* 8 CFR 244.17(a) (''Applicants for periodic re-registration must apply during the registration period provided by USCIS.'').

[50] A bank is under no obligation to a customer having a checking account to pay a check, other than a certified check, which is presented more than six months after its date, but it may charge its customer's account for a payment made thereafter in good faith. UCC 4–404 (2002).

[51] See section IV.B.1.b. Fee-Paying Volume in this preamble.

[52] Agencies may accumulate deposits less than $5,000 until they reach $5,000 or a given Thursday. U.S. Treasury, Treasury Financial Manual Vol 1, Part 5, Chapter 2000, *https://tfm.fiscal.treasury.gov/v1/p5/c200.html*.

[53] Principal 10, Design Control Activities, states that management should control information processing and segregation of duties to reduce risk, and accurate and timely record transactions. GAO, Standards for Internal Control in the Federal Government (Sept. 10, 2014), *https://www.gao.gov/assets/670/665712.pdf*.

administrative burdens and processing errors associated with fee payments.

DHS is also clarifying that fees are non-refundable regardless of the result of the immigration benefit request or how much time the request requires to be adjudicated. As provided in 8 CFR 103.2(a)(1) USCIS filing fees generally are non-refundable and must be paid when the benefit request is filed. As discussed fully in this rule, DHS is authorized to establish fees to recover the costs of providing USCIS adjudication and naturalization services. While the fees are to recover the processing costs of adjudications, the fees are due when filing an immigration benefit request before the request will be considered received and the requestor will receive a receipt date. *See* 8 CFR 103.2(a)(7)(ii)(D). A benefit request will be rejected if it is not submitted with the correct fee(s). Thus the fee is due at filing and is not refundable, regardless of how much time passed from filing to approval, or if the request is denied or approved. Nevertheless, USCIS has recently, greatly, expanded acceptance of credit cards for the payment of USCIS fees. To our misfortune, the increased acceptance of credit cards for the payment of USCIS fees has resulted in a sizeable increase in the number of disputes filed with credit card companies challenging the retention of the fee by USCIS. Disputes are generally filed by requestors whose request was denied, who have changed their mind about the request, or assert that the service was not provided or unreasonably delayed. Troublingly, USCIS loses many of these dispute because the credit card companies agree with the cardholder and have determined that USCIS fails to adequately warn the cardholder that the fee is not refundable and due regardless of the result or time required. As the dollar amount of fees paid with credit cards continues to increase, this result has the potential to have a significant negative fiscal effect on USCIS fee receipts. Therefore, DHS is proposing to clarify that fees will not be refunded no matter the result of the benefit request or how much time the adjudication requires. Proposed 8 CFR 103.2(a)(1). In the event that the bank that issues the credit card rescinds the payment of the fee to USCIS, USCIS reserves the authority to invoice the responsible party (applicant, petitioner, requestor) and pursue collection of the unpaid fee in accordance with 31 CFR 900–904 (Federal Claims Collection Standards).

B. Eliminate $30 Returned Check Fee

DHS also proposes to amend its regulations to remove the $30 charge for dishonored payments. *See* 8 CFR 103.7(a)(2)(i). USCIS data indicates that the cost of collecting the $30 fee outweighs the benefits to the government derived from imposing and collecting the fee. For example, in FY 2016, USCIS collected a total of $416,541 from the $30 returned check fee while the financial service provider billed $508,770 to collect the $30 fee. Furthermore, USCIS does not retain the $30 fee for deposit into the IEFA with other immigration benefit request fees; thus the $30 fee does not provide revenue to USCIS. Agencies may prescribe regulations establishing the charge for a service or thing of value provided by the agency. *See* 31 U.S.C. 9701. However, federal agencies are not required to impose fees as a general matter, nor does DHS or USCIS have a specific statutory authorization or requirement to do so. Therefore, DHS is not required to charge a returned check fee. DHS proposes to remove the $30 fee from regulations.

C. Fee Waivers

1. Background

Currently, USCIS may waive the fee for certain immigration benefit requests when the individual requesting the benefit is unable to pay the fee. *See* 8 CFR 103.7(c). To request a fee waiver, the individual must submit a written waiver request for permission to have their benefit request processed without payment. Under the current regulation, the waiver request must state the person's belief that he or she is entitled to or deserving of the benefit requested and the reasons for his or her inability to pay and include evidence to support the reasons indicated. *See* 8 CFR 103.7(c)(2). There is no appeal of the denial of a fee waiver request. *See id.*

The statute authorizing USCIS to establish fees does not specifically mention fee waivers and fee exemptions for any type of applicant or group, or any criteria for fee waivers.[54] The statute does not require that DHS provide certain services for free, but it authorizes DHS to set USCIS fees at a level that will recover the full costs of adjudication and naturalization services provided ''including the costs of similar services provided without charge to asylum applicants or other immigrants.''[55] DHS interprets that provision as authorizing it to provide certain services for free in all cases in the form of fee exemptions,[56] or free when certain criteria are met in the form of a waiver. DHS has always implemented fee waivers based on need, and since 2007, has precluded fees waivers for individuals that have financial means as a requirement for the status or benefit sought. *See* 72 FR 4912. However, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)[57] requires DHS to permit certain applicants to apply for fee waivers for ''any fees associated with filing an application for relief through final adjudication of the adjustment of status.''[58] DHS interprets ''any fees associated with filing an application for relief through final adjudication of the adjustment of status''[59] to mean that, in addition to the main immigration benefit request that accords a status, (such as Form I–360, Petition for Amerasian, Widow(er), or Special Immigrant or Form I–485, Application to Register Permanent Residence or Adjust Status) applicants must have the opportunity to request a fee waiver for any form associated with the main benefit application up to and including the adjustment of status application.[60] Table 7 lists the immigration categories for which DHS must provide an opportunity to request a fee waiver for main immigration benefit requests and associated forms in accordance with TVPRA.[61]

[54] USCIS is primarily funded by application and petition fees. Under INA 286(m), 8 U.S.C. 1356(m), DHS has the authority to establish the fees it charges for immigration and naturalization services to recover the full costs of such services, including those provided without charge, and to recover costs associated with the administration of the fees collected. Therefore, the fees are set at a level that is intended to recover the full cost of USCIS operations.

[55] *See* INA sec. 286(m), 8 U.S.C. 1356(m).

[56] See, *e.g.,* proposed 8 CFR 106.2(a)(45) and (46) (codifying no fee for an *Application for T Nonimmigrant Status* and *Petition for U Nonimmigrant Status*).

[57] *See* title II, subtitle A, sec. 201(d)(3), Public Law 110–457, 122 Stat. 5044 (2008); INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7).

[58] *See id.*

[59] *See id.*

[60] Certain USCIS forms are not listed in 8 CFR 103.7(b) and therefore have no fee. *See* proposed 8 CFR 106.2 for proposed fees.

[61] INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7).

TABLE 7—STATUTORY FEE WAIVER CATEGORIES AND ASSOCIATED FORMS

Category	Main immigration benefit requests [62]	Associated forms
Violence Against Women Act (VAWA) self-petitioners.[63]	• Form I–360, Petition for Amerasian, Widow(er), or Special Immigrant (no fee). • Form I–485, Application to Register Permanent Residence or Adjust Status. • Form I–751, Petition to Remove Conditions on Residence.	• Form I–131, Application for Travel Document.[64] • Form I–212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal. • Form I–290B, Notice of Appeal or Motion. • Form I–601, Application for Waiver of Grounds of Inadmissibility. • Form I–765, Application for Employment Authorization (no fee for principals).[65]
Victims of Severe Form of Trafficking (T visas).[66]	• Form I–914, Application for T Nonimmigrant Status (no fee). • Form I–914, Supplement A, Application for Family Member of T–1, Recipient (no fee). • Form I–914, Supplement B, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons (no fee). • Form I–485, Application to Register Permanent Residence or Adjust Status.	• Form I–131, Application for Travel Document. • Form I–192, Application for Advance Permission to Enter as a Nonimmigrant. • Form I–193, Application for Waiver of Passport and/or Visa. • Form I–290B, Notice of Appeal or Motion. • Form I–539, Application to Change/Extend Nonimmigrant Status. • Form I–601, Application for Waiver of Grounds of Inadmissibility. • Form I–765, Application for Employment Authorization (no fee for principals).
Victims of Criminal Activity (U visas).[67]	• Form I–918, Petition for U Nonimmigrant Status (no fee). • Form I–918, Supplement A, Petition for Qualifying Family Member of U–1 Recipient (no fee). • Form I–918, Supplement B, U Nonimmigrant Status Certification (no fee). • Form I–929, Petition for Qualifying Family Member of a U–1 Nonimmigrant. • Form I–485, Application to Register Permanent Residence or Adjust Status.	• Form I–131, Application for Travel Document. • Form I–192, Application for Advance Permission to Enter as a Nonimmigrant. • Form I–193, Application for Waiver of Passport and/or Visa. • Form I–290B, Notice of Appeal or Motion. • Form I–539, Application to Extend/Change Nonimmigrant Status. • Form I–765, Application for Employment Authorization (no fee for principals).
Battered spouses of A, G, E–3, or H nonimmigrants.[68]	• Form I–765V, Application for Employment Authorization for Abused Nonimmigrant Spouse (no fee).	• None.
Battered spouses or children of a lawful permanent resident or U.S. citizen under INA 240A(b)(2).[69]	• EOIR–42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents (DOJ form and immigration judge determines fee waiver).	• Form I–601, Waiver of Grounds of Inadmissibility.
Temporary Protected Status.[70]	• I–821, Application for Temporary Protected Status. • Biometric Services Fee	• Form I–131, Application for Travel Document. • Form I–601, Application for Waiver of Grounds of Inadmissibility. • Form I–765, Application for Employment Authorization.

Before 2007, USCIS couldwaive any fee, even if a fee waiver was inconsistent with the underlying immigration benefit request. For example, before 2007, USCIS could waive fees for companies seeking to sponsor foreign workers, individuals seeking status based on substantial business investments, or individuals seeking to sponsor foreign relatives to whom the sponsors must provide financial support. *See* 72 FR 4912. Since 2007, USCIS has limited the fees that may be waived under 8 CFR 103.7(c)(3) based on the general premise that fee waivers must be consistent with any financial considerations that apply to the status or benefit sought. *See* 8 CFR 103.7(c)(1)(ii).

Following the FY 2010/2011 fee rule, USCIS also issued policy guidance to streamline fee waiver adjudications and make them more consistent across offices and form types nationwide. *See* Policy Memorandum, PM–602–0011.1, *Fee Waiver Guidelines as Established by the Final Rule of the USCIS Fee Schedule;* Revisions to Adjudicator's Field Manual (AFM) Chapter 10.9, AFM Update AD11–26 (Mar. 13, 2011) (''Fee

[62] Some immigration benefit requests may not have a fee for the specific category.

[63] *See* INA sec. 101(a)(51), 8 U.S.C. 1101(a)(51); INA section 245(l)(7), 8 U.S.C. 1255(l)(7). Public Law 110–457, 122 Stat. 5044 (Dec. 23, 2008); 22 U.S.C. 7101 *et seq.*

[64] Currently, fees for Form I–131 are exempt if filed in conjunction with a pending or concurrently filed Form I–485 with fee that was filed on or after July 30, 2007. *See* 8 CFR 103.7(b)(1)(i)(M)(4). However, DHS proposes changes to this policy in this rule as explained later in this preamble.

[65] Form I–360 allows a principal self-petitioner to request an EAD incident to case approval without submitting a separate Form I–765. Form I–765 is required for employment authorization requests by derivative beneficiaries.

[66] *See* INA sec. 101(a)(15)(T), 8 U.S.C. 1101(a)(15)(T) (T nonimmigrant status for victims of a severe form of trafficking in persons).

[67] *See* INA sec. 101(a)(15)(U), 8 U.S.C. 1101(a)(15)(U) (U nonimmigrant status for victims of certain criminal activity).

[68] *See* INA sec. 106, 8 U.S.C. 1105a.

[69] *See* INA sec. 240A(b)(2), 8 U.S.C. 1229b(b)(2), and INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7).

[70] See INA sec. 244, 8 U.S.C. 1254a.

Waiver Policy''). The Fee Waiver Policy clarified acceptable measures of income and documentation that individuals may present to demonstrate they are unable to pay a fee when requesting a fee waiver. In June 2011, USCIS issued Form I–912, Request for Fee Waiver, as a standardized form with instructions to request a fee waiver in accordance with the Fee Waiver Policy.[71] USCIS previously engaged in a holistic analysis of the individual's finances to determine inability to pay. *See, e.g.,* William R. Yates, *Field Guidance on Granting Fee Waivers Pursuant to 8 CFR 103.7(c)* (Mar. 4, 2004). The 2011 Fee Waiver Policy established a streamlined process where USCIS would usually waive the entire fee and the biometric services fee for forms listed in 8 CFR 103.7(c)(3) for applicants who at time of filing the fee waiver request with the benefit application: [72]

- Were receiving a means-tested benefit;
- Had a household income at or below 150 percent of the Federal Poverty Guidelines (FPG); or
- Were experiencing extreme financial hardship such as unexpected medical bills or emergencies.

The FY 2010/2011 fee rule also authorized the USCIS director to approve and suspend exemptions from fees or provide that the fee may be waived for a case or class of cases that is not otherwise provided in 8 CFR 103.7(c). *See* 75 FR 58990; 8 CFR 103.7(d).

On October 25, 2019, USCIS published the updated Form I–912 [73] and corresponding policy guidance in the USCIS Policy Manual [74] that removed the means-tested benefit as a criterion in the fee waiver request determination, clarified that the submission of Form I–912 is required to request a fee waiver, and clarified some of the evidence requirements. The new policy will be effective on December 2, 2019. Therefore, as of December 2, 2019 an individual would be eligible to request a fee waiver based on one of two criteria for inability to pay, *i.e.,* if he or she:

- Has a household income at or below 150 percent of the FPG; or
- Is experiencing extreme financial hardship such as unexpected medical bills or emergencies.

This proposed rule further limits forms eligible for a fee waiver and the criteria to establish eligibility for a fee waiver.

2. Cost of Fee Waivers

The U.S. Government Accountability Office (GAO), an independent, nonpartisan agency that works for Congress, describes equity of federal user fees as a balancing act between two principles:

- Beneficiary-pays; and
- Ability-to-pay.[75]

This proposed rule emphasizes the beneficiary-pays principle. Under the beneficiary-pays principle, the beneficiaries of a service pay for the cost of providing that service. *See* GAO–08–386SP at pp. 7–12.

Under the ability-to-pay principle, those who are more capable of bearing the burden of fees should pay more for the service than those with less ability to pay. IEFA fee exemptions, fee waivers, and reduced fees for low income households adhere to this principle. Applicants, petitioners, and requestors who pay a fee cover the cost of processing requests that are fee-exempt, fee-waived, or fee-reduced. For example, if only 50 percent of a benefit request workload is fee-paying, then those who pay the fee will pay twice as much as they would if everyone paid the fee. By paying twice as much, they pay for their benefit request and the cost of the same benefit request that someone else did not pay for.

In prior years, USCIS fees have given significant weight to the ability-to-pay principle. In the FY 2016/2017 fee rule, DHS noted that the estimated annual forgone revenue from fee waivers and exemptions has increased markedly, from $191 million in the FY 2010/2011 fee review to $613 million in the FY 2016/2017 fee review. *See* 81 FR 26922 and 73307. In the FY 2016/2017 proposed rule, DHS estimated that the increase in fee waiver accounted for 9 percent of the 21 percent weighted average fee increase. *See* 81 FR 26910. In the same proposed rule, DHS provided notice that in the future it may revisit the USCIS fee waiver guidance with respect to what constitutes inability to pay under 8 CFR 103.7(c). *See* 81 FR 26922.

Each fee review plans for a certain level of fee waivers, fee exemptions, and other fee-paying policy decisions. Ideally, no IEFA revenue is lost due to fee waivers because USCIS plans for a certain level of fee waivers and fee exemptions. IEFA fees recover full cost, including the estimated cost of fee-waived and fee-exempt work. However, USCIS does forgo revenue by allowing fee waivers and fee exemptions. Forgone revenue represents the total fees that fee waiver or fee exempt applicants, petitioners, and requestors would have paid if they had paid the fees.

In the FY 2019/2020 fee review, USCIS determined that without changes to fee waiver policy, it would forgo revenue of approximately $1,494 million. The proposed fee schedule estimates $962 million forgone revenue from fee waivers and fee exemptions. The difference in forgone revenue is $532 million. Without changes to fee waiver policy, fees would increase by a weighted average of 31 percent, which is 10 percent more than in the proposed fee schedule.

3. Proposed Fee Waiver Changes

As previously stated, INA sec. 286(m), 8 U.S.C. 1356(m) authorizes but does not require that DHS set fees to recover the costs of administering USCIS adjudication and naturalization services. That statute also authorizes setting such fees at a level that will recover the costs of services provided without charge, but it does not require that DHS provide services without charge.[76] Nevertheless, DHS (and previously the INS) has provided fee waivers based on need. *See, e.g.,* 63 FR 43604, 43607 (stating, ''The Service often waives fees for this application when the economic need exists. The proposed rule stated, 'For FY 1998, the Service estimates that approximately 50 percent of the Form I–765 applications will be processed at no charge to applicants, at a total cost of $35.9 million.' ''). For the reasons stated in this rule, DHS has determined that it is necessary to utilize this statutory discretion to establish the following new requirements for waiving USCIS fees.

[71] The form and its instructions may be viewed at *http://www.uscis.gov/i-912.* The proposed version is available for review in the docket for this proposed rule.

[72] *See* Policy Memorandum, PM–602–0011.1, Fee Waiver Guidelines as Established by the Final Rule of the USCIS Fee Schedule; Revisions to Adjudicator's Field Manual (AFM) Chapter 10.9, AFM Update AD11–26 (Mar. 13, 2011); AFM Chapter 10.9(b).

[73] The Office of Information and Regulatory Affairs, Office of Management and Budget (OMB) approved the form changes on October 24, 2019, available at *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201910-1615-006#* (last visited October 25, 2019).

[74] See USCIS, Policy Alert PA 2019–06, Fees for Submission of Benefit Requests, available at *https://www.uscis.gov/sites/default/files/policymanual/updates/20191025-FeeWaivers.pdf* (last visited Oct. 25, 2019) (revising the USCIS interpretation of unable to pay in 8 CFR 103.7(c)).

[75] GAO, *Federal User Fees: A Design Guide* (May 29, 2008), available at *https://www.gao.gov/products/GAO-08-386SP.*

[76] Legislation enacted in 2008 requires that a fee waiver be considered for certain requests. INA sec. 245(l)(7), 8 U.S.C. 1255(l)(7).

a. Limits on Eligible Forms and Categories

Because of the costs of fee waivers, and the inconsistency of current fee waiver regulations with the beneficiary pays principal, DHS proposes to limit fee waivers to immigration benefit requests for which USCIS is required by law to consider a fee waiver or where the USCIS Director exercises favorable discretion as provided in the proposed regulation. *See* proposed 8 CFR 106.3. The proposed regulation would limit the eligible forms and categories to those listed in Table 7: Statutory Fee Waiver Categories and Associated Forms.[77] Accordingly, many forms will generally no longer be eligible for a fee waiver,[78] except in limited circumstances where the law requires that a waiver be made available based on the circumstances of the applicant. Forms that would generally no longer be eligible for a fee waiver include the following:

- Form I–90, Application to Replace Permanent Resident Card;
- Form I–765, Application for Employment Authorization;
- CNMI related petitions and applications; [79]
- Form I–485, Application to Register Permanent Residence or Adjust Status; [80]
- Forms for applicants exempt from the public charge inadmissibility ground; [81]
- Form I–751, Petition to Remove Conditions on Residence;
- Naturalization and citizenship-related forms.[82]

The Senate Appropriations Committee Report that accompanied the fiscal year 2017 Department of Homeland Security Appropriations Act [83] expressed concern about the increased use of fee waivers, which force those paying fees to absorb costs for which they receive no benefit.[84] DHS believes that these changes would make the fee increase more equitable for all immigration benefit requests by requiring fees for the service to be paid by those who benefit.

b. Eligibility Requirements

Further, DHS proposes to generally limit fee waivers to individuals who have an annual household income of less than 125 percent of the FPG as defined by the U.S. Department of Health and Human Services (HHS). Notwithstanding these general limitations, however, a fee waiver may be authorized in the USCIS Director's discretion, even for those benefit requests not normally amenable to a fee waiver,[85] if an individual meets all three of the following requirements:

- Has an annual household income at or below 125 percent of the FPG as defined by HHS;
- Is seeking an immigration benefit for which he or she is not required to submit an affidavit of support under INA section 213A, 8 U.S.C. 1183a, or is not already a sponsored immigrant as defined in 8 CFR 213a.1; and
- Is seeking an immigration benefit for which he or she is not subject to the public charge inadmissibility ground under INA section 212(a)(4), 8 U.S.C. 1182(a)(4).

In addition, DHS would update the language in the regulation to codify that a person must submit a request for a fee waiver on the form prescribed by USCIS, as provided in the previous Form I–912 notice and provide evidence of household income such as federal income tax transcripts.

USCIS believes that making these changes to the fee waiver policy would assure that fee paying applicants do not bear the increasing costs caused by application fees being waived.

c. Income Requirements

The poverty guidelines are used as an eligibility criterion by many Federal public benefit programs and USCIS to determine income levels. The poverty guidelines are a simplified version of the poverty thresholds that the Census Bureau uses to prepare its estimates of the number of individuals and families in poverty.[86] Some federal programs use a percentage multiple of the guidelines (for example, 125 percent or 185 percent of the guidelines), as noted in relevant authorizing legislation or program regulations.[87] The poverty threshold or line (100 percent of the FPG) is the primary version of the federal poverty measure, as updated by the Census Bureau every year, and generally used to estimate the number of Americans in poverty each year.[88]

In the immigration context, USCIS uses 125 percent of the FPG as the standard for public charge and affidavit of support purposes.[89] Congress also identified 125 percent of FPG as a threshold for a sponsor to support an individual immigrant to meet the requirements an affidavit of support in the public charge inadmissibility determination.[90] The threshold for fee waiver eligibility under current regulations of 150 percent of the FPG is higher than the threshold used in the public charge and affidavit of support context. DHS believes limiting fee waivers to households with incomes at or below 125 percent of the FPG, as proposed in this rule, would be appropriate because it would be consistent with the affidavit of support requirements under INA sections 212(a)(4) and 213A, 8 U.S.C. 1182(a)(4).

d. Subject to INA Section 212(a)(4) and Affidavit of Support Requirements

The current fee waiver regulation allows people who are applying for several immigration benefits—advance permission to enter as a nonimmigrant, a waiver for passport and/or visa, adjustment of status, or for a waiver of grounds of inadmissibility—to file a fee waiver request if they are not subject to the public charge inadmissibility ground. *See* 8 CFR 103.7(c)(4) (stating that certain fees may be waived ''only for an alien for which a determination

[77] Under the settlement agreement concluded in *American Baptist Churches* v. *Thornburgh,* 760 F. Supp. 976 (N.D. Cal. 1991) (*ABC*), ''eligible class members who can demonstrate that they fall within the poverty guidelines as set forth in 45 CFR 1060.2 will not be required to pay the fee.'' DHS will continue to allow these applicants to request a fee waiver. In 1991, the U.S. Department of Health and Human Services (HHS) codified at 45 CFR 1060.2 (1990) the federal poverty guidelines issued by the former HHS Office of Economic Opportunity/Community Services Administration. The *ABC* settlement agreement requires USCIS to waive fees for those covered by the agreement who fall squarely within the Federal Poverty Guidelines. The requirements for a fee waiver proposed in this rule are less restrictive than the subject settlement agreement. *See* proposed 8 CFR 106.3(d).

[78] Fee waivers would still be available at the discretion of the USCIS Director, or as provided by INA 245(l)(7), 8 U.S.C. 1255(l)(7). *See* proposed 8 CFR 106.3. An applicant, petitioner, or requestor may not independently request that the Director exercise this authority.

[79] For example, Form I–129CW, Petition for CNMI-Only a Nonimmigrant Transitional Worker, and Form I–539, Application to Extend/Change Nonimmigrant Status.

[80] Certain categories may still be eligible for fee waivers of an I–485, as identified in Table 7, as provided by INA 245(l)(7), 8 U.S.C. 1255(l)(7).

[81] For example, Form I–601, Application for Waiver of Grounds of Inadmissibility, Form I–192, Application for Advance Permission to Enter as Nonimmigrant, and Form I–193, Application for Waiver for Passport and/or Visa.

[82] Including Form N–400, Application for Naturalization; Form N–470, Application to Preserve Residence for Naturalization Purposes; Form N–336, Request for a Hearing on a Decision in Naturalization Proceedings; Form N–565, Application for Replacement of Naturalization/Citizenship Document; Form N–600, Application for Certification of Citizenship; and Form N–600K, Application for Citizenship and Issuance of Certificate Under section 322.

[83] *See* Public Law 115–31, div. F, 131 Stat. 135, 404.

[84] *See* S. Rep. No. 114–264, at 125 (2016).

[85] *See* proposed 8 CFR 106.3(b) and (c).

[86] *See* Annual Update of the HHS Poverty Guidelines 84 FR 1167, 1168, available at *https://www.govinfo.gov/content/pkg/FR-2019-02-01/pdf/2019-00621.pdf.*

[87] *See id.*

[88] *See* ASPE, Poverty Guidelines, available at *https://aspe.hhs.gov/poverty-guidelines* (last visited Aug. 16, 2019).

[89] *See* 8 CFR 212.22(b)(4)(i)(A).

[90] *See* INA sec. 213A(f)(1)(E), 8 U.S.C. 1183a(f)(1)(E).

of their likelihood of becoming a public charge under section 212(a)(4) of the Act is not required at the time of an application for admission or adjustment of status''). Consistent with this provision, DHS is proposing that fee waivers will not be available to applicants who are subject to the public charge inadmissibility ground.[91]

DHS also proposes to preclude fee waivers for applicants who are subject to an affidavit of support under INA section 213A, 8 U.S.C. 1183a, or is already a sponsored immigrant as defined in 8 CFR 213a.1. Under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Congress provided that the affidavit of support could be legally required and enforced for certain immigration categories.[92] A sponsor generally must demonstrate that he or she is able to maintain the sponsored alien at an annual income of not less than 125 percent of the FPG.[93] Although sponsors are not required to assist an alien with immigration fees, a sponsor is generally financially responsible for the alien; thus, an alien with a sponsor should not need a fee waiver. DHS has decided that it is inconsistent with that law and its stated objective that aliens be able to meet their needs for applicants who have a sponsor through an affidavit of support to receive immigration benefits for free, funded by others who are paying their full immigration benefit request fee. Therefore, USCIS believes that limiting fee waivers to those applicants who are not subject to affidavit of support requirements is consistent with congressional intent under IIRIRA.'' [94]

DHS notes that the House Report on Department of Homeland Security Appropriations Bill, 2019 stated, ''USCIS is expected to continue the use of fee waivers for applicants who can demonstrate an inability to pay the naturalization fee. USCIS is also encouraged to consider whether the current naturalization fee is a barrier to naturalization for those earning between 150 percent and 200 percent of the federal poverty guidelines, who are not currently eligible for a fee waiver.'' H. Rep. No. 115–948 at 61 (2018). USCIS appreciates the concerns of this recommendation and fully considered it before publishing this proposed rule. Nevertheless, DHS determined that the current trends and level of fee waivers are not sustainable. Work that USCIS provides for free or below cost impacts other fee-paying applicants by making their fees higher so DHS can recover USCIS full cost. DHS is trying to make the USCIS fee schedule more equitable for all applicants and petitioners. As shown in the supporting documentation for this rule, the number and dollar volume of fee waiver requests and foregone revenue has trended upward during periods of economic improvement. That indicates that, should the economy worsen, the number of fee waiver requests will increase to a level that could threaten the ability of USCIS to deliver programs without disruption.

Violence Against Women Act (VAWA) self-petitioners as defined under INA 101(a)(51); T nonimmigrants; U nonimmigrants; battered spouses of A, G, E–3, or H nonimmigrants; battered spouses or children of a lawful permanent resident or U.S. citizen as provided under INA sec. 240A(b)(2); and TPS applicants are not subject to the public charge inadmissibility provision or the affidavit of support requirements.

e. USCIS Director's Discretionary Fee Waivers and Emergency and Disaster Relief

DHS proposes to retain the authority in regulations for the Director of USCIS to waive any fee for a case or specific class of cases, if the Director determines that such action would be in the public interest and the action is consistent with other applicable law. 8 CFR 103.7(d); proposed 8 CFR 106.3(b). DHS is concerned that the current authority provides too much discretion, however, and thus proposes to limit a Director's discretionary waiver to cases related to one of the following: (1) Asylees; (2) Refugees; (3) National security; (4) Emergencies or major disasters declared in accordance with 44 CFR part 206, subpart B; (5) An agreement between the U.S. government and another nation or nations; or (6) USCIS error.

DHS also proposes to clarify the discretionary authority of the Director to authorize fee waiver requests for a case or specific class of cases such as for emergency and disaster relief including tsunamis, wildfires, and hurricanes in accordance with 44 CFR part 206, subpart B. USCIS would continue to notify the general public of eligibility for fee waivers for specific forms under this provision through policy or website updates. Individuals who would qualify for such a fee waiver would still need to meet the requirements to request a fee waiver as provided in proposed 8 CFR 106.3(d). Proposed 8 CFR 106.3(d) complies with 42 U.S.C. 5174b. That law provides that the President, in consultation with the Governor of a State, may waive certain fees for an individual or household who lives in a federally declared disaster area, including the following USCIS fees: Form I–90, Form I–193, Form I–765, Form N–300, Form N–565, and the biometric services fee, which are forms and services related to establishing immigration status. DHS plans to carry out this permissive authority through the USCIS Director's exercise of his or her discretion to provide a specific class of fee waivers for emergency and disaster relief. *See* 84 FR 3957 (Feb. 13, 2019).

DHS acknowledges that the proposed changes to the fee waiver policies would be a significant change from past fee waiver regulations and policies. Section 286(m) of the INA, 8 U.S.C. 1356(m), authorizes DHS to set USCIS fees at an amount necessary to recover the costs of free adjudication and naturalization services provided. It does not require that DHS provide free services. In past fee rules, DHS has made clear that it would not authorize fee waivers where such a waiver is inconsistent with the benefit requested and that fee waiver policy was based on economic necessity, rather than providing certain applicants with an advantage over another. *See* 75 FR 58974. In addition, DHS has responded to comments requesting that it expand USCIS fee waivers by stating that the financial circumstances required to be eligible for certain benefits, such as intercountry adoptions, directly contradict the rationale for shifting costs related to such applications to others through fee waivers. *See* 72 FR 29863. As previously stated, fee waiver increases accounted for 9 percent of the 21 percent weighted average fee increase in the FY 2016/2017 fee rule, and DHS stated that it may revisit the USCIS fee waiver guidance with respect to what constitutes inability to pay under 8 CFR 103.7(c) because of the increasing costs of providing free services through fee waivers. *See* 81 FR 26922. Therefore, DHS is not basing the proposed changes to USCIS fee waiver policies upon factual findings that contradict those underlying the prior policy. In fact, the changes proposed in this rule are consistent with the direction that DHS previously took regarding fee waivers for emergency and disaster relief.

DHS appreciates that individuals who in the past may have received a free

---

[91] *See generally* 8 CFR 103.7(c)(4).

[92] *See* Div. C, Title V of Public Law 104–208, 110 Stat. 3009, 3009–670 (September 30, 1996).

[93] *See* INA 213A. A sponsor who is on active duty (other than active duty for training) in the U.S. armed forces and who is petitioning for a spouse or child only has to demonstrate the means to maintain an annual income equal to at least 100 percent of the FPG.

[94] See Div. C, Title V of Public Law 104–208, 110 Stat. 3009, 3009–670 (September 30, 1996).

service from USCIS may no longer be able to have their USCIS fees waived after these proposed changes take effect. However, to the extent that a person is in the process of completing and filing an immigration benefit request, has paid for assistance in preparing their request, including gathering necessary evidence to support the request, this rule provides public notice of the impending policy change. As for applicants who are not in the process of preparing a benefit request, there is no action that they would take as a result of assuming they will receive a fee waiver after the publication of this rule because they will be placed on notice of the likelihood of the proposed fee waiver changes and provided sufficient time to conform their behavior to the new requirements before they take effect.

f. Conforming Edits and Request for Comments

DHS also proposes to make conforming edits in its regulations to remove references to fee waivers. *See, e.g.,* proposed 8 CFR 240.63(a), 8 CFR 244.17(a), and 8 CFR 245.15(c)(2)(iv)(B). DHS also proposes to remove fee waivers for Commonwealth of the Northern Mariana Islands (CNMI) fees. *See* proposed 8 CFR 214.2(e)(23)(xv), (w)(14)(iii). DHS welcomes comment on the proposed limits on who may file a fee waiver request and for which forms a fee waiver may be requested.

D. Fee Exemptions

The fee-setting authority under INA section 286(m), 8 U.S.C. 1356(m), authorizes DHS to set its fees for adjudication and naturalization services at a level to ensure recovery of the full costs of providing all such services. That provision does not require that USCIS charge a fee for all of its services, and it provides that USCIS may set fees at less than full cost or provide services for free. That authority necessarily means that DHS may fund or subsidize discounted or free USCIS operations through the fees charged to other unrelated filings. DHS has exercised its discretion to provide free services in a number of ways, such as by codifying ''no fee,'' $0 fee, or simply leaving the fee regulations silent and not codifying a fee for a particular service that it provides.

In addition, the current 8 CFR 103.7(d) provision provides that the USCIS Director may create an exemption from certain fees ''for a case or specific class of cases that is not otherwise provided in this section, if the Director determines that such action would be in the public interest and the action is consistent with other applicable law.'' This authority is limited to the Director and may only be delegated to the USCIS Deputy Director.

An individual would not be permitted to independently submit a request to the USCIS Director to waive his or her fee. Previous USCIS Directors have used this authority to provide fee exemptions for specific categories and groups of immigrants.

Consistent with the discussion above about the TVPRA, no law requires USCIS to provide fee exemptions for any immigration category listed below. Application fees from other form types have always been used to fund the costs of processing fee-exempt filings. *See, e.g.,* 81 FR 73295. Continuing to exempt these populations from paying associated fees would result in the costs of their requests being borne by the other proposed fees.

DHS proposes to clarify the Director's fee exemption provision in proposed 8 CFR 106.3(f) to specify that fee exemptions must be related to one of the following:

- Asylees;
- Refugees;
- National security;
- Emergencies or major natural disasters declared in accordance with 44 CFR part 206, subpart B; [95]
- A diplomatic agreement or to further relations between the U.S. Government and other nations; or
- USCIS error.

Consistent with the proposed change to the Director's exemption criteria, DHS proposes to remove the fee exemptions for an initial request for an employment authorization document (Form I–765) for the following classifications:

- Citizen of Micronesia, Marshall Islands, or Palau;
- Granted Withholding of Deportation or Removal;
- Temporary Protected Status if the individual is filing an initial TPS application and is under 14 years of age or over 65 years of age; and
- Applicant for Asylum and Withholding of Deportation or Removal.

The proposed changes for asylum applicants and an Application for Asylum and Withholding of Deportation or Removal are discussed in a later section of this preamble, V.P.2. Fee for the Initial Application for Employment Authorization while an Asylum Claim is Pending.

DHS is proposing to continue to exempt the following categories that are consistent with the proposed criteria for a Director's exemption:

- Form I–102, Application for Replacement/Initial Nonimmigrant Arrival/Departure Document: Nonimmigrant military members of the U.S. Armed Forces, noncitizen participating in NATO or Partnership for Peace Military Program under the Status of Forces Agreement (SOFA).
- Form I–539, Application to Extend/Change Nonimmigrant Status: Noncitizen with Ambassador, Public Ministry, or Career Diplomatic or Consular Officer and their Immediate Family and Attendant or Servant (A–1, A–2, and A–3), Designated Principal Resident Representative of a Foreign Government and Immediate Family and Attendant or Servant (G–1, G–2, G–3, G–4, and G–5) or NATO nonimmigrants status (NATO–1, NATO–2, NATO–3, NATO–4, NATO–5, NATO–6, NATO–7, and NATO–8).
- Form I–765, Application for Employment Authorization: Asylees, refugees, noncitizens paroled as refugees, N–8 and N–9 Special Immigrants under INA sections 101(a)(27)(I)(i) and (L); [96] Victims of Severe Form of Trafficking in Persons (T–1); Victim of Qualifying Criminal Activity (U–1); dependents of Certain foreign national organizations and NATO; VAWA Self-Petitioner principal; [97] an applicant who filed USCIS Form I–485 on or after July 30, 2007, and before the effective date of this rule, and paid the Form I–485 fee; Taiwanese dependents of Taipei Economic and Cultural Representative Office TECRO E–1 employees.

1. Form I–765 Exemption Related to Asylees and Refugees

USCIS is continuing to provide a fee exemption for Form I–765, Application for Employment Authorization, for individuals who were granted asylum (asylees) or who were admitted as refugees. This long-standing policy is consistent with Article 17(1) of the 1951 Convention relating to the Status of Refugees (as incorporated in the 1967 Protocol relating to the Status of Refugees), which states in pertinent part ''The Contracting State shall accord to refugees lawfully staying in their territory the most favorable treatment accorded to nationals of a foreign

[95] This authority is proposed to extend only to a Presidential declaration of a major disaster or an emergency granted in accordance with 8 CFR part 206, subpart B.

[96] N–8 is a parent of alien classed as SK3 (unmarried son or daughter of retired G–4 (international Organization Officer or Employee, or Immediate Family) and an N–9 is the child of Child of N–8 or SK1 (Retired International Organization Employee, SK2 (spouse of SKI–1), SK4 (unmarried son or daughter of G–3).

[97] DHS notes that derivatives must pay the fees but are eligible to request a fee waiver.

country in the same circumstances, as regards the right to engage in wage-earning employment.''

2. Exemptions Related to International Organization Officers and to Agreement Between the U.S. Government and Other Nations

Under the International Organization Immunities Act,[98] certain representatives of foreign governments may be entitled to enjoy some privileges, exemptions and immunities. USCIS has several forms that provide for NATO participants, ambassadors, and foreign government representatives, as described above. These groups of individuals are limited in number.

DHS believes that continuing to exempt these categories from the fees provides for consistency with agreements between the U.S. Government and another nation or nations, as well as concepts of reciprocity and good relations with other nations. Therefore, USCIS believes that continuing the policy to exclude these categories of applicants is appropriate to comply with agreements and promote good relations with other nations.

3. Exemptions Related to VAWA Benefit Requests and to T and U Nonimmigrant Status Categories

As previously discussed, TVPRA requires DHS to permit certain applicants to apply for fee waivers for ''any fees associated with filing an application for relief through final adjudication of the adjustment of status.'' DHS interprets ''any fees associated with filing an application for relief through final adjudication of the adjustment of status'' to mean that, in addition to the main benefit application, applicants must have the opportunity to request a fee waiver for any form associated with the main benefit application up to and including the adjustment of status application. The fees for the VAWA, T, and U categories for Form I–765 had previously been exempted because of the humanitarian nature of these programs and the likelihood that individuals who file requests related to the VAWA, T and U categories would qualify for a fee waiver if they request it. Thus it is more efficient to exempt that population from fees than to employ staff to review fee waiver requests that would usually be approved. Based on the same reasoning, USCIS will continue to provide a fee exemption for the Form I–765 for VAWA, T and U categories.

[98] 59 Stat. 669, 22 U.S.C. 288.

E. Changes to Biometric Services Fee

1. Incorporating Biometric Activities Into Immigration Benefit Request Fees

DHS proposes to incorporate the biometric services cost into the underlying immigration benefit request fees for which biometric services are applicable. Currently, a separate $85 biometric services fee may apply depending on the immigration benefit request[99] or other circumstances. *See* 8 CFR 103.7(b)(1)(i)(C). USCIS provides tables, forms, instructions and other information to help individuals assess whether they need to pay the biometric services fee. USCIS rejects an application, petition, or request that fails to pay the separate biometric services fee, if it applies. *See* 8 CFR 103.17(b). DHS proposes to incorporate the cost of biometric services into the underlying immigration benefit request fees to simplify the fee structure, reduce rejections of benefit requests for failure to include a separate biometric services fee, and better reflect how USCIS uses biometric information.

DHS has broad statutory authority to collect biometric information when such information is ''necessary'' or ''material and relevant'' to the administration and enforcement of the INA. *See, e.g.,* INA secs. 103(a), 235(d)(3), 264(a); 8 U.S.C. 1103(a), 1225(d)(3), 1304(a). The collection, use, and reuse of biometric data are integral to identity management, excluding people with criminal backgrounds, investigating and addressing national security concerns, and maintaining program integrity.

In previous fee rules, USCIS evaluated the biometric activity cost as a single biometric service fee separate from the underlying application, petition, or request. In the FY 2016/2017 fee review, USCIS called the activity Perform Biometric Services. *See* 81 FR 26913. USCIS clarified that persons filing a benefit request may be required to appear for biometrics services or an interview and pay the biometric services fee. *See* 81 FR 26917 and 81 FR 73325. There has been a single biometric services fee for many years, which includes four separate costs:

- FBI Name Checks;
- FBI fingerprints;
- Application Support Center (ASC) contractual support; and
- Biometric service management overall, including federal employees at the ASC locations.

[99] For a quick reference of the immigration benefit requests that currently require biometric services with the initial submission, see USCIS, Form G–1055, *Fee Schedule,* available at *https://www.uscis.gov/g-1055*.

In the FY 2019/2020 fee review, USCIS identified each of these four costs as distinct activities in the ABC model. These four activities replace the single biometric activity that USCIS used in previous fee reviews.[100] USCIS used volume estimates to allocate these costs to the proposed immigration benefit requests to which they generally apply. The biometric volume estimates were specific to the projected workload for FBI Name Checks, FBI fingerprints, and contractual support at the ASC locations. In most cases, these estimates use the average proportion of workload for each immigration benefit request over the last three years. If USCIS believed the average of the last three years did not reflect current plans, it used more recent data or other assumptions. These proportions of each biometric service to receipts can vary, because there is not always a one-to-one relationship between a specific benefit request and a biometric service. For example, USCIS may not require a new biometric collection at an ASC location if it resubmits existing, stored biometric information to the FBI. As another example, some immigration benefit requests, like adoption petitions and applications, require that all adults in a household submit biometric information. *See, e.g.,* 8 CFR 204.310(a)(3)(ii) and 204.310(b). As such, a single adoption petition or application may require one or more adults to submit biometric information. Using biometric volumes specific to individual biometric activities enables USCIS to better forecast biometric costs. DHS proposes to incorporate biometric costs into IEFA immigration benefit request fees by using this biometric activity-specific information in the proposed fees. *See* proposed 8 CFR 106.2. DHS also proposes conforming edits elsewhere in its regulations to remove references to the separate biometric services fee. *See, e.g.,* proposed 8 CFR 204.5(p)(4), 204.310(a)(3)(ii), 212.19(e), 214.2(e)(23)(viii), 214.14(c)(1), 245.15 (h)(2), and 245a.12(d)(2).

The proposed changes in this rule may assist USCIS when shifting to enterprise-wide person-centric identity management. For example, if USCIS expands FBI Name Checks to additional immigration benefit requests, then DHS may propose to increase the fee as appropriate for the affected immigration benefit requests. This approach may

[100] The single biometric service activity was called Perform Biometric Services in the FY 2016/2017 fee review. *See* 81 FR 26913–4. Previously, USCIS called the activity Capture Biometrics. *See* 75 FR 33459 and 72 FR 4897.

ensure that the affected applicant, petitioner, or requestor would pay the appropriate fee rather than pass the cost burden of all other biometric services to the affected applicants, petitioners, or requestors.

USCIS forecasts biometric workload volumes by immigration benefit request type in order to assign biometrics costs to the appropriate immigration benefit request. Assigning costs to the underlying immigration benefit request type may reduce the administrative burden on USCIS to administer the separate fee and make it easier for applicants, petitioners, and beneficiaries to calculate the total payment that is due. However, USCIS proposes to retain the separate biometric services fee for specific workloads, as described in the next section.

2. Retaining the Separate Biometric Services Fee for Temporary Protected Status

DHS has excluded from USCIS' ABC model for this proposed rule the costs and revenue associated with Temporary Protected Status (TPS), consistent with the previous fee rule. *See* 81 FR 73312–3. In addition, as noted above, DHS proposes generally to eliminate a separate biometric services fee and fund biometric services from the revenue received from the underlying immigration benefit request fees. However, DHS proposes to retain a separate biometric services fee for TPS. Proposed 8 CFR 106.2(a)(37)(iii).

While the TPS registration fee is capped by INA section 244a(c)(1)(B), 8 U.S.C. 1254a(c)(1)(B) at $50, DHS has specific statutory authority to collect ''fees for fingerprinting services, biometric services, and other necessary services'' when administering the TPS program. *See* 8 U.S.C. 1254b. USCIS collects biometrics for TPS registrants. USCIS requires certain TPS initial applicants and re-registrants to pay the biometric services fee in addition to the fees for Form I–821, Application for Temporary Protected Status, and Form I–765, Application for Employment Authorization, if they want employment authorization. *See* Instructions for Form I–821 (''Applicants for both initial TPS and for re-registration who are 14 years of age and older must submit the $85 biometric services fee or a fee waiver request.''). Because the $50 TPS initial application fee is capped by statute and temporary by definition, USCIS has not included it in its ABC model. Nevertheless, the model output of other fees indicates that the $50 amount provided by statute does not recover the full cost of adjudicating these benefit requests.

To reduce the costs of TPS that USCIS must recover from fees charged to other immigration benefit requests, DHS proposes to use the permissive authority in 8 U.S.C. 1254b(a) to require a $30 biometric services fee for TPS initial applications and re-registrations. Proposed 8 CFR 106.2(a)(37)(iii). USCIS based the proposed $30 biometric services fee on the direct costs of collecting, storing, and using biometric information. Currently, USCIS pays approximately $11.50 to the FBI for fingerprinting results. USCIS calculated that biometric collection, storage, and use at an ASC costs approximately $19. USCIS rounded the proposed fee to the nearest $5 increment, similar to other IEFA fees. The proposed fee is less than the current $85 biometric services fee because the current fee includes indirect costs. The FY 2016/2017 fee rule held the biometric services fee to $85, which has not changed since the FY 2010/2011 fee rule.

3. Executive Office for Immigration Review (EOIR) [101] Biometric Services Fee

Similarly, DHS is maintaining the current requirement that applicants filing certain requests with EOIR submit a biometric services fee. Proposed 8 CFR 103.7(a)(2). DHS, including USCIS, handles all aspects of biometrics collection for EOIR and conducts background security checks for individuals in immigration proceedings.[102] This fee is necessary to recover the costs USCIS incurs from performing that service for EOIR. When individuals in immigration proceedings before EOIR seek to file a motion, appeal, or immigration benefit request for relief or protection from removal they are instructed to pay any applicable biometrics and application fees to DHS. *See* 8 CFR 1103.7(a)(3).[103] As previously explained, while DHS proposes to incorporate the costs of biometric services into its underlying immigration benefit request fees, DHS has no authority to change the amounts it receives from EOIR fees to pay the costs it incurs for biometric services (which includes background checks). Under this proposed rule, DHS proposes to adjust only the fee for those requests filed with and processed by USCIS. Consequently, USCIS has calculated and proposes a biometric services fee of $30 that will be required for certain forms for which it performs intake and biometrics services on behalf of EOIR. *See* proposed 8 CFR 103.7(a)(2).

F. Form I–485, Application To Register Permanent Residence or Adjust Status

1. Interim Benefits

DHS proposes to require separate filing fees when filing Form I–765, Application for Employment Authorization and Form I–131, Application for Travel Document concurrently with a Form I–485, Application to Register Permanent Residence or Adjust Status, or after USCIS accepts their Form I–485 and while it is still pending.

Usually, an applicant needs approval of a principal immigration benefit request before receiving ancillary benefits such as employment authorization and a travel document. That is, USCIS only grants those ancillary benefits after or at the same time as it grants the principal immigration status or benefit. In some situations, however, an individual may qualify for an interim ancillary benefit because a benefit request is pending adjudication. For example, a person who applies for adjustment of status, in certain instances, would be able to apply for employment authorization and/or a travel document based on the pending immigration benefit request. *See* 8 CFR 274a.12(c)(9). When this occurs, these ancillary benefits are referred to generally as ''interim benefits.'' [104]

Current DHS regulations provide that applicants who properly file and pay the required fee for a Form I–485 may also file a Form I–765 and/or a Form I–131 without paying any additional fees. *See* 8 CFR 103.7(b)(1)(i)(M)(4) & (II). Applicants may file Form I–765 and/or Form I–131 concurrently with Form I–485. Alternatively, they may file these forms after USCIS accepts their Form I–485 but while the Form I–485 is still pending.

[101] Within the Department of Justice, there is an Executive Office for Immigration Review (EOIR), which includes a Director, the Board of Immigration Appeals, the Office of the Chief Immigration Judge, the Office of the Chief Administrative Hearing Officer, the Office of Legal Access Programs, and other staff as the Attorney General or the Director may provide. *See* 8 CFR 1003.0. USCIS provides intake services for several requests filed with EOIR, for which biometrics may be required.

[102] Guidance is available at Immigration Benefits in EOIR Removal Proceedings, at *https://www.uscis.gov/laws/immigration-benefits-eoir-removal-proceedings* (last reviewed/updated Aug. 22, 2011).

[103] This regulation provides that, except as provided in 8 CFR 1003.8, EOIR does not accept fees, and that fees relating to EOIR proceedings are paid to DHS.

[104] Individuals may derive interim benefits from an Application for Temporary Protected Status, Form I–821. Unless otherwise stated in this proposed rule preamble, DHS uses interim benefits to refer to benefits associated with Form I–485, Application to Register Permanent Residence or Adjust Status.

Before the FY 2008/2009 fee rule, applicants paid separate fees to apply for employment authorization or a travel document while waiting on USCIS to adjudicate Form I–485. Applicants who had not yet received a green card but who may have had to renew these interim benefits paid any associated fees for the renewals. *See* 72 FR 4894. Since the FY 2008/2009 fee rule, USCIS has allowed anyone who files Form I–485 to file Forms I–131 and I–765 concurrently (or after USCIS accepted their Form I–485 but while the Form I–485 was still pending) without a fee if they properly filed a Form I–485 with the required Form I–485 fee. Applicants who had not yet received a green card but who may have had to renew these interim benefits did not have to pay any associated fees. For the FY 2008/2009 fee rule, USCIS determined that calculating fees for Form I–485 at an amount that would include interim benefits would improve efficiency and save most applicants money. *See* 72 FR 4894 and 29861–2. By providing that the fees for interim benefits would be included in the fee for Form I–485, USCIS addressed the perception that it benefits from increased revenue by processing Forms I–485 more slowly. *See* 72 FR 4894 and 29861–2. The FY 2010/2011 fee rule continued the practice of ''bundling'' the fees for interim benefits and Form I–485. *See* 75 FR 58968.

In the FY 2016/2017 fee review, USCIS determined the workload volume and fee-paying percentage of Forms I–765 and Forms I–131 that are not associated with Forms I–485. This enabled USCIS to derive a fee-paying percentage for standalone Forms I–765 and Forms I–131, meaning those forms not filed concurrently with a Form I–485. *See* 81 FR 26918 and 73300. By isolating stand-alone interim benefit applicants from those concurrently filing Form I–485, USCIS more accurately assessed fee-paying percentages, fee-paying volumes, and fees for all three benefit types. *Id.*

DHS proposes to return to charging separate fees for Forms I–485, I–765, and I–131. *See* proposed 8 CFR 106.2(a)(16); 8 CFR 106.2(a)(32); 8 CFR 106.2(a)(7)(iii). The proposed change would be subject to phased implementation. Specifically, individuals who filed a Form I–485 after July 30, 2007 (the FY 2008/2009 fee rule) and before this proposed change takes effect will continue to be able to file Forms I–131 and I–765 without additional fees for as long as their Form I–485 is pending. Individuals who filed before the FY 2008/2009 fee rule or after this proposed change becomes effective would pay separate fees for interim benefits. The proposed changes are summarized in Table 8. Dates are not available for the proposed changes.

TABLE 8—FORM I–485 FILING DATES AND INTERIM BENEFITS

Form I–485 filing date	Bundled fee applies?
Before July 30, 2007	No.
After July 30, 2007, but before [INSERT EFFECTIVE DATE OF THIS RULE]	Yes.
After implementing this proposed change with a final rule	No.

DHS proposes this change in order to reduce the proposed fee increases for Form I–485 and other forms. For example, in the previous fee rule, USCIS isolated the workload volume and fee-paying percentage of Forms I–765 and I–131 that are not associated with Form I–485. *See* 81 FR 26918. Isolating the volumes for interim benefits reduced the overall volume on the fee schedule because we only counted interim benefit volumes as part of the Form I–485 forecast instead of counting them twice (for Form I–485 and the interim benefit). Based on the total number of Form I–485 applications that were concurrently filed with Forms I–131 and I–765 on the same day in FY 2017, USCIS expects approximately 424,000 annual interim benefit applications in FY 2019/2020 forecast. In the proposed fee schedule, USCIS assumes these interim benefit applicants will pay the applicable fees for Forms I–485, I–131, and I–765. If USCIS were to continue the previous approach and assume these applicants only pay the fee for Form I–485, then the proposed fee for Form I–485 would be $1,240, $120 or approximately 11 percent more than the proposed fee of $1,120. *See* 8 CFR 103.7(b)(1)(i)(U); proposed 8 CFR 106.2(a)(16). Other proposed fees would also change on this hypothetical fee schedule. For example, the Form I–90, Application to Replace Permanent Resident Card, fee would remain $455 in this hypothetical fee schedule. The proposed Form I–90 fee is $415, $40 or approximately 9 percent less than the current $455 fee. *See* 8 CFR 103.7(b)(1)(i)(G); proposed 8 CFR 106.2(a)(1). This version of the fee schedule has a weighted average fee increase of 23 percent compared to the 21 percent average fee increase in proposed fee schedule.[105] In general, the fees are higher in a fee schedule with bundled fee interim benefits because it has lower workload and fee-paying volume than the proposed fee schedule. This means there are fewer immigration benefit requests for USCS to recover projected costs in a fee schedule with bundled fee interim benefits. DHS proposes separate fees for interim benefit applications and Form I–485 applications in order to lower the proposed fees for most other applicants, petitioners, and requestors.

DHS proposes to reduce the Form I–485 fee to $1,120, which is $20 or 2 percent less than the current $1,140 fee that includes interim benefits. However, the cost reducing effects of unbundling interim benefit fees is partially offset by several other factors that increase the costs of the Form I–485. For example, background check requirements have increased.[106] USCIS is also interviewing a greater proportion of adjustment of status applicants, requiring more time and effort to adjudicate Form I–485.[107] In addition, USCIS did not realize the efficiency gains anticipated when it bundled interim benefits. *See* 72 FR 4894. This is due to a number of reasons. Mainly, annual numerical visa limits established by Congress and high demand have created long wait times for some visa categories.[108] Many

[105] *See* footnote 6 for more information on the weighted averages in the fee schedule. In a fee schedule with free interim benefits, the sum of the current fees multiplied by the projected FY 2019/2020 fee-paying receipts for each immigration benefit type, divided by the total fee-paying receipts is $533. This is $3 higher than in the proposed fee schedule because the fee-paying volumes are lower when we assume free interim benefits. The weighted average proposed fee is $655, $122 or 23 percent higher than the weighted average current fee of $533 in this hypothetical fee schedule that assumes free interim benefits.

[106] *See, e.g.,* Exec. Order No. 13780, *Protecting the Nation From Foreign Terrorist Entry Into the United States,* 82 FR 13209 (Mar. 6, 2017).

[107] USCIS, *USCIS to Expand In-Person Interview Requirements for Certain Permanent Residency Applicants, https://www.uscis.gov/news/news-releases/uscis-to-expand-in-person-interview-requirements-for-certain-permanent-residency-applicants* (last reviewed/updated Aug. 28, 2017).

[108] *See* USCIS, Visa Retrogression at *https://www.uscis.gov/green-card/green-card-processes-*

applicants must wait years for visas to become available. While USCIS has some control over its own allocation of resources to address processing times and backlogs, USCIS has no direct control over delays caused by the U.S. Department of State's allocation of visa numbers and Congress' annual visa numerical limits. USCIS has taken some actions to alleviate the filing burden and fees on those individuals whose Form I–485 applications are still pending due to the lack of available immigrant visas. For example, DHS now provides EADs with 2-year validity periods when the final action date for determining visa availability retrogresses.[109]

New applicants would only pay for the benefits that they wish to receive as a result of this proposal. In the FY 2008/2009 and FY 2010/2011 fee rules, some commenters stated they did not want to pay for additional benefits they did not want, need, or receive. *See* 72 FR 29861–3 and 75 FR 58968. This proposal is in line with the beneficiary-pays principle discussed in the Fee Waivers section of this preamble. Finally, this change would treat Form I–485 applicants similarly to other applicants who apply for interim benefits. In previous fee rules, bundled interim benefit fees were only associated with a pending Form I–485. However, several other applications may warrant interim benefits.[110] DHS has decided it is more equitable to treat all of these petitioners and applicants the same, regardless of the request that may grant interim benefits. Some applicants would pay significantly more to adjust status and apply for one or more interim benefits. Table 9 compares the current fees for Form I–485 applicants that may bundle interim benefits to the proposed fees without bundling.

TABLE 9—CURRENT AND PROPOSED FEES FOR ADJUSTMENT OF STATUS WITH INTERIM BENEFITS

Immigration benefit request	Current fees	Proposed fees	Difference	Percentage difference
I–485, Application to Register Permanent Residence or Adjust Status	$1,140	$1,120	−$20	−2 percent
I–765, Application for Employment Authorization	410	490	80	20
I–131, Application for Travel Document	575	585	10	2
Biometric Services Fee	85	[111] N/A	−85	−100
Total Fees for Form I–485 and biometric services	1,225	1,120	−105	−9
Total Fees for Forms I–485 and I–765 and biometric services		1,610	385	31
Total Fees for Forms I–485 and I–131 and biometric services		1,705	480	39
Total Fees for Form I–485, all interim benefits, and biometric services		2,195	970	79

2. Form I–485 Fee for Child Under 14, Filing with Parent

Currently, Form I–485 has two fees. The fee for an adult is $1,140, and the fee for a child under the age of 14 concurrently filing with a parent is $750. *See* 8 CFR 103.7(b)(1)(i)(U). DHS proposes to require payment of the proposed $1,120 fee for all applicants, including children under the age of 14 years concurrently filing Form I–485 with a parent.[112] *See* 8 CFR 103.7(b)(1)(i)(U)(*2*); proposed 8 CFR 106.2(a)(16).

DHS no longer believes there is a cost basis for the two different Form I–485 fees. As explained in the FY 2016/2017 fee rule, USCIS does not track the adjudication time for Form I–485 based on the age of the applicant so there is no data showing a cost difference correlated to the difference in applicant age. *See* 81 FR 73301. The FY 2016/2017 fee rule calculated the $750 fee using the model output to comply more closely with the ABC methodology for full cost recovery. *See* 81 FR 26919. USCIS assumed that the $750 fee would not include the cost of an EAD. *Id.* As such, the completion rate for the $750 fee was lower than most adults. In addition, children under the age of 14 do not typically pay the $85 biometric services fee required for adults that apply to adjust status. In the proposed Form I–485 fee, USCIS assumes the same completion rate and biometric services for adults and children because DHS proposes to separate interim benefit request fees from the fee for Form I–485. DHS believes that a single fee for Form I–485 will reduce the burden of administering separate fees and better reflect the cost of adjudication. This proposal will affect a small percentage of Form I–485 applicants. In FY 2017 and 2018, approximately 6 percent of Form I–485 applicants paid the $750 fee. See Table 10 for Form I–485 fee-paying receipts and percentages for the two years.

and-procedures/visa-availability-priority-dates/visa-retrogression (last reviewed/updated March 8, 2018).

[109] USCIS may, in its discretion, determine the validity period assigned to any document issued evidencing an individual's authorization to work in the United States. *See* 8 CFR 274a.12(b).

[110] *See* footnote 79.

[111] As noted earlier in this preamble, DHS propose to eliminate the separate $85 fee in most cases. *See* V.E. Changes to Biometric Services Fee section for more information.

[112] The parent may be seeking classification as an immediate relative of a U.S. citizen, a family-sponsored preference immigrant, or a family member accompanying or following to join a spouse or parent under sections 201(b)(2)(A)(i), 203(a)(2)(A), or 203(d) of the INA; 8 U.S.C. 1151(b)(2)(A)(i), 1153(a)(2)(A), or 1153(d).

TABLE 10—FORM I–485 FEE-PAYING RECEIPTS

Form I–485 applicant type	Current fee	FY 2017 fee-paying receipts	Percent of FY 2017	FY 2018 fee-paying receipts	Percent of FY 2018
Applicant under the age of 14 years who submits the application concurrently with the Form I–485 of a parent	$750	32,870	6	33,290	6
All other fee-paying applicants for Form I–485	1,140	511,432	94	496,113	94
Total	N/A	544,302	100	529,403	100

In addition, DHS is proposing to clarify the fee for applicants for adjustment of status pursuant to INA section 245(i). Such applicants are required to properly file Form I–485 with fee along with Form I–485 Supplement A and the $1,000 statutory fee, unless exempted by the statute. USCIS proposes that the fee for the Application to Adjust Status under Section 245(i) of the Act, Form I–485, Supplement A, be revised to clarify that the Form I–485 Supplement A and the $1,000 fee must be submitted when the Form I–485 is filed or still pending. *See* proposed 8 CFR 106.2(a)(17). An applicant who has not paid the $1,000 statutory fee when applying for adjustment of status has not been lawfully adjusted and cannot satisfy the ''lawfully admitted'' requirement of INA section 318, 8 U.S.C. 1429, for naturalization. DHS is also proposing to delete the text from the Form I–485, Supplement A, that provides that there is no fee when the applicant is an unmarried child under 17 or the spouse or the unmarried child under 21 of an individual with lawful immigration status and who is qualified for and has applied for voluntary departure under the family unity program. *See* 8 CFR 103.7(b)(1)(i)(V); proposed 8 CFR 106.2(a)(17). Those fee exemptions are explicitly provided by statute and will be included in the applicable form instructions. *See* INA section 245(i)(1)(C), 8 U.S.C. 1255(i)(1)(C). It is unnecessary to codify them in the Code of Federal Regulations.

G. Continuing To Hold Refugee Travel Document Fee to the Department of State Passport Fee

Consistent with U.S. obligations under Article 28 of the 1951 Convention relating to the Status of Refugees,[113] DHS proposes to continue to charge a fee for refugee travel documents linked to the fee for a U.S. passport book. *See* 75 FR 58972 (discussing Article 28 standards for assessing charges for a refugee travel document). In previous fee rules, DHS aligned the refugee travel document fees to the sum of the United States passport book application fee plus the additional execution fee that DOS charges for first time applicants. *See* 81 FR 73301 and 75 FR 58972. Since the FY 2016/2017 fee rule, DOS increased the execution fee from $25 to $35, a $10 or 40 percent increase. *See Department of State, Schedule of Fees for Consular Services, Department of State and Overseas Embassies and Consulates-Passport Services Fee Changes,* 83 FR 4425 (Jan. 31, 2018). Under this proposal, DHS would increase refugee travel document fees by a conforming amount. DHS refugee travel document fees would be $145 for adults and $115 for children under the age of 16 years, consistent with current U.S. passport fees. *See* proposed 8 CFR 106.2(a)(7)(i) and (ii).

H. Form I–131A, Carrier Documentation

DHS proposes to separate the fee for Form I–131A, Application for Carrier Documentation, from other travel document fees and to expand the population eligible to file Form I–131A. *See* 8 CFR 103.7(b)(1)(i)(M)(3); proposed 8 CFR 106.2(a)(8). The proposed fee for Form I–131A is $1,010, a $435 or 76 percent increase from the current $575 fee. *Id.* In 2016, USCIS began using Form I–131A, Application for Carrier Documentation. *See* 80 FR 59805. In the FY 2016/2017 fee rule, DHS implemented a fee that was calculated using the total Form I–131 and I–131A workload. *See* 81 FR 73294–5.

Currently, certain lawful permanent residents (LPRs) may use Form I–131A to apply for a travel document (carrier documentation) if their Permanent Resident Card (PRC), also known as a Green Card or Form I–551, or their reentry permit is lost, stolen, or destroyed while outside of the United States. Carrier documentation allows an airline or other transportation carrier to board the LPR without any penalty to the airline or transportation carrier for permitting an individual to board without a visa or travel document. *See* INA section 273, 8 U.S.C. 1323 (providing for a fine of $3,000 for each noncitizen without proper documentation). In order to be eligible for carrier documentation, an LPR who was traveling on a PRC must have been outside the United States for less than one year, and an LPR who was traveling on a reentry permit must have been outside the United States for less than two years. Form I–131A is not an application for a replacement PRC or reentry permit.

DHS proposes a Form I–131A fee separate from Form I–131 because Form I–131A differs from other applications for travel documents. The proposed separate Form I–131A fee would be more equitable because the form requires a different adjudicative process than Form I–131, including processing by personnel outside of the United States, which affects the projected cost for Form I–131A. Other travel documents may be adjudicated inside or outside of the United States, while the DOS Bureau of Consular Affairs, located outside of the United States, will process Form I–131A following the closure of some USCIS international offices.[114] It generally costs more to process Form I–131A outside of the United States, and therefore, providing carrier documentation is relatively more expensive for USCIS than providing other travel documents. The proposed fee includes direct costs to account for the fee DOS charges USCIS to adjudicate Form I–131A applications, which is

[113] The United States is party to the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267 (1968), which incorporates articles 2 through 34 of the 1951 Convention. The United States is not party to the 1951 Convention. *See Sale* v. *Haitian Ctrs. Council, Inc.,* 509 U.S. 155, 169 n.19 (1993) (''Although the United States is not a signatory to the Convention itself, in 1968 it acceded to the United Nations Protocol Relating to the Status of Refugees, which bound the parties to comply with Articles 2 through 34 of the Convention as to persons who had become refugees because of events taking place after January 1, 1951.'').

[114] *See USCIS Will Adjust International Footprint to Seven Locations* at *https://www.uscis.gov/news/news-releases/uscis-will-adjust-international-footprint-seven-locations* (last reviewed/updated Aug. 9, 2019). The volume and cost projections used in this rule were generated before planning to adjust the international footprint of USCIS and do not incorporate cost changes associated with the adjustment. DHS will incorporate resulting cost changes in future fee rules.

approximately $385 each.[115] In the FY 2018 interagency agreement and in this proposed rule, USCIS projects that DOS will receive approximately 6,199 Forms I–131A each year. Separately, USCIS forecasts that USCIS or DOS will receive 3,600 Forms I–131A each year based on historic USCIS receipts. The total Form I–131A receipt forecast for USCIS or DOS is 9,799 per year.

DHS also proposes to expand the population that is eligible to use Form I–131A. DHS proposes to allow individuals whose advance parole documents or combination employment authorization and advance parole cards (combo cards) that are lost, stolen, or destroyed to use Form I–131A to apply for a carrier document while abroad. Currently, there is no clear process for individuals who lose advance parole documents while they are abroad to replace those documents. Since USCIS does not issue advance parole documents to individuals who are abroad, it is not possible to replace a lost or stolen advance parole document until the individual returns to the United States. Some have applied for humanitarian parole to return to the United States, which requires the applicant to demonstrate an urgent humanitarian reason or significant public benefit as there is currently no other appropriately established process for such individuals to obtain a travel document to return to the United States. *See generally* INA sec. 212(d)(5), 8 U.S.C. 1182(d)(5); 8 CFR part 223.[116] DHS proposes to permit those individuals to file Form I–131A to request carrier documentation, which would allow them to board a return flight to the United States despite their advance parole document having been lost, stolen, or destroyed. DOS personnel would verify that such an individual previously obtained the advance parole authorization before issuing the carrier documentation. At this time, USCIS cannot estimate the number of additional Form I–131A requests that may be filed as a result of this proposed change. However, USCIS expects the increase in the number of filings to be small. While USCIS does not track Form I–131 humanitarian parole requests made specifically for carrier documentation, there were approximately 200 Form I–131 submissions in FY 2017 without a designation of the underlying basis of the request. Individuals who used humanitarian parole requests to obtain carrier documentation would be a subset of those approximately 200 receipts.

I. Separating Form I–129, Petition for a Nonimmigrant Worker, Into Different Forms

Currently, employers and other qualified filers, such as agents, sponsoring organizations and investors (collectively referred to as a ''benefit requestor'' or separately referred to as a ''petitioner'' or ''applicant,'' as applicable) may use Form I–129, Petition for a Nonimmigrant Worker, to make a benefit request on behalf of a current or future nonimmigrant worker to temporarily perform services or labor, or to receive training in the United States.[117] Using this single form, petitioners or applicants can file petitions or applications for many different types of nonimmigrant workers.[118] Some classifications also allow nonimmigrants to ''self-petition'' or file a petition or application on behalf of themselves. Some nonimmigrant classifications require use of Form I–129 supplemental forms, such as the H Classification Supplement, or additional separate forms, such as Form I–129S, Nonimmigrant Petition Based on Blanket L Petition. Certain petitioners or applicants must pay statutory fees in addition to a base filing fee in some cases. For example, several statutory fees exist for H and L nonimmigrant workers.[119] In some cases, petitioners or applicants pay a single fee for multiple nonimmigrant beneficiaries. USCIS provides several optional checklists to help navigate the specific requirements of some nonimmigrant classifications.

DHS proposes to separate Form I–129 into several forms. These new forms will incorporate information from the various supplemental forms for specific types of workers or nonimmigrant classifications. DHS proposes different fees for these new forms. The proposed fees are calculated to better reflect the costs associated with processing the benefit requests for the various categories of nonimmigrant worker. The current base filing fee for Form I–129 is $460. *See* 8 CFR 103.7(b)(1)(i)(I). This base filing fee is paid regardless of how many nonimmigrant workers will benefit from the petition or application, the type of worker (for example, landscaper, chef, scientist, computer programmer, physician, athlete, musician, etc.), whether an employee is identified, and without differentiating the amount of time it takes to adjudicate the different nonimmigrant classifications. Therefore, in order to reflect these differences, DHS is proposing a range of fees for petitions and applications for nonimmigrant workers, listed in Table 11 and explained in the subsequent sections. By splitting the form and proposing several different fees, USCIS believes it will simplify or consolidate the information requirements for petitioners and applicants as well as better reflect the cost to adjudicate each specific nonimmigrant classification. In addition, DHS is proposing that, where any new Form I–129 is filed for a named worker who is present in the United States, the petitioner must provide USCIS with a valid domestic address for the named worker(s) when submitting the form. DHS welcomes comments on the new forms.

In 2017, the DHS Office of Inspector General (OIG) released a report on H–1B visa participants. It discussed how USCIS verifies H–1B visa participants through the Administrative Site Visit and Verification Program (ASVVP). ASVVP includes site visits on all religious worker petitioners, including R nonimmigrants, as well as randomly selected site visits for certain H–1B and L workers to assess whether petitioners and beneficiaries comply with applicable immigration laws and regulations. As a result of the OIG audit, USCIS began to collect better information on the costs associated with ASVVP. For example, ASVVP now uses unique project and task codes in the USCIS financial system to track spending. Additionally, USCIS tracks ASVVP hours by form type in the Fraud Detection and National Security Data System, which USCIS uses to identify fraud and track potential patterns. In the

[115] The FY 2018 interagency agreement between Department of State and USCIS uses an Economy Act rate of $385.88 for the adjudication. USCIS used FY 2018 rates when calculating the proposed fees. The FY 2019 interagency agreement between Department of State and USCIS uses an Economy Act rate of $352.15 for the adjudication.

[116] For relevant guidance, see *USCIS to Issue Employment Authorization and Advance Parole Card for Adjustment of Status Applicants: Questions and Answers, https://www.uscis.gov/news/questions-and-answers/uscis-issue-employment-authorization-and-advance-parole-card-adjustment-status-applicants-questions-and-answers* (last reviewed/updated March 9, 2018).

[117] See Temporary (Nonimmigrant) Workers at *https://www.uscis.gov/working-united-states/temporary-nonimmigrant-workers* (last reviewed/updated Sept. 7, 2011).

[118] For example, nonimmigrants workers in the following classifications: E–1, E–2, E–2C, H–1B, H–2A, H–2B, H–3, L–1, O–1, O–2, P–1, P–1S, P–2, P–2S, P–3, P–3S, Q–1, R–1, TN1, and TN2. See Form I–129, Petition for a Nonimmigrant Worker at *https://www.uscis.gov/i-129* (last reviewed/updated Sept 11, 2018).

[119] Various statutory fees apply to H and L nonimmigrants. For more information on the fees and statutory authority, see USCIS, *H and L Filing Fees for Form I–129, Petition for a Nonimmigrant Worker, https://www.uscis.gov/forms/h-and-l-filing-fees-form-i-129-petition-nonimmigrant-worker* (last updated/reviewed Feb. 2, 2018).

FY 2019/2020 fee review, USCIS used some of this new information to identify distinct costs for these site visits. USCIS used the ASVVP hours by immigration benefit request to assign the appropriate direct costs of site visits to Forms I–129. The proposed fees would result in the cost of ASVVP being covered by the fees paid by the petitioners in proportion to the extent to which ASVVP is being used for that benefit request.

Additionally, USCIS now captures adjudication hours for nonimmigrant worker petitions based on the classification for which the petition is filed (see discussion of Completion Rates in section IV.B.2). Therefore, the proposed fees include the costs associated with the estimated adjudication hours for each of the new petitions being proposed in this rule.

TABLE 11—PROPOSED FORM NUMBERS AND FORM TITLES FOR SEPARATING FORM I–129

Proposed form No.	Proposed form title	Proposed fee(s)
I–129CW	Petition for a CNMI-Only Nonimmigrant Transitional Worker	$705.
I–129E&TN	Application for Nonimmigrant Worker: E or TN Classification	$705.
I–129H1	Petition for Nonimmigrant Worker: H–1 Classification	$560.
I–129H2A	Petition for Nonimmigrant Worker: H–2A Classification	$860 (named); $425 (unnamed).
I–129H2B	Petition for Nonimmigrant Worker: H–2B Classification	$725 (named); $395 (unnamed).
I–129L	Petition for Nonimmigrant Worker: L Classification	$815.
I–129MISC	Petition for Nonimmigrant Worker: H–3, P, Q, or R Classification	$705.
I–129O	Petition for Nonimmigrant Worker: O Classification	$715.

1. Form I–129H1, Petition for Nonimmigrant Worker: H–1 Classifications

DHS proposes to create Form I–129H1, Petition for H–1B Nonimmigrant Worker or H–1B1 Free Trade Nonimmigrant Worker. *See* proposed 8 CFR 106.2(a)(3)(i). The H–1B nonimmigrant program is for individuals who will perform services in a specialty occupation, services of exceptional merit and ability relating to a Department of Defense (DOD) cooperative research and development project, or services as a fashion model of distinguished merit or ability; while the H–1B1 nonimmigrant program is for nationals of Singapore or Chile engaging in specialty occupations. *See* INA sec. 101(a)(15)(H)(i)(b), (H)(i)(b1); 8 U.S.C. 1101(a)(15)(H)(i)(b), (H)(i)(b1).[120] DHS proposes a fee of $560 for the Form I–129H1. The proposed fee for a petitioner to file Form I–129H1 more accurately incorporates the direct cost of USCIS fraud prevention efforts for H–1B workers and other planned changes. DHS does not propose any changes to statutory fee amounts for certain H–1B petitioners because it does not have the authority to change the amount of these fees.[121]

2. Forms I–129H2A and I–129H2B, Petitions for H–2A and H–2B Workers

DHS proposes to create Form I–129H2A, Petition for Nonimmigrant Worker: H–2A Classification, and Form I–129H2B, Petition for Nonimmigrant Worker: H–2B Classification. The H–2A program allows U.S. employers or U.S. agents who meet specific regulatory requirements to bring foreign nationals to the United States to fill temporary agricultural jobs.[122] The H–2B program allows U.S. employers or U.S. agents who meet specific regulatory requirements to bring foreign nationals to the United States to fill temporary nonagricultural jobs.[123] On March 6, 2017, OIG issued an audit report after reviewing whether the fee structure associated with H–2 petitions is equitable and effective.[124] OIG identified a number of issues and provided recommendations to address the issues. The creation of the two new forms, Forms I–129H2A and I–129H2B, is USCIS' response to OIG's recommendations. Further, USCIS proposes the following changes:

- Separate fees for petitions with named workers and petitions with unnamed workers;
- Limit the number of named workers that may be on a single petition to 25.

DHS proposes separate H–2A and H–2B fees for petitions with named workers and unnamed workers. Currently, petitions for H–2A or H–2B workers may include named or unnamed workers. Petitioners must name workers when (1) the petition is filed for a worker who is a national of a country not designated by the Secretary of Homeland Security as eligible to participate in the H–2A or H–2B program; or (2) the beneficiary is in the United States. *See* 8 CFR 214.2(h)(2)(iii). In addition, USCIS may require the petitioner to name H–2B workers where the name is needed to establish eligibility for H–2B nonimmigrant status. USCIS estimates that it requires less time and resources to adjudicate a petition with unnamed workers than one with named workers. USCIS runs background checks on named workers, but cannot do so for unnamed workers. After the petition is approved, the petitioner finds workers and the worker applies for a nonimmigrant visa with DOS, who will then vet the worker. Therefore, USCIS believes that it takes less time for a

[120] *See* H–1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models, *https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models* (last reviewed/updated April 3, 2017).

[121] Certain H–1B petitions may have to pay up to $6,000 in statutory fees. DHS does not have the authority to adjust the amount of these statutory fees. USCIS does not keep most of the revenue. CBP receives 50 percent of the $4,000 9–11 Response and Biometric Entry-Exit fee and the remaining 50 percent is deposited into the General Fund of the Treasury. USCIS retains 5 percent of the $1,500 or $750 American Competitiveness and Workforce Improvement Act (ACWIA) fee. The remainder goes to the Department of Labor and the National Science Foundation. USCIS keeps one third of the $500 Fraud Detection and Prevention fee, while the remainder is split between the Department of State and the Department of Labor. These statutory fees are in addition to the current Form I–129 fee of $460 and optional premium processing fee of $1,410. *See* USCIS, *H and L Filing Fees for Form I–129, Petition for a Nonimmigrant Worker, https://www.uscis.gov/forms/h-and-l-filing-fees-form-i-129-petition-nonimmigrant-worker* (last updated/reviewed Feb. 2, 2018).

[122] *See* H–2A Temporary Agricultural Workers, *https://www.uscis.gov/working-united-states/temporary-workers/h-2a-temporary-agricultural-workers* (last reviewed/updated March 8, 2018).

[123] *See* H–2B Temporary Non-Agricultural Workers, *https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers* (last reviewed/updated June 11, 2018). H–2B petitioners who file with USCIS are required to pay a $150 Fraud Detection and Prevention fee per petition regardless of the number of beneficiaries to which the petition pertains. DHS does not propose any change to this statutory fee because it lacks the authority to do so by rulemaking. *See* INA secs. 214(c)(12)–(13), 286(v); 8 U.S.C. 1184(c)(12)–(13) 1356(v). This statutory fee is in addition to the current Form I–129 fee of $460 and optional premium processing fee of $1,410.

[124] DHS OIG, *H–2 Petition Fee Structure Is Inequitable and Contributes to Processing Errors* (Mar. 6, 2017), *available at https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-42-Mar17.pdf.*

USCIS immigration services officer to adjudicate a petition with unnamed workers. The proposed fees reflect the average adjudication time estimated by USCIS.

USCIS proposes to implement a limit of 25 named beneficiaries per petition. Proposed 8 CFR 214.2(h)(2)(ii), (h)(5)(i)(B). Currently, there is no limit on the number of named or unnamed workers that may be on a single petition. USCIS currently charges a flat fee regardless of whether a petition includes one or hundreds of named temporary nonimmigrant workers. However, because USCIS completes a background check for each named beneficiary, petitions with more named beneficiaries require more time and resources to adjudicate than petitions with fewer named beneficiaries. This means the cost to adjudicate a petition increases with each additional named beneficiary. In one case, a petitioner included more than 600 named workers in one petition.[125] OIG observed that the flat fee structure (meaning the same fee regardless of the number of nonimmigrants included in the petition) disproportionally costs more per nonimmigrant for petitions with few beneficiaries compared to those with large numbers of beneficiaries. In other words, petitioners filing petitions with low named beneficiary counts subsidize the cost of petitioners filing petitions with high named beneficiary counts.

OIG's interviews of USCIS immigration services officers indicated that usually a maximum of 10 petitions could be processed within a normal workday.[126] USCIS immigration services officers could generally adjudicate a petition with 1–25 named workers in 2 hours. DHS estimates the proposed change will increase H–2A and H–2B petition filing volume by approximately 2,000 based on the number of H–2A and H–2B petitions that were received in FY 2017 with 26 or more named beneficiaries. DHS assumed that the total number of named beneficiaries requested by an employer would remain the same, so that an employer petitioning for more than 25 named beneficiaries would file multiple petitions.

The proposed fees would address the inequities in the current fee structure identified by the OIG audit. The proposed limit of 25 named beneficiaries per petition may make it easier for USCIS immigration services officers to promptly adjudicate a petition. For example, the proposed $425 fee for an H–2A petition without named workers is approximately 51 percent less than the proposed $860 fee for an H–2A petition with named workers because the adjudication requires less time. Due to the decreased complexity of the adjudication, the proposed $425 fee for a petition without named workers is $35 or 8 percent less than the current $460 fee for the Form I–129. The proposed $860 fee for a petition with named workers is $400 or 87 percent more than the current $460 fee for the Form I–129.

3. Form I–129L, Petition for Nonimmigrant Worker: L Classification

DHS proposes to create Form I–129L, Petition for Nonimmigrant Worker: L Classification, with a proposed fee of $815. *See* proposed 8 CFR 106.2(a)(3)(iv). Under current requirements, petitioners sponsoring L nonimmigrant workers, who are intracompany transferees,[127] may be required to submit additional statutory fees or other additional forms to USCIS. For example, two statutory fees may apply for L nonimmigrant workers.[128] Some petitions require the additional Form I–129S, Nonimmigrant Petition Based on Blanket L Petition.

The proposed Form I–129L would collect the information required for these petitions. Although the current L Classification Supplement to Form I–129 only separates out L–1A manager or executive from L–1B specialized knowledge, the proposed form would further separate out L–1A managers from L–1A executives on the form. However, DHS is not proposing different fees for managers and executives, because the agency has no records on the difference in completion rates or costs for processing petitions for managers and executives. USCIS currently captures completion rates for H–1B, L, and other types of petitions, but not for subgroups, such as managers and executives, within classifications. The proposed fee is based on the completion rate for the average of L–1 petitions. As mentioned in section V.I. Separating Form I–129, Petition for a Nonimmigrant Worker, into Different Forms, the proposed fees also assign the direct costs of ASVVP site visits, currently used for certain H–1B, L, and all religious workers, to the specific form for the classification.

4. Form I–129O, Petition for Nonimmigrant Worker: O Classification

DHS proposes to create Form I–129O, Petition for Nonimmigrant Worker: O Classification, with a proposed fee of $715. *See* proposed 8 CFR 106.2(a)(3)(vi). The separate form would allow USCIS to tailor instructions and data collection requirements for these petitions for persons with extraordinary ability in the sciences, arts, education, business, or athletics, persons with extraordinary achievement in the motion picture or television industry, and qualifying essential support personnel. *See* INA secs. 101(a)(15)(O), 214(c); 8 U.S.C. 1101(a)(15)(O), 1184(c); 8 CFR 214.2(o). Similar to some other proposed changes to Form I–129, DHS proposes to limit each Form I–129O petition to 25 named beneficiaries.[129] Proposed 8 CFR 214.2(o)(2)(iv)(F). As previously discussed in the H–2A and H–2B section above, limiting the number of named beneficiaries simplifies and optimizes the adjudication of these petitions, which can lead to reduced average processing times for a petition. Because USCIS completes a background check for each named beneficiary, petitions with more named beneficiaries require more time and resources to adjudicate than petitions with fewer named beneficiaries. This means the cost to adjudicate a petition increases with each additional named beneficiary. Thus, limiting the number of named beneficiaries may ameliorate the inequity of petitioners filing petitions with low beneficiary counts who effectively subsidize the cost of petitioners filing petitions with high beneficiary counts. USCIS currently captures adjudication hours for these types of petitions. As stated in section

[125] *Id.* at 13.

[126] *Id.* at 17.

[127] The L–1 intracompany transferee nonimmigrant classification permits a multinational organization to transfer certain employees from one of its affiliated foreign entities to one of its entities in the United States. The L–1A classification is for employees coming to the United States temporarily to perform services in a managerial or executive capacity. The L–1B classification is for employees coming to the United States temporarily to perform services that require specialized knowledge. *See* INA sec. 101(a)(15)(L), 8 U.S.C. 1101(a)(15)(L).

[128] Certain L petitioners may have to pay up to $5,000 in statutory fees. DHS does not have the authority to adjust the amount of these statutory fees. USCIS does not keep most of the revenue derived from these fees. CBP receives 50 percent of the $4,500 9–11 Response and Biometric Entry-Exit fee revenue and the remaining 50 percent is deposited into the General Fund of the Treasury. USCIS retains one third of the $500 Fraud Detection and Prevention fee revenue, while the remainder is split between the Department of State and the Department of Labor. These statutory fees are in addition to the current Form I–129 fee of $460 and optional premium processing fee of $1,410. *See* USCIS, *H and L Filing Fees for Form I–129, Petition for a Nonimmigrant Worker, https://www.uscis.gov/forms/h-and-l-filing-fees-form-i-129-petition-nonimmigrant-worker* (last updated/reviewed Feb. 2, 2018).

[129] While O–1 petitions are limited to a single named beneficiary, a petition for O–2 nonimmigrant workers may include multiple named beneficiaries in certain instances. *See* 8 CFR 214.2(o)(2)(iii)(F).

IV.B.2. Completion Rates, the proposed fee is partly based on this data.

5. Form I–129E&TN, Application for Nonimmigrant Worker: E and TN Classification

DHS proposes to create a separate Form I–129 supplement for E and TN applicants entitled Form I–129E&TN, Application for Nonimmigrant Worker: E and TN Classification. The Treaty Trader (E–1) and Treaty Investor (E–2) classifications are for citizens of countries with which the United States maintains treaties of commerce and navigation. The applicant must be coming to the United States to engage in substantial trade principally between the United States and the treaty country (E–1), to develop and direct the operations of an enterprise in which the applicant has invested or is in the process of investing a substantial amount of capital (E–2), or to work in the enterprise as an executive, supervisor, or essentially skilled employee. *See* INA sec. 101(a)(15)(E), 8 U.S.C. 1101(a)(15)(E); 8 CFR 214.2(e). An E–2 CNMI or E–2C investor is a noncitizen who seeks to enter or remain in the Commonwealth of the Northern Mariana Islands (CNMI) in order to maintain an investment in the CNMI that was approved by the CNMI government before November 28, 2009. This classification allows an eligible noncitizen to be lawfully present in the CNMI in order to maintain the investment during the transition period from CNMI to federal immigration law, which was extended by Public Law 115–218, sec. 3(a) on July 24, 2018 and will expire on December 31, 2029. *See* 48 U.S.C. 1806; *proposed* 8 CFR 214.2(e)(23). The E–3 classification applies to nationals of Australia who are coming to the United States solely to perform services in a specialty occupation requiring theoretical and practical application of a body of highly specialized knowledge and at least the attainment of a bachelor's degree, or its equivalent, as a minimum for entry into the occupation in the United States. *See* INA secs. 101(a)(15)(E) and 214(i)(1); 8 U.S.C. 1101(a)(15)(E) and 1184(i)(1). The TN Classification was created to implement part of a trilateral North American Free Trade Agreement (NAFTA) between Canada, Mexico, and the United States. In accordance with the NAFTA, a citizen of Canada or Mexico who seeks temporary entry as a business person to engage in business activities at a professional level may be admitted to the United States. *See* INA sec. 214(e), 8 U.S.C. 1184(e); 8 CFR 214.6; proposed 8 CFR 106.2(a)(3)(viii).

6. Form I–129MISC, Petition for Nonimmigrant Worker: H–3, P, Q, or R Classification

DHS proposes to create a new form for the remaining non-immigrant worker classifications, called Form I–129MISC, Petition for Nonimmigrant Worker: H–3, P, Q, or R Classification. The costs used to determine the proposed fee for this form aggregate all identifiable costs associated with the adjudication of these different visa classifications, including the costs of administering site visits for R visa workers under the Administrative Site Visit and Verification Program. As previously discussed in sections 2 and 4, DHS proposes for classifications that allow one petition to be filed for multiple beneficiaries, to limit such petitions to 25 named beneficiaries. Proposed 8 CFR 214.2(p)(2)(iv)(F). As stated previously, this change, as with all new I–129 form types, is expected to simplify and optimize the adjudication of these petitions, which is expected to lead to reduced processing times and reduced completion rates. Because USCIS completes a background check for each named beneficiary, petitions with more beneficiaries require more time and resources to adjudicate than petitions with fewer named beneficiaries. This means the cost to adjudicate a petition increases with each additional named beneficiary. Thus, limiting the number of named beneficiaries may ameliorate the inequity of petitioners filing petitions with low beneficiary counts who effectively subsidize the cost of petitioners filing petitions with high beneficiary counts. USCIS does not have separate completion rates for the proposed Forms I–129E&TN and I–129MISC. Currently, USCIS adjudicators report hours on these classifications in a catch-all Form I–129 category. Creation of new separate forms may allow USCIS to track each separately and calculate specific fees for each petition or application in the future, which could serve as a basis for further refinement of the fee for the various nonimmigrant classifications in future fee rules. The proposed fee for both Forms I–129E&TN and I–129MISC is $705. *See* proposed 8 CFR 106.2(a)(3)(viii).

7. Commonwealth of the Northern Mariana Islands (CNMI) Fees

Two recent public laws affected statutory fees for the Commonwealth of the Northern Mariana Islands (CNMI). The Northern Mariana Islands Economic Expansion Act, Public Law 115–53, sec. 2, 131 Stat. 1091, 1091 (2017) (2017 CNMI Act) increased the CNMI education funding fee from $150 to $200. *See* 48 U.S.C. 1806(a)(6)(A)(i). USCIS began accepting this increased fee on August 23, 2017.[130] DHS proposes to make conforming edits to the fee for the Petition for a CNMI-Only Nonimmigrant Transitional Worker, Form I–129CW, because of this statutory change. *See* 8 CFR 103.7(b)(1)(i)(J); proposed 8 CFR 106.2(c)(7). Employers must pay the fee for every beneficiary that they seek to employ as a CNMI-only transitional worker. The fee must be paid at the time of filing the petition. By statute, since it is for each worker approved, USCIS refunds the CNMI education funding fee if the petition is not approved. The fee is a recurring fee that petitioners must pay every year. A prospective employer requesting issuance of a permit with a validity period longer than one year must pay the fee for each year of requested validity. USCIS transfers the revenue from the CNMI education funding fee to the treasury of the Commonwealth Government to use for vocational education, apprenticeships, or other training programs for United States workers. The Northern Mariana Islands U.S. Workforce Act of 2018, Public Law 115–218, sec. 3, 132 Stat. 1547 (2018) (2018 CNMI Act), granted DHS the authority to adjust the fee for inflation. *See* 48 U.S.C. 1806(a)(6)(A)(ii). Beginning in FY 2020, DHS may adjust the $200 CNMI education funding fee once per year by notice in the **Federal Register**.[131] The adjustment must be based on the annual change in the Consumer Price Index for All Urban Consumers (CPI–U) published by the Bureau of Labor Statistics. *See* proposed 8 CFR 106.2(c)(7)(iii).

In addition to authorizing inflation adjustments for the CNMI education funding fee, the 2018 CNMI Act created a new $50 CNMI fraud prevention and detection fee. 2018 CNMI Act, sec. 3 (amending 48 U.S.C. 1806(a)(6)(A)(iv)). The new $50 fraud prevention and detection fee is in addition to other fees that employers must pay for petitions to employ CNMI-only transitional workers. *See* proposed 8 CFR 106.2(c)(6). USCIS began accepting the fee on July 25,

[130] USCIS, *New Legislation Increases Availability of Visas for CNMI Workers for Fiscal Year 2017, https://www.uscis.gov/news/news-releases/new-legislation-increases-availability-visas-cnmi-workers-fiscal-year-2017* (last reviewed/updated on Aug. 28, 2017).

[131] Beginning in fiscal year 2020, the Secretary of Homeland Security, through notice in the **Federal Register**, may annually adjust the supplemental fee imposed under clause (i) by a percentage equal to the annual change in the Consumer Price Index for All Urban Consumers published by the Bureau of Labor Statistics. 48 U.S.C. 1806(a)(6)(A)(ii).

2018.[132] The new fee is only due at the time of filing. It is a single $50 fee per petition, not a fee charged per beneficiary like the CNMI education funding fee. USCIS must use the revenue for preventing immigration benefit fraud in the CNMI, in accordance with INA section 286(v)(2)(B), 8 U.S.C. 1356(v)(2)(B). *See also* 48 U.S.C. 1806(a)(6)(A)(iv), as amended by 2018 CNMI Act, sec. 3.

DHS also proposes conforming edits to CNMI regulations regarding fee waivers and biometric services. Currently, some CNMI applicants and beneficiaries may qualify for a fee waiver based on inability to pay or other reasons. *See* 8 CFR 214.2(e)(23)(xv), (w)(5), and (w)(14)(iii). Generally, fee waivers are not available for employment-based applications and petitions. However, when DHS established the CW–1 petition fees, it decided to treat the CNMI with more flexibility in this regard. *See* 76 FR 55513–4. As discussed in section V.C., Fee Waivers, DHS proposes to limit fee waivers to immigration benefit requests for which USCIS is required by law to consider a fee waiver. DHS proposes in this rule to treat CW–1 petitions like other employment-based petitions. *See* proposed 8 CFR 106.3. The proposed change would eliminate fee waiver eligibility for CNMI applicants and beneficiaries. *See* proposed 8 CFR 214.2(e)(23)(xv), (w)(5) and (w)(14)(iii). Currently, in addition to the petition fee paid by their employer, CNMI beneficiaries may pay an additional biometric services fee when seeking a grant or extension of CW–1 status in the CNMI. *See* 76 FR 55513–4; 8 CFR 214.2(e)(23)(viii) and (w)(15). As explained in section V. E., Changes to Biometric Services Fee, DHS proposes to incorporate the cost of biometric services into the underlying immigration benefit request fees. This proposed change would place the entire financial burden for CNMI petition fees on the employer, eliminating any fees paid by the employee. *See* proposed 8 CFR 106.2, 214.2(v)(23)(viii) and (w)(15). However, employees and their families filing Form I–539 to request a grant or extension of derivative CW–2 nonimmigrant status for a spouse or child of a CW–1 nonimmigrant would still be responsible for that filing fee. A fee waiver would no longer be available.

DHS does not propose to limit the number of named beneficiaries included in a single I–129CW filing.

J. Premium Processing

1. Change Premium Processing Fee by Guidance

The INA permits certain employment-based immigration benefit applicants and petitioners to request, for an additional fee, premium processing. *See* Public Law 106–553, App. B, tit. I, sec. 112, 114 Stat. 2762, 2762A–68 (Dec. 21, 2000); INA sec. 286(u), 8 U.S.C. 1356(u). Congress set the premium processing fee and authorized USCIS to adjust the fee for inflation, as determined by the Consumer Price Index (CPI). *Id.* DHS recently increased the premium processing fee for inflation. *See* 83 FR 44449; 8 CFR 103.7(b)(1)(i)(SS); proposed 8 CFR 106.4. The current fee is $1,410.[133] USCIS currently offers premium processing to employment-based petitions including Form I–129, Petition for Nonimmigrant Worker, and Form I–140, Immigrant Petition for Alien Worker, in certain visa classifications. Currently, petitioners and applicants use Form I–907, Request for Premium Processing Service, and pay the $1,410 fee to request 15-day processing. DHS is not proposing a change to premium processing fees at this time.

DHS proposes to amend its regulations so that it can notify the public of future premium processing fee inflationary increases through changes to Form I–907 instructions (following the requirements of 5 CFR part 1320) and the USCIS website, *http://www.uscis.gov*. *See* proposed 8 CFR 106.2(a)(43), 106.4(c) and 106.4(e)(ii). By law, DHS may adjust the premium processing fee for inflation according to CPI; therefore, the amount of the fee increase is straightforward and need not be codified. USCIS requires the flexibility to change the fee amount without undue delay when it needs additional premium processing fee revenue to provide premium processing services and to make infrastructure improvements in the adjudications and applicant- or petitioner-service processes as authorized by INA sec. 286(u), 8 U.S.C. 1356(u).

2. Change Calendar Days to Business Days

DHS proposes to change the limitation for 15-day processing currently codified at 8 CFR 103.7(e) from calendar days to business days. Proposed 8 CFR 106.4(d). For purposes of calculating the 15-day premium processing clock, business days are those days on which the Federal Government is open for business and does not include weekends, federally observed holidays, or the days on which Federal Government offices are closed, such as for weather-related or other reasons. The closure may be nationwide or in the region where the adjudication of the benefit for which premium processing is sought will take place. The former INS established the 15-day period in June 2001. *See Establishing Premium Processing Service for Employment-Based Petitions and Applications,* 66 FR 29682 (June 1, 2001). The June 1, 2001 rule cited the District of Columbia Appropriations Act of 2001, Public Law 106–553, as specifying that the INS was required to process applications under the Premium Processing Service in 15 calendar days. 66 FR 29682. DHS has determined that the June 1, 2001 interim rule was incorrect, and that the District of Columbia Appropriations Act, 2001 did not include a requirement that the Service process applications under the Premium Processing Service in 15 calendar days. Therefore, DHS is free to interpret its authority under INA section 286(u), 8 U.S.C. 1356(u), to establish a new processing timeframe as 15 business days rather than 15 calendar days. In recent years, USCIS suspended premium processing for certain categories of employment-based petitions to permit officers to process long-pending non-premium filed petitions and to prevent a lapse in employment authorization for beneficiaries of Form I–129 extension of stay petitions. In certain instances, USCIS has been unable to accomplish the required 15-day response due to the high volume of incoming petitions and a significant surge in premium processing requests.[134] The proposed change from 15 calendar days to 15 business days will provide USCIS

[132] USCIS, *New Law Extends CNMI CW–1 Program, Mandates New Fraud Fee, and Will Require E-Verify Participation, https://www.uscis.gov/news/alerts/new-law-extends-cnmi-cw-1-program-mandates-new-fraud-fee-and-will-require-e-verify-participation* (last reviewed/updated on July 25, 2018).

[133] Premium processing fees are paid in addition to the regular form fee. *See* INA sec. 286(u), 8 U.S.C. 1356(u); 8 CFR 103.7(b)(1)(i)(SS)(1); proposed 8 CFR 103.4. For example, individuals would pay the proposed $545 fee for a Form I–140 under this rule, plus $1,410 for premium processing. Premium processing prioritizes the applicable application or petition for adjudication. The additional fee permits USCIS to devote specific resources to the processing of that immigration benefit request and to make infrastructure improvements in the adjudications and customer-service processes.

[134] *See* ‘‘USCIS Will Temporarily Suspend Premium Processing for All H–1B Petitions, *https://www.uscis.gov/archive/uscis-will-temporarily-suspend-premium-processing-all-h-1b-petitions* (last reviewed/updated March 3, 2017); USCIS Will Temporarily Suspend Premium Processing for Fiscal Year 2019 H–1B Cap Petitions, *https://www.uscis.gov/news/alerts/uscis-will-temporarily-suspend-premium-processing-fiscal-year-2019-h-1b-cap-petitions* (last reviewed/updated March 20, 2018).

additional time to complete the necessary processing on a premium processing petition and issue a decision. The additional time may also reduce the need for USCIS to suspend premium processing when request filing volumes are high.

3. Actions That End or Restart The 15-Day Period

DHS also proposes that USCIS would refund the premium processing service fee but continue to process the case if it cannot take an adjudicative action on the request, as evidenced by notification of (but not necessarily receipt of) an approval or denial notice by the end of the 15th business day, beginning on the date the properly filed premium processing request was initially accepted by USCIS or the premium processing clock reset upon receipt of a response to a request for evidence (RFE) or notice of intent to deny (NOID). Proposed 8 CFR 106.4(d). That proposal represents no change, other than how the 15 days is calculated, from the current regulations governing USCIS requests for premium processing. 8 CFR 103.7(e). However, DHS also proposes to clarify its current premium processing regulations as they relate to what actions would terminate the 15-day period or otherwise start a new 15-day period. The current regulation is potentially confusing because it includes interim actions in the list of adjudicative actions evidencing of a ''final decision'' for the purpose of stopping the 15-day period. 8 CFR 103.7(e)(2)(i) (''If USCIS cannot reach a final decision on a request for which premium processing was requested, as evidenced by an approval notice, denial notice, a notice of intent to deny, or a request for evidence, USCIS will refund the premium processing service fee, but continue to process the case.''). In this rule, DHS proposes to clarify the two circumstances in which it would refund the premium processing fee:

1. Where USCIS does not take any adjudicative action within 15 business days from the date on which it accepts a properly filed request for premium processing, together with all required fees, or

2. Where USCIS does not take subsequent adjudicative action within 15 business days from the date on which USCIS receives a response to an RFE or a NOID.

DHS proposes that the 15-day period will stop when USCIS takes certain adjudicative actions, specifically the notification of an approval, denial, RFE or NOID. Proposed 8 CFR 106.4(d)(1). DHS also proposes to clarify that when USCIS issues an RFE or NOID on a benefit request for which premium processing service has been properly requested, including the payment of all required fees, a new 15 business day period will begin upon the receipt by USCIS of the benefit requestor's RFE or NOID response at the address that was required by the notice or online. Proposed 8 CFR 106.4(d)(2).

4. Expedited Processing for Other Requests

Commenters regularly request that DHS extend premium processing to other immigration benefit requests. *See, e.g.,* 75 FR 58978 and 81 FR 73309. The FY 2019/2020 fee review did not analyze the potential effect of premium processing for other forms. Congress established the premium processing service for ''employment-based petitions and applications.'' INA sec. 286(u), 8 U.S.C. 1356(u). Congress established the premium processing fee at an amount it determined to be appropriate, and it permitted USCIS to increase the fee based on inflation. *See* 81 FR 73309. These fees cover the estimated costs of providing premium processing for the associated benefits. Nevertheless, it would be difficult to estimate the staff, resources, and costs necessary to ensure the processing of additional benefit types within a certain time frame, especially when those cases may require other types of background checks, interviews, and additional steps that USCIS does not generally control. Expanding the premium processing program would require USCIS to estimate the costs of a service that does not currently exist with sufficient confidence that it can deliver the service promised and not impair service in other product lines. DHS would require the devotion of considerable resources to study a potential new premium processing program. Thus, DHS proposes no extension of premium processing beyond its current usage. However, comments are welcome on the subject.

K. Regional Centers

DHS proposes no fee change for Form I–924, Application for Regional Center Designation under the Immigrant Investor Program because the current fee is adequate. *See* 8 CFR 103.7(b)(1)(i)(WW); proposed 106.2(a)(47).

L. Secure Mail Initiative

In 2016, an OIG audit recommended that USCIS evaluate the costs and benefits of using the U.S. Postal Service's hold for pickup as an alternative secure method for delivering secure documents to applicants.[135] USCIS has decided to implement Signature Confirmation Restricted Delivery (SCRD) as the sole method of delivery of secure documents for USCIS.[136] Proposed 8 CFR 103.2(b)(19)(iii). USCIS began phasing in use of the Signature Confirmation Restricted Delivery service to re-mail Permanent Resident Cards, Employment Authorization Cards, and Travel Booklets returned by USPS as non-deliverable beginning on April 30, 2018.[137] USCIS analyzed the additional costs associated with expanding this service to all USCIS secured documents and determined that the cost in FY 2019 would be $26.9 million, based on anticipated mailing volumes and the per unit mailing cost of the service. USCIS planned for similar costs in FY 2020. As detailed in the supporting documentation, the ABC model assigned this additional cost to the Issue Document activity for immigration benefit requests that may result in a Permanent Resident Card, Employment Authorization Card, or Travel Booklet. Issue Document means producing and distributing secure cards that identify the holder as a foreign national and also identifies his or her immigration status and/or employment authorization.[138] As proposed, DHS, at its discretion, may require the use of Signature Confirmation Restricted Delivery for additional documents beyond Permanent Resident Cards, Employment Authorization Cards, and Travel Booklets (for example, certificates of naturalization and citizenship, which are currently being mailed to recipients) in the future by updating the relevant form instructions. Proposed 8 CFR 103.2(b)(19)(iii).

M. Intercountry Adoptions

1. Adjustment to Proposed Fees for Certain Intercountry Adoption-Specific Forms

DHS proposes to limit the increase of adoption-related fees in this rule

[135] DHS OIG, *Better Safeguards are Needed in USCIS Green Card Issuance* (Nov. 16, 2016), *available at https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-11-Nov16.pdf.*

[136] DHS OIG, *Verification Review: Better Safeguards are Needed in USCIS Green Card Issuance* (Apr. 10, 2018), *available at https://www.oig.dhs.gov/sites/default/files/assets/2018-04/OIG-18-61-Apr18.pdf.*

[137] USCIS, *USCIS to Begin Using More Secure Mail Delivery Service, https://www.uscis.gov/news/news-releases/uscis-begin-using-more-secure-mail-delivery-service* (last reviewed/updated April 27, 2018).

[138] See the FY 2019/2020 Immigration Examinations Fee Account Fee Review Supporting Documentation included in the docket of this NPRM for more information on fee review activities.

consistent with previous fee rules. *See, e.g.,* 81 FR 73298. DHS will continue its policy of reducing fee burdens on adoptive families by covering some of the costs attributable to the adjudication of certain adoption-related petitions and applications (Forms I–600/600A/800/800A) through the fees collected from other immigration benefit requests. If DHS used the estimated fee-paying unit cost from the ABC model for Form I–600, then this benefit request would have a fee of at least $1,423.[139] DHS believes that it would be contrary to public and humanitarian interests to impose a fee of this amount on prospective adoptive parents seeking to adopt a child from another country. Therefore, DHS proposes to apply the 5 percent weighted average increase to the current fee of $775, representing a $35 increase to $810 for Forms I–600/600A/800/800A. Proposed 8 CFR 106.2(b)(21), (22), (23), (33), (34), (35).

2. Clarification of Fee Exception for Birth Siblings

DHS proposes amendments to 8 CFR 106.2, 204.3, and 204.313 to clarify the regulations and align them with current practice regarding when prospective adoptive parents are not required to pay the Form I–600 or Form I–800 filing fee for multiple Form I–600 or Form I–800 petitions. Currently, prospective adoptive parents with a valid Form I–600A or Form I–800A approval to adopt more than one child are not required to pay a fee for the first Form I–600 or Form I–800 petition. They are required to pay the Form I–600 or Form I–800 filing fee for additional Form I–600 or Form I–800 petitions, unless the beneficiaries are birth siblings. If the beneficiaries are not birth siblings, the Form I–600 or Form I–800 fee is required for each petition after the first. To align with current and historical practice, DHS proposes to clarify in the regulations that this exception is limited to ''birth'' siblings. This approach is consistent with the special treatment afforded in the INA to ''natural siblings,'' which allows a Form I–600 or Form I–800 petition to be filed for a child up to age 18, rather than age 16, only if the beneficiary is the ''natural sibling'' of another foreign born child who has immigrated (or will immigrate) based on adoption by the same adoptive parents. INA 101(b)(1)(F)(ii) and (G)(iii); 8 U.S.C. 1101(b)(1)(F)(ii) and (G)(iii). While the INA uses the term ''natural sibling,'' DHS generally uses the term ''birth siblings'' synonymously, which includes half-siblings but does not include adoptive siblings.

3. Suitability and Eligibility Approval Validity Period

DHS proposes amendments to 8 CFR 204.3 relating to orphan cases under INA section 101(b)(1)(F), 8 U.S.C. 1101(b)(1)(F) (non-Convention cases). The proposed revisions to the orphan regulations are necessary to eliminate disparity between the 18-month approval period for the Form I–600A, Application for Advance Processing of an Orphan Petition, the 15-month validity period of FBI fingerprint clearances, and the 15-month approval period for a Form I–800A, Application for Determination of Suitability to Adopt a Child from a Convention Country and any approved extension.

Under current regulation, the approval of a Form I–600A in an orphan case is valid for 18 months. *See* 8 CFR 204.3(h)(3)(i). However, standard USCIS policy has been that the FBI's clearance of a person's fingerprints is valid for 15 months, thereby creating inconsistency and a gap period with the 18-month approval validity period for the Form I–600A. This inconsistency was partially resolved with the ratification of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention) and subsequent codification of 8 CFR 204.312(e)(1), whereby the initial approval period for a Form I–800A in a Convention case is 15 months from the date USCIS received the initial FBI response for the fingerprints of the prospective adoptive parent(s) and any adult members of the household. This 15-month period also applies to the extension of the Form I–800A approval period for an additional 15 months from the date USCIS receives the new FBI response on the fingerprints. Creating parity in the approval periods for suitability and eligibility determinations provides additional protections for adopted children and provides consistency and alignment of the orphan and Hague regulations. Having a standardized 15-month validity period will also alleviate the burden on prospective adoptive parents and adoption service providers to manage and monitor multiple expiration dates. Therefore, DHS proposes to alter the validity period for a Form I–600A approval in an orphan case to 15 months. Proposed 8 CFR 204.3(b), (d), (h)(3)(i),[140] (h)(7), & (h)(13).

4. Form I–600A/I–600, Supplement 3, Request for Action on Approved Form I–600A/I–600

DHS proposes to create a new form to further align the processes for adoptions from countries that are party to the Hague Adoption Convention, with the process for adoptions from countries that are not party to that Convention. The proposed form name is Form I–600A/I–600, Supplement 3, Request for Action on Approved Form I–600A/I–600. The proposed fee is $405. Proposed 8 CFR 106.2(b)(23). As discussed in the Paperwork Reduction Act section of this preamble, the draft Supplement 3 is posted in the docket of this rulemaking for the public to review and provide comments.

Currently, U.S. citizen applicants and petitioners (prospective adoptive parents) face somewhat different processes depending on whether the child or children that they wish to adopt is from a Hague Adoption Convention country or a non-Hague Adoption Convention country. USCIS uses Forms I–800, I–800A, and I–800A Supplement 3 for Hague Adoption Convention countries. USCIS uses Forms I–600 and I–600A for non-Hague Adoption Convention countries. A fee for Form I–600A/I–600 Supplement 3 would further align the Form I–600A/I–600 post-approval request process with the existing Form I–800A process in four key areas:

1. Suitability & Eligibility Extensions;
2. New Approval Notices;
3. Change of Country; and
4. Duplicate Approval Notices.

USCIS adjudicators must re-assess whether prospective adoptive parents are still suitable and eligible to adopt if the prospective adoptive parents' circumstances have changed after the initial USCIS suitability determination. The proposed fee would help recover some of the cost for this work.

Table 12 and the following sections summarize the current process and the proposed changes.

---

[139] Model output from supporting documentation in the docket, page 22.

[140] In addition to changing the 18-month period to 15 months, DHS is removing the internal procedure from 8 CFR 204.3(h)(3)(i) that provides where documents will be forwarded and notification of overseas offices of the approval, and is correcting a reference to the number of children the prospective adoptive parents are approved for in the home study to refer to the number of children the prospective adoptive parents are approved for in the Form I–600A approval. DHS is also adding a reference to proposed 8 CFR 106.2(a)(23) in section 204.3(h)(3)(i), relating to Form I–600A extension requests. Additionally, DHS is replacing the reference to an outbreak of Severe Acute Respiratory Syndrome in section 204.3(h)(3)(ii) with a more general reference to public health or other emergencies. This revision will provide the agency with the flexibility to extend Form I–600A validity periods when it determines that an emergency situation, other than a SARS outbreak, prevents petitioners from timely filing a Form I–600 petition before expiration of their Form I–600A approval.

TABLE 12—SUMMARY OF CURRENT AND PROPOSED ADOPTION PROCESSES RELATED TO PROPOSED FORM I–600A/I–600 SUPPLEMENT 3

Type of change	Current process	Proposed process
Suitability & Eligibility Extensions.	The Form I–600A approval notice reflects a validity period for the prospective adoptive parents' suitability and eligibility determination. Currently, U.S. citizen applicants (prospective adoptive parents) may request one initial extension of their Form I–600A approval without fee by submitting a request in writing. Prospective adoptive parents are not able to request a second or subsequent extension of their Form I–600A approval.	DHS proposes to require prospective adoptive parents to submit Form I–600A/I–600, Supplement 3 to request the initial no-fee extension. Form I–600A/I–600 Supplement 3 would allow prospective adoptive parents to request second or subsequent extensions with the proposed fee.
Home Study Updates	Currently, prospective adoptive parents can request a new approval notice based on a significant change and updated home study with no fee. New approvals require adjudicators to re-assess whether prospective adoptive parents remain suitable and eligible to adopt after the significant change in circumstances. (For example, significant decreases in finances, change of residence, other changes in the household, etc.) Prospective adoptive parents must pay the fee for Form I–600A or I–600 if it is a second or subsequent request unless they are also requesting their first (no fee) extension or first (no fee) change of country.	DHS proposes to require prospective adoptive parents to submit Form I–600A/I–600, Supplement 3 to request a new approval notice. The prospective adoptive parent must pay the fee unless they are also filing a first time request for either an extension or change of country. Second or subsequent requests would require the proposed fee.
Change of Country	Currently, prospective adoptive parents may change their proposed country of adoption once without fee. For example, if they are matched with an eligible orphan in a country other than the country initially identified on their Form I–600A. For subsequent country changes, prospective adoptive parents file Form I–824, Application for Action on an Approved Application or Petition, with fee.	DHS proposes to require prospective adoptive parents to submit Form I–600A/I–600, Supplement 3 to request the initial no-fee change of proposed country of adoption.* [141] Form I–600A/I–600 Supplement 3 would allow prospective adoptive parents to request a second or subsequent change in the proposed country of adoption with the proposed fee.

* See d. below for limitations in Hague Adoption Convention transition cases and countries.

a. Suitability & Eligibility Extensions

Currently, U.S. citizen prospective adoptive parents for non-Hague Adoption Convention countries may request no-fee initial extension of their Form I–600A approval.[142] Requests are submitted in writing and second or subsequent requests to extend their approval are not allowed. *See* 8 CFR 103.7(b)(1)(i)(Z)(*3*). DHS proposes that prospective adoptive parents be allowed to request more than one extension of their Form I–600A approval, if necessary, by filing the proposed Form I–600A/I–600 Supplement 3. The first request would be free under this proposal. Second or subsequent requests would require the proposed fee of $405. *See* proposed 8 CFR 106.2(a)(23).

b. New Approval Notices

Currently, prospective adoptive parents using the non-Hague Adoption Convention process may request a new approval notice based on a significant change in circumstances and an updated home study at no cost. *See* 8 CFR 103.7(b)(1)(i)(Z). DHS proposes that prospective adoptive parents must file the proposed Form I–600A/I–600 Supplement 3 to notify USCIS of a significant change and request a new approval notice. *See* proposed 8 CFR 106.2(a)(23). The prospective adoptive parent must pay the proposed fee of $405 unless they are also filing either a first time request for an extension or change of country on the same Supplement 3.

c. Change of Country

Currently, prospective adoptive parents may change the proposed country of adoption once without fee and may make subsequent country changes by filing Form I–824, Application for Action on an Approved Application or Petition, with fee. *See* 8 CFR 103.7(b)(1)(i)(OO). DHS proposes that prospective adoptive parents be allowed to change the proposed country of adoption by filing the proposed Form I–600A/I–600 Supplement 3. The first request to change countries would remain without fee under this proposal. Second or subsequent requests would require the proposed fee of $405. *Id.*

d. Hague Adoption Convention Transition Cases

DHS proposes to clarify the processes for requesting an extension of the Form I–600A approval and other actions on an approved Form I–600A or I–600 as they pertain to adoptions from countries that newly become a party to the Hague Adoption Convention. When the Hague Adoption Convention enters into force for a country, cases that meet certain criteria are generally permitted by the new Convention country to proceed as ''transition cases'' under the non-Hague Adoption Convention process (Form I–600A and Form I–600 process). Provided that the new Convention country agrees with the transition criteria, USCIS will generally consider a case to be a transition case if, before the date the Convention entered into force for the country, the prospective adoptive parent(s): (1) Filed a Form I–600A that designated the transition country as the intended country of adoption or did not designate a specific country; (2) filed a Form I–600 on behalf of a beneficiary from the transition country; or (3) completed the adoption of a child from the transition country. If the case does not qualify as a transition case, the prospective adoptive parents will generally need to follow the Hague

[141] See section V.M.4.d. for limitations in Hague Adoption Convention transition cases and countries.

[142] The Form I–600A approval notice reflects the validity period of the prospective adoptive parents' suitability and eligibility determination.

Adoption Convention process with the filing of Form I–800A and Form I–800. With the addition of the new Form I–600A/I–600 Supplement 3, DHS proposes to codify certain limitations on when the Supplement 3 can be used in the context of transition cases.

i. Suitability and Eligibility Extensions

If a case qualifies as a transition case based on the filing of Form I–600A before the entry into force date, in order to continue as a transition case the prospective adoptive parents must file the Form I–600 petition while the Form I–600A approval remains valid. Currently, prospective adoptive parents are permitted to request a one-time, no-fee extension of their Form I–600A approval in order to remain a transition case. As discussed in section a.) above, DHS proposes that prospective adoptive parents may request more than one extension of their Form I–600A approval outside of the transition context. DHS proposes that prospective adoptive parents may only be permitted to request a one-time extension of their Form I–600A approval as a qualified transition case. *See* proposed 8 CFR 106.2(a)(23). Generally, transition countries have requested that DHS limit the ability of transition cases to continue indefinitely in order to limit the confusion that having two simultaneously running processes causes to its administrative bodies and judicial systems. This will provide prospective adoptive parents who have taken certain steps to begin the intercountry adoption process with a country before the Convention entered into force additional time to complete the adoption process under the non-Hague process, but reasonably limits the ability to indefinitely extend the validity period of the Form I–600A approval and the processing of transition cases under the non-Hague process.

ii. Change of Country

The transition criteria were generally designed to permit prospective adoptive parents who had taken certain steps to begin the intercountry adoption process with a country before the Convention entered into force to be able to continue under the non-Hague process, rather than requiring them to begin under the Hague process, which has different processing requirements. If the prospective adoptive parents designated a country of intended adoption on their Form I–600A or prior change of country request other than the transition country, they generally would not fall into the category of families the transition criteria were intended to reach because the designation is an indication they have begun the intercountry adoption process with the designated country and not with the transition country. Therefore, in the transition context, prospective adoptive parents who designated a country on their Form I–600A or prior change of country request that is not the transition country generally have not been permitted to change their Form I–600A approval to a transition country for purposes of being considered a transition case. DHS proposes to codify this limitation in this rule. *See* proposed 8 CFR 106.2(a)(23).

iii. Requests To Increase the Number of Children Approved To Adopt

Outside of the transition context, prospective adoptive parents are generally permitted to request an updated Form I–600A approval notice to increase the number of children they are approved to adopt. In the transition context, however, prospective adoptive parents with transition cases generally have not been permitted to request an increase in the number of children they are approved to adopt from a transition country.[143] However, unless prohibited by the new Convention country, DHS will permit prospective adoptive parent(s) to request an updated Form I–600A approval notice to increase the number of children they are approved to adopt as a transition case only in order to pursue the adoption of a birth sibling, provided the birth sibling(s) is (are) identified and the Form I–600 petition is filed before the Form I–600A approval expires. *See* proposed 8 CFR 106.2(a)(23). This approach is consistent with the special treatment afforded in the INA to ''natural siblings,'' which allows a Form I–600 or Form I–800 petition to be filed for a child up to age 18, rather than age 16, only if the beneficiary is the ''natural sibling'' of another foreign born child who has immigrated (or will immigrate) based on adoption by the same adoptive parents. INA 101(b)(1)(F)(ii) and (G)(iii); 8 U.S.C. 1101(b)(1)(F)(ii) and (G)(iii). While the INA uses the term ''natural sibling,'' DHS generally uses the term ''birth siblings'' synonymously, which includes half-siblings but does not include adoptive siblings.

5. Form I–800A, Supplement 3, Request for Action on Approved Form I–800A

DHS also proposes to provide a fee of $405 at 8 CFR 106.2 and clarify 8 CFR 204.312 to align with the current process for adjudicating Form I–800A Supplement 3. Currently, prospective adoptive parents may request a first extension of the Form I–800A approval and a first time change in the proposed country of adoption, by filing Form I–800A Supplement 3 without a fee. Second or subsequent requests for an extension or change of country can currently be made by filing Form I–800A Supplement 3 with a fee. Additionally, prospective adoptive parents can currently request a new approval notice based on a significant change and updated home study by filing Form I–800A Supplement 3. A request for a new approval notice must be submitted with a fee, unless the prospective adoptive parents are also filing a first time request for either an extension or change of country on the same Supplement 3. When DHS implemented the Hague Adoption Convention, as a matter of operational efficiency USCIS decided to accept Form I–800A Supplement 3 extension requests regardless of whether the Form I–800 petition was already filed, rather than requiring prospective adoptive parents to file a new Form I–800A to begin the process anew. That procedure generally shortens the subsequent suitability and eligibility adjudication process for prospective adoptive parents seeking an extension of their Form I–800A approval, as Supplement 3 adjudications are generally prioritized over new Form I–800A filings, allowing for a new decision on the prospective adoptive parents' suitability and eligibility to occur more quickly. Therefore, DHS proposes to amend 8 CFR 204.312(e)(1)(i) to permit the filing of Form I–800A Supplement 3 regardless of whether Form I–800 has been filed.

N. Changes to Genealogy Search and Records Requests

DHS proposes changes to the genealogy search and request fees in the FY 2019/2020 IEFA fee review. These proposals will allow USCIS to send pre-existing digital records as part of a response to requestors who have filed Form G–1041, Genealogy Index Search Request, and may otherwise help USCIS improve genealogy processes.

The USCIS genealogy program processes requests for historical records of deceased individuals. *See* Establishment of a Genealogy Program, 73 FR 28026 (May 15, 2008) (final rule). Before creating a genealogy program, USCIS processed the requests as Freedom of Information Act (FOIA) request workload, which resulted in delays. *See* Establishment of a Genealogy Program, 71 FR 20357–8 (Apr. 20, 2006) (proposed rule).

[143] *See https://www.uscis.gov/adoption/country-information/adoption-information-haiti.*

Requestors use the USCIS website [144] or Form G–1041, Genealogy Index Search Request, to request an index search of USCIS historical records. *See* 8 CFR 103.7(b)(1)(i)(E). USCIS informs the requestor whether any records are available by mailing a response letter. Requestors use the Form G–1041A, Genealogy Records Request, to obtain copies of USCIS historical records, if they exist. *See* 8 CFR 103.7(b)(1)(i)(F).

In the FY 2016/2017 fee rule, USCIS adopted the first change to the genealogy search and records requests fees since they had been established at $65 fee for both search requests and records requests. *See* 81 FR 73304. At the time, genealogy fees were insufficient to cover the full costs of the genealogy program. USCIS increased the fee to meet the estimated cost of the program and permit USCIS to respond to requests for such historical records and materials.

After nearly ten years of operating the genealogy program, DHS proposes to make several changes to the process. Ultimately, these changes are intended to allow USCIS to provide genealogy search results and historic records more quickly when pre-existing digital records exist.

First, DHS proposes to expand the use of online genealogy requests. DHS proposes to revise genealogy regulations to encourage requestors to submit the electronic versions of Form G–1041, Genealogy Index Search Request, and Form G–1041A, Genealogy Records Request, through the online portal at *https://www.uscis.gov/genealogy*. *See* proposed 8 CFR 103.40(b). Electronic versions of the requests reduce the administrative burden on USCIS by eliminating the need to manually enter requestor data into its systems. Requestors that cannot submit the forms electronically may still submit paper copies of both forms with the required filing fees.

Second, DHS proposes to change the search request process so that USCIS may provide requestors with pre-existing digital records, if they exist, in response to a Form G–1041, Genealogy Index Search Request. When requestors submit Form G–1041, Genealogy Index Search Request, on paper or electronically, USCIS searches for available records. If no record is found, then USCIS notifies the requestor by mail or email. If USCIS identifies available records, then USCIS provides details on the available records, but does not provide the copies of the actual records. Under current regulations, a requestor must file Form G–1041A, Genealogy Records Request, with a fee for each file requested, before USCIS provides any records that it found as a result of the search request. DHS proposes to provide the requestor with those pre-existing digital records, if they exist, in response to the initial search request. *See* proposed 8 CFR 103.40(f). DHS proposes in this rule to streamline the process for Form G–1041, Records Index Search and provide the pre-existing digital records to either an electronic reading room that can be accessed with a unique pin number, by mail with a CD, or paper copy and not require Form G–1041A. If no records exist, or if only paper copies of the records exist, then the requestor must follow the current process.

As a result of the proposed changes for pre-existing digital records, USCIS proposes to limit Form G–1041A, Genealogy Records Request, to only paper file requests. *See* proposed 8 CFR 103.40(g). Consistent with current practices, requestors must still pay the genealogy records request fee for a paper record requested. USCIS believes the change will increase efficiency and decrease future wait times for requestors.

Lastly, DHS proposes to change the genealogy fees as a result of these operational changes. *See* 8 CFR 103.7(b)(1)(i)(E) and (F); proposed 8 CFR 106.2(c)(1) and (2). The proposed fees are based on results from the same ABC model used to calculate other immigration benefit request fees proposed in this rule. The proposed fees for Forms G–1041 and G–1041A are $240 and $385 respectively. They are based on the projected costs and volumes of the genealogy program. The projected costs include a portion of Lockbox costs and an estimated staffing requirement for genealogy workload. USCIS estimated the workload volume based on these proposed changes. Additionally, USCIS used historic information to calculate completion rates for genealogy search and records requests. The completion rates allow for separate search and record request fees based on the average time to complete a request. As such, the proposed fees each represent the average staff time required to complete the request, similar to most other fees proposed in this rule.

O. Naturalization and Citizenship Related Forms

1. No Longer Limit the Form N–400 Fee

DHS proposes to increase the fee for Form N–400, Application for Naturalization, from $640 to $1,170, a $530 or 83 percent increase. *See* 8 CFR 103.7(b)(1)(BBB); proposed 8 CFR 106.2(b)(3). Prior fee rules shifted a portion of the Form N–400 cost to other fee-paying immigration benefit requestors, such as applicants for Certificates of Citizenship. In the FY 2010/2011 and the FY 2016/2017 fee rules, the Form N–400 fee was set below the ABC model output. The FY 2010/2011 fee rule held the fee to $595, the amount set in the FY 2008/2009 fee rule. *See* 75 FR 58975. The FY 2016/2017 fee rule limited the fee to only $640, a $45 or 8 percent increase. *See* 81 FR 73307.

The FY 2010/2011 proposed rule explained that holding Form N–400 to the FY 2008/2009 fee raised all other proposed fees by approximately $8 each. *See* 75 FR 33462. For DHS to recover full cost of Form N–400, the FY 2010/2011 proposed fee would have been $655, a $60 or roughly a 10 percent increase. *See* 75 FR 33462–3. In the FY 2016/2017 fee rule supporting documentation, USCIS estimated that each Form N–400 may cost $871 to complete, plus the cost for biometric services of $75, for a total of $946.[145]

In crafting prior fee rules, DHS reasoned that setting the Form N–400 fee at an amount less than its estimated costs and shifting those costs to other fee payers was appropriate in order to promote naturalization and immigrant integration.[146] DHS now believes that shifting costs to other applicants in this manner is not equitable given the significant increase in Form N–400 filings in recent years.[147] Therefore, DHS proposes to no longer limit the Form N–400 fee, thereby mitigating the fee increase of other immigration benefit requests and implementing the beneficiary-pays principle. DHS proposes a $1,170 fee for Form N–400 to recover the full cost of adjudicating the Form N–400, as well as a proportion of costs not recovered by other forms for which fees are limited or must be offered a waiver by statute.[148]

---

[144] USCIS, *Genealogy, https://www.uscis.gov/genealogy.*

[145] See the Model Output column of Appendix Table 4: Final Fees by Immigration Benefit Request in the docket of the FY 2016/2017 fee rule. The model output is the projected total cost from the ABC model divided by projected fee-paying volume. It is only a forecast unit cost (using a budget) and not the actual unit cost (using spending from prior years). USCIS does not track actual costs by immigration benefit request.

[146] *See, e.g.,* 75 FR 33461; 81 FR 26916.

[147] Based on filing volume trends in recent years, USCIS forecasts an increase of 82,827 Form N–400 applications, nearly a 10% percent increase from the FY 2016/2017 fee rule forecast. *See* Table 4: Workload Volume Comparison.

[148] See the supporting documentation of this proposed rule, Appendix V: Proposed Fee Adjustments to IEFA Immigration Benefits, for more information.

2. Remove Form N–400 Reduced Fee

In addition to eliminating Form N–400 fee waiver requests, as explained above at section V.C., DHS proposes to remove the reduced fee option for those naturalization applicants with family incomes greater than 150 percent and not more than 200 percent of the FPG currently codified at 8 CFR 103.7(b)(1)(i)(BBB)(*1*). Currently, qualifying applicants pay a fee of $320 plus an additional $85 for biometric services, for a total of $405. To qualify for a reduced fee, the eligible applicant must submit a Form I–942, Request for Reduced Fee, along with his or her Form N–400. Form I–942 requires the names of everyone in the household and documentation of the household income to determine if the applicant's household income is greater than 150 and not more than 200 percent of the FPG. DHS implemented this reduced fee option in the FY 2016/2017 fee rule to limit any potential economic disincentives that some eligible naturalization applicants may face when deciding whether to seek U.S. citizenship. *See* 81 FR 73307. DHS now proposes to eliminate the reduced fee option and return to a policy of all naturalization applicants paying the same fee. For the same reasons explained above with regard to no longer limiting the Form N–400 fee, DHS proposes to eliminate the reduced fee in order to recover full cost for naturalization services.[149] The proposed fees would also recover a portion of the cost of adjudicating forms for which USCIS is required by law to offer a fee waiver request and where the fees are limited by law, regulation, or policy, referred to as cost reallocation in the supporting documentation.[150] DHS also proposes to eliminate Form I–942 because there will no longer be a purpose for it.

3. Military Naturalization and Certificates of Citizenship

DHS does not propose any changes to fee exemptions for military members and veterans who file a Form N–400 under the military naturalization provisions. Military naturalization applications will continue to be fee exempt. *See* 8 CFR 103.7(b)(1)(BBB)(*2*); proposed 8 CFR 106.2(b)(3). USCIS does not charge a fee to military naturalization applicants because such fees are prohibited by statute. *See* INA secs. 328(b)(4), 329(b)(4). Applicants who request a hearing on a naturalization decision under INA sections 328 or 329 with respect to military service will continue to be fee exempt. *See* 8 CFR 103.7(b)(1)(AAA); proposed 8 CFR 106.2(b)(2). Members and veterans of any branch of the U.S. Armed Forces will continue to be exempt from paying the fee for an Application for Certificate of Citizenship, Form N–600. *See* 8 CFR 103.7(b)(1)(EEE); proposed 8 CFR 106.2(b)(6). While the statute prohibits fees for military naturalization applicants themselves, the Department of Defense (DOD) currently reimburses USCIS for costs related to such applications.[151] Accordingly, USCIS does not propose to increase fees to subsidize the costs of military naturalization applications.

4. Proposed Changes to Other Naturalization-Related Application and Certificate of Citizenship Application Fees

DHS proposes to adjust fees for other citizenship and naturalization forms. Some of the proposed fees are significant increases from the current fees, but others are decreases to reflect the estimated cost of adjudicating each form.

In previous fee rules, DHS limited the fee increase for several naturalization-related forms, in addition to Form N–400. *See* 75 FR 33461 and 81 FR 26915. These naturalization-related forms are as follows:

- Form N–300, Application to File Declaration of Intention
- Form N–336, Request for a Hearing on a Decision in Naturalization Proceedings (Under Section 336 of the INA)
- Form N–470, Application to Preserve Residence for Naturalization Purposes.

In the FY 2016/2017 fee rule, USCIS estimated that the cost of processing each of these forms was significantly greater than the fee.[152] Consistent with previous fee rules, DHS used its fee setting discretion to limit the increase of these fees, as shown in Table 14 of the supporting documentation of the FY 2016/2017 fee rule. At the time, DHS recognized that charging less than the full cost of adjudicating these and other immigration benefit requests required USCIS to increase fees for other immigration benefit requests to ensure full cost recovery. *See* 81 FR 26915.

The proposed fees in this rule would recover full cost for these immigration benefit requests and a portion of cost reallocation, using the standard methodology described in the supporting documentation included in this docket. *See* proposed 8 CFR 106.2(b)(1), (2), (3), and (4).

TABLE 13—NATURALIZATION FEE-PAYING UNIT COSTS (MODEL OUTPUT) AND FEES COMPARED

Immigration benefit request	FY 2016/ 2017 Fee-paying unit cost	Current fee	Current fee—FY 2016/2017 Cost	FY 2018/ 2019 Fee-paying unit cost	Proposed fee	Proposed fee—FY 2019/ 2020 cost
N–300 Application to File Declaration of Intention	$840	$270	−$570	$1,111	$1,320	$209
N–336 Request for a Hearing on a Decision in Naturalization Proceedings (Under Section 336 of the INA)	1,294	700	−594	1,474	1,755	281
N–400 Application for Naturalization	871	640	−231	985	1,170	185
N–470 Application to Preserve Residence for Naturalization Purposes	792	355	−437	1,347	1,600	253
N–565 Application for Replacement Naturalization/Citizenship Document	399	555	156	458	545	87
N–600 Application for Certificate of Citizenship	841	1,170	329	853	1,015	162

[149] Recently, Congress encouraged USCIS ''to consider whether the current naturalization fee is a barrier to naturalization for those earning between 150 percent and 200 percent of the federal poverty guidelines, who are not currently eligible for a fee waiver.'' H. Rep. 115–948 at 61. Although USCIS considered this report in formulating this proposed rule, USCIS has determined that it is neither equitable, nor in accordance with the principle of self-sufficiency that Congress has frequently emphasized, to continue to force certain other applicants to subsidize fee-waived and reduced-fee applications for naturalization applicants who are unable to pay the full cost fee.

[150] See footnote 40.

[151] The proposed fee would increase the reimbursable agreement between USCIS and DOD by approximately $4 million. The current fees for Form N–400 ($640) and biometric services ($85) total $725 per military naturalization. In FY 2019/2020, USCIS forecasts 9,300 military naturalizations per year. Under the current fees, this would cost DOD $6,742,500 each year. With the proposed $1,170 Form N–400 fee (which includes the cost of biometrics), the same volume would cost $10,881,000, a $4,138,500 or approximately 61 percent increase.

[152] See the Model Output column of Appendix Table 4: Final Fees by Immigration Benefit Request in the docket of the FY 2016/2017 fee rule.

TABLE 13—NATURALIZATION FEE-PAYING UNIT COSTS (MODEL OUTPUT) AND FEES COMPARED—Continued

Immigration benefit request	FY 2016/2017 Fee-paying unit cost	Current fee	Current fee—FY 2016/2017 Cost	FY 2018/2019 Fee-paying unit cost	Proposed fee	Proposed fee—FY 2019/2020 cost
N–600K Application for Citizenship and Issuance of Certificate Under Section 322	841	1,170	329	806	960	154

The proposed fees for Form N–600, Application for Certificate of Citizenship, and Form N–600K, Application for Citizenship and Issuance of Certificate Under Section 322, are lower than the current fees. The current fee for both forms is $1,170. *See* 8 CFR 103.7(b)(1)(i)(EEE) and (FFF). In the previous fee rule, USCIS proposed and finalized a combined rate for both forms. DHS proposes separate fees for each, based on the estimated cost and operational metrics for each workload. *See* proposed 8 CFR 106.2(b)(6) and (7). USCIS used separate completion rates and fee-paying volumes for each proposed fee.

The proposed fee decrease for Forms N–600 and N–600K is mainly due to the effect of the proposed limitation of fee waivers, which will enable greater cost recovery for several form types and limit the need for cost reallocation to fee-paying applicants. As noted in the FY 2016/2017 fee rule, the current fees for Forms N–600 assumed that approximately one third of applicants would receive a fee waiver. *See* 81 FR 73928. To recover full cost, DHS set the N–600 and the N–600K fee at a level high enough for fee-paying applicants to cover the cost of fee-waived work. *Id.* Because fee waivers would be limited under this proposed rule, fee-paying Forms N–600 and N–600K would no longer need to cover the cost of adjudicating fee-waived Forms N–600 and N–600K.[153] The proposed fees provide for the full recovery of costs associated with adjudicating the forms. Therefore, DHS is proposing lower fees for Forms N–600 and N–600K. The proposed fee for Form N–600 is $1,015, a $155 or 13 percent decrease from the current $1,170 fee. *See* 8 CFR 103.7(b)(1)(i)(EEE); proposed 8 CFR 106.2(b)(6). The proposed fee for Form N–600K is $960, a $210 or 18 percent decrease from the current $1,170 fee. *See* 8 CFR 103.7(b)(1)(i)(FFF); proposed 8 CFR 106.2(b)(7). DHS welcomes comments on the proposed changes to naturalization and Certificate of Citizenship applications.

P. Asylum Fees

1. Fee for Form I–589, Application for Asylum and for Withholding of Removal

DHS proposes to establish a $50 fee for Form I–589, Application for Asylum and for Withholding of Removal, when that form is filed with USCIS (''affirmative asylum applications'').[154] *See* proposed 8 CFR 106.2(a)(20). The U.S. Government has never charged a fee for Form I–589, but rather has relied on other fee-paying benefit requestors to subsidize asylum seeking applicants. Application fees from other form types have always been used to fund the operations involved in processing asylum claims. *See, e.g.,* 81 FR 73295 and 73307. However, DHS has experienced a continuous, sizeable increase in affirmative asylum filings, and processing backlogs continue to grow. DHS is exploring ways to alleviate the pressure that the asylum workload places on the administration of other immigration benefits. A minimal fee would mitigate the fee increase of other immigration benefit requests.

Although the INA authorizes DHS to set fees ''at a level that will ensure recovery of the full costs of providing all such services, including the costs of similar services provided without charge to asylum applicants or other immigrants,'' INA sec. 286(m), 8 U.S.C. 1356(m), DHS proposes a $50 fee for Form I–589. The statutory authorization for fees allows, but does not require, imposition of a fee equal to the full cost of the services provided. Thus, DHS retains authority to impose asylum fees that are less than the estimated cost of adjudicating the applications. *See* INA sec. 208(d)(3), 8 U.S.C. 1158(d)(3).[155] In the FY 2019/2020 fee review, USCIS estimates that the cost of adjudicating Form I–589 is approximately $366. It represents the Asylum Division's salaries and Make Determination activity costs from the ABC model, which does not represent the full cost. It does not include estimated costs from any other Asylum Division activities or any other office within USCIS.[156] Therefore, the proposed $50 fee is in accord with INA section 208(d)(3), 1158(d)(3).[157]

To be clear, DHS is proposing a fee for a Form I–589 filed with DHS only. Whether the fee also will apply to a Form I–589 filed with EOIR is a matter within the jurisdiction of the Department of Justice rather than DHS, subject to the laws and regulations governing the fees charged in EOIR immigration proceedings. DHS also believes that the asylum fee may arguably be constrained in amount, but not prohibited, by the 1951 U.N. Convention Relating to the Status of Refugees (''1951 Convention'') and the 1967 U.N. Protocol Relating to the Status of Refugees (''1967 Protocol'').[158] The international treaty obligations of the United States under the 1951 Convention and the 1967 Protocol address the imposition of fees on individuals seeking protection, and

[153] See V.C.3., Proposed Fee Waiver Changes section of this preamble for more information.

[154] Affirmative asylum applications are distinguished from defensive asylum applications, which are filed in proceedings before an immigration judge. *See, e.g.,* 8 CFR 1240.11(c).

[155] This section states, ''The Attorney General may impose fees for the consideration of an application for asylum, for employment authorization under this section, and for adjustment of status under section 209(b). Such fees shall not exceed the Attorney General's costs in adjudicating the applications. The Attorney General may provide for the assessment and payment of such fees over a period of time or by installments. Nothing in this paragraph shall be construed to require the Attorney General to charge fees for adjudication services provided to asylum applicants, or to limit the authority of the Attorney General to set adjudication and naturalization fees in accordance with section 286(m).''

[156] The FY 2019/2020 fee review assigned Asylum Division projected costs into the following other activities: Conduct TECS Check; Fraud Detection and Prevention; Inform the Public; Intake; Management and Oversight; Records Management. See the fee review supporting documentation included in this docket for the definitions of these activities and other information.

[157] The Immigration and Naturalization Service (INS), the predecessor to USCIS, proposed implementing a waivable $130 fee for asylum in 1994. *See* 59 FR 62284 (Dec. 5, 1994). INS did not include a fee in the final rule. The proposed $130 fee would be approximately $222 if adjusted for inflation from December 1994 to June 2019.

[158] 1951 Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; 1967 Protocol relating to the Status of Refugees, *open for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. Although the United States is not a signatory to the 1951 Convention, it adheres to Articles 2 through 34 of the 1951 Convention by operation of the 1967 Protocol, to which the United States acceded on Nov. 1, 1968.

limit ''fiscal charges'' to not higher than those charged to their nationals in similar situations. Accordingly, any fee charged would need to be reasonably aligned with the fees charged for other immigration benefit requests.[159] The proposed $50 fee is in accord with this provision.

This proposal is also consistent with a Presidential Memorandum directing the Attorney General and the Secretary of Homeland Security, as applicable, to take all appropriate actions to propose regulations setting a fee for an asylum application not to exceed the costs of adjudicating the application, as authorized by section 208(d)(3) of the INA (8 U.S.C. 1158(d)(3)) and other applicable statutes, and setting a fee for an initial application for employment authorization for the period an asylum claim is pending.[160]

Additionally, DHS considered the asylum fees charged by other nations. To determine the fiscal charges charged by other countries, USCIS requested a report from the Law Library of Congress on fees charged to asylum applicants by countries that are party to the 1951 Convention and/or its 1967 Protocol.[161] The Law Library of Congress surveyed the 147 signatory countries to the 1951 Convention and/or the 1967 Protocol, and of 147 countries, identified three countries that charge a fee for initial applications for asylum or refugee protection.[162] Those countries and amounts, provided in Table 14, indicate that the proposed $50 fee is in line with the fiscal charges charged by other countries.[163]

TABLE 14—ASYLUM FEES IN OTHER COUNTRIES

Country	Fee amount	Fee in USD	Notes
Australia	AUD 35	$25	No fee for a detained applicant.
Fiji	FJD 465	221	Allows for fee waivers.
Iran	IRR 12,321,000	293	For a family of 5 with some fee exemptions.

The projected FY 2019/2020 workload for Form I–589 is 163,000 annual receipts, or approximately 2 percent of the total USCIS workload forecast. The proposed $50 fee would generate an estimated $8.15 million in annual revenue. Therefore, in addition to alleviating pressure on the immigration benefit system, the proposed $50 fee for Form I–589 mitigates the proposed fee increase of other immigration benefit requests by approximately $5 or $10.

DHS is proposing no fee for an unaccompanied alien child (UAC) in removal proceedings who files Form I–589. The Trafficking Victims Protection Reauthorization Act (TVPRA) of 2000 provides for a range of protections for UACs as amended by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008. Public Law 110–457, 122 Stat. 5044 (2008). A UAC is defined by statute as a child who is less than 18 years old, has no legal status in the U.S., and has no parent or legal guardian in the U.S. who is available to provide care and physical custody. 6 U.S.C. 279(g)(2). Among other provisions, the TVPRA gives USCIS initial jurisdiction over asylum claims filed by UACs, even by those who are in removal proceedings before EOIR such that their asylum applications would otherwise be within the jurisdiction of an immigration judge. Section 235(d)(7)(B) of the TVPRA, as codified at 8 U.S.C. 1158(b)(3)(C), provides that ''[a]n asylum officer . . . [in the U.S. Citizenship and Immigration Services' (''USCIS'') Asylum Division] . . . shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child.'' In accordance with the statute governing asylum applications filed by UACs, they may file their Form I–589 with USCIS, even if they are in removal proceedings and their asylum claims are thus asserted as a defense to removal. Consistent with the protections provided to UACs by the TVPRA, and to avoid undue delay for this vulnerable population by impeding UACs in removal proceedings from filing a Form I–589, DHS proposes to exclude them from the proposed fees. A UAC who is not in removal proceedings will be charged the same proposed $50 Form I–589 fee as other affirmative filers.

As discussed in section V.C. of this preamble on fee waivers, DHS proposes that the $50 Form I–589, Application for Asylum and Withholding of Removal, fee will not be waivable. The proposed $50 fee would generate an estimated $8.15 million in annual revenue. If DHS permits fee waiver requests, it assumes that the costs of administering the fee waiver request review process may exceed the revenue, thereby offsetting any cost recovery achieved from the fee. Therefore, DHS proposes that the $50 Form I–589 fee is mandatory. DHS acknowledges that an alien who is not placed in removal proceedings will have no means of applying for recognition as a person in need of refugee protection and its attendant benefits such as asylum or withholding-based employment authorization, travel documents, or documentation of immigration status, if they do not pay the proposed $50 fee.[164] That is why although INA section 208(d)(3), 8 U.S.C.

[159] To the extent that the asylum application fee may arguably be considered to be a ''fiscal charge'' for purposes of Article 29(1) of the 1951 Convention Relating to the Status of Refugees—as incorporated by reference in the 1967 Protocol Relating to the Status of Refugees—the proposed $50 fee would be in accord with that provision, which limits ''fiscal charges'' charged to refugees to an amount not higher than those charged by the United States to U.S. nationals in similar situations. The proposed $50 fee would be reasonably aligned with the fees charged to U.S. nationals for other immigration benefit requests. And Congress, as evidenced by the express authority conferred in INA section 208(d)(3), clearly does not believe that charging a fee for asylum applications would run contrary to U.S. obligations under the 1967 Protocol. *See also INS* v. *Stevic,* 467 U.S. 407, 428 n.22 (1984) (describing provisions of the Convention and Protocol as ''precatory and not self-executing'').

[160] *See* Presidential Memorandum on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System (Apr. 29, 2019), available at *https://www.whitehouse.gov/presidential-actions/presidential-memorandum-additional-measures-enhance-border-security-restore-integrity-immigration-system/* (last visited Aug. 6, 2019).

[161] *See* Library of Congress, *Fees Charged for Asylum Applications by States Parties to the 1951 Refugee Convention* (Dec. 29, 2017), *https://www.loc.gov/law/help/asylum-application-fees/index.php*.

[162] Additionally, while it does not charge a fee for making a claim for refugee or protection status, New Zealand typically grants individuals a ''Refugee Claimant Visitor Visa'' while claims are processed and charges for that visa (although that fee may be waived). Canada does not charge for making a claim of protection, but does charge for obtaining proof of permanent protection.

[163] Exchange rates as of June 30, 2019. *See* Department of the Treasury, Bureau of Fiscal Service, *Treasury Reporting Rates of Exchange: Current Rates* (Aug. 14, 2019), *https://www.fiscal.treasury.gov/reports-statements/treasury-reporting-rates-exchange/current.html*.

[164] *See, e.g.,* 1951 Refugee Convention Art. 27 (''The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.''), Art. 28(1) (''The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require . . . .'').

1158(d)(3) expressly authorizes charging a fee up to the full cost of providing the service, DHS is proposing a fee of $50 instead of at the level permitted under the INA to recover costs. In addition, DHS does not want the inability to pay the fee to be an extraordinary circumstance excusing an applicant from meeting the one-year filing deadline in INA 208(a)(2)(B), (D). *See also* 8 CFR 208.4(a)(5)(v) (''extraordinary circumstances'' includes situations in which the alien filed the Form I–589 prior to 1-yr deadline but application was returned as not properly filed, and then alien refiled within reasonable period thereafter). DHS considered the authority provided in INA section 208(d)(3), including that the fee be paid in installments or over time, various fee amounts and decided to propose $50 because it could be paid in one payment, would not require an alien an unreasonable amount of time to save, would generate some revenue to offset costs, discourage frivolous filings, and not be so high as to be unaffordable to even an indigent alien. DHS welcomes comments on the imposition of this fee, including the amount and whether it should be waivable.

2. Fee for the Initial Application for Employment Authorization While an Asylum Claim Is Pending

DHS proposes to require applicants who have applied for asylum or withholding of removal before EOIR (defensive asylum) or filed Form I–589 with USCIS (affirmative asylum), to pay the fee for initial filings of Form I–765. Currently, USCIS exempts applicants with pending asylum applications who are filing their first EAD application under the 8 CFR 274a.12(c)(8) eligibility category from the Form I–765 fee if the applicant submits evidence of an asylum application and follows other instructions.[165] Applicants with pending claims of asylum pay the fee for EAD renewal and replacement, per Form I–765 instructions and pursuant to 8 CFR 274a.12(c)(8).[166] USCIS projects that this change will require approximately 300,000 asylum applicants to pay the Form I–765 fee each year. USCIS will continue to require the fee for renewal EADs.

Initial applicants with pending claims of asylum are approximately 13 percent of the total Form I–765 workload volume forecast. Continuing to exempt this population from paying the Form I–765 fee would further increase the proposed fee. If DHS exempts initial applicants with pending claims of asylum, then the proposed fee would be $500 instead of $490, meaning fee-paying EAD applicants would pay $10 to fund the cost of EADs for asylum applicants. Therefore, DHS proposes that initial applicants with pending asylum claims pay a $490 Form I–765 fee in order to keep the fee lower for all fee-paying EAD applicants. All other noncitizens applying for employment authorization are required to pay fees. *See* 8 CFR 274a.13. DHS notes that INA section 208(d)(3), 8 U.S.C. 1158(d)(3), seems to limit the amount that can be charged for employment authorization for an asylum applicant where it states, ''Such fees shall not exceed the Attorney General's costs in adjudicating the applications.'' However, section 208(d)(3) also states, ''Nothing in this paragraph shall be construed to require the Attorney General to charge fees for adjudication services provided to asylum applicants, or to limit the authority of the Attorney General to set adjudication and naturalization fees in accordance with section 1356(m) of this title.'' That sentence permits DHS to charge asylum applicants the same fee for employment authorization that it charges all others for employment authorization because we calculate the proposed fee for the Form I–765, Application for Employment Authorization Document, using the fee-setting methodology outlined in this rule in accordance with INA sec. 286(m), 8 U.S.C. 1356(m). The proposed EAD fee ensures asylum applicants will pay no more for an EAD than any other EAD applicant except those for whom the fee has been waived. Therefore, the fee for Form I–765 proposed to be charged to asylum applicants complies with section 208(d)(3).

Q. DACA Renewal Fees

DHS proposes to add a fee for Deferred Action on Childhood Arrivals (DACA) renewal requests. *See* proposed 8 CFR 106.2(a)(38). Currently, DACA requestors use Form I–821D, Consideration of Deferred Action for Childhood Arrivals, for DACA renewal requests. Form I–821D currently has no fee. However, DACA requestors must pay the current fees of $410 and $85 for Form I–765 and biometrics services, respectively, which total $495 and may not be waived, although currently there are very limited circumstances where a fee exemption may be granted under DACA policy criteria. The proposed Form I–821D filing fee for renewal DACA requests is $275.[167] [168] This proposed filing fee for Form I–821D includes the cost of biometric services. Under the proposal, DACA requestors would still need to pay the filing fee for Form I–765 unless they qualify for an exemption, as provided through policy.[169] The proposed Form I–821D fee to request DACA renewal, plus the EAD fee, is $765. DHS proposes that DACA fees may not be waived, consistent with its current policy. One of the focuses of DACA when it was launched in 2012 is that the processing of DACA requests, including associated applications for employment authorization, does not result in an economic drain on DHS resources. Therefore, DHS set a standard for the exemption from the Form I–765 fee for DACA requests in a manner that balances the needs of the most vulnerable population likely to request DACA against USCIS' fiscal requirements for implementing the DACA initiative. A DACA requestor who requested Form I–765 fee exemptions faced significant delays in adjudicating the deferred action and the EAD request. Requests for DACA renewal will come from individuals who have had authorization to work lawfully in the U.S. for up to two years

[165] This fee exemption is provided in the Instructions to Form I–765, *Application for Employment Authorization,* by the USCIS Director or Deputy Director under the authority in 8 CFR 103.7(d); *see also* 8 CFR 274a.13(a)(applicants for EADs may be required to apply on a designated form and pay fees in accordance with form instructions).

[166] Class members subject to the settlement agreement under *American Baptist Churches* v. *Thornburgh,* 760 F. Supp. 796 (N.D. Cal. 1991), will be charged the fee generally applicable to employment authorization applications as proposed in this rule. The revised form instructions for Form I–765, Application for Employment Authorization, provide that class members may request that their fee be waived, as required by that agreement using the authority in proposed 8 CFR 106.3(d).

[167] Currently, DHS may also accept a limited number of requests from individuals who previously received DACA but whose most recent DACA grant expired before September 5, 2017 or was terminated at any time. Although these requests are filed as initial DACA requests because the individual is no longer eligible to file a renewal request under longstanding DACA policy, these requests would be subject to the proposed fee for renewal requests because two nationwide preliminary injunctions currently require USCIS to allow anyone who previously received DACA to request additional periods of deferred action and employment authorization.

[168] DHS does not propose to introduce a fee for Form I–821D initial DACA requests because USCIS does not currently accept such requests, except as described in footnote 167 above, or plan to accept them in the future. Should USCIS be required to accept initial DACA requests in the future, DHS would charge requestors the proposed $30 biometrics fee, because biometrics costs associated with these requests would not be recovered via the application fee of $0.

[169] *See* USCIS, Frequently Asked Questions, *https://www.uscis.gov/archive/frequently-asked-questions* (last reviewed/edited March 8, 2018).

and DHS assumes that these individuals will have found work and are currently working. Therefore, DHS proposes a consistent policy and will require the Form I–765 fee for DACA renewal.

TABLE 15—CURRENT AND PROPOSED DACA RENEWAL FEES COMPARED

DACA renewal request fees	Current fees	Proposed fees	Difference	Percentage difference
I–765 Application for Employment Authorization	$410	$490	$80	20%
I–821D Consideration of Deferred Action for Childhood Arrivals (Renewal)	0	275	275	N/A
Biometric Services	85	N/A	N/A	N/A
Total DACA Fees (Renewal)	495	765	270	55

The proposed Form I–821D fee does not include cost reallocation.[170] In other words, it does not recover any of the cost for workload without fees or with reduced fees. As such, the DACA workload in the proposed Form I–765 does not recover the projected costs of workload without fees or with fees below projected full cost. DHS proposes to not assign cost reallocation to the Form I–821D fee to mitigate the fiscal risk of relying on revenue from DACA in the event the DACA policy is ended in the future. However, the non-DACA related workload for Form I–765 does include cost reallocation. The Form I–765 proposed fee would be higher if both DACA and non-DACA workload included cost reallocation of workload without fees or with fees below projected full cost.

In September 2017, DHS rescinded the 2012 DACA memo and initiated a plan to wind down the policy, while opting not to terminate DACA and EADs for individuals who had a previously approved DACA request, based solely on the rescission. At present, however, DHS is operating under two nationwide preliminary injunctions issued by federal district courts in California (*Regents of University of California* v. *DHS,* No. 17–cv–05211 (N.D. Cal.)) and New York (*State of New York* v. *Trump,* No. 17–cv–05228 (E.D.N.Y.)). These injunctions require DHS to ''maintain the DACA program on a nationwide basis on the same terms and conditions as were in effect before the rescission on September 5, 2017.'' Under these injunctions, DHS is not required to accept DACA requests from individuals who have not previously been granted DACA and is not required to accept DACA-based advance parole applications. The District Court for the District of Columbia also vacated DHS's rescission of DACA and ordered the government to accept initial DACA requests and resume accepting DACA-based advance parole applications. However, the court then ordered a limited stay of its order to preserve the status quo pending appeal. *Trustees of Princeton University* v. *United States,* No. 1:17–cv–2325 (D.D.C.), consolidated with *NAACP* v. *Trump,* No. 17–cv–01907 (D.D.C.). Additionally, the U.S. Court of Appeals for the Fourth Circuit issued a decision that vacated the DACA rescission as arbitrary and capricious and remanded the case for further proceedings, reversing a ruling by the District Court for the District of Maryland. However, the Fourth Circuit subsequently stayed issuance of the mandate pending resolution of the Government's petition for writ of certiorari. *See Casa de Maryland* v. *DHS,* Nos. 18–1521–L; 18–1522 (4th Cir. 2019). Therefore, USCIS is currently required to continue accepting and adjudicating DACA requests from individuals who have previously been granted DACA, but is not required to accept requests from other individuals, or applications for DACA-based advance parole. DHS plans to file a request with the subject courts to allow DHS to implement all of the changes proposed in this rule to the extent that they may affect past, current, or future DACA recipients.

Currently, individuals who request deferred action under DACA do so without paying a fee that recovers the full cost to adjudicate such requests. Therefore, other applicants, petitioners, and requestors ultimately bear the burden to cover the full cost of DACA adjudications. While the DHS request for the courts to approve the effects of this proposed rule on DACA are pending, DHS publishes this NPRM for public comment on the proposed DACA fees. If any of the courts deny DHS's request to impose new DACA fees, then Form I–821D fees will be removed before the final rule is adopted and the costs of administering DACA will be reallocated to fee-paying immigration benefit requests. As such, the fee for Form I–765 may increase. Refer to section *VII. Other Possible Fee Scenarios* for additional information regarding potential fees with and without a fee for Form I–821D.

R. Fees Shared by CBP and USCIS

DHS combined the estimated cost and volume information for USCIS and CBP in the proposed fees for several immigration benefit requests that both components adjudicate. This affects the proposed fees for the following immigration benefit requests:

- Form I–192, Application for Advance Permission to Enter as a Nonimmigrant.
- Form I–193, Application for Waiver of Passport and/or Visa.
- Form I–212, Application for Permission to Reapply for Admission into the U.S. after Deportation or Removal.
- Form I–824, Application for Action on an Approved Application or Petition.

USCIS calculated proposed fees using the same methodology as other proposed fees and then added information from CBP into the ABC model. CBP provided revenue collections from FY 2014 to FY 2017 for these immigration benefit requests. We divided the revenue collections by the fee for each immigration benefit request to derive the fee-paying volume for each immigration benefit request. CBP estimates the total cost for Forms I–192 and I–193 as part of its statement of net cost, leveraging the same software that USCIS uses for the ABC model.[171] CBP does not estimate the total cost of Forms I–212 or I–824. Dividing CBP's total costs by fee-paying volume can determine a fee-paying unit cost, and ultimately, fees for Forms I–192 and I–

[170] *See* section IV.B.3. Assessing Proposed Fees for more information.

[171] USCIS uses commercially available activity-based costing software, SAP Business Objects Profitability and Cost Management, to create financial models to implement activity-based costing (ABC), as described in the Methodology section of this preamble and the supporting documentation in the docket for this proposed rule.

193. Table 16 summarizes the CBP cost estimates, derived fee-paying volumes, and estimated unit costs.

estimates, derived fee-paying volumes, and estimated unit costs.

TABLE 16—CBP FY 2017 ESTIMATED COSTS AND VOLUMES

Form	Estimated cost	Derived fee-paying volume	Estimated fee-paying unit cost
I–192	$2,154,502	6,557	$329
I–193	17,951,942	7,613	2,358
I–212	N/A	232	N/A
I–824	N/A	103	N/A

USCIS incorporated the total costs and derived fee-paying volume for the respective CBP workloads into the ABC model. The proposed fees represent single DHS fees for each of these workloads by combining the estimated costs and fee-paying volumes of USCIS and CBP. DHS believes that a single fee for each of these shared workloads will reduce confusion for individuals interacting with CBP and USCIS.

S. 9–11 Response and Biometric Entry-Exit Fee for H–1B and L–1 Visas

In 2010 Congress enacted new fees for certain H–1B or L petitioners. *See* Public Law 111–230, sec. 402.[172] USCIS concluded at that time that the statutory language in section 402 of Public Law 111–230 was ambiguous and required it to interpret the statute and determine the full extent to which the fee would apply. In particular, the statute referred to the filing fee and fraud prevention and detection fee required to be submitted with an application for admission, but it was otherwise silent regarding petitions for H–1B or L classification or for requests for a change of status or extension of stay for beneficiaries who were already admitted into the United States. USCIS interpreted the statute's ambiguity to apply the fees to petitions for H–1B or L–1 classification when the fraud fee was otherwise required because the statutory language referred to these fees as being collected in addition to the already extant filing and fraud prevention and detection fees. USCIS, therefore, implemented these fees as applying only when the fraud fee was otherwise collected, in accordance with section 214(c)(12) of the INA, 8 U.S.C. 1184(c)(12); that is, with respect to petitions for an initial grant of status or requesting a change of employer, but not to extension petitions filed by the same employer on behalf of the same employee. The Public Law 111–230 fee sunset on September 30, 2015.

In section 402(g) of Div. O of the Consolidated Appropriations Act, 2016 (Public Law 114–113) [173] enacted December 18, 2015, Congress reenacted and doubled these fees, effective immediately through September 30, 2025.[174] Although otherwise identical to the earlier Public Law 111–230 statutory language except for the relevant dates and dollar amounts,[175] Congress added new phrasing at two places, in pertinent part: ''. . . the *combined* filing fee and fraud prevention and detection fee required to be submitted with an application for admission [as an H–1B or L], *including an application for an extension of such status,* shall be increased . . .'' (emphasis added). There is no known legislative history about the Public Law 114–113 fees before enactment.

USCIS again concluded that the language in Public Law 114–113, as in the previous statute, was ambiguous and therefore USCIS had to determine whether the fee applied to all extension petitions by covered employers, or just those for which the fraud fee was also charged (extension of stay with change of employer).[176] The first reading would be a significant new substantive expansion of the fees compared to the 2010–2015 interpretation; the latter would be consistent with the scope of the fees charged during that earlier period (although in the higher amounts provided by the new provision). In the absence of specific legislative history elucidating the intent of the statutory changes, and given the continued ambiguity of the statute (specifically the reference to the ''combined filing fee ($4,000 for H–1B and $4,500 for L–1 respectively) and fraud prevention and detection fee ($500) required to be submitted''), USCIS interpreted the Public Law 114–113 fee to similarly apply only when the fraud fee described in section 214(c)(12) of the INA, 8 U.S.C. 1184(c)(12), is also required and issued guidance accordingly.[177]

The construction of the statutory ambiguity USCIS adopted in 2015 was not, however, the only reasonable one.

[172] Public Law 111–230 required the submission of an additional fee of $2,000 for certain H–1B petitions and $2,250 for certain L–1A and L–1B petitions. These additional fees, similar to the subsequently enacted fees under Public Law 114–113, applied to petitioners who employ 50 or more employees in the United States with more than 50 percent of its employees in the United States in H–1B or L–1 nonimmigrant status.

[173] Section 402(g) of Div. O of Public Law 114–113 added a new section 411 to the Air Transportation Safety and System Stabilization Act, 49 U.S.C. 40101 note. Section 411 provided that the fees collected thereunder would be divided 50/50 between general Treasury and a new ''9–11 Response and Biometric Exit Account'', until deposits into the latter amounted to $1 billion, at which point further collections would go only to general Treasury. Deposits into the 9–11 account are available to DHS for a biometric entry-exit screening system as described in 8 U.S.C. 1365b.

[174] This sunset date was extended another two years, until September 30, 2027, by section 30203 of Public Law 115–123 (Feb. 9, 2018).

[175] The new provision's ''notwithstanding section 281 of the Immigration and Nationality Act (8 U.S.C. 1351) or any other provision of law'' clause, unlike the 2010 enactment, expressly referred to sec. 281 of the INA, but this difference made no legal difference in the scope of the clause, as that clause is not meaningfully different from ''Notwithstanding any other provision of this Act or any other provision of law'' clause in Public Law 111–230 sec. 402.

[176] In enacting the new statute, Congress used the same wording of the previous statute, with the addition of the words ''combined'' and ''including an application for an extension of such status.'' Because Congress can be assumed to have been aware of the agency's interpretation of the previous statute, USCIS concluded, as an initial matter, that Congress added the phrase ''including an application for an extension of such status'' to clarify that the new fees not only apply to initial petitions for H–1B or L classification, but also in extension of stay cases. However, it was not clear whether Congress meant the new fees to apply to *all* extension of stay requests (a substantive change) or just a certain subset of cases, meaning, those involving an initial petition by a new employer on behalf of an individual already in H–1B or L–1 status who is seeking an extension of stay (a clarification). Further, the fact that Congress not only also included the specific reference to the fraud fee, but in fact reinforced the significance of that reference by inserting the word ''combined,'' made ambiguous whether Congress intended the fee to apply to all extension cases or just those that required the fraud fee.

[177] *See* ''Fee Increase for Certain H–1B and L–1 Petitions (Pub. L. 114–113)'' at *https://www.uscis.gov/working-united-states/temporary-workers/fee-increase-certain-h-1b-and-l-1-petitions-public-law-114-113* (last reviewed/updated Feb. 20, 2018).

Another reasonable interpretation is that the Public Law 114–113 fee applies to all extension of stay petitions even when the fraud fee is not applicable. Under this alternative interpretation, the language ''including an application for an extension of such status'' is a substantive amendment, and the insertion of the word ''combined'' is a clarifying one. It is plausible that Congress added the reference to extension of status so that the fee would be collected for all extension of stay petitions, not just those where a change of employer is also requested. In that case, the insertion of the word ''combined'' can be viewed as a clarifying edit that the increase to the fee is applied only once per petition and not once for the filing fee and once for the fraud fee such that it might apply two times for some petitions. Furthermore, when the fraud fee does not apply, the ''combined'' fee is simply the filing fee plus $0. This interpretation would give meaning to all the alterations to the earlier statute.

DHS has reexamined this matter and believes that this second, alternative interpretation of Public Law 114–113 would be most consistent with the goal of the statute to ensure employers that overly rely on H–1B or L nonimmigrant workers' pay an additional fee by making the fee applicable to all petitions by employers that meet the statute's 50 employee/50 percent test, regardless of whether or not the fraud fee also applies.[178] In other words, the fee should apply to all H–1B or L–1 petitions, whether for new employment or an extension of stay. DHS thus proposes to amend and clarify the regulations at new 8 CFR 106.2(c)(8) and (9)—currently 8 CFR 103.7(b)(1)(i)(III) and (JJJ)—to specify that this fee will apply to all H–1B and L–1 extension petitions in addition to all previously covered H–1B and L–1 petitions. The regulation would clarify that this includes individual L–1 petitions (Form I–129S) filed on the basis of a previously approved ''blanket L'' petition, but it does not apply to amended petitions filed by employers with respect to its employee that do not request an extension of stay. The amended regulation would also update the sunset date for the provision from September 30, 2025 to September 30, 2027, as provided in Public Law 115–123. It would further provide for alternative fee amounts or sunset dates in case Congress changes them by a subsequently enacted law.

Beyond the above, various policy reasons support this change in DHS's implementation of the Public Law 114–113 fee provision. Fee collections under the provision are applied towards the important purposes of (1) funding the 9–11 Response and Biometric Fee Exit Account to be used for a biometric entry-exit screening system; and (2) deficit reduction and other public purposes funded by general Treasury revenues. Collections have fallen well short of projections. In its report on the fee provision in Public Law 114–113, the Congressional Budget Office (CBO) estimated annual revenues of $420 million per year (except for $380 million in the first year of FY 2016) from these fees through their lifespan.[179] However, collections for FY 2016 ($158 million), 2017 ($125 million), and 2018 ($119 million) totaled only about $402 million. DHS believes that collections have fallen short of the CBO projections mainly because of the USCIS construction of the statutory provision to exclude extension petitions except when filed to facilitate a change of employer. DHS proposes to reduce this shortfall and better achieve the funding aims of the statute through increased collections of these fees in the future.

T. Form I–881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Public Law 105–100 (NACARA))

DHS proposes to adjust the fee for Form I–881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Pub. L. 105–100 (NACARA)). The IEFA fees for this application have not changed since 2005. The proposed fees more accurately reflect USCIS' estimated costs associated with adjudicating the application. Additionally, DHS proposes to combine the current multiple fees into a single Form I–881 fee in effort to reduce administrative burden.

INS implemented two fees for this benefit request in 1999. *See* 63 FR 64895 (Nov. 24, 1998) (proposed rule) and 64 FR 27856 (May 21, 1999) (interim final rule). The two IEFA fees were $215 for an individual and $430 as a maximum per family. *See* 64 FR 27867–8. EOIR collected a separate $100 fee. *Id.* INS used ABC to determine the proposed IEFA fees. *See* 63 FR 64900. The IEFA NACARA fees have only changed by inflation since creation of the NACARA program. *See* 69 FR 20528 (Apr. 15, 2004) and 70 FR 56182 (Sept. 26, 2005). The current fees are as follows:

1. $285 for individuals,
2. $570 maximum for families, and
3. $165 at EOIR, whether an individual or family.

In FY 2018, the fees generated approximately $142,000 in IEFA revenue, when approximately 98 percent of applicants paid the $285 fee. EOIR provided receipt information for FY 2016 to FY 2018. EOIR received 339 applications in FY 2016, 326 in FY 2017, and 277 in FY 2018. DHS proposes no changes to the EOIR fee.

In prior fee rules, DHS has not changed the Form I–881 fees. *See* 72 FR 29854, 75 FR 58964, and 75 FR 73312. It excluded this immigration benefit request from previous fee rules, essentially treating it like other temporary programs or policies such as TPS and DACA. *See* 81 FR 73312. DHS expects the population will be exhausted eventually due to relevant eligibility requirements. *Id.*

DHS proposes a single $1,800 fee for any Form I–881 filed with USCIS. *See* proposed 8 CFR 106.2(a)(41). USCIS does not have systems in place that can track the different adjudicative level of effort required between Form I–881 applications by an individual compared to a family. Regardless, DHS does not have any policy reasons that would justify charging a separate fee for a small population that will soon be exhausted. Additionally, removing the distinction will simplify USCIS' revenue collections and reporting, thus reducing the administrative burden of the program.

USCIS forecasts an average of 340 annual Form I–881 receipts in the FY 2019/2020 biennial period. Current USCIS fees would generate approximately $100,000 in IEFA revenue. The proposed single fee of $1,800 would generate approximately $612,000 in revenue and slightly mitigate the proposed fee increase of other immigration benefit requests.

U. Miscellaneous Technical and Procedural Changes

DHS proposes several technical or procedural changes. This rule moves the fee regulations for USCIS to a separate part of Chapter I of Title 8 of the Code

[178] USCIS counts all full-time and part-time employees when determining whether an employer must pay this fee. H–1B and all L–1 employees are combined in the counting to determine if the 50% threshold is met to trigger the fee. See *https://www.uscis.gov/working-united-states/temporary-workers/fee-increase-certain-h-1b-and-l-1-petitions-public-law-114-113.* DHS is adding the words ''in the aggregate'' to proposed 8 CFR 106.2(c)(8) and (9) to clarify its interpretation and how employees would be counted, consistent with current practice, to determine if this additional fee is required.

[179] *See* CBO Cost Estimate, H.R. 2029 Amendment #1 (2016 Omnibus), table 3 at sec. 402, *https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/costestimate/hr2029amendment1divisionsa.pdf* (Dec. 16, 2015).

of Federal Regulations. It moves them from 8 CFR part 103 to 8 CFR part 106 in an effort to reduce the length and density of part 103 as well as to make it easier to locate specific fee provisions. In addition to the renumbering and redesignating of paragraphs, this rule has reorganized and reworded some sections to improve readability.

DHS proposes to remove some redundant text and consolidate USCIS fee requirements. For example, some regulations erroneously specified that USCIS will not accept personal checks.[180] *See, e.g.,* 8 CFR 245a.2(e)(3), 245a.3(d)(3), and 245a.4(b)(5)(iii). DHS proposes to remove the erroneous or redundant text and instead refer to consolidated fee requirements in 8 CFR 106.1. *See* proposed 8 CFR 106.1, 245a.2(e)(3), 245a.3(d)(3), and 245a.4(b)(5)(iii).

DHS proposes to revise 8 CFR 214.2(p)(2)(iv)(F) to incorporate statutory changes that have occurred after 8 CFR 214.2(p)(2)(iv)(F) was codified and to conform this regulatory language to longstanding practice that allow petitions for multiple P nonimmigrants. Specifically, DHS proposes to add a reference to ''team'' in 8 CFR 214.2(p)(2)(iv)(F) to account for INA section 214(c)(4)(G), 8 U.S.C. 1184(c)(4)(G) (''The Secretary of Homeland Security shall permit a petition under this subsection to seek classification of more than 1 alien as a nonimmigrant under section 1101(a)(15)(P)(i)(a) of this title''), which was added in 2006 and mandates DHS to allow a petitioner to include multiple P–1A athletes in one petition.[181] DHS also proposes to delete ''seeking classification based on the reputation of the group as an entity'' from 8 CFR 214.2(p)(2)(iv)(F) because certain athletic teams applying for P–1 nonimmigrant classification and groups applying for P–2 or P–3 nonimmigrant classification are not necessarily required to establish reputation of the team or group as an entity. *Id.*

DHS proposes to update regulations regarding adjustment of status under INA section 245(i), 8 U.S.C. 1255(i), commonly referred to as the Legal Immigration Family Equity (LIFE) Act. The current regulations are inconsistent with Form I–485 instructions. DHS proposes to refer to the current form instructions and supporting evidence requirements. *See* proposed 245a.12(d). DHS also proposes to remove outdated requirements for passport photos, biographic and biometric information. *See* proposed 8 CFR 245a.12(d), (d)(2), and (d)(4). In the past, USCIS required applicants and beneficiaries to submit a fingerprint form or biographic information with benefit requests. Currently, USCIS collects biometric data at Application Support Centers.

DHS proposes to change outdated references to the Missouri Service Center, now named the National Benefits Center.[182] *See* proposed 8 CFR 245a.12(b) and (c); 245a.13(e) and (e)(1); 245a.18(c)(1); 245a.19(a); and 245a.33(a) and (b). The National Benefits Center (NBC) performs centralized front-end processing of applications and petitions that require field office interviews (primarily, Forms I–485 and N–400). In addition, the NBC adjudicates some form types to completion, including but not limited to intercountry adoption cases and immigration benefits associated with the LIFE Act. The old name is why some receipt notices for the NBC begin with the letters ''MSC'' instead of ''NBC.''

DHS also proposes to amend the title of 8 CFR part 103 to make it more descriptive of its contents. *See* proposed 8 CFR part 103. The current title of part 103 is IMMIGRATION BENEFITS; BIOMETRIC REQUIREMENTS; AVAILABILITY OF RECORDS. Part 103 contains several significant requires for filing requests, forms and documents with USCIS, especially in 8 CFR 103.2, which should be made more clear to the users of that part. Therefore, DHS proposes to revise the title of the part to include a reference to filing requirements. The proposed title is, ''PART 103—IMMIGRATION BENEFIT REQUESTS; USCIS FILING REQUIREMENTS; BIOMETRIC REQUIREMENTS; AVAILABILITY OF RECORDS.''

In addition, DHS is proposing a severability provision in new 8 CFR part 106. DHS believes that the provisions of each new part function sensibly independent of other provisions. However, to protect the goals for which this rule is being proposed DHS is codifying our intent that the provisions be severable so that, if necessary, the regulations can continue to function without a stricken provision. Proposed 8 CFR 106.6.

VI. Proposed Fee Adjustments to IEFA Immigration Benefits

Projected USCIS costs for FY 2019 and 2020 exceed projected revenue by an average of $1,262.3 million each year. Therefore, DHS proposes to adjust the fee schedule to recover the full cost of processing immigration benefit requests and to continue to maintain or improve current service delivery standards.

After resource costs are identified, the ABC model distributes them to USCIS' primary processing activities. Table 17 outlines total IEFA costs by activity.

TABLE 17—PROJECTED IEFA COSTS BY ACTIVITY

[Dollars in millions]

Activity	FY 2019	FY 2020	FY 2019/2020 average
Conduct TECS Check	$139.7	$148.6	$144.2
Direct Costs	59.6	60.7	60.1
Fraud Detection and Prevention	335.8	378.7	357.3
Inform the Public	402.0	422.8	412.4
Intake	135.5	138.6	137.1
Issue Document	71.1	72.6	71.9
Make Determination	1,644.3	1,753.5	1,698.9
Management and Oversight	1,148.7	1,169.8	1,159.2
Perform Biometrics Services subtotal	222.8	228.3	225.6
Manage Biometric Services	67.8	70.4	69.1
Collect Biometric Data	81.6	83.1	82.4
Check Fingerprints	34.6	35.3	34.9

[180] For additional information on how to pay USCIS filing fees, see USCIS, *Paying USCIS Fees* available at, *https://www.uscis.gov/forms/paying-uscis-fees* (last reviewed/updated Feb. 14, 2018).

[181] *See* Public Law 109–463, 120 Stat. 3477 (2006).

[182] USCIS, *National Benefits Center: What It Is and What It Does* available from, *https://www.uscis.gov/archive/blog/2012/06/national-benefits-center-what-it-is-and* (released June 5, 2012).

TABLE 17—PROJECTED IEFA COSTS BY ACTIVITY—Continued

[Dollars in millions]

Activity	FY 2019	FY 2020	FY 2019/2020 average
Check Name	38.8	39.6	39.2
Records Management	349.6	358.8	354.2
Research Genealogy	2.0	2.0	2.0
Systematic Alien Verification for Entitlements	47.0	48.3	47.7
Total IEFA Costs	4,558.1	4,782.9	4,670.5

Next, the ABC model distributes activity costs to immigration benefit requests. Table 18 summarizes total revenue by immigration benefit request based on the proposed fee schedule.

TABLE 18—PROJECTED FY 2019/2020 AVERAGE ANNUAL REVENUE PER IMMIGRATION BENEFIT WITH PROPOSED FEES

[Dollars in millions]

Immigration benefit request	Revenue forecast
I–90 Application to Replace Permanent Resident Card	$283.33
I–102 Application for Replacement/Initial Nonimmigrant Arrival-Departure Document	3.51
I–129 Petition for a Nonimmigrant Worker Subtotal	330.30
I–129H1B—Named Beneficiaries	237.05
I–129H2A—Named Beneficiaries	3.41
I–129H2B—Named Beneficiaries	1.64
I–129L—Named Beneficiaries	33.82
I–129O	18.20
I–129CW, I–129E&TN, and I–129MISC	30.66
I–129H2A—Unnamed Beneficiaries	3.82
I–129H2B—Unnamed Beneficiaries	1.70
I–129F Petition for Alien Fiancé(e)	24.92
I–130 Petition for Alien Relative	541.90
I–131 Application for Travel Document	170.27
I–131 Refugee Travel Document for an individual age 16 or older	3.00
I–131 Refugee Travel Document for a child under the age of 16	0.14
I–131A Application for Carrier Documentation	9.90
I–140 Immigrant Petition for Alien Worker	87.75
I–191 Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA)	0.21
I–192 Application for Advance Permission to Enter as Nonimmigrant	32.23
I–193 Application for Waiver of Passport and/or Visa	21.40
I–212 Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal	6.33
I–290B Notice of Appeal or Motion	14.60
I–360 Petition for Amerasian, Widow(er) or Special Immigrant	1.92
I–485 Application to Register Permanent Residence or Adjust Status	572.24
I–526 Immigrant Petition by Alien Entrepreneur	56.21
I–539 Application to Extend/Change Nonimmigrant Status	89.56
I–589 Application for Asylum and for Withholding of Removal	8.15
I–600/600A; I–800/800A Intercountry Adoption-Related Petitions and Applications	4.98
I–600A/I–600 Supplement 3 Request for Action on Approved Form I–600A/I–600	0.31
I–601 Application for Waiver of Ground of Excludability	20.40
I–601A Provisional Unlawful Presence Waiver	64.32
I–612 Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended)	0.31
I–687 Application for Status as a Temporary Resident	0.00
I–690 Application for Waiver of Grounds of Inadmissibility	0.02
I–694 Notice of Appeal of Decision	0.01
I–698 Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA)	0.16
I–751 Petition to Remove Conditions on Residence	113.18
I–765 Application for Employment Authorization	941.82
I–800A Supplement 3 Request for Action on Approved Form I–800A	0.31
I–817 Application for Family Unity Benefits	0.81
I–821D Consideration of Deferred Action for Childhood Arrivals (Renewal)	108.90
I–824 Application for Action on an Approved Application or Petition	5.57
I–829 Petition by Entrepreneur to Remove Conditions on Permanent Resident Status	13.65
I–881 Application for Suspension of Deportation or Special Rule Cancellation of Removal	0.61
I–910 Application for Civil Surgeon Designation	0.34
I–924 Application For Regional Center Designation Under the Immigrant Investor Program	9.25
I–924A Annual Certification of Regional Center	4.25
I–929 Petition for Qualifying Family Member of a U–1 Nonimmigrant	1.53
N–300 Application to File Declaration of Intention	0.01
N–336 Request for a Hearing on a Decision in Naturalization Proceedings	6.80

TABLE 18—PROJECTED FY 2019/2020 AVERAGE ANNUAL REVENUE PER IMMIGRATION BENEFIT WITH PROPOSED FEES—Continued

[Dollars in millions]

Immigration benefit request	Revenue forecast
N–400 Application for Naturalization	949.72
N–470 Application to Preserve Residence for Naturalization Purposes	0.17
N–565 Application for Replacement Naturalization/Citizenship Document	12.78
N–600/600K Naturalization Certificate Application Subtotal	50.41
N–600 Application for Certificate of Citizenship	47.56
N–600K Application for Citizenship and Issuance of Certificate Under Section 322	2.85
USCIS Immigrant Fee	114.49
Biometric Services	8.55
G–1041 Genealogy Index Search Request	1.12
G–1041A Genealogy Records Request	0.98
Total	4,693.62

Table 19 depicts the current and proposed USCIS fees for immigration benefit requests and biometric services. For a more detailed description of the basis for the changes described in this table, see Appendix Table 3 in the FY 2019/2020 Fee Review Supporting Documentation accompanying this proposed rule.

TABLE 19—PROPOSED FEES BY IMMIGRATION BENEFIT

Immigration benefit request	Current fee	Proposed fee	Delta ($)	Percent change
I–90 Application to Replace Permanent Resident Card	$455	$415	−$40	−9%
I–102 Application for Replacement/Initial Nonimmigrant Arrival-Departure Document	445	490	45	10
I–129 Petition for a Nonimmigrant worker	460	N/A	N/A	N/A
I–129H1 I–129 H–1B—Named Beneficiaries	460	560	100	22
I–129H2A I–129 H–2A—Named Beneficiaries	460	860	400	87
I–129H2B I–129 H–2B—Named Beneficiaries	460	725	265	58
I–129L Petition for L Nonimmigrant Worker	460	815	355	77
I–129O Petition for O Nonimmigrant Worker	460	715	255	55
I–129CW, I–129E&TN, and I–129MISCV Petition for a CNMI-Only Nonimmigrant Transitional Worker; Application for Nonimmigrant Worker: E and TN Classification; and Petition for Nonimmigrant Worker: H–3, P, Q, or R Classification.	460	705	245	53
I–129H2A I–129 H–2A—Unnamed Beneficiaries	460	425	−35	−8
I–129H2B I–129 H–2B—Unnamed Beneficiaries	460	395	−65	−14
I–129F Petition for Alien Fiancé(e)	535	520	−15	−3
I–130 Petition for Alien Relative	535	555	20	4
I–131 Application for Travel Document	575	585	10	2
I–131 Travel Document for an individual age 16 or older	135	145	10	7
I–131 I–131 Refugee Travel Document for a child under the age of 16	105	115	10	10
I–131A Application for Carrier Documentation	575	1,010	435	76
I–140 Immigrant Petition for Alien Worker	700	545	−155	−22
I–191 Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA)	930	800	−130	−14
I–192 Application for Advance Permission to Enter as Nonimmigrant	[183] 585/930	1,415	830/485	142/52
I–193 Application for Waiver of Passport and/or Visa	585	2,790	2,205	377
I–212 Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal	930	1,040	110	12
I–290B Notice of Appeal or Motion	675	705	30	4
I–360 Petition for Amerasian Widow(er) or Special Immigrant	435	455	20	5
I–485 Application to Register Permanent Residence or Adjust Status	[184] 1,140/750	1,120	−20/370	−2/49
I–526 Immigrant Petition by Alien Entrepreneur	3,675	4,015	340	9
I–539 Application to Extend/Change Nonimmigrant Status	370	400	30	8
I–589 Application for Asylum and for Withholding of Removal	0	50	50	N/A
I–600/600A Petition to Classify Orphan as an Immediate Relative/Application for Advance Processing of an Orphan Petition	775	810	35	5
I–600A/I–600 Supp. 3 Request for Action on Approved Form I–600A/I–600	N/A	405	N/A	N/A
I–601 Application for Waiver of Ground of Excludability	930	985	55	6
I–601A Application for Provisional Unlawful Presence Waiver	630	960	330	52
I–612 Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended)	930	525	−405	−44
I–687 Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act	1,130	1,130	0	0
I–690 Application for Waiver of Grounds of Inadmissibility	715	770	55	8
I–694 Notice of Appeal of Decision	890	725	−165	−19

TABLE 19—PROPOSED FEES BY IMMIGRATION BENEFIT—Continued

Immigration benefit request	Current fee	Proposed fee	Delta ($)	Percent change
I–698 Application to Adjust Status From Temporary to Permanent Resident (Under Section 245A of the INA)	1,670	1,615	−55	−3
I–751 Petition to Remove Conditions on Residence	595	760	165	28
I–765 Application for Employment Authorization	410	490	80	20
I–800/800A Petition to Classify Convention Adoptee as an Immediate Relative/Application for Determination of Suitability to Adopt a Child from a Convention Country	775	810	35	5
I–800A Supp. 3 Request for Action on Approved Form I–800A	385	405	20	5
I–817 Application for Family Unity Benefits	600	590	−10	−2
I–821D Consideration of Deferred Action for Childhood Arrivals (Renewal)	0	275	275	N/A
I–824 Application for Action on an Approved Application or Petition	465	500	35	8
I–829 Petition by Entrepreneur to Remove Conditions on Permanent Resident Status	3,750	3,900	150	4
I–881 Application for Suspension of Deportation or Special Rule Cancellation of Removal	[185] 285/570	1,800	1,515/1,230	532/216
I–910 Application for Civil Surgeon Designation	785	650	−135	−17
I–924 Application for Regional Center Designation Under the Immigrant Investor Program	17,795	17,795	0	0
I–924A Annual Certification of Regional Center	3,035	4,470	1,435	47
I–929 Petition for Qualifying Family Member of a U–1 Nonimmigrant	230	1,515	1,285	559
I–941 Application for Entrepreneur Parole	1,200	1,200	0	0
N–300 Application to File Declaration of Intention	270	1,320	1,050	389
N–336 Request for a Hearing on a Decision in Naturalization Proceedings	700	1,755	1,055	151
N–400 Application for Naturalization	640/320	1,170	530	83
N–470 Application to Preserve Residence for Naturalization Purposes	355	1,600	1,245	266
N–565 Application for Replacement Naturalization/Citizenship Document	555	545	−10	−2
N–600 Application for Certificate of Citizenship	1,170	1,015	−155	−13
N–600K Application for Citizenship and Issuance of Certificate Under Section 322	1,170	960	−210	−18
USCIS Immigrant Fee	220	200	−20	−9
G–1041 Genealogy Index Search Request	65	240	175	269
G–1041A Genealogy Records Request	65	385	320	492
Biometric Services	85	30	−55	−65

VII. Other Possible Fee Scenarios

Subject to certain limitations, the fees that DHS proposes in this rule may change in the subsequent final rule based on policy decisions, in response to public comments, intervening legislation, and other changes. DHS will explain any changes between the proposed and final fees. Nevertheless, DHS notes that the content of a final rule, beyond public comments and policy modifications, appreciably depends on two factors that are to some extent beyond its control. As previously described, this rule includes a proposed DACA renewal fee associated with Form I–821D. See section V.Q. DACA Fees of this preamble. However, DHS is currently operating under two nationwide preliminary injunctions to maintain the DACA policy. DHS is not currently accepting initial DACA requests, except in limited circumstances.[186] USCIS evaluated separate DACA initial and renewal fees in case that changes. Additionally, the proposed fees include USCIS funding $207.6 million of ICE expenses associated with adjudication and naturalization services in both FY 2019 and FY 2020. See section IV.A.1.a. Use IEFA Fee Collections to Fund ICE Activities of this preamble. Any combination of those proposals may not materialize because DHS must obtain relief from the DACA preliminary injunctions. This rule also proposes the transfer of IEFA funds to ICE consistent with the Administration's budget requests for fiscal years 2019 and 2020. If Congress rejects the Administration's request, or if DHS does not ultimately shift these costs from annual appropriations to the IEFA, USCIS will not include this use of these funds in its fee model for the final rule. Uncertainties associated with each aspect of the rule could result in changes to the final fees.[187]

To reduce the uncertainty that such conditions present to the affected public, USCIS proposes and evaluates six fee scenarios based on these three factors. Each scenario lays out what the fees would be if certain conditions materialize and present a range of fees. Thus, the final fees may be one of the scenarios presented, or an amount in between the highest and lowest fees proposed. Scenario A refers to the proposed fees described in detail throughout this proposed rule. Scenario B includes DACA renewal fees, but it excludes the ICE transfer. Scenario C excludes DACA fees, but it includes the ICE transfer. Scenario D excludes both DACA fees and the ICE transfer.

[183] The current fee for Form I–192 is 585 when filed with and processed by CBP. When filed with USCIS, the fee is 930. *See* 8 CFR 103.7(b)(1)(i)(P).

[184] The 750 fee applies to ''an applicant under the age of 14 years when [the application] is (i) submitted concurrently with the Form I–485 of a parent, (ii) the applicant is seeking to adjust status as a derivative of his or her parent, and (iii) the child's application is based on a relationship to the same individual who is the basis for the child's parent's adjustment of status, or under the same legal authority as the parent.'' *See* 8 CFR 103.7(b)(1)(i)(U)(2).

[185] Currently there are two USCISs fees for Form I–881: $285 for individuals and $570 for families. *See* 8 CFR 103.7(b)(1)(i)(QQ)(1). EOIR has a separate $165 fee. DHS proposes no changes to the EOIR fee.

[186] See footnotes 167 and 168.

[187] In addition, litigation regarding various fees may result in DHS not implementing certain fees or fee increases. DHS is considering whether to include a severability provision in the final fee rule, or ''fallback'' provisions that provide for alternative fee schedules in the event that certain aspects of the rule are not implemented. DHS requests comment on this option.

Scenarios E and F list separate initial and renewal fees for DACA, with or without the ICE transfer. Table 20 lists the assumptions and effects of these three factors on each fee scenario. The following sections briefly describe the differences and list the possible fees in each scenario.

TABLE 20—PROPOSED FEE SCHEDULE SCENARIOS

Fee scenario	DACA renewal fees included	DACA initial fee included	ICE Transfer included	Average budget ($ millions)	Percent weighted average fee increase [188]
A	Yes	No	Yes	$4,670.5	21%
B	Yes	No	No	4,462.9	15
C	No	No	Yes	4,651.7	25
D	No	No	No	4,444.2	20
E	Yes	Yes	Yes	4,672.4	20
F	Yes	Yes	No	4,464.8	15

A. Fee Schedule With DACA Renewal Fees

Scenarios A and B produced fee levels in between the highest and lowest scenarios. Table 21 lists the individual fees for each. These fees are lower than in some scenarios because DACA fees recover part of USCIS costs. Scenario B produces lower fees than Scenario A because it has a lower budget by excluding the ICE transfer.

TABLE 21—PROPOSED FEE SCHEDULE WITH DACA RENEWAL FEE WITH AND WITHOUT THE ICE TRANSFER

Immigration benefit request	Scenario A	Scenario B
I–90 Application to Replace Permanent Resident Card	$415	$385
I–102 Application for Replacement/Initial Nonimmigrant Arrival-Departure Document	490	465
I–129 Petition for a Nonimmigrant worker	N/A	N/A
I–129H1B—Named Beneficiaries	560	535
I–129H2A—Named Beneficiaries	860	840
I–129H2B—Named Beneficiaries	725	700
I–129L—Named Beneficiaries	815	795
I–129O	715	690
I–129CW, I–129E&TN, and I–129MISC	705	685
I–129H2A—Unnamed Beneficiaries	425	400
I–129H2B—Unnamed Beneficiaries	395	370
I–129F Petition for Alien Fiancé(e)	520	495
I–130 Petition for Alien Relative	555	535
I–131 Application for Travel Document	585	550
I–131 Refugee Travel Document for an individual age 16 or older	145	145
I–131 Refugee Travel Document for a child under the age of 16	115	115
I–131A Application for Carrier Documentation	1,010	1,010
I–140 Immigrant Petition for Alien Worker	545	520
I–191 Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA)	800	780
I–192 Application for Advance Permission to Enter as Nonimmigrant	1,415	1,355
I–193 Application for Waiver of Passport and/or Visa	2,790	2,805
I–212 Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal	1,040	1,025
I–290B Notice of Appeal or Motion	705	675
I–360 Petition for Amerasian Widow(er) or Special Immigrant	455	435
I–485 Application to Register Permanent Residence or Adjust Status	1,120	1,095
I–526 Immigrant Petition by Alien Entrepreneur	4,015	4,010
I–539 Application to Extend/Change Nonimmigrant Status	400	375
I–589 Application for Asylum and for Withholding of Removal	50	50
I–600/600A Orphan Adoption-Related Petitions and Applications	810	770
I–600A Supplement 3 Request for Action on Approved Form I–600A	405	385
I–601 Application for Waiver of Ground of Excludability	985	965
I–601A Provisional Unlawful Presence Waiver	960	940
I–612 Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended)	525	495
I–687 Application for Status as a Temporary Resident	1,130	1,130
I–690 Application for Waiver of Grounds of Inadmissibility	770	745
I–694 Notice of Appeal of Decision	725	705
I–698 Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA)	1,615	1,600
I–751 Petition to Remove Conditions on Residence	760	735
I–765 Application for Employment Authorization	490	455
I–800/800A Hague Adoption Convention Adoption-Related Petitions and Applications	805	770
I–800A Supplement 3 Request for Action on Approved Form I–800A	405	385
I–817 Application for Family Unity Benefits	590	565
I–821D Consideration of Deferred Action for Childhood Arrivals (Initial)	0	0
I–821D Consideration of Deferred Action for Childhood Arrivals (Renewal)	275	250
I–824 Application for Action on an Approved Application or Petition	500	475
I–829 Petition by Entrepreneur to Remove Conditions on Permanent Resident Status	3,900	3,895

188 See footnote 6 for more information on the weighted averages in the fee schedule.

TABLE 21—PROPOSED FEE SCHEDULE WITH DACA RENEWAL FEE WITH AND WITHOUT THE ICE TRANSFER—Continued

Immigration benefit request	Scenario A	Scenario B
I–881 Application for Suspension of Deportation or Special Rule Cancellation of Removal	1,800	1,785
I–910 Application for Civil Surgeon Designation	650	625
I–924 Application For Regional Center Designation Under the Immigrant Investor Program	17,795	17,795
I–924A Annual Certification of Regional Center	4,470	4,470
I–929 Petition for Qualifying Family Member of a U–1 Nonimmigrant	1,515	1,465
N–300 Application to File Declaration of Intention	1,320	1,305
N–336 Request for a Hearing on a Decision in Naturalization Proceedings	1,755	1,730
N–400 Application for Naturalization	1,170	1,150
N–470 Application to Preserve Residence for Naturalization Purposes	1,600	1,585
N–565 Application for Replacement Naturalization/Citizenship Document	545	515
N–600 Application for Certificate of Citizenship	1,015	985
N–600K Application for Citizenship and Issuance of Certificate Under Section 322	960	940
USCIS Immigrant Fee	200	175
Biometric Services	30	30
G–1041 Genealogy Index Search Request	240	240
G–1041A Genealogy Records Request	385	385

B. Fee Schedule Without DACA Fees

Scenarios C and D exclude DACA workload from the fee schedules. Table 22 lists the fees for these scenarios. These scenarios produced some of the highest fees because they do not include DACA fee-paying volume to recover a portion of the projected budget. The fee review budget in these scenarios is lower than scenarios A, B, E, and F because USCIS removed certain estimated costs related to DACA, so as to mitigate the financial risk to USCIS of dependence upon revenue associated with a temporary program that may be eliminated in the future.[189] However, the decrease to the budget from DACA does not offset the fee increase. Scenario C yields the highest fees in some cases because it includes the ICE transfer in the budget. Scenario D fees may be higher or lower than the proposed fees in scenario A because it has the lowest total budget, but it excludes DACA fee-paying volume to recover a portion of the projected budget.

TABLE 22—FEE SCHEDULE WITHOUT DACA FEES AND WITH OR WITHOUT THE ICE TRANSFER

Immigration benefit request	Scenario C	Scenario D
I–90 Application to Replace Permanent Resident Card	$440	$410
I–102 Application for Replacement/Initial Nonimmigrant Arrival-Departure Document	510	480
I–129 Petition for a Nonimmigrant worker	0	0
I–129H1B—Named Beneficiaries	585	555
I–129H2A—Named Beneficiaries	870	850
I–129H2B—Named Beneficiaries	735	710
I–129L—Named Beneficiaries	830	805
I–129O	725	705
I–129CW, I–129E&TN, and I–129MISC	720	695
I–129H2A—Unnamed Beneficiaries	440	410
I–129H2B—Unnamed Beneficiaries	410	385
I–129F Petition for Alien Fiancé(e)	535	510
I–130 Petition for Alien Relative	575	550
I–131 Application for Travel Document	625	585
I–131 Refugee Travel Document for an individual age 16 or older	145	145
I–131 Refugee Travel Document for a child under the age of 16	115	115
I–131A Application for Carrier Documentation	1,015	1,010
I–140 Immigrant Petition for Alien Worker	580	555
I–191 Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA)	815	790
I–192 Application for Advance Permission to Enter as Nonimmigrant	1,465	1,395
I–193 Application for Waiver of Passport and/or Visa	2,775	2,790
I–212 Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal	1,070	1,050
I–290B Notice of Appeal or Motion	735	700
I–360 Petition for Amerasian Widow(er) or Special Immigrant	475	450
I–485 Application to Register Permanent Residence or Adjust Status	1,155	1,125
I–526 Immigrant Petition by Alien Entrepreneur	4,015	4,005
I–539 Application to Extend/Change Nonimmigrant Status	420	395
I–589 Application for Asylum and for Withholding of Removal	50	50
I–600/600A Orphan Adoption-Related Petitions and Applications	845	770
I–600A Supplement 3 Request for Action on Approved Form I–600A	420	400
I–601 Application for Waiver of Ground of Excludability	1,035	1,010
I–601A Provisional Unlawful Presence Waiver	980	960

[189] In the FY 2019/2020 fee review scenarios without DACA fees, USCIS removed contractual costs related to DACA from the ABC model. These excluded costs were for form intake, biometric collection, and EAD card production for DACA volumes. While DHS did not discuss the methodology in the FY 2016/2017 fee rule docket, DHS took a similar approach to exclude temporary or uncertain costs related to temporary programs. *See* 81 FR 26914.

TABLE 22—FEE SCHEDULE WITHOUT DACA FEES AND WITH OR WITHOUT THE ICE TRANSFER—Continued

Immigration benefit request	Scenario C	Scenario D
I–612 Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended)	545	515
I–687 Application for Status as a Temporary Resident	1,130	1,130
I–690 Application for Waiver of Grounds of Inadmissibility	790	760
I–694 Notice of Appeal of Decision	740	715
I–698 Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA)	1,635	1,615
I–751 Petition to Remove Conditions on Residence	780	755
I–765 Application for Employment Authorization	590	550
I–800/800A Hague Adoption Convention Adoption-Related Petitions and Applications	845	805
I–800A Supplement 3 Request for Action on Approved Form I–800A	420	400
I–817 Application for Family Unity Benefits	615	590
I–821D Consideration of Deferred Action for Childhood Arrivals (Initial)	N/A	N/A
I–821D Consideration of Deferred Action for Childhood Arrivals (Renewal)	N/A	N/A
I–824 Application for Action on an Approved Application or Petition	520	495
I–829 Petition by Entrepreneur to Remove Conditions on Permanent Resident Status	3,905	3,895
I–881 Application for Suspension of Deportation or Special Rule Cancellation of Removal	1,825	1,805
I–910 Application for Civil Surgeon Designation	660	635
I–924 Application For Regional Center Designation Under the Immigrant Investor Program	17,795	17,795
I–924A Annual Certification of Regional Center	4,465	4,460
I–929 Petition for Qualifying Family Member of a U–1 Nonimmigrant	1,535	1,480
N–300 Application to File Declaration of Intention	1,340	1,315
N–336 Request for a Hearing on a Decision in Naturalization Proceedings	1,770	1,745
N–400 Application for Naturalization	1,195	1,170
N–470 Application to Preserve Residence for Naturalization Purposes	1,615	1,595
N–565 Application for Replacement Naturalization/Citizenship Document	580	550
N–600 Application for Certificate of Citizenship	1,035	1,005
N–600K Application for Citizenship and Issuance of Certificate	975	950
USCIS Immigrant Fee	215	185
Biometric Services	30	30
G–1041 Genealogy Index Search Request	240	240
G–1041A Genealogy Records Request	385	385

C. Fee Schedule With Both DACA Initial and Renewal Fees

In scenarios E and F, USCIS adds its forecast of 43,000 initial requests for DACA. While the fee review budget is slightly higher than scenarios A and B, the increased fee-paying volume produces some of the lowest fees. Table 23 lists the fees in these scenarios.

TABLE 23—FEE SCHEDULE WITH DACA INITIAL AND RENEWAL FEES

Immigration benefit request	Scenario E	Scenario F
I–90 Application to Replace Permanent Resident Card	$415	$385
I–102 Application for Replacement/Initial Nonimmigrant Arrival-Departure Document	485	460
I–129 Petition for a Nonimmigrant worker	0	0
I–129H1—Named Beneficiaries	550	520
I–129H2A—Named Beneficiaries	810	790
I–129H2B—Named Beneficiaries	705	685
I–129L—Named Beneficiaries	790	770
I–129O	695	670
I–129CW, I–129E&TN, and I–129MISC	680	660
I–129H2A—Unnamed Beneficiaries	405	385
I–129H2B—Unnamed Beneficiaries	390	365
I–129F Petition for Alien Fiancé(e)	500	475
I–130 Petition for Alien Relative	550	530
I–131 Application for Travel Document	585	550
I–131 Refugee Travel Document for an individual age 16 or older	145	145
I–131 Refugee Travel Document for a child under the age of 16	115	115
I–131A Application for Carrier Documentation	1,010	1,010
I–140 Immigrant Petition for Alien Worker	545	520
I–191 Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA)	800	780
I–192 Application for Advance Permission to Enter as Nonimmigrant	1,415	1,350
I–193 Application for Waiver of Passport and/or Visa	2,790	2,805
I–212 Application for Permission to Reapply for Admission into the U.S. After Deportation or Removal	1,040	1,020
I–290B Notice of Appeal or Motion	700	670
I–360 Petition for Amerasian Widow(er) or Special Immigrant	455	430
I–485 Application to Register Permanent Residence or Adjust Status	1,120	1,095
I–526 Immigrant Petition by Alien Entrepreneur	4,015	4,010
I–539 Application to Extend/Change Nonimmigrant Status	390	370
I–589 Application for Asylum and for Withholding of Removal	50	50

TABLE 23—FEE SCHEDULE WITH DACA INITIAL AND RENEWAL FEES—Continued

Immigration benefit request	Scenario E	Scenario F
I–600/600A Orphan Adoption-Related Petitions and Applications	805	770
I–600A Supplement 3 Request for Action on Approved Form I–600A	400	380
I–601 Application for Waiver of Ground of Excludability	985	965
I–601A Provisional Unlawful Presence Waiver	960	940
I–612 Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended)	515	485
I–687 Application for Status as a Temporary Resident	1,130	1,130
I–690 Application for Waiver of Grounds of Inadmissibility	770	745
I–694 Notice of Appeal of Decision	715	695
I–698 Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA)	1,615	1,600
I–751 Petition to Remove Conditions on Residence	745	720
I–765 Application for Employment Authorization	480	445
I–800/800A Hague Adoption Convention Adoption-Related Petitions and Applications	805	770
I–800A Supplement 3 Request for Action on Approved Form I–800A	400	380
I–817 Application for Family Unity Benefits	590	565
I–821D Consideration of Deferred Action for Childhood Arrivals (Initial)	500	480
I–821D Consideration of Deferred Action for Childhood Arrivals (Renewal)	270	250
I–824 Application for Action on an Approved Application or Petition	495	475
I–829 Petition by Entrepreneur to Remove Conditions on Permanent Resident Status	3,900	3,895
I–881 Application for Suspension of Deportation or Special Rule Cancellation of Removal	1,800	1,785
I–910 Application for Civil Surgeon Designation	650	625
I–924 Application For Regional Center Designation Under the Immigrant Investor Program	17,795	17,795
I–924A Annual Certification of Regional Center	4,465	4,465
I–929 Petition for Qualifying Family Member of a U–1 Nonimmigrant	1,510	1,465
N–300 Application to File Declaration of Intention	1,320	1,305
N–336 Request for a Hearing on a Decision in Naturalization Proceedings	1,755	1,730
N–400 Application for Naturalization	1,170	1,150
N–470 Application to Preserve Residence for Naturalization Purposes	1,600	1,585
N–565 Application for Replacement Naturalization/Citizenship Document	545	515
N–600 Application for Certificate of Citizenship	1,015	985
N–600K Application for Citizenship and Issuance of Certificate	960	940
USCIS Immigrant Fee	200	175
Biometric Services	30	30
G–1041 Genealogy Index Search Request	240	240
G–1041A Genealogy Records Request	385	385

VIII. Statutory and Regulatory Requirements

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

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess the costs and benefits of available alternatives, and if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This proposed rule has been designated an ''economically significant regulatory action'' under section 3(f)(1) of E.O. 12866. Accordingly, the rule has been reviewed by OMB.

USCIS' current fee schedule is expected to yield $3.41 billion of average annual revenue during the FY 2019/2020 biennial period. This represents a $0.93 billion, or 38 percent, increase from the FY 2016/2017 fee rule projection of $2.48 billion. *See* 81 FR 26911. The projected revenue increase is due to higher fees as a result of the FY 2016/2017 fee rule and more anticipated fee-paying receipts. The FY 2016/2017 fee rule forecasted 5,870,989 total workload receipts and 5,140,415 fee-paying receipts. *See* 81 FR 26923–4. However, the FY 2019/2020 fee review forecasts 9,336,015 total workload receipts and 7,789,861 fee-paying receipts. This represents a 59 percent increase to workload and 52 percent increase to fee-paying receipt volume assumptions.

USCIS would use the increase in revenue under INA section 286(m), (n), 8 U.S.C. 1356(m), (n), to ensure that USCIS would recover its full operating costs and maintain an adequate level of service. USCIS would set fees at levels sufficient to cover the full cost of the corresponding services associated with fairly and efficiently adjudicating immigration benefit requests and at a level sufficient to fund overall requirements and general operations, including the full costs of processing immigration benefit requests and associated support benefits; the full cost of providing similar benefits to asylum and refugee applicants at no charge; and the full cost of providing similar benefits to others at no charge.

The INA provides for the collection of fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services, including services provided without charge to asylum applicants and certain other applicants. DHS must fund the costs of providing services without charge by using a portion of the filing fees that are collected for other immigration benefits. While most immigration benefit request filing fees apply to individuals, as described above, some also apply to small entities. USCIS seeks to minimize the impact on all parties, but in particular small entities. An alternative to the increased economic burden of the proposed rule is to maintain fees at their current level for small entities. The strength of this alternative is that it assures no additional fee burden is placed on small entities; however, this alternative also would cause negative impacts to small entities.

Without the fee adjustments proposed in this rule, significant operational changes would be necessary. Given current filing volume and other economic considerations, additional revenue is necessary to prevent immediate and significant cuts in planned spending. The proposed revenue increase is based on currently available USCIS costs and volume projections.

In addition to simple fee adjustments, the proposed rule includes numerous other changes in forms and policies related to fee payment. Some of these changes would result in cost savings, and others would result in costs or transfers. For the 10-year implementation period of the proposed rule, DHS estimates the total cost of the rule to applicants/petitioners is $4,730,732,250 undiscounted, $4,035,410,566 discounted at 3-percent, and $3,322,668,371 discounted at 7-percent. DHS estimates the total cost savings (benefits) to the applicants/petitioners is $220,187,510 undiscounted, $187,824,412 discounted at 3-percent, and $154,650,493 discounted at 7-percent. Much of this total is expected to be transfers between applicants and the federal government or between groups of applicants, rather than new, real resource costs to the U.S. economy. These costs, transfers, and and cost savings (benefits) are briefly described below in Table 24, and in more detail in Tables 47 and 48 of the Regulatory Impact Analysis (RIA).

TABLE 24—SUMMARY OF PROPOSED PROVISIONS AND IMPACTS

Proposed provision	Description of proposed change to provision	Estimated costs or transfers of proposed provision	Estimated benefits of proposed provision
(a) Secure Mail Initiative	USCIS has decided to implement Signature Confirmation Restricted Delivery as the sole method of delivery of secure documents for USCIS.	*Quantitative:* Applicants— • None. *Qualitative:* Applicants— • None. DHS/USCIS — • Mailing costs from USPS for Signature Confirmation Restricted Delivery confirmation.	*Quantitative:* Applicants— • Applicants with unstable addresses or who move often will be much more certain to receive their documents. *Qualitative:* Applicants— • None. DHS/USCIS— • Signature Confirmation Restricted Delivery will verify that the address information DHS has for a particular immigration benefit request is accurate. • Reduces the likelihood of misdelivered documents that could be misused.
(b) Clarify Dishonored Fee Check Representment Requirement and Fee Payment Method.	DHS is proposing that if a check or other financial instrument used to pay a fee is returned as unpayable *because of insufficient funds,* USCIS will resubmit the payment to the remitter institution one time. In addition, DHS proposes that it may reject a request that is accompanied by a check that is dated more than 365 days before the receipt date. DHS is also clarifying that fees are non-refundable regardless of the result of the immigration benefit request or how much time the request requires to be adjudicated. DHS is clarifying that fees will not be refunded no matter the result of the benefit request or how much time the adjudication requires.	*Quantitative:* Applicants- • None. *Qualitative:* Applicants— • None. DHS/USCIS— • The expansion by USCIS to accept credit cards for the payment of USCIS fees has resulted in a rise in the number of disputes filed with credit card companies challenging the retention of the fee by USCIS. As credit card use increases, this result has the potential to have a significant negative fiscal effect on USCIS fee receipts.	*Quantitative:* Applicants— • None. *Qualitative:* Applicants— • None. DHS/USCIS— • USCIS can devote more time to adjudicate cases and to reduce administrative burdens and processing errors associated with fee payments, by clarifying the dishonored fee check re-presentment. • In the event that the bank that issues the credit card rescinds the payment of the fee to USCIS, USCIS reserves the authority to invoice the responsible party (applicant, petitioner, and requestor) for the unpaid fee.
(c) Eliminate $30 Returned Check Fee	DHS proposes to remove the $30 charge for dishonored payments.	*Quantitative:* Applicants— • None. *Qualitative:* Applicants— • Costs to applicants if they had to reapply after rejection for a certain immigrant benefit. DHS/USCIS— • Could be an increase in insufficient payments by applicants because the $30 fee may serve as a deterrent for submitting a deficient payment.	*Quantitative:* Applicants— • $0.33 million annual cost savings. *Qualitative:* Applicants— • The current $30 charge and the potential of having a benefit request rejected encourage applicants to provide the correct filing fees when submitting an application or petition. • Applicants who submit bad checks would no longer have to pay a fee. DHS/USCIS— • None.

TABLE 24—SUMMARY OF PROPOSED PROVISIONS AND IMPACTS—Continued

Proposed provision	Description of proposed change to provision	Estimated costs or transfers of proposed provision	Estimated benefits of proposed provision
(d) Fee waivers	DHS proposes to limit fee waivers to statutorily mandated fee waivers and to those applicants who have an annual household income of less than 125% of the FPG. Additionally, fee waiver applicants cannot be admitted into the United States subject to an affidavit of support under INA section 213A, 8 U.S.C 1183a and not be subject to the public charge inadmissibility ground under INA section 212(a)(4), 8 U.S.C. 1182(a)(4). *Qualitative:* Applicants— • Limiting fee waivers may adversely affect some applicants' ability to apply for immigration benefits. DHS/USCIS— • None.	*Quantitative:* Applicants— • $360.1 million annually from applicable USCIS form transfer fees. DHS/USCIS— • None. *Qualitative:* Applicants— None. DHS/USCIS— • Reduce or eliminate administrative costs required to maintain training or guidance necessary to adjudicate unique fee waiver requests.	*Quantitative:* Applicants— • Cost savings of $5.6 million annually from eliminated opportunity cost of time spent completing the fee waiver request. DHS/USCIS— • None.
(e) Fee Exemptions	DHS proposes to remove the fee exemptions for an initial request for an employment authorization document (EAD) for the following classifications: • Citizen of Micronesia, Marshall Islands, or Palau; • Granted Withholding of Deportation; • Temporary Protected Status (TPS) if filing an initial TPS application for individuals under 14 years of age or over 65 years of age. • Applicant for Asylum and Withholding of Deportation or Removal.	*Quantitative:* Applicants— • Costs of $15.9 million annually in filing fees to filers of Form I–765 from the categories listed in the proposed provision no longer exempted.	*Quantitative:* Applicants— • None.
(a)		*Qualitative:* Applicants— • This could result in lost wages for the workers and lost productivity for the sponsoring employers. The lost wages and productivity can be considered as costs of the forgone benefits. This may be a very small population, and USCIS believes they will find some way to pay for their EAD filing fee. DHS/USCIS— • None.	*Qualitative:* Applicants— • The removal of fee exemptions for these populations may reduce further increases of other fees to pay for these exemptions. DHS/USCIS— • DHS notes that the continuing to provide these fee exemptions would result in the costs of those fee services being transferred to the fees for other forms. Removing the exemptions allows DHS to recover the costs of adjudication of Form I–765 for these categories from those who benefit from the service instead of other fee payers.
(f) Changes to Biometric Services Fee	DHS proposes to incorporate the biometric services cost into the underlying immigration benefit request fee instead of charging a flat $85 biometric services fee.	*Quantitative:* Applicants— • None.	*Quantitative:* Applicants— • EOIR and TPS applicants would save $16.0 million in cost savings resulting from a $55 reduction in biometrics service fees per applicant.

TABLE 24—SUMMARY OF PROPOSED PROVISIONS AND IMPACTS—Continued

Proposed provision	Description of proposed change to provision	Estimated costs or transfers of proposed provision	Estimated benefits of proposed provision
	DHS proposes to require a $30 biometric services fee for TPS initial applications and re-registrations and EOIR applicants. *Qualitative:* Applicants— • None. DHS/USCIS— • None.	*Qualitative:* Applicants— • Simplifies the process to submit payments. • Could result in fewer incorrect payments and therefore, fewer rejected applications. • Biometric costs incorporated into the fee would actually correspond to the services used. DHS/USCIS— • Eliminating the separate payment of the biometric services fee would decrease the administrative burden required to process both a filing fee and biometric services fee for a single benefit request. • Agency can assign a biometric cost to the form fee that is based on the appropriate contract instead of a standard cost.	
(g) Discontinue providing free interim benefits when Forms I–75 and I–131 are filed concurrently with pending Form I–485 or when a Form I–485 is pending.	DHS proposes to require separate fees for Forms I–765 and/or I–131 when filed concurrently with Form I–485 or with a pending I–485.	*Quantitative:* Applicants— • $329.7 million for Forms I–765 and/or I–131 concurrently filed with Form I–485 or while it is pending. *Qualitative:* Applicants— • None.	*Quantitative:* Applicants— • Not estimated. *Qualitative:* Applicants— • None. DHS/USCIS— • The proposed provision would be to isolate stand-alone interim benefit applicants from those concurrently filing Form I–485 allowing USCIS to more accurately assessed fee-paying percentages, fee-paying volumes, and fees for all three benefit types. • Easier to administer separate fees than to determine if the I–131 or I–765 is supposed to be free or require a fee
(h) Form I–485 Fee for Children Under 14, Filing with Parent.	DHS proposes to require payment of the full $1,120 proposed fee for a child under the age of 14 years when concurrently filing Form I–485 with a parent.	*Quantitative:* Applicants— • Not estimated. *Qualitative:* Applicants— • $23.3 million from increased USCIS form fees. DHS/USCIS— • None.	*Quantitative:* Applicants— • Not estimated. *Qualitative:* Applicants— • None. DHS/USCIS— • Easier to administer one single fee for Form I–485 would reduce the burden of adjudication and better reflect the cost of adjudication.
(i) Allow Individuals with Advance Parole to use Form I–131A, Application for Travel Document (Carrier Documentation) and Expand the Population Eligible to File Form I–131A.	DHS proposes to expand the population eligible to use Form I–131A to include requests for replacement advance parole documents	*Quantitative:* Applicants— • $4.1 million for new costs to file Form I–131A. *Qualitative:* Applicants— • None. DHS/USCIS— • None.	*Quantitative:* • None. *Qualitative:* Applicants— • The creation of a process for individuals to replace advance parole cards while abroad. DHS/USCIS— • None.

TABLE 24—SUMMARY OF PROPOSED PROVISIONS AND IMPACTS—Continued

Proposed provision	Description of proposed change to provision	Estimated costs or transfers of proposed provision	Estimated benefits of proposed provision
(j) Separating Form I–129, Petition for a Nonimmigrant Worker, into Different Forms, and Limit Petitions Where Multiple Beneficiaries are Permitted to 25 Named Beneficiaries per Petition.	DHS proposes to separate the Petition for a Nonimmigrant Worker, Form I–129 into several forms with different corresponding fees. DHS also proposes to impose a limit of 25 named beneficiaries per petition where multiple beneficiaries are permitted.	*Quantitative:* Applicants— • Annual transfer form fees, opportunity costs of time, and multiple forms limited to 25 named beneficiaries to file Form I–129 would range depending on who files the form. • With the new requirements some petitioners will now be required to file multiple petitions because the forms are limited to only 25 named beneficiaries. This will require additional cost for the petitioners to use a HR, In-house, or Outsourced lawyer to complete the different I–129 classifications forms, with different fees. HR Specialist—$69.6 million; and In-house Lawyer—$65.4 million; or Outsourced Lawyer—$59.8 million. DHS/USCIS— • Not estimated. *Qualitative:* Applicants— • None. DHS/USCIS— • None.	*Quantitative:* Applicants— • None. DHS/USCIS— • None. *Qualitative:* Applicants— • Separating forms would allow applicants to focus on each form's use and would reduce the need to navigate lengthy instructions that do not apply to their petition. • Separating fees might prevent future increases in fees to one petitioner population that may be caused by some other petitioner population also using that form. DHS/USCIS— • By splitting the form and proposing several different fees, USCIS believes it will simplify or consolidate the information requirements for petitioners and applicants as well as better reflect the cost to adjudicate each specific nonimmigrant classification. • Proposed fees would be imposed on the separate form for each specific petitioner population that causes the adjudication costs; other petitioners filing for other nonimmigrant classifications would not be burdened with costs not associated with their filings. • Splitting the form and fees will allow USCIS to focus the information requirements for petitioners, better reflect the cost to adjudicate each specific nonimmigrant classification, and recover the revenue more directly from those petitioners who are receiving the benefit. • Breaking out Form I–129 will affect backlogs only insofar as updating the fees enables USCIS to achieve full cost recovery and assign more resources to a particular adjudication as needs and priorities dictate.
(k) Extend premium processing timeframe from 15 calendar days to 15 business days.	DHS proposes to change the premium processing timeframe from 15 calendar days to 15 business days.	*Quantitative:* Applicants— • Not estimated.	*Quantitative:* Applicants— • Not estimated. Employers could lose some productivity but USCIS has no way to estimate what that loss may be.

TABLE 24—SUMMARY OF PROPOSED PROVISIONS AND IMPACTS—Continued

Proposed provision	Description of proposed change to provision	Estimated costs or transfers of proposed provision	Estimated benefits of proposed provision
		Qualitative: Petitioners— • Increased time burden and potential costs to employers who must plan for additional business days while waiting for premium processing. • Applicants may have to wait longer for decisions on their cases, from 15 calendar days to 15 business days. DHS/USCIS— • None.	*Qualitative:* Petitioners— • Removes petitioner expectation of 15 calendar day processing to allow for better business planning. DHS/USCIS— • Reduces risk of failing to complete premium processing in the allotted timeframe, which results in refunds to petitioners and possibly suspension of the premium processing service. • Allows USCIS additional time to process a petition. USCIS will avoid having to issue a refund and possibly avoid suspending premium processing service.
(l) Creation of Form I–600A/600 Supplement 3, Request for Action on Approved For I–600A/I–600 and new fee.	DHS proposes to: Create a new form, I–600 Supplement 3, Request for Action on an Approved Form I–600A/I–600, and fee; clarify the regulations and align them with current practice regarding when prospective adoptive parents are not required to pay the Form I–600 or Form I–800 filing fee for multiple Form I–600 or Form I–800 petitions; alter the validity period for a Form I–600A approval in an orphan case from 18 to 15 months to remove inconsistencies between Form I–600A approval periods and validity of the FBI fingerprint authorization.	*Quantitative:* Applicants— • $0.57 million for new form fees. *Qualitative:* Applicants— • None. DHS/USCIS— • None.	*Quantitative:* Applicants— • None. *Qualitative:* Applicants— • Improve and align the adjudication and approval processes for adoptions from countries that are party to the Hague Adoption Convention and countries that are not. • Clarify the process for applicants who would like to request an extension of Form I–600A/I–600 and/or another type of approved change to their application/petition. DHS/USCIS— • Standardizes USCIS process and provides for the ability to collect a fee. • Improve and align the USCIS adjudication and approval processes for adoptions of children from countries that are party to the Hague Adoption Convention and from countries that are not. • Changing the validity period to 15 months will make the Form I–600A approval periods consistent with the validity of FBI biometric related background checks. The uniform 15-month validity period will also alleviate the burden on prospective adoptive parents and adoption service providers to monitor multiple expiration dates.

TABLE 24—SUMMARY OF PROPOSED PROVISIONS AND IMPACTS—Continued

Proposed provision	Description of proposed change to provision	Estimated costs or transfers of proposed provision	Estimated benefits of proposed provision
(m) Changes to Genealogy Search and Records Requests.	DHS proposes several changes to the USCIS genealogy program and how the agency processes genealogy requests. DHS proposes to expand the use of electronic genealogy requests; change the search request process so that USCIS may provide requesters with digital records, if they exist; and change the genealogy fees.	*Quantitative:* Applicants— • None. *Qualitative:* Applicants— • None. DHS/USCIS— • USCIS may still need to mail some records in cases where requestors who cannot submit the forms electronically need to submit paper copies of both forms with required filing fees.	*Quantitative:* Applicants— • None. *Qualitative:* Applicants— • Genealogy search and records request process changes would increase efficiency and decrease wait times for requestors. DHS/USCIS— • Reduce costs for mailing, records processing, and storage costs because electronic versions of records requests would reduce the administrative burden on USCIS. • USCIS would save $16 to $45 per index search service and $26 to $55 for each textual file retrieved. • Providing digital records in response to a Form G–1041 request may reduce the number of Form G–1041A requests that would be filed because there would already be a copy of the record if it was previously digitized.
(n) Remove Reduced Fee for Naturalization Applicants Using Form I–942, Request for Reduced Fee, When Filing Form N–400, Application for Naturalization.	DHS proposes to eliminate the reduced fee option for Form N–400 that applies to applicants whose documented household income is greater than 150 percent and not more than 200 percent of the Federal poverty level.	*Quantitative:* Applicants— • $2.9 million annually in transfer fees to file Form N–400 for individuals who would have previously requested a reduced Form N–400 fee using Form I–942. *Qualitative:* Applicants— • None. DHS/USCIS— • None.	*Quantitative:* Applicants— • None. *Qualitative:* Applicants— • None. DHS/USCIS— • Not transfer form N–400 costs to other form fees.
(o) Charge for an initial Form I–765 while an asylum claim is pending.	DHS proposes to require the fee for an initial Application for Employment Authorization, Form I–765, when asylum applicants apply for asylum or file an Application for Asylum and for Withholding of Removal, Form I–589. Currently, USCIS exempts these initial applicants with pending asylum applications.	*Quantitative:* Applicants— • $93.1 million for applicants who have applied for asylum or withholding of removal before EOIR (defensive asylum) or filed Form I–589 Application for Asylum and for Withholding of Removal with USCIS (affirmative asylum), to pay the fee for initial filings of Form I–765. DHS/USCIS— • None.	*Quantitative:* Applicants— • None. *Qualitative:* Applicants— • None. DHS/USCIS— • Using LIFO in fiscal year 2018 completed pending cases at an 80 percent rate in the first 30 days, and 98 percent of pending asylum cases were completed within 60 days of receipt.
(p) Charge a fee for Form I–589, Application for Asylum and for Withholding of Removal.	DHS proposes a $50 fee for Form I–589, Application for Asylum and for Withholding of Removal.	*Quantitative:* Applicants— • Asylum applicants would pay $5.6 million in filing fee costs for Form I–589. Qualitative: Applicants— • Some applicants may not be able to afford this fee and would no longer be able to apply for asylum.	*Quantitative:* Applicants— • None. *Qualitative:* Applicants— • None. DHS/USCIS— • None.
(q) Charge a fee for Deferred Action for Childhood Arrivals (DACA) renewal requestors, Form I–821D.	DHS proposes a fee for renewal Deferred Action on Childhood Arrivals (DACA). Form I–821D currently has no fee. DHS does not propose to introduce a fee for Form I–821D initial DACA requests because USCIS does not currently accept such requests, except as described in preamble above, or plan to accept them in the future.	*Quantitative:* • $75.3 million for renewal application Form I–821D transfer fees. Qualitative: Applicants— • None. DHS/USCIS— • None.	*Quantitative:* Applicants— • None. *Qualitative:* Applicants— • None. DHS/USCIS— • Costs for processing DACA renewal will be recovered from those who receive the benefit rather than from other fee payers.

TABLE 24—SUMMARY OF PROPOSED PROVISIONS AND IMPACTS—Continued

Proposed provision	Description of proposed change to provision	Estimated costs or transfers of proposed provision	Estimated benefits of proposed provision
(r) Fee Combining for Form I–881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Public Law 105–100 [NACARA]).	DHS proposes to combine the current multiple fees charged for an individual or family into a single fee for each filing of Form I–881, Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Pub. L. 105–100, the Nicaraguan Adjustment and Central American Relief Act [NACARA]).	*Quantitative:* Applicants— • $0.90 million annual costs to apply for suspension of deportation or special rule cancellation of removal under NACARA using Form I–881.	*Quantitative:* Applicants— • $0.11 million in cost savings from the reduced passport-style photos requirement.
(a)	*Qualitative:* Applicants— • None. DHS/USCIS— • None.	*Qualitative:* Applicants— • None. DHS/USCIS— • Combining the two IEFA fees into a single fee will streamline the revenue collections and reporting. • USCIS proposing a single Form I–881 fee may help reduce the administrative burden on USCIS on the small workload.	
(s) Clarify who must pay a 9–11 Response and Biometric Entry-Exit Fee for H–1B and L–1..	DHS proposes to apply the 9–11 Response and Biometric Entry-Exit Fee to all covered petitions (meaning those meeting the 50 employee/50 percent H–1B or L test), whether for new employment or extension.	*Quantitative:* Applicants— • $186.2 million in transfer fees. *Qualitative:* Applicants— • None. DHS/USCIS— • None.	*Quantitative:* Applicants— • None. *Qualitative:* Applicants— • Fee would consistently be applied to all H–1B or L–1 petitions, whether for new employment or extension. DHS/USCIS— • The collected fees would help increase the 9–11 Response and Biometric Entry-Exit fee account for biometric entry-exit screening, deficit reduction, and other public purposes funded by general Treasury revenues.

DHS has prepared a full analysis according to Executive Orders 12866 and 13563 which can be found in the docket for this rulemaking or by searching for RIN 1615–AC18 on *www.regulations.gov*.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (Mar. 29, 1996), requires Federal agencies to consider the potential impact of regulations on small entities during the development of their rules. The term ''small entities'' refers to small businesses, not-for-profit organizations that are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. An ''individual'' is not defined by the RFA as a small entity and costs to an individual from a rule are not considered for RFA purposes. In addition, the courts have held that the RFA requires an agency to perform an initial regulatory flexibility analysis (IRFA) of small entity impacts only when a rule directly regulates small entities. Consequently, any indirect impacts from a rule to a small entity are not considered as costs for RFA purposes. Below is a summary of the small entity analysis. A more detailed analysis is available in the rulemaking docket at *http://www.regulations.gov*.

Individuals, rather than small entities, submit the majority of immigration and naturalization benefit applications and petitions. This rule would affect entities that file and pay fees for certain immigration benefit requests. Consequently, there are six categories of USCIS benefits that are subject to a RFA analysis for this proposed rule: Petition for a Nonimmigrant Worker, Form I–129; Immigrant Petition for an Alien Worker, Form I–140; Civil Surgeon Designation, Form I–910; Petition for Amerasian, Widow(er), or Special Immigrant, Form I–360; Genealogy Forms G–1041 and G–1041A, Index Search and Records Requests; and the Application for Regional Center Designation Under the Immigrant Investor Program, Form I–924.

DHS does not believe that the increase in fees proposed in this rule would have a significant economic impact on a substantial number of small entities that file Forms I–129, I–140, I–910, or I–360. However, DHS does not have sufficient data on the revenue collected through administrative fees by regional centers to definitively determine the economic impact on small entities that may file Form I–924. DHS also does not have sufficient data on the requestors that file genealogy forms, Forms G–1041 and G–1041A, to determine whether such filings were made by entities or individuals and thus is unable to determine if the fee increase for genealogy searches is likely to have a significant economic impact on a substantial number of small entities. DHS is publishing this initial regulatory flexibility analysis to aid the public in commenting on the small entity impact of its proposed adjustment to the USCIS fee schedule. In particular, DHS requests information and data that would help to further assess the impact on small entities in the regional centers or on genealogy forms.

Initial Regulatory Flexibility Analysis (IRFA)

1. *A description of the reasons why the action by the agency is being considered.*

DHS proposes to adjust fees USCIS charges for certain immigration and naturalization benefits. DHS has determined that current fees would not recover the full costs of services provided. Adjustment to the fee schedule is necessary to recover costs and maintain adequate service.

2. *A succinct statement of the objectives of, and legal basis for, the proposed rule.*

DHS's objectives and legal authority for this proposed rule are discussed in the preamble of this rule.

3. *A description and, where feasible, an estimate of the number of small entities to which the proposed rule would apply.*

Entities affected by this rule are those that file and pay fees for certain immigration benefit applications and petitions on behalf of a foreign national. These applications include Form I–129, Petition for a Nonimmigrant Worker; Form I–140, Immigrant Petition for an Alien Worker; Form I–910, Civil Surgeon Designation; Form I–360, Petition for Amerasian, Widow(er), or Special Immigrant; Genealogy Forms G–1041 and G–1041A, Index Search and Records Requests; and Form I–924, Application for Regional Center Designation Under the Immigrant Investor Program. Annual numeric estimates of the small entities impacted by this fee increase total (in parentheses): Form I–129 (77,571 entities), Form I–140 (22,165 entities), Form I–910 (428 entities), and Form I–360 (698 entities).[190] DHS was not able to determine the numbers of regional centers or genealogy requestors that would be considered small entities, therefore does not provide numeric estimates for Form I–924 or Forms G–1041 and G–1041A.[191]

This rule applies to small entities, including businesses, non-profit organizations, and governmental jurisdictions filing for the above benefits. Forms I–129 and I–140, would see a number of industry clusters impacted by this rule (see Appendix A of the Small Entity Analysis for a list of impacted industry codes for Forms I–129, I–140, I–910, and I–360). The fee for civil surgeon designation would apply to physicians requesting such designation. The fee for Amerasian, widow(er), or special immigrants would apply to any entity petitioning on behalf of a religious worker. Finally, the Form I–924 would impact any entity seeking designation as a regional center under the Immigrant Investor Program or filing an amendment to an approved regional center application. Captured in the dataset for Form I–924 is also Form I–924A, which regional centers must file annually to establish continued eligibility for regional center designation for each fiscal year.

DHS does not have sufficient data on the requestors for the genealogy forms, Forms G–1041 and G–1041A, to determine if entities or individuals submitted these requests. DHS has previously determined that requests for historical records are usually made by individuals. If professional genealogists and researchers submitted such requests in the past, they did not identify themselves as commercial requestors and thus could not be segregated in the data. Genealogists typically advise clients on how to submit their own requests. For those that submit requests on behalf of clients, DHS does not know the extent to which they can pass along the fee increases to their individual clients. Therefore, DHS does not currently have sufficient data to definitively assess the estimate of small entities for these requests.

a. Petition for a Nonimmigrant Worker, Form I–129

DHS proposes to adjust the fee for Petition for a Nonimmigrant Worker, Form I–129, from $460 to various fees. Currently, employers may use Form I–129, to petition for H–1B, H–2A, H–2B, H–3, L–1, O–1, O–2, P–1, P–1S, P–2, P–2S, P–3, P–3S, Q–1, or R–1 nonimmigrant workers. As applicable, employers also may use Form I–129 to apply for E–1, E–2, E–3, or TN nonimmigrant status for eligible workers. DHS proposes to separate the Petition for a Nonimmigrant Worker, Form I–129, into several forms. These forms would include information from the various supplemental forms for specific types of workers. DHS proposes different fees for these new forms. The proposed fees are calculated at a more detailed level than the current fees.

The current fee for Form I–129 is $460. DHS proposes the following fees for new Forms I–129 (separated into new forms by worker type):

- Form I–129H1, Petition for Nonimmigrant Worker: H–1 Classifications—$560
- Form I–129H2A, Petition for Nonimmigrant Worker: H–2A Classification (Named Beneficiaries)—$860
- Form I–129H2B, Petition for Nonimmigrant Worker: H–2B Classification (Named Beneficiaries)—$725
- Form I–129L, Petition for Nonimmigrant Worker: L Classifications (Named Beneficiaries)—$815
- Form I–129O, Petition for Nonimmigrant Worker: O Classifications—$715
- Forms Form I–129CW, Petition for a CNMI-Only Nonimmigrant Transitional Worker; I–129E&TN, Application for Nonimmigrant Worker: E and TN Classifications; and I–129MISC, Petition for Nonimmigrant Worker: H–3, P, Q, or R Classification—$705
- Form I–129H2A, Petition for Nonimmigrant Work Classification: H–2A Classification (Unnamed Beneficiaries)—$425
- Form I–129H2B, Petition for Nonimmigrant Worker: H–2B Classification (Unnamed Beneficiaries)—$395.

For petitioners filing Form I–129 for H–2A and H–2B workers with only unnamed beneficiaries, DHS proposes a lower fee than the current filing fee. DHS proposes to increase the fee when filed for all other worker types. The fee adjustments and percentage increases or decreases are summarized in Table 25.

TABLE 25—USCIS PROPOSED FEES FOR SEPARATED FORMS I–129 FOR FISCAL YEAR 2019/2020

Immigration benefit request	Current fee	Proposed fee	Difference fee increase/ decrease	Percent change
Form I–129H1—Named Beneficiaries	$460	$560	$100	22
Form I–129H2A—Named Beneficiaries	460	860	400	87
Form I–129H2A—Unnamed Beneficiaries	460	425	−35	−8
Form I–129H2B—Named Beneficiaries	460	725	265	58

[190] Calculation: 90,726 Form I–129 * 85.5 percent = 77,571 small entities; 30,321 Form I–140 * 73.1 percent = 22,165 small entities; 476 Form I–910 * 90.0 percent = 428 small entities; 760 Form I–360 * 91.9 percent = 698 small entities.

[191] Small entity estimates are calculated by multiplying the population (total annual receipts for the USCIS form) by the percentage of small entities, which are presented in subsequent sections of this analysis.

TABLE 25—USCIS PROPOSED FEES FOR SEPARATED FORMS I–129 FOR FISCAL YEAR 2019/2020—Continued

Immigration benefit request	Current fee	Proposed fee	Difference fee increase/ decrease	Percent change
Form I–129H2B—Unnamed Beneficiaries	460	395	−65	−14
Form I–129O	460	715	255	55
Form I–129 L1A/L1B/LZ Blanket	460	815	355	77
Forms I–129CW, I–129E&TN, and I–129MISC	460	705	245	53

Source: USCIS FY 2019/2020 Proposed Fee Schedule (see preamble).

Using a 12-month period of data on the number of Form I–129 petitions filed from October 1, 2016 to September 31, 2017, DHS collected internal data for each filing organization including the name, Employer Identification Number (EIN), city, state, zip code, and number/type of filings. Each entity may make multiple filings. For instance, there were receipts for 530,442 Form I–129 petitions, but only 90,726 unique entities that filed those petitions. Since the filing statistics do not contain information such as the revenue of the business, DHS used third party sources of data to collect this information. DHS used a subscription-based, online database—Hoover's—as well as three open-access databases—Manta, Cortera, and Guidestar—to help determine an organization's small entity status and then applied Small Business Administration size standards to the entities under examination.[192]

The method DHS used to conduct the small entity analysis was based on a representative sample of the impacted population with respect to each form. To identify a representative sample, DHS used a standard statistical formula to determine a minimum sample size of 384 entities, which included using a 95 percent confidence level and a 5 percent confidence interval for a population of 90,726 unique entities filing Form I–129 petitions. Based on previous experience conducting small entity analyses, DHS expects to find 40 to 50 percent of the filing organizations in the online subscription and public databases. Accordingly, DHS selected a sample size that was approximately 69 percent larger than the necessary minimum to allow for non-matches (filing entities that could not be found in any of the four databases). Therefore, DHS conducted searches on 650 randomly selected entities from a population of 90,726 unique entities that filed Form I–129 petitions.

Of the 650 searches for small entities that filed Form I–129 petitions, 473 searches returned a successful match of a filing entity's name in one of the databases and 177 searches did not match a filing entity. Based on previous experience conducting regulatory flexibility analyses, DHS assumes filing entities not found in the online database are likely to be small entities. As a result, in order to prevent underestimating the number of small entities this rule would affect, DHS conservatively considers all of the non-matched entities as small entities for the purpose of this analysis. Among the 473 matches for Form I–129, DHS determined 346 to be small entities based on revenue or employee count and according to their assigned North American Industry Classification System (NAICS) code. Therefore, DHS was able to classify 556 of 650 entities as small entities that filed Form I–129 petitions, including combined non-matches (177), matches missing data (33), and small entity matches (346). Using the subscription-based, online databases mentioned above (Hoover's, Manta, Cortera, and Guidestar), the 33 matches missing data found in the databases lacked applicable revenue or employee count data.

DHS determined that 556 of 650 (85.5 percent) of the entities filing Form I–129 petitions were small entities. Furthermore, DHS determined that 346 of the 650 entities searched were small entities based on sales revenue data, which were needed to estimate the economic impact of the proposed rule. Since these 346 small entities were a subset of the random sample of 650 entity searches, they were statistically significant in the context of this research. In order to calculate the economic impact of this rule, DHS estimated the total costs associated with the proposed fee increase for each entity and divided that amount by the sales revenue of that entity.[193] Based on the proposed fee increases for Form I–129, DHS calculated the average economic impact on the 346 small entities with revenue data as summarized in Table 26.

TABLE 26—ECONOMIC IMPACTS ON SMALL ENTITIES WITH REVENUE DATA

Immigration benefit request	Fee increase/ decrease	Average impact percentage
Form I–129H1	$100	0.16
Form I–129H2A—Named Beneficiaries	400	0.65
Form I–129H2A—Unnamed Beneficiaries	−35	−0.06
Form I–129H2B—Named Beneficiaries	265	0.43
Form I–129H2B—Unnamed Beneficiaries	−65	−0.10
Form I–129L	355	0.57
Form I–129O	255	0.41
Forms I–129CW, I–129E&TN, and I–129MISC	245	0.40

Source: USCIS calculation.

[192] U.S. Small Business Administration, Office of Advocacy, Size Standards Table. Available at *https://www.sba.gov/document/support--table-size-standards*.

[193] Total Economic Impact to Entity = (Number of Petitions Submitted per Entity * $X difference in current fee from proposed fee)/Entity Sales Revenue.

Among the 346 small entities with reported revenue data, each one would experience an economic impact of less than 2 percent with the exception of 11 entities for any immigration benefit request using separate Forms I–129. Depending on the type of immigration benefit request, the average impact on all 346 small entities with revenue data ranges from −0.10 to 0.65 percent, as shown in the supporting comprehensive small entity analysis. Therefore, the average economic impact on the described 346 small entities is less than 1 percent, regardless of which newly separate Form I–129 petition is applicable. As a result, the additional fees this rulemaking proposes do not represent a significant economic impact on these small entities.

b. Immigrant Petition for an Alien Worker, Form I–140

USCIS proposes to decrease the fee to file Immigrant Petition for an Alien Worker, Form I–140, from $700 to $545, a decrease of $155 (22 percent). Using a 12-month period of data on the number of Form I–140 petitions filed from October 1, 2016 to September 31, 2017, DHS collected internal data similar to that of Form I–129. The total number of Form I–140 petitions was 139,439, with 30,321 unique entities that filed petitions. DHS used the same databases previously mentioned to search for information on revenue and employee count.

DHS used the same method as with Form I–129 to conduct the small entity analysis based on a representative sample of the impacted population. To identify a representative sample, DHS used a standard statistical formula to determine a minimum sample size of 383 entities, which included using a 95 percent confidence level and a 5 percent confidence interval on a population of 30,321 unique entities for Form I–140 petitions. Based on previous experience conducting small entity analyses, DHS expected to find 40 to 50 percent of the filing organizations in the online subscription and public databases. Accordingly, DHS selected a sample size that was approximately 44 percent larger than the necessary minimum to allow for non-matches (filing entities that could not be found in any of the four databases). Therefore, DHS conducted searches on 550 randomly selected entities from a population of 30,321 unique entities that filed Form I–140 petitions.

Of the 550 searches for small entities that filed Form I–140 petitions, 480 searches successfully matched the name of the filing entity to names in the databases and 70 searches did not match the name of a filing entity. Based on previous experience conducting regulatory flexibility analyses, DHS assumes filing entities not found in the online databases are likely to be small entities. As a result, in order to prevent underestimating the number of small entities this rule would affect, DHS conservatively considers all of the non-matched entities as small entities for the purpose of this analysis. Among the 480 matches for Form I–140, DHS determined 324 to be small entities based on revenue or employee count and according to their NAICS code. Therefore, DHS was able to classify 402 of 550 entities as small entities that filed Form I–140 petitions, including combined non-matches (70), matches missing data (8), and small entity matches (324). Using the subscription-based, online databases mentioned above (Hoover's, Manta, Cortera, and Guidestar), the 8 matches missing data that were found in the databases lacked applicable revenue or employee count statistics.

DHS determined that 402 out of 550 (73.1 percent) entities filing Form I–140 petitions were small entities. Furthermore, DHS determined that 324 of the 550 searched were small entities based on sales revenue data, which were needed to estimate the economic impact of the proposed rule. Since these 324 were a small entity subset of the random sample of 550 entity searches, they were considered statistically significant in the context of this research. Similar to Form I–129, DHS calculated the economic impact of this rule on entities that filed Form I–140 by estimating the total cost savings associated with the proposed fee decrease for each entity and divided that amount by sales revenue of that entity.

Among the 324 small entities with reported revenue data, each would experience an economic impact of less than −2 percent. Using the above methodology, the greatest economic impact proposed by this fee change totaled −1.86 percent and the smallest totaled −0.0000001 percent. The average impact on all 324 small entities with revenue data was −0.07 percent. Because of the fee decrease, these small entities would see a cost savings per application in filing fees based on petitions. The negative number represents cost savings to the petitioner. Therefore, the larger it is, the greater the cost savings for the petitioners. The average impact on all 324 small entities with revenue data was −0.07 percent. The evidence suggests that the decreased fee proposed by this rule does not represent a significant economic impact on these entities.

In addition to the individual Form I–129 and Form I–140 analyses, USCIS analyzed any cumulative impacts of these form types to determine if there were any impacts to small entities when analyzed together. USCIS isolated those entities that overlapped in both samples of Forms I–129 and I–140 by EIN. Only 1 entity had an EIN that overlapped in both samples; this was a small entity that submitted 3 Form I–129 petitions and 1 Form I–140 petition. Due to little overlap in entities in the samples and the relatively minor impacts on revenue of fee increases of Forms I–129 and I–140, USCIS does not expect the combined impact of these two forms to be an economically significant burden on a substantial number of small entities.

c. Civil Surgeon Designation, Form I–910

DHS proposes to decrease the fee for Civil Surgeon Designations, Form I–910, from $785 to $650, a decrease of $135 (17 percent). Using a 12-month period of data from October 1, 2016 to September 31, 2017, DHS collected internal data on filings of Form I–910. The total number of Form I–910 petitions was 757, with 476 unique entities that filed applications. The third party databases mentioned previously were used again to search for revenue and employee count information.

Using the same methodology as the Forms I–129 and I–140, USCIS conducted the small entity analysis based on a representative sample of the impacted population. To identify a representative sample, DHS used a standard statistical formula to determine a minimum sample size of 213 entities, which included using a 95 percent confidence level and a 5 percent confidence interval on a population of 476 unique entities for Form I–910. USCIS conducted searches on 300 randomly selected entities from a population of 476 unique entities for Form I–910 petitions, a sample size approximately 40 percent larger than the minimum necessary.

Of the 300 searches for small entities that filed Form I–910 petitions, 266 searches successfully matched the name of the filing entity to names in the databases and 34 searches did not match the name of a filing entity. DHS assumes filing entities not found in the online databases are likely to be small entities. DHS also assumes all of the non-matched entities as small entities for the purpose of this analysis. Among the 266 matches for Form I–910, DHS determined 189 to be small entities based on their revenue or employee count and according to their NAICS code. Therefore, DHS was able to classify 270 of 300 entities as small entities that filed Form I–910 petitions, including combined non-matches (34), matches missing data (47), and small entity matches (189). DHS also used the subscription-based, online databases mentioned above (Hoover's, Manta, Cortera, and Guidestar), and the 8 matches missing data that were found in the databases lacked revenue or employee count statistics.

DHS determined that 270 out of 300 (90 percent) entities filing Form I–910 applications were small entities. Furthermore, DHS determined that 189 of the 300 entities searched were small entities based on sales revenue data, which were needed in order to estimate the economic impact of the proposed rule. Since these 189 were a small entity subset of the random sample of 300 entity searches, they were statistically significant in the context of this research.

Similar to the Forms I–129 and I–140, DHS calculated the economic impact of this rule on entities that filed Form I–910 by estimating estimated the total savings associated with the proposed fee decrease for each entity and divided that amount by sales revenue of that entity. Among the 189 small entities with reported revenue data, all experienced an economic impact considerably less than 1.0 percent. The greatest economic impact imposed by this proposed fee change totaled −1.350 percent and the smallest totaled −0.001 percent. The average impact on all 189 small entities with revenue data was −1.104 percent. The decreased fee will create cost savings for the individual applicant of $135. The negative number represents cost savings to the applicant. Therefore, the larger it is, the greater the cost savings for the applicants. The evidence suggests that the decreased fee proposed by this rule does not represent a significant economic impact on these entities.

d. Petition for Amerasian, Widow(er), or Special Immigrant, Form I–360

DHS proposes to increase the fee for foreign religious workers who file using Form I–360 from $435 to $455, an increase of $20 (5 percent). Using a 12-month period of data on the number of Form I–360 petitions filed from October 1, 2016 to September 31, 2017, DHS collected internal data on filings of Form I–360 for religious workers. The total number of Form I–360 petitions was 2,446, with 760 unique entities that filed petitions. DHS used the same databases mentioned previously to search for information on revenue and employee count.

DHS used the same method as with Forms I–129 and I–140 to conduct the small entity analysis based on a representative sample of the impacted population. To identify a representative sample, DHS used a standard statistical formula to determine a minimum sample size of 332 entities, which included using with a 95 percent confidence level and a 5 percent confidence interval on a population of 760 unique entities for Form I–360 petitions. To account for missing organizations in the online subscription and public databases, DHS selected a sample size that was approximately 27 percent larger than the necessary minimum to allow for non-matches (filing entities that could not be found in any of the four databases). Therefore, DHS conducted searches on 420 randomly selected entities from a population of 760 unique entities that filed Form I–360 petitions.

Of the 420 searches for small entities that filed Form I–360 petitions, 417 searches successfully matched the name of the filing entity to names in the databases and 3 searches did not match the name of the filing entities in the databases. DHS assumes that filing entities not found in the online databases are likely to be small entities. As a result, in order to prevent underestimating the number of small entities this rule would affect, DHS conservatively assumes to consider all of the non-matched entities as small entities for the purpose of this analysis. Among the 417 matches for Form I–360, DHS determined 309 to be small entities based on revenue or employee count and according to their NAICS code. Therefore, DHS was able to classify 386 of 420 entities as small entities that filed Form I–360 petitions, including combined non-matches (3), matches missing data (74), and small entity matches (309). DHS also used the subscription-based, online databases mentioned above (Hoover's, Manta, Cortera, and Guidestar), the 74 matches missing data that were found in the databases lacked revenue or employee count data.

DHS determined that 386 out of 420 (91.9 percent) entities filing Form I–360 petitions were small entities. Furthermore, DHS determined that 309 of the 420 searched were small entities based on sales revenue data, which were needed to estimate the economic impact of the proposed rule. Since 309 small entities were a subset of the random sample of 420 entity searches, they were statistically significant in the context of this research.

Similar to other forms analyzed in this RFA, DHS calculated the economic impact of this rule on entities that filed Form I–360 by estimating the total costs associated with the proposed fee increase for each entity. Among the 309 small entities with reported revenue data, each would experience an economic impact of less than 1.0 percent. The greatest economic impact imposed by this proposed fee change totaled 0.46 percent and the smallest totaled 0.000002 percent. The average impact on all 309 small entities with revenue data was 0.02 percent.

DHS also analyzed the proposed costs by this rule on the petitioning entities relative to the costs of the typical employee's salary. Guidelines suggested by the SBA Office of Advocacy indicate that the impact of a rule could be significant if the cost of the regulation exceeds 5 percent of the labor costs of the entities in the sector.[194] According to the Bureau of Labor Statistics (BLS), the mean annual salary is $53,290 for clergy,[195] $46,980 for directors of religious activities and education,[196] and $35,860 for other religious workers.[197] Based on an average of 1.5 religious workers[198] petitioned-for per entity, the additional average annual cost would be $30 per entity.[199] The additional costs per entity proposed by this rule represent only 0.06 percent of the average annual salary for clergy, 0.06 percent of the average annual salary for directors of religious activities and education, and 0.08 percent of the average annual salary for all other religious workers.[200] Therefore, using

[194] Office of Advocacy, Small Business Administration, ''A Guide for Government Agencies, How to Comply with the Regulatory Flexibility Act'', page 19: *https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf*

[195] Bureau of Labor Statistics, U.S. Department of Labor, ''Occupational Employment Statistics, May 2018, ''Clergy'': *https://www.bls.gov/oes/2018/may/oes212011.htm* (viewed September 24, 2019).

[196] Bureau of Labor Statistics, U.S. Department of Labor, ''Occupational Employment Statistics, May 2018, ''Directors of Religious Activities and Education'': *https://www.bls.gov/oes/2018/may/oes212099.htm* (viewed September 24, 2019).

[197] Bureau of Labor Statistics, U.S. Department of Labor, ''Occupational Employment Statistics, May 2018, ''Religious Workers, All Other'': *https://www.bls.gov/oes/2018/may/oes212099.htm* (viewed September 24, 2019).

[198] USCIS calculated the average filing per entity of 1.5 petitions, from the Form I–360 Sample with Petition Totals in Appendix E, of the Small Entity Analysis for the U.S. Citizenship and Immigration Services Fee Schedule NPRM. Calculation: (total number of petitions from each sample id)/(total number of sample Form I–360 petitions) = 618/420 = 1.5 average petitions filed per entity.

[199] Calculation: 1.5 average petitions per entity * $20 increase in petition fees = $30 additional total cost per entity.

[200] Calculation: $30 per entity/$53,290 clergy salary × 100 = .06 percent;

$30 per entity/$46,980 directors of religious activities and education × 100 = .06 percent;

average annual labor cost guidelines, the additional regulatory compliance costs proposed by this rule are not significant.

e. Genealogy Requests—Genealogy Index Search Request Form G–1041 and Genealogy Record Request, Form G–1041A

DHS proposes fee increases to file both types of genealogy requests: Form G–1041, Genealogy Index Search Request and Form G–1041A, Genealogy Record Request. The fee to file Form G–1041 would increase from $65 to $240, an increase of $175 (269 percent increase). The fee for Form G–1041A would increase from $65 to $385, an increase of $320 (492 percent). Based on DHS records for calendar years 2013 to 2017, there was an annual average of 3,840 genealogy index search requests made using Form G–1041 and there was an annual average of 2,152 genealogy records requests made using Form G–1041A. DHS does not have sufficient data on the requestors for the genealogy forms to determine if entities or individuals submitted these requests.

DHS has previously determined that individuals usually make requests for historical records.[201] If professional genealogists and researchers submitted such requests in the past, they did not identify themselves as commercial requestors and, therefore, DHS could not separate these data from the dataset. Genealogists typically advise clients on how to submit their own requests. For those that submit requests on behalf of clients, DHS does not know the extent to which they can pass along the fee increases to their individual clients. Therefore, DHS currently does not have sufficient data to definitively assess the impact on small entities for these requests.

However, DHS must still recover the full costs of this program. As stated in the preamble to this proposed rule, reducing the filing fee for any one benefit request submitted to DHS simply transfers the additional cost to process this request to other immigration and naturalization filing fees.

For this proposed fee rule, DHS proposes to expand the use of electronic genealogy requests to encourage requesters to use the electronic versions of Form G–1041 and Form G–1041A. DHS also proposes to change the search request process so that USCIS may provide requesters with electronic records, if they exist, in response to the initial index request. These proposed changes may reduce the time it takes to request and receive genealogy records and, in some cases, it would eliminate the need to make multiple search requests and submit separate fees. Moreover, DHS notes that providing digital records in response to a Form G–1041 request may reduce the number of Form G–1041A requests that would be filed because there would already be a copy of the record if it was previously digitized. As a result, the volume of Form G–1041A requests USCIS receives may decrease, though DHS is unable to estimate by how much. DHS requests comments from the public on the impacts to small entities of the proposed fee increases to the genealogy forms.

f. Regional Center Under the Immigrant Investor Program, Form I–924 and I–924A

As part of the Immigration Act of 1990, Public Law 101–649, 104 Stat. 4978, Congress established the EB–5 immigrant visa classification to incentivize employment creation in the United States. Under the EB–5 program, lawful permanent resident (LPR) status is available to foreign nationals who invest the required amount in a new commercial enterprise that will create at least 10 full-time jobs in the United States. *See* INA sec. 203(b)(5), 8 U.S.C. 1153(b)(5). A foreign national may also invest a lower amount in a targeted employment area defined to include rural areas and areas of high unemployment. *Id.;* 8 CFR 204.6(f). The INA allots 9,940 immigrant visas each fiscal year for foreign nationals seeking to enter the United States under the EB–5 classification.[202] *See* INA sec. 201(d), 8 U.S.C. 1151(d); INA sec. 203(b)(5), 8 U.S.C. 1153(b)(5). Not less than 3,000 of these visas must be reserved for foreign nationals investing in targeted employment areas. *See* INA sec. 203(b)(5)(B), 8 U.S.C. 1153(b)(5)(B).

Enacted in 1992, section 610 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Public Law 102–395, 106 Stat. 1828, established a pilot program that requires the allocation of a limited number of EB–5 immigrant visas to individuals who invest through DHS-designated regional centers.[203] Under the Regional Center Program, foreign nationals base their EB–5 petitions on investments in new commercial enterprises located within USCIS-designated ''regional centers.'' DHS regulations define a regional center as an economic unit, public or private, that promotes economic growth, including increased export sales, improved regional productivity, job creation, and increased domestic capital investment. *See* 8 CFR 204.6(e). While all EB–5 petitioners go through the same petition process, those petitioners participating in the Regional Center Program may meet statutory job creation requirements based on economic projections of either *direct* or *indirect* job creation, rather than only on jobs directly created by the new commercial enterprise. *See* 8 CFR 204.6(j)(4)(iii), (m)(3). As of August 12, 2019, there were 826 USCIS-approved regional centers.[204] Requests for regional center designation must be filed with USCIS on Form I–924, Application for Regional Center Designation Under the Immigrant Investor Program. *See* 8 CFR 204.6(m)(3)–(4). Once designated, regional centers must provide USCIS with updated information to demonstrate continued eligibility for the designation by submitting a Form I–924A, Annual Certification of Regional Center, on an annual basis or as otherwise requested. *See* 8 CFR 204.6(m)(6)(i)(B).

DHS proposes no adjustment to the fee for the Application for Regional Center Designation Under the Immigrant Investor Program, Form I–924. The current fee to file Form I–924 is $17,795. However, DHS is proposing to increase the fee for the Annual Certification of Regional Center, Form I–924A, from $3,035 to $4,470 per filing, an increase of $1,435 (47 percent). Using a 12-month period of data on the number of Forms I–924 and I–924A from October 1, 2016 to September 31, 2017, DHS collected internal data on these forms. DHS received a total of 280 Form I–924 applications and 847 Form I–924A applications.

Regional centers are difficult to assess because there is a lack of official data on employment, income, and industry classification for these entities. It is difficult to determine the small entity status of regional centers without such data. Such a determination is also difficult because regional centers can be structured in a variety of different ways

$30 per entity/$35,860 other religious workers × 100 = .08 percent.

[201] See ''Establishment of a Genealogy Program; Proposed Rule,''71 FR 20357 (April 20, 2006). Available at: *https://www.regulations.gov/document?D=USCIS-2006-0013-0001.*

[202] An immigrant investor, his or her spouse, and children (if any) will each use a separate visa number.

[203] Current law requires that DHS annually set aside 3,000 EB–5 immigrant visas for regional center investors. Public Law 105–119, sec. 116, 111 Stat. 2440 (Nov. 26, 1997). If this full annual allocation is not used, remaining visas may be allocated to foreign nationals who do not invest in regional centers.

[204] USCIS Immigrant Investor Regional Centers: *https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers* (last reviewed/updated Aug. 20, 2019).

and can involve multiple business and financial activities, some of which may play a direct or indirect role in linking investor funds to new commercial enterprises and job-creating projects or entities. The information provided by regional centers as part of the Forms I–924 and I–924A does not include adequate data to allow DHS to reliably identify the small entity status of individual applicants. Although regional center applicants typically report the NAICS codes associated with the sectors they plan to direct investor funds toward, these codes do not necessarily apply to the regional centers themselves. In addition, information provided to DHS concerning regional centers generally does not include regional center revenues or employment.

DHS was able to obtain some information under some specific assumptions in an attempt to analyze the small entity status of regional centers.[205] In the DHS final rule ''EB–5 Immigrant Investor Program Modernization,'' DHS analyzed estimated administrative fees and revenue amounts for regional centers. DHS found both the mean and median for administrative fees to be $50,000 and the median revenue amount to be $1,250,000 over the period fiscal years 2014 to 2017. DHS does not know the extent to which these regional centers can pass along the fee increases to the individual investors. Passing along the costs from this rule could reduce or eliminate the economic impacts to the regional centers. While DHS cannot definitively claim there is no significant economic impact to these small entities based on existing information, DHS would assume existing regional centers with revenues equal to or less than $447,000 per year (some of which DHS assumes would be derived from administrative fees charged to individual investors) could experience a significant economic impact. If DHS assumes a fee increase that represents 1 percent of annual revenue is a ''significant'' economic burden under the RFA.[206] DHS welcomes comments from the public on the impacts to small entities of the proposed fee increases to Form I–924A and requests information from the public on data sources on the average revenues collected by regional centers in the form of administrative fees and the extent to which regional centers may pass along the fee increases to the individual investors.

g. Other Possible Fee Scenarios

As discussed earlier in the preamble, the fees that DHS proposes may change in a final rule based on policy decisions, in response to public comments, intervening legislation, and other changes. Other than fee adjustments made in response to public comments and policy modifications, DHS notes that the fee adjustments in a final rule depend on two factors beyond its control. As previously described in the preamble, this rule includes proposed DACA fees associated with Form I–821D. However, DHS is currently operating under two nationwide preliminary injunctions to maintain the DACA policy. Additionally, the proposed fees are based on IEFA funding $207.6 million of ICE expenses. If DHS does not obtain relief from the DACA preliminary injunctions, Congress rejects the proposal to fund these ICE expenses with IEFA funding, or DHS does not ultimately shift the aforementioned ICE costs from annual appropriations to the IEFA, then fees for most of the forms analyzed in this IRFA would also change.

Table 27 shows the current and proposed fees for the forms analyzed in this IRFA according to each fee schedule scenario based on the two factors mentioned above. Scenario A refers to the proposed fees described in detail throughout this rule. Scenario B includes DACA fees, but excludes the ICE transfer. Scenario C excludes DACA fees, but includes the ICE transfer. Scenario D excludes both DACA fees and the ICE transfer. Scenario E and F includes separate initial and renewal fees for DACA fees; scenario E includes the ICE transfer, but F excludes the ICE transfer.

TABLE 28—PROPOSED FEE SCHEDULE BY SCENARIO WITH FORMS AFFECTING SMALL ENTITIES, INITIAL REGULATORY FLEXIBILITY ANALYSIS

Immigration benefit request	Current fee	Scenario A	Scenario B	Scenario C	Scenario D	Scenario E	Scenario F
I–129 Petition for a Nonimmigrant worker	$460	$N/A	$N/A	$N/A	$N/A	$N/A	$N/A
I–129H1	460	560	535	585	555	550	520
I–129H2A—Named Beneficiaries	460	860	840	870	850	810	790
I–129H2B—Named Beneficiaries	460	725	700	735	710	705	685
I–129L	460	815	795	830	805	790	770
I–129O	460	715	690	725	705	695	670
I–129CW, I–129E&TN, and I–129MISC	460	705	685	720	695	680	660
I–129H2A—Unnamed Beneficiaries	460	425	400	440	410	405	385
I–129H2B—Unnamed Beneficiaries	460	395	370	410	385	390	365
I–140 Immigrant Petition for Alien Worker	700	545	520	580	555	545	520
I–360 Petition for Amerasian Widow(er) or Special Immigrant	435	455	435	475	450	455	430
I–910 Application for Civil Surgeon Designation	785	650	625	660	635	650	625
I–924 Application for Regional Center Designation Under the Immigrant Investor Program	17,795	17,795	17,795	17,795	17,795	17,795	17,795
I–924A Annual Certification of Regional Center	3,035	4,470	4,470	4,465	4,460	4,465	4,465
G–1041 Genealogy Index Search Request	65	240	240	240	240	240	240
G–1041A Genealogy Records Request	65	385	385	385	385	385	385

Source: USCIS analysis.

[205] The methodology used to analyze the small entity status of regional centers is explained in further detail in Section D of the RFA section within DHS final rule ''EB–5 Immigrant Investor Program Modernization,'' available at 84 FR 35750.

[206] Calculation: 1 percent of $447,000 = $4,470 (the new fee for Form I–924A).

Further, tables 28 and 29 show the estimated economic impact on small entities based on the fee schedule proposed for each of the fee scenarios. DHS followed the same method as previously described in this IRFA to estimate the economic impact on small entities for each fee scenario, A—F.

TABLE 29—ESTIMATED ECONOMIC IMPACT ON SMALL ENTITIES FOR PROPOSED FEE SCHEDULE BY SCENARIO (A–D), RFA INITIAL REGULATORY FLEXIBILITY ANALYSIS

Immigration benefit request	Scenario A		Scenario B		Scenario C		Scenario D	
	Increase/ decrease from current fee	Average economic impact percent	Increase/ decrease from current fee	Average economic impact percent	Increase/ decrease from current fee	Average economic impact percent	Increase/ decrease from current fee	Average economic impact percent
I–129 Petition for a Nonimmigrant worker	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
I–129H1B	$100	0.22	$75	0.16	$125	0.27	$95	0.21
I–129H2A—Named Beneficiaries	400	0.87	380	0.83	410	0.89	390	0.85
I–129H2B—Named Beneficiaries	265	0.58	240	0.52	275	0.60	250	0.54
I–129L	355	0.77	335	0.73	370	0.80	345	0.75
I–129O	255	0.55	230	0.50	265	0.58	245	0.53
Form I–129CW, I–129E&TN, and I–129MISC	245	0.53	225	0.49	260	0.57	235	0.51
I–129H2A—Unnamed Beneficiaries	−35	−0.08	−60	−0.13	−20	−0.043	−50	−0.11
I–129H2B—Unnamed Beneficiaries	−65	−0.14	−90	−020	−50	−0.11	−75	−0.16
I–140 Immigrant Petition for Alien Worker	−155	−0.221	−180	−0.257	−120	−0.171	−145	−0.207
I–360 Petition for Amerasian Widow(er) or Special Immigrant	20	0.05	0	N/A	40	0.0919	15	0.034
I–910 Application for Civil Surgeon Designation	−135	−0.17	−160	−0.20	−125	−0.16	−150	−0.19
I–924 Application For Regional Center Designation Under the Immigrant Investor Program	0	N/A	0	N/A	0	N/A	0	N/A
I–924A Annual Certification of Regional Center	1,435	0.47	1,435	0.47	1,430	0.47	1,425	0.47
G–1041 Genealogy Index Search Request	175	2.69	175	2.69	175	2.69	175	2.69
G–1041A Genealogy Records Request	320	4.92	320	4.92	320	4.92	320	4.92

Source: USCIS analysis.
Calculation: Increase or Decrease Fee Amount per Scenario/Current Fee Amount = Average Economic Impact Percent

TABLE 30—ESTIMATED ECONOMIC IMPACT ON SMALL ENTITIES FOR PROPOSED FEE SCHEDULE BY SCENARIO (E–F), INITIAL REGULATORY FLEXIBILITY ANALYSIS

Immigration benefit request	Scenario E		Scenario F	
	Increase/ decrease from current fee	Average economic impact percent	Increase/ decrease from current fee	Average economic impact percent
I–129 Petition for a Nonimmigrant worker	N/A	N/A	N/A	N/A
I–129H1B	$90	0.19	$60	0.13
I–129H2A—Named Beneficiaries	350	0.76	330	0.72
I–129H2B—Named Beneficiaries	245	0.53	225	0.49
I–129L	330	0.72	310	0.67
I–129O	235	0.51	210	0.46
Form I–129CW, I–129E&TN, and I–129MISC	220	0.48	200	0.43
I–129H2A—Unnamed Beneficiaries	(55)	−0.12	(75)	−0.16
I–129H2B—Unnamed Beneficiaries	(70)	−0.15	(95)	−0.21
I–140 Immigrant Petition for Alien Worker	(155)	−0.221	(180)	−257
I–360 Petition for Amerasian Widow(er) or Special Immigrant	20	0.05	(5)	0.01
I–910 Application for Civil Surgeon Designation	(135)	−0.17	(160)	−0.20
I–924 Application for Regional Center Designation Under the Immigrant Investor Program	0	0	0	0
I–924A Annual Certification of Regional Center	1,430	0.47	1,430	0.47
G–1041 Genealogy Index Search Request	175	2.69	175	2.69
G–1041A Genealogy Records Request	320	4.92	320	4.92

Source: USCIS analysis.
Calculation: Increase or Decrease Fee Amount per Scenario/Current Fee Amount = Average Economic Impact Percent

To reduce the uncertainty that such conditions present to the affected public, USCIS proposes and evaluates six fee scenarios based on these three factors. Each scenario lays out what the fees would be if certain conditions materialize and present a range of fees. Thus, the final fees may be one of the scenarios presented, or an amount in between the highest and lowest fees proposed. Scenario A refers to the proposed fees described in detail throughout this proposed rule. Scenario B includes DACA renewal fees, but it excludes the ICE transfer. Scenario C excludes DACA fees, but it includes the ICE transfer. Scenario D excludes both DACA fees and the ICE transfer. Scenarios E and F list separate initial and renewal fees for DACA, with or without the ICE transfer. Table 20 lists the assumptions and effects of these three factors on each fee scenario. The preamble has more detail on each scenario, regarding proposed fee changes, budgets, and transfers.

Furthermore, tables 28 and 29 show the estimated economic impact on small entities based on the fee schedule proposed for each of the fee scenarios. DHS followed the same method as previously described in this IRFA to estimate the economic impact on small entities for each fee scenario. The tables illustrate each scenario with an increased/decreased form fee and average economic impact, for each immigration benefit request. The results show the decreased form fees in parenthesis produce a negative average economic impact, in scenarios A–F. This would indicate across all scenarios, the economic impact from the decreased fee would create cost savings and/or higher revenues for the individual applicant or petitioner. The negative number represents cost savings to the applicant/petitioner. Therefore, the larger it is the greater the cost savings for the applicants/petitioners. The evidence suggests that the increased/ decreased fees proposed by this rule does not represent a significant economic impact on these entities.

4. *A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for preparation of the report or record.*

The proposed rule does not directly impose any new or additional ''reporting'' or ''recordkeeping'' requirements on filers of Forms I–129, I–140, I–910, I–360, G–1041, G–1041A, I–924, or I–924A. The proposed rule does not require any new professional skills for reporting.

5. *An identification, to the extent practical, of all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule.*

DHS is unaware of any duplicative, overlapping, or conflicting Federal rules, but invites any comment and information regarding any such rules.

6. *Description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities, including alternatives considered such as:*

(1) Establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) Clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) Use of performance rather than design standards; and

(4) Any exemption from coverage of the rule, or any part thereof, for such small entities.

The INA provides for the collection of fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services, including services provided without charge to asylum applicants and certain other immigrant applicants. In addition, DHS must fund the costs of providing services without charge by using a portion of the filing fees that are collected for other immigration benefits. Without an adjustment in fees, USCIS would not be able to sustain the current level of service for immigration and naturalization benefits. While most immigration benefit fees apply to individuals, as described above, some also apply to small entities. USCIS seeks to minimize the impact on all parties, but in particular small entities. An alternative to the increased economic burden of the proposed rule is to maintain fees at their current level for small entities. The strength of this alternative is that it assures no additional fee-burden is placed on small entities; however, this alternative also would cause negative impacts to small entities.

Without the fee adjustments proposed in this rule, significant operational changes would be necessary. Given current filing volume and other economic considerations, additional revenue is necessary to prevent immediate and significant cuts in planned spending. These spending cuts would include reductions in areas such as federal and contract staff, infrastructure spending on information technology and facilities, travel, and training. Depending on the actual level of workload received, these operational changes would result in longer application processing times, a degradation in service to applicants and petitioners, and reduced efficiency over time. These cuts would ultimately represent increased costs to small entities by causing delays in benefit processing and reduced support service. Tables 29 and 30 show the estimated economic impact on small entities based on each of the fee scenarios considered. The tables illustrate an increase/ decrease in fee and average economic impact for each immigration benefit request in each scenario. The decreased form fees shown in parentheses produce negative average economic impacts in scenarios A–F. This indicates that the economic impacts from the decreased fees would create cost savings for individual applicants and petitioners. The evidence suggests that the decreased fees proposed by this rule do not represent a significant economic impact on these entities.

7. *Questions for Comment to Assist Regulatory Flexibility Analysis*

- Please provide comment on the numbers of small entities that may be impacted by this rulemaking.
- Please provide comment on any or all of the provisions in the proposed rule with regard to the economic impact of this rule, paying specific attention to the effect of the rule on small entities in light of the above analysis, as well as the full small entity analysis on *regulations.gov.*
- Please provide comment on any significant alternatives DHS should consider in lieu of the changes proposed by this rule.
- Please describe ways in which the rule could be modified to reduce burdens for small entities consistent with the Immigration and Nationality Act and the Chief Financial Officers Act requirements.
- Please identify all relevant Federal, State or local rules that may duplicate, overlap or conflict with the proposed rule.

C. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of UMRA 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 a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The value equivalent of $100 million in 1995 adjusted for inflation to 2018 levels by the Consumer Price Index for All Urban Consumers (CPI–U) is $165 million. While this rule may result in the expenditure of more than $100 million by the private sector annually, the rulemaking is not a ''Federal mandate'' as defined for UMRA purposes.[207] The payment of immigration benefit fees by individuals or other private sector entities is, to the extent it could be termed an enforceable duty, one that arises from participation in a voluntary Federal program, applying for immigration status in the United States.[208] Therefore, no actions were

[207] *See* 2 U.S.C. 658(6).

[208] *See* 2 U.S.C. 658(7)(A)(ii).

deemed necessary under the provisions of the UMRA.

D. Congressional Review Act

This proposed rule is a major rule as defined by 5 U.S.C. 804, also known as the Congressional Review Act, as enacted in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, 110 Stat. 847, 868 *et seq.* Accordingly, this rule, if enacted as a final rule, would be effective at least 60 days after the date on which Congress receives a report submitted by DHS under the Congressional Review Act, or 60 days after the final rule's publication, whichever is later.

E. Executive Order 13132 (Federalism)

This proposed rule would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this proposed rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This proposed rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–12, DHS must submit to OMB, for review and approval, any reporting requirements inherent in a rule, unless they are exempt. The Information Collection. table below shows the summary of forms that are part of this rulemaking.

TABLE 30—INFORMATION COLLECTION

OMB No.	Form No.	Form name	Type of information collection
1615–0105	G–28	Notice of Entry of Appearance as Attorney or Accredited Representative.	No material or non- substantive change to a currently approved collection.
1615–0096	G–1041	Genealogy Index Search Request	No material or non- substantive change to a currently approved collection.
	G–1041A	Genealogy Records Request (For each microfilm or hard copy file).	
1615–0079	I–102	Application for Replacement/Initial Nonimmigrant Arrival-Departure Document.	No material or non- substantive change to a currently approved collection.
1615–0111	I–129CW	Petition for a CNMI-Only Nonimmigrant Transitional Worker.	No material or non- substantive change to a currently approved collection.
1615–XXXX	I–129E&TN	Application for Nonimmigrant Worker: E and TN Classifications.	New Collection.
1615–0001	I–129F	Petition for Alien Fiancé(e)	No material or non- substantive change to a currently approved collection.
1615–0009	I–129H1	Petition for Nonimmigrant Worker: H–1 Classifications.	Revision of a Currently Approved Collection.
1615–XXXX	I–129H2A	Petition for Nonimmigrant Worker: H–2A Classification.	New Collection.
1615–XXXX	I–129H2B	Petition for Nonimmigrant Worker: H–2B Classification.	New Collection.
1615–XXXX	I–129L	Petition for Nonimmigrant Worker: L Classifications	New Collection.
1615–XXXX	I–129MISC	Petition for Nonimmigrant Worker: H–3, P, Q, or R Classifications.	New Collection.
1615–XXXX	I–129O	Petition for Nonimmigrant Worker: O Classifications	New Collection.
1615–0012	I–130	Petition for Alien Relative	No material or non- substantive change to a currently approved collection.
	I–130A	Supplemental Information for Spouse Beneficiary.	
1615–0013	I–131	Application for Travel Document	Revision of a Currently Approved Collection.
1615–0135	I–131A	Application for Travel Document (Carrier Documentation).	Revision of a Currently Approved Collection.
1615–0015	I–140	Immigrant Petition for Alien Worker	No material or non- substantive change to a currently approved collection.
1615–0016	I–191	Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA).	No material or non- substantive change to a currently approved collection.
1615–0017	I–192	Application for Advance Permission to Enter as Nonimmigrant.	No material or non- substantive change to a currently approved collection.
1615–0018	I–212	Application for Permission to Reapply for Admission Into the United States After Deportation or Removal.	No material or non- substantive change to a currently approved collection.
1615–0095	I–290B	Notice of Appeal or Motion	No material or non- substantive change to a currently approved collection.
1615–0020	I–360	Petition for Amerasian, Widow(er), or Special Immigrant.	No material or non- substantive change to a currently approved collection.
1615–0023	I–485	Application to Register Permanent Residence or Adjust Status.	No material or non- substantive change to a currently approved collection.
	I–485A	Supplement A to Form I–485, Adjustment of Status Under Section 245(i).	
	I–485J	Confirmation of Bona Fide Job Offer or Request for Job Portability Under INA Section 204(j).	
1615–0026	I–526	Immigrant Petition by Alien Entrepreneur	No material or non- substantive change to a currently approved collection.

TABLE 30—INFORMATION COLLECTION—Continued

OMB No.	Form No.	Form name	Type of information collection
1615–0003	I–539	Application to Extend/Change Nonimmigrant Status	No material or non- substantive change to a currently approved collection.
1615–0067	I–589	Application for Asylum and for Withholding of Removal.	Revision of a Currently Approved Collection.
1615–0028	I–600	Petition to Classify Orphan as an Immediate Relative.	Revision of a Currently Approved Collection.
	I–600A	Application for Advance Processing of an Orphan Petition.	
	I–600/A SUPP1	Form I–600A/I–600 Supplement 1, Listing of Adult Member of the Household.	
	I–600/A SUPP2	Form I–600A/I–600 Supplement 2, Consent to Disclose Information.	
	I–600/A SUPP3	Form I–600A/I–600 Supplement 3, Request for Action on Approved Form I–600A/I–600.	
1615–0029	I–601	Application for Waiver of Grounds of Inadmissibility	No material or non- substantive change to a currently approved collection.
1615–0123	I–601A	Application for Provisional Unlawful Presence Waiver.	No material or non- substantive change to a currently approved collection.
1615–0030	I–612	Application for Waiver of the Foreign Residence Requirement (Under Section 212(e) of the INA, as Amended).	No material or non- substantive change to a currently approved collection.
1615–0032	I–690	Application for Waiver of Grounds of Inadmissibility	No material or non- substantive change to a currently approved collection.
1615–0034	I–694	Notice of Appeal of Decision Under Sections 245A or 210 of the Immigration and Nationality Act.	No material or non- substantive change to a currently approved collection.
1615–0035	I–698	Application to Adjust Status From Temporary to Permanent Resident (Under Section 245A of the INA).	No material or non- substantive change to a currently approved collection.
1615–0038	I–751	Petition to Remove Conditions on Residence	No material or non- substantive change to a currently approved collection.
1615–0040	I–765	Application for Employment Authorization	Revision of a Currently Approved Collection.
1615–0005	I–817	Application for Family Unity Benefits	No material or non- substantive change to a currently approved collection.
1615–0043	I–821	Application for Temporary Protected Status	No material or non- substantive change to a currently approved collection.
1615–0124	I–821D	Consideration of Deferred Action for Childhood Arrivals.	Revision of a Currently Approved Collection.
1615–0044	I–824	Application for Action on an Approved Application or Petition.	No material or non- substantive change to a currently approved collection.
1615–0045	I–829	Petition by Entrepreneur to Remove Conditions on Permanent Resident Status.	No material or non- substantive change to a currently approved collection.
1615–0072	I–881	Application for Suspension of Deportation or Special Rule Cancellation of Removal.	No material or non- substantive change to a currently approved collection.
1615–0082	I–90	Application to Replace Permanent Resident Card	No material or non- substantive change to a currently approved collection.
1615–0048	I–907	Request for Premium Processing Service	No material or non- substantive change to a currently approved collection.
1615–0114	I–910	Application for Civil Surgeon Designation	No material or non- substantive change to a currently approved collection.
1615–0116	I–912	Application for Fee Waiver	Revision of a Currently Approved Collection.
1615–0099	I–914	Application for T nonimmigrant status	No material or non- substantive change to a currently approved collection.
1615–0104	I–918	Application for U nonimmigrant status	No material or non- substantive change to a currently approved collection.
1615–0061	I–924	Application for Regional Designation Center Under the Immigrant Investor Program.	No material or non- substantive change to a currently approved collection.
	I–924A	Annual Certification of Regional Center.	
1615–0106	I–929	Petition for Qualifying Family Member of a U–1 Nonimmigrant.	No material or non- substantive change to a currently approved collection.
1615–0136	I–941	Application for Entrepreneur Parole	No material or non- substantive change to a currently approved collection.
1615–0133	I–942	Application for Reduced Fee	Discontinuation.
1615–0122	Immigrant Fee	Fee paid for immigrant visa processing	No material or non- substantive change to a currently approved collection.
1615–0078	N–300	Application to File Declaration of Intention	No material or non- substantive change to a currently approved collection.
1615–0050	N–336	Request for a Hearing on a Decision in Naturalization Proceedings.	No material or non- substantive change to a currently approved collection.
1615–0052	N–400	Application for Naturalization	No material or non- substantive change to a currently approved collection.

TABLE 30—INFORMATION COLLECTION—Continued

OMB No.	Form No.	Form name	Type of information collection
1615–0056	N–470	Application to Preserve Residence for Naturalization Purposes.	No material or non- substantive change to a currently approved collection.
1615–0091	N–565	Application for Replacement of Naturalization/Citizenship Document.	No material or non- substantive change to a currently approved collection.
1615–0057	N–600	Application for Certification of Citizenship	No material or non- substantive change to a currently approved collection.
1615–0087	N–600K	Application for Citizenship and Issuance of Certificate under Section 322.	No material or non- substantive change to a currently approved collection.

Various USCIS Forms

Under the Paperwork Reduction Act of 1995, Public Law 104–13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. This rule will require non-substantive edits to the forms listed above with the listed action ''No material/non-substantive change to a currently approved collection.'' These edits include: updates to the fees collected, including changes to the collection of biometric service fees; modification of various form instructions to conform with changes to USCIS Form I–912; modification to USCIS Form N–400 to conform with the discontinuation of USCIS Form I–942; modification to various form instructions to conform with changes to the conditions for fee exemptions; removal of the returned check fee; addition of language regarding delivery requirements of certain secured documents; general language modification of fee activities within various USCIS forms. Accordingly, USCIS has submitted a Paperwork Reduction Act Change Worksheet, Form OMB 83–C, and amended information collection instruments to OMB for review and approval in accordance with the PRA.[209]

USCIS Form I–129H–1

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0009 in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition for a Nonimmigrant Worker: H–1B Classifications.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–129H1; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit; Not-for-profit institutions. USCIS uses the data collected on this form to determine eligibility for the requested nonimmigrant classification and/or requests to extend or change nonimmigrant status. An employer (or agent, where applicable) uses this form to petition USCIS for classification of an alien as an H–1B nonimmigrant. An employer (or agent, where applicable) also uses this form to request an extension of stay of an H–1B or H–1B1 nonimmigrant worker or to change the status of an alien currently in the United States as a nonimmigrant to H–1B or H–1B1. The form serves the purpose of standardizing requests for H–1B and H–1B1 nonimmigrant workers, and ensuring that basic information required for assessing eligibility is provided by the petitioner while requesting that beneficiaries be classified under the H–1B or H–1B1 nonimmigrant employment categories. It also assists USCIS in compiling information required by Congress annually to assess effectiveness and utilization of certain nonimmigrant classifications.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–129H1 is 358,702 and the estimated hour burden per response is 4 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,434,808 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $184,731,530.00.

USCIS Form I–129H2A

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

[209] As stated earlier DHS proposes a biometric services fee of $30 that will be required for certain forms for which it performs intake and biometrics services on behalf of EOIR and to remove the $30 fee for dishonored fee payment instruments. EOIR will make the changes to their affected forms required by this rule by submitting a Paperwork Reduction Act Change Worksheet, Form OMB 83–C, and amended information collection instruments to OMB for review and approval if DHS publishes a final rule to make these proposed changes.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–NEW in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection

(1) *Type of Information Collection:* New Collection.

(2) *Title of the Form/Collection:* Petition for a Nonimmigrant Worker: H–2A Classifications.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–129H2A; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit; Not-for-profit institutions. USCIS uses the data collected on this form to determine eligibility for the requested H–2A nonimmigrant petition and/or requests to extend or change nonimmigrant status. An employer or agent uses this form to petition USCIS for classification of an alien as an H–2A nonimmigrant. An employer or agent also uses this form to request an extension of stay or change of status on behalf of the alien worker. The form serves the purpose of standardizing requests for H–2A nonimmigrant workers, and ensuring that basic information required for assessing eligibility is provided by the petitioner. It also assists USCIS in compiling information required by Congress annually to assess effectiveness and utilization of certain nonimmigrant classifications.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–129H2A is 9,870 and the estimated hour burden per response is 3 hours; the estimated total number of respondents for the information collection Named Worker Attachment for Form I–129H2A is 68,049 and the estimated hour burden per response is 30 minutes; the estimated total number of respondents for the information collection Joint Employer Supplement for Form I–129H2A is 5,000 and the estimated hour burden per response is 10 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 64,469.50 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $5,083,050.

USCIS Form I–129H2B

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–NEW in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection

(1) *Type of Information Collection:* New Collection.

(2) *Title of the Form/Collection:* Petition for Nonimmigrant Worker: H–2B Classification.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–129H2B; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit; Not-for-profit institutions. USCIS uses the data collected on this form to determine eligibility for the requested H–2B nonimmigrant petition and/or requests to extend or change nonimmigrant status. An employer or agent uses this form to petition USCIS for classification of an alien as an H–2B nonimmigrant. An employer or agent also uses this form to request an extension of stay or change of status on behalf of the alien worker. The form serves the purpose of standardizing requests for nonimmigrant workers, and ensuring that basic information required for assessing eligibility is provided by the petitioner. It also assists USCIS in compiling information required by Congress annually to assess effectiveness and utilization of certain nonimmigrant classifications.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–129H2B is 5,922 and the estimated hour burden per response is 3 hours; the estimated total number of respondents for the information collection Named Worker Attachment for Form I–129H2B is 59,325 and the estimated hour burden per response is 0.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 47,428.50 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $3,049,830.00.

USCIS Form I–129L

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–NEW in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection

(1) *Type of Information Collection:* New Collection.

(2) *Title of the Form/Collection:* Petition for Nonimmigrant Worker: I–129L Classification.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–129L; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit; Not-for-profit institutions. USCIS uses the data collected on Form I–129L to determine a petitioner and beneficiary's eligibility for L–1A and L–1B classification. The form is also used to determine eligibility for an LZ Blanket petition. An employer uses this form to petition USCIS for classification of the beneficiary as an L–1 nonimmigrant. An employer also uses this form to request an extension of stay or change of status on behalf of the beneficiary. The form standardizes these types of petitioners and ensures that the information required for assessing eligibility is provided by the petitioner about themselves and the beneficiary. The form also enables USCIS to compile data required for an annual report to Congress assessing the effectiveness and utilization of certain nonimmigrant classifications.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–129L is 42,642 and the estimated hour burden per response is 3 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 127,926 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $21,960,630.00.

USCIS Form I–129O

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–NEW in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection

(1) *Type of Information Collection:* New Collection.

(2) *Title of the Form/Collection:* Petition for Nonimmigrant Worker: O Classification.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–129O; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit; Not-for-profit institutions. USCIS uses the data collected on this form to determine eligibility for the requested nonimmigrant petition and/or requests to extend or change nonimmigrant status. An employer or agent uses this form to petition USCIS for classification of an alien as an O nonimmigrant worker. An employer or agent also uses this form to request an extension of stay or change of status on behalf of the alien worker. The form serves the purpose of standardizing requests for nonimmigrant workers, and ensuring that basic information required for assessing eligibility is provided by the petitioner while requesting that beneficiaries be classified under certain nonimmigrant employment categories. It also assists USCIS in compiling information required by Congress annually to assess effectiveness and utilization of certain nonimmigrant classifications.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–129O is 20,652 and the estimated hour burden per response is 3 hours; the estimated total number of respondents for the information collection Attachment 1—Additional Beneficiary for Form I–129O is 1,012 and the estimated hour burden per response is 0.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 62,462 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this

collection of information is $10,635,780.00.

USCIS Form I–129MISC

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–NEW in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection

(1) *Type of Information Collection:* New Collection.

(2) *Title of the Form/Collection:* Petition for Nonimmigrant Worker: H–3, P, Q, or R Classification.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–129MISC; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit; Not-for-profit institutions. USCIS uses the data collected on this form to determine eligibility for the requested nonimmigrant classification and/or requests to extend or change nonimmigrant status. An employer (or agent, where applicable) uses this form to petition USCIS for classification of an alien as an H–3, P, Q, or R nonimmigrant. An employer (or agent, where applicable) also uses this form to request an extension of stay of an H–3, P, Q, or R nonimmigrant worker or to change the status of an alien currently in the United States as a nonimmigrant to H–3, P, Q, or R. The form serves the purpose of standardizing requests for H–3, P, Q, or R nonimmigrant workers, and ensuring that basic information required for assessing eligibility is provided by the petitioner while requesting that beneficiaries be classified under the H–3, P, Q, or R nonimmigrant employment categories. It also assists USCIS in compiling information required by Congress annually to assess effectiveness and utilization of certain nonimmigrant classification.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–129MISC is 22,378 and the estimated hour burden per response is 3 hours; the estimated total number of respondents for the information collection H–3 Classification Supplement to Form I–129MISC, Petition for Nonimmigrant Worker: H–3, P, Q, or R Classification is 248 and the estimated hour burden per response is 0.25 hours; the estimated total number of respondents for the information collection P Classification Supplement to Form I–129MISC is 6,094 and the estimated hour burden per response is 0.5 hours; the estimated total number of respondents for the information collection Q–1 International Cultural Exchange Alien Supplement to Form I–129MISC is 78 and the estimated hour burden per response is 0.167 hours; the estimated total number of respondents for the information collection R–1 Classification Supplement to Form I–129MISC is 1 and the estimated hour burden per response is 1 hours; the estimated total number of respondents for the information collection Attachment 1—Additional Beneficiary for Form I–129MISC is 6,457 and the estimated hour burden per response is 0.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 73,494.53 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $11,524,670.

USCIS Form I–129E&TN

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–NEW in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection

(1) *Type of Information Collection:* New Collection.

(2) *Title of the Form/Collection:* Petition for Nonimmigrant Worker: E and TN Classification.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–129E&TN; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Business or other for-profit; Not-for-profit institutions. USCIS uses the data collected on this form to determine eligibility for the requested nonimmigrant classification and/or requests to extend or change nonimmigrant status. An employer agent, or applicant uses this form to apply to USCIS for classification of an alien as an E–1, E–2, E–3, or TN

nonimmigrant. An employer, agent, applicant, or CNMI investor also uses this form to request an extension of stay in one of these classifications for an alien or for themselves, or to change the status of an alien currently in the United States as a nonimmigrant or their own status if they are currently in the United States as a nonimmigrant to E–1, E–2, E–3, or TN. The form serves the purpose of standardizing requests for nonimmigrant workers in these classifications, and ensuring that basic information required for assessing eligibility is provided by the applicant. It also assists USCIS in compiling information required by Congress annually to assess effectiveness and utilization of certain nonimmigrant classification.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–129E&TN is 11,860 and the estimated hour burden per response is 3 hours; the estimated total number of respondents for the information collection E–1/E–2 Classification Supplement to Form I–129E&TN is 3,714 and the estimated hour burden per response is 1.45 hours; the estimated total number of respondents for the information collection E–3 Classification Supplement to Form I–129E&TN is 1,857 and the estimated hour burden per response is 1 hours; the estimated total number of respondents for the information collection NAFTA Supplement to Form I–129E&TN is 6,289 and the estimated hour burden per response is 0.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 45,966.80 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $6,107,900.

USCIS Form I–131

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0013 in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Travel Document, Form I–131; Extension, Without Change, of a Currently Approved Collection.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–131; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Certain aliens, principally permanent or conditional residents, refugees or asylees, applicants for adjustment of status, aliens in Temporary Protected Status (TPS), and aliens abroad seeking humanitarian parole who need to apply for a travel document to lawfully enter or reenter the United States. Eligible recipients of Deferred Action for Childhood Arrivals (DACA) may now request an advance parole documents based on humanitarian, educational and employment reasons. Lawful permanent residents may now file requests for travel permits (transportation letter or boarding foil).

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–131 is 464,900 and the estimated hour burden per response is 1.9 hours; the estimated total number of respondents for biometrics processing is 86,000 and the estimated hour burden per response is 1.17 hours, the estimated total number of respondents for passport-style photos is 360,000 and the estimated hour burden per response is 0.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,163,930 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $143,254,100.

USCIS Form I–131A

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0135 in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Carrier Documentation.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–131A; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. USCIS uses the information provided on Form I–131A to verify the status of permanent or conditional residents, and determine whether the applicant is eligible for the requested travel document.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–131A is 5,100 and the estimated hour burden per response is .92 hours; biometrics processing is 5,100 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 10,659 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $919,275.

USCIS Form I–589

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0067 in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Asylum and for Withholding of Removal.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–589; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. Form I–589 is necessary to determine whether an alien applying for asylum and/or withholding of removal in the United States is classified as refugee, and is eligible to remain in the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of USCIS respondents for the information collection in Form I–589 is approximately 114,000, and the estimated annual respondents for Form I–589 filed with DOJ is approximately 150,000. The estimated hour burden per response is 13 hours per response; and the estimated number of respondents providing biometrics to USCIS is 110,000, and to DOJ (collected on their behalf by USCIS) is 150,000. The estimated hour burden per response for biometrics submissions is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection for USCIS is 1,610,700 hours, and for DOJ is 2,125,500.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information for USCIS is estimated to be $44,688,000 and for DOJ is 59 million.

USCIS Form I–600, I–600A, Supplement 1, Supplement 2, Supplement 3

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0028 in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Petition to Classify Orphan as an Immediate Relative; Application for Advance Processing of an Orphan Petition; Supplement 1, Listing of an Adult Member of the Household; Supplement 2, Consent to Disclose Information; Supplement 3, Request for Action on Approved Form I–600A/I–600.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form I–600, Form I–600A, Form I–600A/I–600 Supplement 1, Form I–600A/I–600 Supplement 2, Form I–600A/I–600 Supplement 3; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. A U.S. citizen adoptive parent may file a petition to classify an orphan as an immediate relative through Form I–600 under section 101(b)(1)(F) of the INA. A U.S. citizen prospective adoptive parent may file Form I–600A in advance of the Form I–600 filing and USCIS will make a determination regarding the prospective adoptive parent's eligibility to file Form I–600A and his or her suitability and eligibility to properly parent an orphan. A U.S. citizen prospective/adoptive parent may file a petition to classify an orphan as an immediate relative under section 201(b)(2)(A) of the INA through Form I–600. If there are other adult members of the U.S. citizen prospective/adoptive parent's household, as defined at 8 CFR 204.301, the prospective/adoptive parent must include Form I–600A/I–600 Supplement 1 when filing both Form I–600A and Form I–600. A Form I–600A/I–600 Supplement 2, Consent to Disclose Information, is an optional form that a U.S. citizen prospective/adoptive parent may file to authorize USCIS to disclose case-related information that would otherwise be protected under the Privacy Act, 5 U.S.C. 552a, to adoption service providers or other individuals. Form I–600A/I–600 authorized disclosures will assist USCIS in the adjudication of Forms I–600A and I–600. USCIS has created a new Form I–600A/I–600 Supplement 3, Request for Action on Approved Form I–600A/I–600, for this information collection. Form I–600A/I–600 Supplement 3 is a form that prospective/adoptive parents must use if they need to request action such as an extended or updated suitability determination based upon a significant change in their circumstances or change in the number or characteristics of the children they intend to adopt, a change in their intended country of adoption, or a request for a duplicate notice of their approved Form I–600A suitability determination.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–600 is 1,200 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection Form I–600A is 2,000 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection Form I–600/I–600A Supplement 1 is 301 and the estimated hour burden per response is 1 hour; the estimated total number of respondents for the information collection Form I–600/I–600A Supplement 2 is 1,260 and the estimated hour burden per response is 0.25 hours; the estimated total number of respondents for the information collection Form I–600/I–600A Supplement 3 is 1,286 and the estimated hour burden per response is 1 hours; the estimated total number of respondents for the Home Study information collection is 2,500 and the estimated hour burden per response is 25 hours; the estimated total number of respondents for the Biometrics information collection is 2,520 and the estimated hour burden per response is 1.17 hours; the estimated total number of respondents for the Biometrics—DNA information collection is 2 and the estimated hour burden per response is 6 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 70,562.40 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $7,759,232.

USCIS Form I–765

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0040 in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Employment Authorization.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–765; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. USCIS uses Form I–765 to collect information needed to determine if an alien is eligible for an initial EAD, a new replacement EAD, or a subsequent EAD upon the expiration of a previous EAD under the same eligibility category. Aliens in many immigration statuses are required to possess an EAD as evidence of work authorization.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–765 is 2,096,000 and the estimated hour burden per response is 4.5 hours; the estimated total number of respondents for the information collection I–765WS is 41,912 and the estimated hour burden per response is 0.5 hours; the estimated total number of respondents for the information collection biometrics is 42,387 and the estimated hour burden per response is 1.17 hours; the estimated total number of respondents for the information collection passport photos is 2,096,000 and the estimated hour burden per response is 0.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 10,550,549 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $367,575,520.

USCIS Form I–821D

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0124 in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Consideration of Deferred Action for Childhood Arrivals.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form I–821D; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. As part of the administration of its programs, USCIS exercises its prosecutorial discretion on a case-by-case basis to defer action on instituting removal proceedings against individuals.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–821D Initial Request is 40,819 and the estimated hour burden per response is 3.08 hours. The estimated total number of respondents for the information collection I–821D Renewal Request is 418,775 and the estimated hour burden per response is 3.08 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 1,415,550 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $50,555,340.

USCIS Form I–912

DHS and USCIS invite the general public and other Federal agencies to comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0116 in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Fee Waiver.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–912; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. USCIS uses the data collected on this form to verify that the applicant is unable to pay for the immigration benefit being requested. USCIS will consider waiving a fee for an application or petition when the applicant or petitioner clearly demonstrates that he or she is unable to pay the fee. Form I–912 standardizes the collection and analysis of statements and supporting documentation provided by the applicant with the fee waiver request. Form I–912 also streamlines and expedites USCIS' review, approval, or denial of the fee waiver request by clearly laying out the most salient data and evidence necessary for the determination of inability to pay. Officers evaluate all factors, circumstances, and evidence supplied in support of a fee waiver request when making a final determination. Each case is unique and is considered on its own merits. If the fee waiver is granted, the application will be processed. If the fee waiver is not granted, USCIS will notify the applicant and instruct him or her to file a new application with the appropriate fee.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–912 is 116,323 and the estimated hour burden per response is 1.17 hours; the estimated total number of respondents for the information collection DACA Exemptions is 108 and the estimated hour burden per response is 1.17 hours; the estimated total number of respondents for the information collection 8 CFR 103.7(d) Director's exception request is 20 and the estimated hour burden per response is 1.17 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 136,247.67 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $436,211.25.

USCIS Form I–942

Under the Paperwork Reduction Act of 1995, Public Law 104–13, all agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. Although this rule does not impose any new reporting or recordkeeping requirements under the PRA, this rule will require the discontinuation of USCIS Form I–942, Request for Reduced Fee. This discontinuation results from the Notice of Proposed Rulemaking eliminating the option to request a reduced fee, which makes the Form I–942 unnecessary. Accordingly, USCIS has submitted a Paperwork Reduction Act Change Worksheet, Form OMB 83–C, and amended information collection instruments to OMB for review and approval in accordance with the PRA.

Differences in information collection request respondent volume and fee model filing volume projections.

DHS notes that the estimates of annual filing volume in the PRA section of this preamble are not the same as those used in the model used to calculate the fee amounts proposed in this rule. For example, the fee calculation model estimates 163,000 annual Form I–589 filings while the PRA section estimates the average annual number of respondents will be 114,000. The model projects 2,851,000 Form I–765 filings while the estimated total number of respondents for the information collection I–765 is 2,096,000. As stated in section IV.B.1.a of this preamble, the VPC forecasts USCIS workload volume using based on short- and long-term volume trends and time series models, historical receipts data, patterns (such as level, trend, and seasonality) or correlations with historical events to forecast receipts. Workload volume is used to determine the USCIS resources needed to process benefit requests and is the primary cost driver for assigning activity costs to immigration benefits and biometric services in the USCIS ABC model. DHS uses a different method for estimating the average annual number of respondents for the information collection over the three-year OMB approval of the control number, generally basing the estimate on the average filing volumes in the previous 3 of 5 year period, with less consideration of the volume effects on planned or past policy changes. Nevertheless, when the information collection request is nearing expiration USCIS will update the estimates of annual respondents based on actual results in the submission to OMB. The PRA burden estimates are generally updated at least every three years. Thus, DHS expects that the PRA estimated annual respondents will be updated to reflect the actual effects of this proposed rule within a relatively short period after a final rule takes effect.

H. National Environmental Policy Act

DHS Directive (Dir) 023–01 Rev. 01 establishes the procedures that DHS and its components use to comply with the National Environmental Policy Act (NEPA) and the Council on Environmental Quality (CEQ) regulations for implementing NEPA. 40 CFR parts 1500–1508.[210] The CEQ regulations allow Federal agencies to establish, with CEQ review and concurrence, categories of actions (''categorical exclusions'') which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment or Environmental Impact Statement. 40 CFR 1507.3(b)(2)(ii) and 1508.4. Dir. 023–01 Rev. 01 establishes categorical exclusions that DHS has found to have no such effect. Dir. 023–01 Rev. 01 Appendix A Table 1. For an action to be categorically excluded from further NEPA review, Dir. 023–01 Rev. 01 requires the action to satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the Categorical Exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Dir. 023–01 Rev. 01 section V.B (1)–(3).

The Department analyzed this proposed action and concluded that NEPA does not apply because, as discussed above, the potential impacts of the rule are not amenable to further an analysis which is generally unquantifiable, largely because of the lack of any direct causal relationship between the rule and any specific impact that might be asserted from generalized population growth or otherwise. Attempts at more detailed analysis would be excessively speculative. Nevertheless, even if NEPA did apply to this action, the action clearly would come within categorical exclusion A3(d) in Dir. 023–01 Rev. 01, Appendix A, Table 1, for rules that interpret or amend an existing regulation without changing its environmental effect. This rule is not part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, if NEPA were determined to apply, this rule would be categorically excluded from further NEPA review.

[210] See also DHS, Implementing the National Environmental Policy Act, *https://www.dhs.gov/publication/directive-023-01-rev-01-and-instruction-manual-023-01-001-01-rev-01-and-catex* (last published Feb. 21, 2019).

List of Subjects

8 CFR Part 103

Administrative practice and procedures, Authority delegations (government agencies), Freedom of Information, Privacy, Reporting and recordkeeping requirements, and Surety bonds.

8 CFR Part 106

Immigration, User fees.

8 CFR Part 204

Administrative practice and procedure, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 211

Documentary requirements: immigrants; waivers.

Accordingly, DHS proposes to amend chapter I of title 8 of the Code of Federal Regulations as follows:

PART 103—IMMIGRATION BENEFIT REQUESTS; USCIS FILING REQUIREMENTS; BIOMETRIC REQUIREMENTS; AVAILABILITY OF RECORDS

■ 1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356, 1356b, 1372; 31 U.S.C. 9701; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 101 *et seq.*); E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2; Pub. L. 112–54, 125 Stat 550 (8 U.S.C. 1185 note).

■ 2. The heading for part 103 is revised to read as set forth above.

■ 3. Section 103.2 amended:

■ a. By revising the last sentence of paragraph (a)(1);

■ b. By revising paragraph (a)(7)(ii)(D);

■ c. In paragraph (b)(9) introductory text by removing ''8 CFR 103.7(b)(1)(i)(C)'' and adding in its place ''8 CFR 106.2'' in the second sentence; and

■ d. By revising paragraph (b)(19)(iii).

The revisions read as follows:

§ 103.2 Submission and adjudication of benefit requests.

(a) * * *

(1) * * * Filing fees generally are non-refundable regardless of if the benefit request is approved or denied, or how much time the adjudication requires. Except as otherwise provided

in this chapter I, fees must be paid when the benefit request is filed.

* * * * *

(7) * * *

(ii) * * *

(D) *Submitted with the correct fee(s).* If a check or other financial instrument used to pay a fee is returned as unpayable because of insufficient funds, USCIS will resubmit the payment to the remitter institution one time. If the instrument used to pay a fee is returned as unpayable a second time, the filing may be rejected. Financial instruments returned as unpayable for a reason other than insufficient funds will not be redeposited. If a check or other financial instrument used to pay a fee is dated more than one year before the request is received, the payment and request may be rejected.

* * * * *

(b) * * *

(19) * * *

(iii) *Secure identity documents.* (A) USCIS will send secure identification documents, such as a Permanent Resident Card or Employment Authorization Document, only to the applicant or self-petitioner unless the applicant or self-petitioner specifically consents to having his or her secure identification document sent to a designated agent, their attorney or accredited representative or record, as specified on the form instructions.

(B) The designated agent, or attorney or accredited representative, will be required to provide identification and sign for receipt of the secure document.

* * * * *

§ 103.3 [Amended]

■ 4. Section 103.3 is amended by removing ''§ 103.7 of this part'' and adding in its place ''8 CFR 106.2'' in paragraph (a)(2)(i).

§ 103.5 [Amended]

■ 5. Section 103.5 is amended by removing ''§ 103.7'' and adding in its place ''8 CFR 106.2'' in paragraph (a)(1)(iii)(B).

■ 6. Section 103.7 is revised to read as follows:

§ 103.7 Fees.

(a) *DOJ fees.* Fees for proceedings before immigration judges and the Board of Immigration Appeals are described in 8 CFR 1003.8, 1003.24, and 1103.7.

(1) *USCIS may accept DOJ fees.* Except as provided in 8 CFR 1003.8, or as the Attorney General otherwise may provide by regulation, any fee relating to any EOIR proceeding may be paid to USCIS. Payment of a fee under this section does not constitute filing of the document with the Board or with the immigration court. DHS will provide the payer with a receipt for a fee and return any documents submitted with the fee relating to any immigration court proceeding.

(2) *DHS–EOIR biometric services fee.* Fees paid to and accepted by DHS relating to any immigration proceeding as provided in 8 CFR 1103.7(a)(3) must include an additional $30 for DHS to collect, store, and use biometric information.

(3) *Waiver of Immigration Court fees.* An immigration judge or the Board may waive any fees prescribed under this chapter for cases under their jurisdiction to the extent provided in 8 CFR 1003.8 and 1003.24.

(b) *USCIS fees.* USCIS fees will be required as provided in 8 CFR part 106.

(c) *Remittances.* Remittances to the Board of Immigration Appeals must be made payable to the ''United States Department of Justice,'' in accordance with 8 CFR 1003.8.

(d) *Non-USCIS DHS immigration fees.* The following fees are applicable to one or more of the immigration components of DHS:

(1) *DCL System Costs Fee.* For use of a Dedicated Commuter Lane (DCL) located at specific U.S. ports-of-entry by an approved participant in a designated vehicle:

(i) $80.00, or

(ii) $160.00 for a family (applicant, spouse and minor children); plus,

(iii) $42 for each additional vehicle enrolled.

(iv) The fee is due after approval of the application but before use of the DCL.

(v) This fee is non-refundable, but may be waived by DHS.

(2) *Petition for Approval of School for Attendance by Nonimmigrant Student* (*Form I–17*). (i) For filing a petition for school certification: $3,000 plus, a site visit fee of $655 for each location required to be listed on the form;

(ii) For filing a petition for school recertification: $1,250, plus a site visit fee of $655 for each new location required to be listed on the form.

(3) *Form I–68.* For application for issuance of the Canadian Border Boat Landing Permit under section 235 of the Act:

(i) $16.00, or

(ii) $32 for a family (applicant, spouse and unmarried children under 21 years of age, and parents of either spouse).

(4) *Form I–94.* For issuance of Arrival/Departure Record at a land border port-of-entry: $6.00.

(5) *Form I–94W.* For issuance of Nonimmigrant Visa Waiver Arrival/Departure Form at a land border port-of-entry under section 217 of the Act: $6.00.

(6) *Form I–246.* For filing application for stay of deportation under 8 CFR part 243: $155.00.

(7) *Form I–823.* For application to a PORTPASS program under section 286 of the Act:

(i) $25.00, or

(ii) $50.00 for a family (applicant, spouse, and minor children).

(iii) The application fee may be waived by DHS.

(iv) If fingerprints are required, the inspector will inform the applicant of the current Federal Bureau of Investigation fee for conducting fingerprint checks prior to accepting the application fee.

(v) The application fee (if not waived) and fingerprint fee must be paid to CBP before the application will be processed. The fingerprint fee may not be waived.

(vi) For replacement of PORTPASS documentation during the participation period: $25.00.

(8) Fee Remittance for F, J, and M Nonimmigrants (*Form I–901*). The fee for Form I–901 is:

(i) For F and M students: $350.

(ii) For J–1 au pairs, camp counselors, and participants in a summer work or travel program: $35.

(iii) For all other J exchange visitors (except those participating in a program sponsored by the Federal Government): $220.

(iv) There is no Form I–901 fee for J exchange visitors in federally funded programs with a program identifier designation prefix that begins with G–1, G–2, G–3, or G–7.

(9) *Special statistical tabulations:* The DHS cost of the work involved.

(10) *Monthly, semiannual, or annual ''Passenger Travel Reports via Sea and Air'' tables*:

(i) For the years 1975 and before: $7.00.

(ii) For after 1975: Contact: U.S. Department of Transportation, Transportation Systems Center, Kendall Square, Cambridge, MA 02142.

(11) *Request for Classification of a citizen of Canada to engage in professional business activities pursuant to section 214(e) of the Act (Chapter 16 of the North American Free Trade Agreement).* $50.00.

(12) *Request for authorization for parole of an alien into the United States.* $65.00.

(13) *Global Entry.* Application for Global Entry: $100.

(14) *U.S. Asia-Pacific Economic Cooperation (APEC) Business Travel Card.* Application fee: $70.

(15) *Notice of Appeal or Motion (Form I–290B) filed with ICE SEVP.* For a Form

I–290B filed with the Student and Exchange Visitor Program (SEVP): $675.

■ 7. Section 103.17 is revised to read as follows:

§ 103.17 Biometric services fee.

DHS may charge a fee to collect biometric information, to provide biometric collection services, to conduct required national security and criminal history background checks, to verify an individual's identity, and to store and maintain this biometric information for reuse to support other benefit requests. If a request for immigration benefits must be submitted with a biometric services fee, 8 CFR part 106 will contain the requirement. When a biometric services fee is required, a benefit request submitted without the correct biometric services fee may be rejected.

■ 8. Section 103.40 is revised to read as follows:

§ 103.40 Genealogical research requests.

(a) *Nature of requests.* Genealogy requests are requests for searches and/or copies of historical records relating to a deceased person, usually for genealogy and family history research purposes.

(b) *Forms.* (1) USCIS provides on its website at *https://www.uscis.gov/genealogy* the required forms in electronic versions: Genealogy Index Search Request, or Genealogy Records Request.

(c) *Required information.* Genealogical Research Requests may be submitted to request one or more separate records relating to an individual. A separate request must be submitted for each individual searched. All requests for records or index searches must include the individual's:

(i) Full name (including variant spellings of the name and/or aliases, if any).

(ii) Date of birth, at least as specific as a year.

(iii) Place of birth, at least as specific as a country and preferably the country name at the time of the individual's immigration or naturalization.

(d) *Optional information.* To better ensure a successful search, a Genealogical Research Request may include each individual's:

(i) Date of arrival in the United States.

(ii) Residence address at time of naturalization.

(iii) Names of parents, spouse, and children if applicable and available.

(d) *Additional information required to retrieve records.* For a Genealogy Records Request, requests for copies of historical records or files must:

(i) Identify the record by number or other specific data used by the Genealogy Program Office to retrieve the record as follows:

(A) C-Files must be identified by a naturalization certificate number.

(B) Forms AR–2 and A-Files numbered below 8 million must be identified by Alien Registration Number.

(C) Visa Files must be identified by the Visa File Number. Registry Files must be identified by the Registry File Number (for example, R–12345).

(e) *Information required for release of records.* (1) Documentary evidence must be attached to a Genealogy Records Request or submitted in accordance with the instructions on the Genealogy Records Request form.

(2) Search subjects will be presumed deceased if their birth dates are more than 100 years before the date of the request. In other cases, the subject is presumed to be living until the requestor establishes to the satisfaction of USCIS that the subject is deceased.

(3) Documentary evidence of the subject's death is required (including but not limited to death records, published obituaries or eulogies, published death notices, church or bible records, photographs of gravestones, and/or copies of official documents relating to payment of death benefits).

(f) *Index search.* Requestors who are unsure whether USCIS has any record of their ancestor, or who suspect a record exists but cannot identify that record by number, may submit a request for index search. An index search will determine the existence of responsive historical records. If no record is found, USCIS will notify the requestor accordingly. If records are found, USCIS will give the requestor electronic copies of records stored in digital format for no additional fee. For records found that are stored in paper format, USCIS will give the requestor the search results, including the type of record found and the file number or other information identifying the record. The requestor can use index search results to submit a Genealogy Records Request.

(g) *Processing of paper record copy requests.* This service is designed for requestors who can identify a specific record or file to be retrieved, copied, reviewed, and released. Requestors may identify one or more files in a single request.

§ 103.41 [Removed and Reserved]

■ 9. Section 103.41 is removed and reserved.

■ 10. Part 106 is added to read as follows:

PART 106—USCIS FEE SCHEDULE

Sec.

106.1 Fee requirements.
106.2 Fees.
106.3 Fee waivers and exemptions.
106.4 Premium processing service.
106.5 Authority to certify records.
106.6 DHS severability.

Authority: 8 U.S.C. 1101, 1103, 1254a, 1254b, 1304, 1356; Pub. L. 107–609; Pub. L. 115–218.

§ 106.1 Fee requirements.

(a) Fees must be submitted with any USCIS benefit request or other request in the amount and subject to the conditions provided in this part and remitted in the manner prescribed in the relevant form instructions, on the USCIS website, or in a **Federal Register** document. The fees established in this part are associated with the benefit, the adjudication, or the type of request and not solely determined by the form number listed below.

(b) Fees must be remitted from a bank or other institution located in the United States and payable in U.S. currency. The fee must be paid using the method that USCIS prescribes for the request, office, filing method, or filing location, as provided in the form instructions or by individual notice.

(c) If a remittance in payment of a fee or any other matter is not honored by the bank or financial institution on which it is drawn:

(1) The provisions of 8 CFR 103.2(a)(7)(ii) apply, no receipt will be issued, and if a receipt was issued, it is void and the benefit request loses its receipt date; and

(2) If the benefit request was approved, the approval may be revoked upon notice. If the approved benefit request requires multiple fees, this provision will apply if any fee submitted is not honored. Other fees that were paid for a benefit request that is revoked under this provision will be retained and not refunded. A revocation of an approval because the fee submitted is not honored may be appealed to the USCIS Administrative Appeals Office, in accordance with 8 CFR 103.3 and the applicable form instructions.

§ 106.2 Fees.

(a) *I Forms*—(1) *Application to Replace Permanent Resident Card, Form I–90.* For filing an application for a Permanent Resident Card, Form I–551, to replace an obsolete card or to replace one lost, mutilated, or destroyed, or for a change in name: $415.

(2) *Application for Replacement/Initial Nonimmigrant Arrival-Departure Document, Form I–102.* For filing an application for Arrival/Departure Record Form I–94, or Crewman's Landing Permit Form I–95, to replace one lost, mutilated, or destroyed: $490.

(i) For nonimmigrant member of in the U.S. armed forces: No fee for initial filing;

(ii) For a nonimmigrant member of the North Atlantic Treaty Organization (NATO) armed forces or civil component: No fee for initial filing;

(iii) For nonimmigrant member of the Partnership for Peace military program under the Status of Forces Agreement (SOFA): No fee for initial filing.

(3) *Petition or Application for a Nonimmigrant Worker.* For filing a petition or application for a nonimmigrant worker:

(i) Petition for H–1B Nonimmigrant Worker or H–1B1 Free Trade Nonimmigrant Worker, Form I–129H1: $560.

(ii) Petition for H–2A Nonimmigrant Worker, Form I–129H2A, with 1 to 25 named beneficiaries: $860.

(iii) Petition for H–2A Nonimmigrant Worker, Form I–129H2A, with only unnamed beneficiaries: $425.

(iv) Petition for H–2B Nonimmigrant Worker, Form I–129H2B, with 1 to 25 named beneficiaries: $725.

(v) Petition for H–2B Nonimmigrant Worker, Form I–129H2B, with only unnamed beneficiaries: $395.

(vi) Petition for L Nonimmigrant Worker, Form I–129L: $815.

(vii) Petition for O Nonimmigrant Worker, Form I–129O, with 1 to 25 named beneficiaries: $715.

(viii) Petition or Application for E, H–3, P, Q, R, or TN Nonimmigrant Worker, Forms I–129E or I–129MISC, with 1 to 25 named beneficiaries: $705.

(4) *Petition for a CNMI-Only Nonimmigrant Transitional Worker, Form I–129CW.* For an employer to petition on behalf of beneficiaries in the Commonwealth of the Northern Mariana Islands (CNMI): $705.

(i) Additional fees in 8 CFR 106.2(c) may apply.

(5) *Petition for Alien Fiancé(e),* Form I–129F:

(i) For filing a petition to classify a nonimmigrant as a fiancée or fiancé under section 214(d) of the Act: $520.

(ii) For a K–3 spouse as designated in 8 CFR 214.1(a)(2) who is the beneficiary of an immigrant petition filed by a U.S. citizen on a Petition for Alien Relative, Form I–130: No fee.

(6) *Petition for Alien Relative,* Form I–130. For filing a petition to classify status of a foreign national relative for issuance of an immigrant visa under section 204(a) of the Act: $555.

(7) *Application for Travel Document, Form I–131.* For filing an application for travel document:

(i) $145 for a Refugee Travel Document for someone 16 or older.

(ii) $115 for a Refugee Travel Document for a child under 16.

(iii) $585 for advance parole and any other travel document.

(iv) There is no fee for applicants who filed USCIS Form I–485 on or after July 30, 2007, and before [EFFECTIVE DATE OF THE FINAL RULE], and paid the Form I–485 fee, or for applicants for Special Immigrant Status based on an approved Form I–360 as an Afghan or Iraqi Interpreter, or Iraqi National employed by or on behalf of the U.S. Government or Afghan National employed by the U.S. Government or the International Security Assistance Forces (''ISAF'').

(8) *Application for Carrier Documentation, Form I–131A.* For filing an application to allow a lawful permanent resident to apply for a travel document (carrier documentation) to board an airline or other transportation carrier to return to the United States: $1,010.

(9) *Immigrant Petition for Alien Worker, Form I–140.* For filing a petition to classify preference status of an alien on the basis of profession or occupation under section 204(a) of the Act: $545.

(10) *Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA), Form I–191.* For filing an application for discretionary relief under section 212(c) of the Act: $800.

(11) *Application for Advance Permission to Enter as a Nonimmigrant, Form I–192.* For filing an application for discretionary relief under section 212(d)(3), (d)(13), or (d)(14) of the Act, except in an emergency case or where the approval of the application is in the interest of the U.S. Government: $1,415.

(12) *Application for Waiver of Passport and/or Visa, Form I–193.* For filing an application for waiver of passport and/or visa: $2,790.

(13) *Application for Permission to Reapply for Admission into the United States After Deportation or Removal, Form I–212.* For filing an application for permission to reapply for admission by an excluded, deported or removed alien, an alien who has fallen into distress, an alien who has been removed as an alien enemy, or an alien who has been removed at government expense: $1,040.

(14) *Notice of Appeal or Motion, Form I–290B.* For appealing a decision under the immigration laws in any type of proceeding over which the Board of Immigration Appeals does not have appellate jurisdiction: $705. The fee will be the same for appeal of a denial of a benefit request with one or multiple beneficiaries. There is no fee for an appeal or motion associated with a denial of a petition for a special immigrant visa filed by or on behalf of an individual seeking special immigrant status as an Iraqi or Afghan national who was employed by or on behalf of the U.S. Government in Iraq or Afghanistan.

(15) *Petition for Amerasian, Widow(er), or Special Immigrant, Form I–360.* For filing a petition for an Amerasian, Widow(er), or Special Immigrant: $455. The following requests are exempt from this fee:

(i) A petition seeking classification as an Amerasian;

(ii) A self-petition for immigrant status as an abused spouse or child of a U.S. citizen or lawful permanent resident or an abused parent of a U.S. citizen son or daughter; or

(iii) A petition for special immigrant juvenile classification; or

(iv) A petition seeking special immigrant visa or status an Iraqi or Afghan national who was employed by or on behalf of the U.S. Government in Iraq or Afghanistan.

(16) *Application to Register Permanent Residence or Adjust Status, Form I–485.* For filing an application for permanent resident status or creation of a record of lawful permanent residence $1,120. There is no fee if an applicant is filing as a refugee under section 209(a) of the Act or for applicants for Special Immigrant Status based on an approved Form I–360 as an Afghan or Iraqi Interpreter, or Iraqi National employed by or on behalf of the U.S. Government or Afghan National employed by the U.S. Government or the International Security Assistance Forces (''ISAF'').

(17) *Application to Adjust Status under Section 245(i) of the Act, Form I–485 Supplement A.* Supplement A to Form I–485 for persons seeking to adjust status under the provisions of section 245(i) of the Act: A sum of $1,000 must be paid while the applicant's *Application to Register Permanent Residence or Adjust Status* is pending, unless payment of the additional sum is not required under section 245(i) of the Act.

(18) *Immigrant Petition by Alien Entrepreneur, Form I–526.* For filing a petition for an alien entrepreneur: $4,015.

(19) *Application To Extend/Change Nonimmigrant Status, Form I–539.* For filing an application to extend or change nonimmigrant status: $400.

(i) For nonimmigrant A, G, and NATO: No fee.

(20) *Application for Asylum and for Withholding of Removal, Form I–589.* For filing an application for asylum status: $50. There is no fee for applications filed by unaccompanied

alien children who are in removal proceedings.

(21) *Petition to Classify Orphan as an Immediate Relative, Form I–600.* For filing a petition to classify an orphan as an immediate relative for issuance of an immigrant visa under section 204(a) of the Act.

(i) There is no fee for the first Form I–600 filed for a child on the basis of an approved Application for Advance Processing of an Orphan Petition, Form I–600A, during the Form I–600A approval or extended approval period.

(ii) Except as specified in (iii) below, if more than one Form I–600 is filed during the Form I–600A approval period, the fee is $810 for the second and each subsequent Form I–600 petition submitted.

(iii) If more than one Form I–600 is filed during the Form I–600A approval period on behalf of beneficiary birth siblings, no additional fee is required.

(22) *Application for Advance Processing of an Orphan Petition, Form I–600A.* For filing an application for determination of suitability and eligibility to adopt an orphan: $810.

(23) *Request for Action on Approved Form I–600A/I–600, Form I–600A/I–600 Supplement 3.* This filing fee is not charged if Form I–600A/I–600 Supplement 3 is filed in order to obtain a first extension of the approval of the Form I–600A or to obtain a first time change of non-Hague Adoption Convention country during the Form I–600A approval period. If Form I–600A/I–600 Supplement 3 is filed in order to request a new approval notice based on a significant change and updated home study, the filing fee is charged unless a first extension of the Form I–600A approval or first time change of non-Hague Adoption Convention country is also being requested on the same Supplement 3. Second or subsequent extensions of the approval of the Form I–600A, second or subsequent changes of non-Hague Adoption Convention country, requests for a new approval notice based on a significant change and updated home study, and requests for a duplicate approval notice are permitted with Form I–600A/I–600 Supplement 3 with the filing fee: $405. Form I–600A/I–600 Supplement 3 cannot be used to extend eligibility to proceed as a Hague Adoption Convention transition case beyond the first extension once the Convention enters into force for the new Convention country. Form I–600A/I–600 Supplement 3 cannot be used to request a change of country to a Hague Adoption Convention transition country for purposes of becoming a transition case if another country was already designated on the Form I–600A or prior change of country request. Form I–600A/I–600 Supplement 3 may only be used to request an increase the number of children the applicant/petitioner is approved to adopt from a transition country if the additional child is a birth sibling of a child who the applicant/petitioner has adopted or is in the process of adopting, as a transition case, and is identified and petitioned for while the Form I–600A approval is valid, unless the new Convention country prohibits such birth sibling cases from proceeding as transition cases.

(24) *Application for Waiver of Ground of Inadmissibility, Form I–601.* For filing an application for waiver of grounds of inadmissibility: $985.

(25) *Application for Provisional Unlawful Presence Waiver, Form I–601A.* For filing an application for provisional unlawful presence waiver: $960.

(26) *Application for Waiver of the Foreign Residence Requirement (under Section 212(e) of the Immigration and Nationality Act, as Amended), Form I–612.* For filing an application for waiver of the foreign-residence requirement under section 212(e) of the Act: $525.

(27) *Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act, Form I–687.* For filing an application for status as a temporary resident under section 245A(a) of the Act: $1,130.

(28) *Application for Waiver of Grounds of Inadmissibility, Form I–690.* For filing an application for waiver of a ground of inadmissibility under section 212(a) of the Act as amended, in conjunction with the application under sections 210 or 245A of the Act, or a petition under section 210A of the Act: $770.

(29) *Notice of Appeal of Decision under Sections 245A or 210 of the Immigration and Nationality Act (or a petition under section 210A of the Act), Form I–694.* For appealing the denial of an application under sections 210 or 245A of the Act, or a petition under section 210A of the Act: $725.

(30) *Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of the INA), Form I–698.* For filing an application to adjust status from temporary to permanent resident (under section 245A of Pub. L. 99–603): $1,615. The adjustment date is the date of filing of the application for permanent residence or the applicant's eligibility date, whichever is later.

(31) *Petition to Remove Conditions on Residence, Form I–751.* For filing a petition to remove the conditions on residence based on marriage: $760.

(32) *Application for Employment Authorization, Form I–765:* $490. *Application for Employment Authorization for Abused Nonimmigrant Spouse, Form I–765V:* No fee. There is no initial fee for:

(i) An applicant who filed USCIS Form I–485 on or after July 30, 2007, and before [EFFECTIVE DATE OF THE FINAL RULE], and paid the Form I–485 fee;

(ii) Refugees and aliens paroled as refugee;

(iii) Victims of Severe Forms of Trafficking (T–1);

(iv) Nonimmigrant Victim of Criminal Activity (U–1);

(v) Dependents of certain government and internal organizations or NATO personnel;

(vi) N–8 (Parent of alien classed as SK3) and N–9 (Child of N–8) nonimmigrants;

(vi) VAWA Self-Petitioners;

(vii) Applicants for Special Immigrant Status based on an approved Form I–360 as an Afghan or Iraqi Interpreter, or Iraqi National employed by or on behalf of the U.S. Government or Afghan National employed by the U.S. Government or the International Security Assistance Forces (''ISAF''); and

(viii) Aliens granted asylee status (AS1, AS6).

(33) *Petition to Classify Convention Adoptee as an Immediate Relative, Form I–800.* (i) There is no fee for the first Form I–800 filed for a child on the basis of an approved Application for Determination of Suitability to Adopt a Child from a Convention Country, Form I–800A, during the Form I–800A approval period.

(ii) Except as specified in paragraph (a)(33)(iii) of this section, if more than one Form I–800 is filed during the Form I–800A approval period, the fee is $810 for the second and each subsequent Form I–800 petition submitted.

(iii) If more than one Form I–800 is filed during the Form I–800A approval period on behalf of beneficiary birth siblings, no additional fee is required.

(34) *Application for Determination of Suitability to Adopt a Child from a Convention Country, Form I–800A.* For filing an application for determination of suitability and eligibility to adopt a child from a Hague Adoption Convention country: $810.

(35) *Request for Action on Approved Application for Determination of Suitability to Adopt a Child from a Convention Country,* Form I–800A, Supplement 3. This filing fee is not charged if Form I–800A Supplement 3 is filed in order to obtain a first extension of the approval of the Form I–

800A or to obtain a first time change of Hague Adoption Convention country during the Form I–800A approval period. If Form I–800A Supplement 3 is filed in order to request a new approval notice based on a significant change and updated home study, the filing fee is charged unless a first extension of the Form I–800A approval or first time change of Hague Adoption Convention country is also being requested on the same Supplement 3. Second or subsequent extensions of the Form I–800A approval, second or subsequent changes of Hague Adoption Convention country, requests for a new approval notice based on a significant change and updated home study, and requests for a duplicate approval notice are permitted with the filing of a Form I–800A, Supplement 3 and the required filing fee: $405.

(36) *Application for Family Unity Benefits, Form I–817.* For filing an application for voluntary departure under the Family Unity Program: $590.

(37) *Application for Temporary Protected Status, Form I–821.* (i) For first time applicants: $50 or the maximum permitted by section 244(c)(1)(B) of the Act.

(ii) There is no fee for re-registration.

(iii) A Temporary Protected Status (TPS) applicant or re-registrant must pay $30 for biometric services unless exempted in the applicable form instructions.

(38) *Consideration of Deferred Action for Childhood Arrivals, Form I–821D.* (i) For first time requestors: $0.

(ii) The fee for renewal is $275.

(39) *Application for Action on an Approved Application or Petition, Form I–824.* $500.

(40) *Petition by Entrepreneur to Remove Conditions on Permanent Resident Status, Form I–829.* For filing a petition by entrepreneur to remove conditions: $3,900.

(41) *Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to Section 203 of Pub. L. 105–100), Form I–881.* (i) $1,800 for adjudication by DHS.

(ii) $165 for adjudication by EOIR. If the Form I–881 is referred to the immigration court by DHS the $1,800 fee is required.

(42) *Application for Authorization to Issue Certification for Health Care Workers, Form I–905.* $230.

(43) *Request for Premium Processing Service, Form I–907.* The Request for Premium Processing Service fee will be as provided in 8 CFR 106.4.

(44) *Application for Civil Surgeon Designation, Form I–910.* $650.

(45) *Application for T Nonimmigrant Status, Form I–914.* No fee.

(46) *Petition for U Nonimmigrant Status, Form I–918.* No fee.

(47) *Application for Regional Center Designation under the Immigrant Investor Program, Form I–924.* $17,795.

(48) *Annual Certification of Regional Center, Form I–924A.* To provide updated information and certify that a Regional Center under the Immigrant Investor Program has maintained its eligibility: $4,470.

(49) *Petition for Qualifying Family Member of a U–1 Nonimmigrant, Form I–929.* For a principal U–1 nonimmigrant to request immigration benefits on behalf of a qualifying family member who has never held U nonimmigrant status: $1,515.

(50) *Application for Entrepreneur Parole, Form I–941.* For filing an application for parole for an entrepreneur: $1,200.

(51) *Public charge Bond, Form I–945.* $25.

(52) *Request for Cancellation of Public Charge Bond, Form I–356.* $25.

(b) *N Forms*—(1) *Application to File Declaration of Intention, Form N–300.* For filing an application for declaration of intention to become a U.S. citizen: $1,320.

(2) *Request for a Hearing on a Decision in Naturalization Proceedings (under section 336 of the Act), Form N–336.* For filing a request for hearing on a decision in naturalization proceedings under section 336 of the Act: $1,755. There is no fee for an applicant who has filed an Application for Naturalization under sections 328 or 329 of the Act with respect to military service and whose application has been denied.

(3) *Application for Naturalization, Form N–400.* For filing an application for naturalization: $1,170. No fee is charged an applicant who meets the requirements of sections 328 or 329 of the Act with respect to military service.

(4) *Application to Preserve Residence for Naturalization Purposes, Form N–470.* For filing an application for benefits under section 316(b) or 317 of the Act: $1,600.

(5) *Application for Replacement Naturalization/Citizenship Document, Form N–565.* For filing an application for a certificate of naturalization or declaration of intention in place of a certificate or declaration alleged to have been lost, mutilated, or destroyed; for a certificate of citizenship in a changed name under section 343(c) of the Act; or for a special certificate of naturalization to obtain recognition as a citizen of the United States by a foreign state under section 343(b) of the Act: $545. There is no fee when this application is submitted under 8 CFR 338.5(a) or 343a.1 to request correction of a certificate that contains an error.

(6) *Application for Certificate of Citizenship, Form N–600.* For filing an application for a certificate of citizenship under section 309(c) or section 341 of the Act: $1,015. There is no fee for any application filed by a member or veteran of any branch of the U.S. Armed Forces.

(7) *Application for Citizenship and Issuance of Certificate Under Section 322, Form N–600K.* For filing an application for citizenship and issuance of certificate under section 322 of the Act: $960.

(c) *G Forms, Statutory Fees, and Non-Form Fees*—(1) *Genealogy Index Search Request, Form G–1041:* $240. The fee is due regardless of the search results.

(2) *Genealogy Records Request, Form G–1041A:* $385. USCIS will refund the records request fee when it is unable to locate any file previously identified in response to the index search request.

(3) *USCIS Immigrant Fee.* For DHS domestic processing and issuance of required documents after an immigrant visa is issued by the U.S. Department of State: $200.

(4) *American Competitiveness and Workforce Improvement Act (ACWIA) fee.* For filing certain H–1B petitions as described in 8 CFR 214.2(h)(19) and USCIS form instructions: $1,500 or $750.

(5) *Fraud detection and prevention fee.* (i) For filing certain H–1B and L petitions as described in 8 U.S.C. 1184(c) and USCIS form instructions: $500.

(ii) For filing certain H–2B petitions as described in 8 U.S.C. 1184(c) and USCIS form instructions: $150.

(6) *Fraud detection and prevention fee for CNMI.* For employer petitions in CNMI as described in Public Law 115–218 and USCIS form instructions: $50.

(7) *CNMI education funding fee.* The fee amount will be as prescribed in the form instructions and:

(i) The fee amount must be paid in addition to, and in a separate remittance from, other filing fees;

(ii) Every employer who is issued a permit must pay the education funding fee every year;

(iii) An employer who is issued a permit with a validity period of longer than 1 year must pay the fee for each year of requested validity at the time the permit is requested;

(iv) Beginning in FY 2020, the fee may be adjusted once per year by notice in the **Federal Register** based on the amount of inflation according to the Consumer Price Index for All Urban

Consumers (CPI–U) since the fee was set by law at $200 on July 24, 2018.

(8) *9–11 Response and Biometric Entry-Exit Fee for H–1B Visa.* For all petitioners filing an H–1B petition who employ 50 or more employees in the United States if more than 50 percent of the petitioner's employees in the aggregate are in H–1B, L–1A or L–1B nonimmigrant status, except for petitioners filing an amended petition without an extension of stay request: $4,000. This fee will apply to petitions filed on or before September 30, 2027.

(9) *9–11 Response and Biometric Entry-Exit Fee for L–1 Visa.* For all petitioners filing an L–1 petition who employ 50 or more employees in the United States, if more than 50 percent of the petitioner's employees in the aggregate are in H–1B, L–1A or L–1B nonimmigrant status, except for petitioners filing an amended petition without an extension of stay request: $4,500. This fee will apply to petitions filed on or before September 30, 2027.

(10) *Claimant under section 289 of the Act.* No fee.

§ 106.3 Fee waivers and exemptions.

(a) *Fee waiver.* No fee relating to any benefit request submitted to USCIS may be waived except as provided by section 245(l)(7) of the Act, 8 U.S.C. 1255(l)(7), any other law, or by regulation. Specifically, the following categories of requestors may apply for a waiver of any fees for an immigration benefit and any associated filing up to and including an application for adjustment of status:

(1) Violence Against Women Act (VAWA) self-petitioners as defined under INA 101(a)(51);

(2) T nonimmigrants;

(3) U nonimmigrants;

(4) Battered spouses of A, G, E–3, or H nonimmigrants;

(5) Battered spouses or children of a lawful permanent resident or U.S. citizen as provided under INA 240A(b)(2); and

(6) Applicants for Temporary Protected Status.

(b) *Director's exemption for individual requests.* (1) The Director of USCIS may authorize a waiver on an individual, case-by-case basis of a form fee required by 8 CFR 106.2 that is not otherwise waivable under this section if the Director determines that such action would be in the public interest, the action is consistent with other applicable law, and the waiver is related to one of the following:

(i) Asylees;

(ii) Refugees;

(iii) National security;

(iv) Emergencies or major disasters declared in accordance with 44 CFR part 206, subpart B;

(v) An agreement between the U.S. government and another nation or nations; or

(vi) USCIS error.

(2) The Director may not approve an exception to the requirements under paragraph (d) of this section. An applicant, petitioner, or requestor may not directly submit a request that the Director exercise this authority. This discretionary authority may be delegated only to the USCIS Deputy Director.

(c) *Director's exception.* The Director of USCIS may authorize the waiver, in whole or in part, of a form fee required by 8 CFR 106.2 that is not otherwise waivable under this section, if the Director determines that such action is an emergent circumstance, or if a major natural disaster has been declared in accordance with 44 CFR part 206, subpart B. This discretionary authority may be delegated only to the USCIS Deputy Director. The Director may not waive the requirements of paragraph (d) of this section.

(d) *Eligibility for fee waiver.* A waiver of fees is limited to an alien with an annual household income at or below 125 percent of the Federal Poverty Guidelines as updated periodically in the **Federal Register** by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2). In addition, a waiver of fees as provided in paragraphs (b) and (c) of this section may not be provided to a requestor who is seeking an immigration benefit for which he or she:

(1) Is subject the affidavit of support requirements under section 213A of the Act, U.S.C. 1183a or is already a sponsored immigrant as defined in 8 CFR 213a.1; or

(2) Is subject to the public charge inadmissibility ground under section 212(a)(4) of the Act, 8 U.S.C. 1182(a)(4).

(e) *Form required.* A person must submit a request for a fee waiver on the form prescribed by USCIS in accordance with the instructions on the forms.

(f) *Exemptions.* The Director of USCIS may provide an exemption for any fee required by 8 CFR 106.2. This discretionary authority may only be delegated to the USCIS Deputy Director. The Director must determine that such action would be in the public interest, the action is consistent with the applicable law, and the exemption is related to one of the following:

(1) Asylees;

(2) Refugees;

(3) National security;

(4) Emergencies or major disasters declared in accordance with 44 CFR part 206, subpart B;

(5) An agreement between the U.S. government and another nation or nations; or

(6) USCIS error.

(g) *Documentation of gross household income.* A person submitting a request for a fee waiver must submit the following documents as evidence of annual gross household income:

(1) A transcript(s) from the United States Internal Revenue Service (IRS) of the person's IRS Form 1040, U.S. Individual Income Tax Return;

(2) If the person was not required to file a Federal income tax return, he or she must submit their most recent IRS Form W–2, Wage and Tax Statement, Form 1099G, Certain Government Payments, or Social Security Benefit Form SSA–1099, if applicable;

(3) If the person filed a Federal income tax return, and has recently changed employment or had a change in salary, the person must also submit copies of consecutive pay statements (stubs) for the most recent month or longer;

(4) If the person does not have income and has not filed income tax returns, he or she must submit documentation from the IRS that indicates that no Federal income tax transcripts and no IRS Form W–2s were found.

§ 106.4 Premium processing service.

(a) *General.* A person submitting a request to USCIS may request 15 business-day processing of certain employment-based immigration benefit requests.

(b) *Submitting a request.* A request must be submitted on the form prescribed by USCIS and prepared and submitted in accordance with the form instructions. If the request for premium processing is submitted together with the underlying benefit request, all required fees in the correct amount must be paid.

(c) *Fee amount.* The fee amount will be prescribed in the form instructions and:

(1) Must be paid in addition to, and in a separate remittance from, other filing fees.

(2) May be adjusted once per year by notice in the **Federal Register** based on the amount of inflation according to the Consumer Price Index (CPI) since the fee was set by law at $1,000 on June 1, 2001.

(d) *15-day limitation.* USCIS will refund the premium processing service fee, but continue to process the case if:

(1) USCIS does not issue a notice of any adjudicative action by the end of the 15th business day from the date USCIS accepted a properly filed request for premium processing for an eligible

employment-based immigration benefit request, including all required fees. The adjudicative action is evidenced by the notification of, but not necessarily receipt of, an approval, denial, request for evidence (RFE) or notice of intent to deny (NOID); or

(2) USCIS does not issue a notice of a subsequent adjudicative action by the end of the 15th business-day from the date USCIS received the response to an RFE or NOID. In premium processing cases where USCIS issues an RFE or NOID within 15 business days from the initial date of acceptance, a new 15-day period begins on the date that USCIS receives the response to the RFE or NOID.

(3) USCIS may retain the premium processing fee and not reach a conclusion on the request within 15 business days, and not notify the person who filed the request, if USCIS opens an investigation for fraud or misrepresentation relating to the benefit request.

(e) *Requests eligible for premium processing.* (1) USCIS will designate the categories of employment-based benefit requests that are eligible for premium processing.

(2) USCIS will announce by its official internet website, currently *http://www.uscis.gov*, those requests for which premium processing may be requested, the dates upon which such availability commences and ends, and any conditions that may apply.

§ 106.5 Authority to certify records.

The Director of USCIS, or such officials as he or she may designate, may certify records when authorized under 5 U.S.C. 552 or any other law to provide such records.

§ 106.6 DHS severability.

The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions will continue in effect.

PART 204—IMMIGRANT PETITIONS

■ 11. The authority citation for part 204 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1182, 1184, 1186a, 1255, 1641; 8 CFR part 2.

■ 12. Section 204.3 is amended:

■ a. In paragraph (b), in the definition of ''Orphan petition'', by revising the second sentence;

■ b. By revising the fourth fifth sentences of paragraph (d) introductory text; and

■ c. By revising paragraphs (h)(3)(i) and (ii) and (h)(7) and (13).

The revisions read as follows:

§ 204.3 Orphan cases under section 101(b)(1)(F) of the Act (non-Hague Adoption Convention cases).

* * * * *

(b) * * *

Orphan petition means * * * The petition must be completed in accordance with the form's instructions and submitted with the required supporting documentation and, if there is not a pending, or currently valid and approved advanced processing application, the fee as required in 8 CFR 106.2. * * *

* * * * *

(d) * * * If the prospective adoptive parents fail to file the orphan petition within the approval validity period of the advanced processing application, the advanced processing application will be deemed abandoned pursuant to paragraph (h)(7) of this section. If the prospective adoptive parents file the orphan petition after the approval period of the advanced processing application has expired, the petition will be denied pursuant to paragraph (h)(13) of this section. * * *

* * * * *

(h) * * *

(3) * * *

(i) If the advanced processing application is approved, the prospective adoptive parents will be advised in writing. A notice of approval expires 15 months after the date on which USCIS received the FBI response on the applicant's, and any additional adult member of the household's, biometrics, unless approval is revoked. If USCIS received the responses on different days, the 15-month period begins on the earliest response date. The notice of approval will specify the expiration date. USCIS may extend the validity period for the approval of a Form I–600A as provided in paragraph (h)(3)(ii) of this section or if requested in accordance with 8 CFR 106.2(a)(23). During this time, the prospective adoptive parents may file an orphan petition for one orphan without fee. If the Form I–600A approval is for more than one orphan, the prospective adoptive parents may file a petition for each of the additional children, to the maximum number approved. If the orphans are birth siblings, no additional fee is required. If the orphans are not birth siblings, an additional fee is required for each orphan beyond the first orphan. Approval of an advanced processing application does not guarantee that the orphan petition will be approved.

(ii) If the USCIS Director, or an officer designated by the USCIS Director, determines that the ability of a prospective adoptive parent to timely file a petition has been adversely affected by the outbreak of a public health or other emergency in a foreign country, such Director or designated officer may extend the validity period of the approval of the advance processing application, either in an individual case or for a class of cases. An extension of the validity of the approval of the advance processing application may be subject to such conditions as the USCIS Director, or officer designated by the USCIS Director may establish.

* * * * *

(7) *Advanced processing application deemed abandoned for failure to file orphan petition within the approval validity period of the advanced processing application.* If an orphan petition is not properly filed within 15 months of the approval date of the advanced processing application, the application will be deemed abandoned. Supporting documentation will be returned to the prospective adoptive parents, except for documentation submitted by a third party which will be returned to the third party, and documentation relating to the fingerprint checks. The director will dispose of documentation relating to biometrics checks in accordance with current policy. Such abandonment will be without prejudice to a new filing at any time with fee.

* * * * *

(13) *Orphan petition denied: Petitioner files orphan petition after the approval of the advanced processing application has expired.* If the petitioner files the orphan petition after the advanced processing application has expired, the petition will be denied. This action will be without prejudice to a new filing at any time with fee.

* * * * *

■ 13. Section 204.5 is amended:

■ a. In the definition of ''Petition'' in paragraph (m)(5) by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2''; and

■ b. By revising paragraph (p)(4).

The revision reads as follows:

§ 204.5 Petitions for employment-based immigrants.

* * * * *

(p) * * *

(4) *Application for employment authorization.* To request employment authorization, an eligible applicant described in paragraph (p)(1), (2), or (3) of this section must file an application for employment authorization (Form I–765), with USCIS, in accordance with 8 CFR 274a.13(a) and the form

instructions. Such applicant is subject to the collection of his or her biometric information as provided in the form instructions. Employment authorization under this paragraph may be granted solely in 1-year increments, but not to exceed the period of the alien's authorized admission.

* * * * *

§ 204.6 [Amended]

■ 14. Section 204.6 is amended by removing ''8 CFR 103.7(b)(1)(i)(XX)'' and adding in its place ''8 CFR 106.2'' in paragraph (m)(6)(i)(C).

§ 204.310 [Amended]

■ 15. Section 204.310 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' and by removing and reserving paragraph (a)(3)(ii).

§ 204.311 [Amended]

■ 16. Section 204.311 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (u)(4).

■ 17. Section 204.312 is amended by revising paragraph (e)(3)(i) introductory text to read as follows:

§ 204.312 Adjudication of the Form I–800A.

* * * * *

(e) * * *

(3)(i) If the 15-month validity period for a Form I–800A approval is about to expire, the applicant may file Form I–800A Supplement 3, with the filing fee under 8 CFR 106.2, if required. The applicant may not file a Form I–800A Supplement 3 seeking extension of an approval notice more than 90 days before the expiration of the validity period for the Form I–800A approval, but must do so on or before the date on which the validity period expires. The applicant is not required to pay the Form I–800A Supplement 3 filing fee for the first request to extend the approval of a Form I–800A, or to obtain a first time change of Hague Convention country during the Form I–800A approval period. If the applicant files a second or subsequent Form I–800A Supplement 3 to obtain a second or subsequent extension or a second or subsequent change of Hague Convention country, then, the applicant must pay the Form I–800A Supplement 3 filing fee, as specified in 8 CFR 106.2, for the second, or any subsequent, Form I–800A Supplement 3 that is filed. Any Form I–800A Supplement 3 that is filed to obtain an extension of the approval of a Form I–800A or a change of Hague Convention country must be accompanied by:

* * * * *

§ 204.313 [Amended]

■ 18. Section 204.313 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in the next to last sentence of paragraph (a) and by adding the word ''birth'' before ''siblings'' in the last sentence of paragraph (a).

* * * * *

PART 211—DOCUMENTARY REQUIREMENTS: IMMIGRANTS; WAIVERS

■ 19. The authority citation for part 211 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1181, 1182, 1203, 1225, 1257; 8 CFR part 2.

§ 211.1 [Amended]

■ 20. Section 211.1 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (b)(3).

§ 211.2 [Amended]

■ 21. Section 211.2 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (b).

PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

■ 22. The authority citation for part 212 continues to read as follows:

Authority: 6 U.S.C. 111, 202(4) and 271; 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1185 note (section 7209 of Pub. L. 108–458), 1187, 1223, 1225, 1226, 1227, 1255, 1359; 8 CFR part 2.

§ 212.2 [Amended]

■ 23. Section 212.2 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraphs (b)(1), (c)(1)(ii), (d), and (g)(1).

§ 212.3 [Amended]

■ 24. Section 212.3 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (a).

§ 212.4 [Amended]

■ 25. Section 212.4 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (b).

§ 212.7 [Amended]

■ 26. Section 212.7 is amended:

■ a. By removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (a)(1); and

■ b. By removing ''8 CFR 103.7(b)'' and adding in its place ''8 CFR 106.2'' in paragraphs (e)(1) and (e)(5)(i).

§ 212.15 [Amended]

■ 27. Section 212.15 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (j)(2)(ii).

§ 212.18 [Amended]

■ 28. Section 212.18 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraphs (a)(2).

■ 29. Section 212.19 is amended by revising paragraphs (b)(1), (c)(1), (e), (h)(1), and (j) to read as follows:

§ 212.19 Parole for entrepreneurs.

* * * * *

(b) * * *

(1) *Filing of initial parole request form.* An alien seeking an initial grant of parole as an entrepreneur of a start-up entity must file Form I–941, Application for Entrepreneur Parole, with USCIS, with the required fee, and supporting documentary evidence in accordance with this section and the form instructions, demonstrating eligibility as provided in paragraph (b)(2) of this section.

* * * * *

(c) * * *

(1) *Filing of re-parole request form.* Before expiration of the initial period of parole, an entrepreneur parolee may request an additional period of parole based on the same start-up entity that formed the basis for his or her initial period of parole granted under this section. To request such parole, an entrepreneur parolee must timely file Form I–941, Application for Entrepreneur Parole, with USCIS, with the required fee and supporting documentation in accordance with the form instructions, demonstrating eligibility as provided in paragraph (c)(2) of this section.

* * * * *

(e) *Collection of biometric information.* An alien seeking an initial grant of parole or re-parole before [EFFECTIVE DATE OF FINAL RULE] will be required to submit biometric information. An alien seeking an initial grant of parole or re-parole may be required to submit biometric information.

* * * * *

(h) * * *

(1) The entrepreneur's spouse and children who are seeking parole as derivatives of such entrepreneur must individually file Form I–131, Application for Travel Document. Such application must also include evidence that the derivative has a qualifying relationship to the entrepreneur and otherwise merits a grant of parole in the

exercise of discretion. Such spouse or child will be required to appear for collection of biometrics in accordance with the form instructions or upon request.

* * * * *

(j) *Reporting of material changes.* An alien granted parole under this section must immediately report any material change(s) to USCIS. If the entrepreneur will continue to be employed by the start-up entity and maintain a qualifying ownership interest in the start-up entity, the entrepreneur must submit a form prescribed by USCIS, with any applicable fee in accordance with the form instructions to notify USCIS of the material change(s). The entrepreneur parolee must immediately notify USCIS in writing if he or she will no longer be employed by the start-up entity or ceases to possess a qualifying ownership stake in the start-up entity.

* * * * *

PART 214—NONIMMIGRANT CLASSES

■ 30. The authority citation for part 214 continues to read as follows:

Authority: 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305, 1356, and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Public Law 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2.

■ 31. Section 214.1 is amended:

■ a. By removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (c)(1);

■ b. By removing ''§ 103.7 of this chapter'' and adding in its place ''8 CFR 106.2'' in paragraph (c)(2);

■ c. By revising paragraph (c)(5); and

■ d. By removing:

■ i. ''a Form I–129'' and adding in its place ''an application or petition'' in the first sentence of paragraph (j) introductory text; and

■ ii. ''Form I–129'' and adding in its place ''application or petition'' in the second and third sentences of paragraph (j) introductory text.

The revision reads as follows:

§ 214.1 Requirements for admission, extension, and maintenance of status.

* * * * *

(c) * * *

(5) *Decision on application for extension or change of status.* Where an applicant or petitioner demonstrates eligibility for a requested extension, it may be granted at the discretion of USCIS. The denial of an application for extension of stay may not be appealed.

* * * * *

■ 32. Amend § 214.2:

■ a. By revising paragraph (e)(8)(iii), the first sentence of paragraph (e)(8)(iv) introductory text, paragraphs (e)(8)(iv)(B), and (e)(8)(v);

■ b. By removing ''Form I–129 and E Supplement'' and adding in its place ''the form prescribed by USCIS'' in paragraphs (e)(20) introductory text and in two places in paragraph (e)(21)(i);

■ c. By revising paragraph (e)(23)(viii);

■ d. By removing and reserving paragraph (e)(23)(xv);

■ e. By removing either ''8 CFR 103.7'', ''8 CFR 103.7(b)'' or ''8 CFR 103.7(b)(1)'' and adding in their places ''8 CFR 106.2'' in paragraphs (f)(9)(ii)(F)(*1*), (h)(19)(ii), (m)(14)(ii), and (r)(3), (5), and (13);

■ f. By removing ''Form I–129'' and adding in its place ''application or petition'' wherever it appears in paragraphs (h)(1)(i)(B), (h)(6)(vii), (l)(14)(ii) introductory text, and (o)(2)(iv)(G);

■ g. By revising paragraphs (h)(2)(i)(A), (h)(2)(ii), and (h)(5)(i)(B);

■ h. By removing ''I–129'' and adding in its place ''the form prescribed by USCIS'' in paragraph (h)(6)(iii)(E);

■ i. By removing ''Petition for Nonimmigrant Worker (Form I–129)'' and adding in its place ''the form prescribed by USCIS'' in paragraph (h)(19)(vi)(A);

■ j. By revising paragraphs (h)(19)(i), (m)(14)(ii) introductory text, and (o)(2)(iv)(F);

■ k. By removing ''Form I–129'' and adding in its place ''an application or petition'' in the first sentence of paragraph (o)(12)(i);

■ l. By revising paragraph (p)(2)(iv)(F);

■ m. By removing ''Form I–129'' and adding in its place ''application or petition'' wherever it appears in paragraph (p)(2)(iv)(C)(*2*), the second sentence of paragraph (q)(3)(i), and paragraphs (q)(4)(i) and (q)(6);

■ n. By removing ''Form I–129'' and adding in its place ''the form prescribed by USCIS'' in paragraphs (h)(2)(i)(D), (h)(5)(i)(A), (h)(11)(i)(A), (h)(14), (h)(15)(i), (l)(2)(ii), (l)(3) introductory text, (l)(4)(iv) introductory text, (l)(5)(ii)(F), (l)(15)(i), (l)(17)(i), (o)(2)(iv)(D), (p)(13), (p)(14)(i), (q)(4)(iii), and in the second sentence of paragraph (q)(5)(i);

■ o. By removing ''Form I–129, Petition for Nonimmigrant Worker'' and adding in its place ''the form prescribed by USCIS'' in its place in paragraphs (l)(2)(i), (l)(5)(ii)(F), (o)(2)(i), (o)(11), (p)(2)(i), (q)(3)(i), and the first sentence of paragraph (q)(5)(i);

■ p. By removing ''Form I–129 petition'' and adding in its place ''application or petition'' in paragraph (p)(2)(iv)(H); and

■ q. By revising paragraph (r)(3) introductory text and the definition of ''Petitions'' in paragraph (r)(3) and revising paragraphs (r)(5), (w)(5), (w)(14)(iii), and (w)(15).

The revisions read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(e) * * *

(8) * * *

(iii) *Substantive changes.* Approval of USCIS must be obtained where there will be a substantive change in the terms or conditions of E status. The treaty alien must file a new application in accordance with the instructions on the form prescribed by USCIS requesting extension of stay in the United States, plus evidence of continued eligibility for E classification in the new capacity. Or the alien may obtain a visa reflecting the new terms and conditions and subsequently apply for admission at a port-of-entry. USCIS will deem there to have been a substantive change necessitating the filing of a new application where there has been a fundamental change in the employing entity's basic characteristics, such as a merger, acquisition, or sale of the division where the alien is employed.

(iv) *Non-substantive changes.* Neither prior approval nor a new application is required if there is no substantive, or fundamental, change in the terms or conditions of the alien's employment which would affect the alien's eligibility for E classification. * * *

(B) Request a new approval notice reflecting the non-substantive change by filing an application with a description of the change, or;

* * * * *

(v) *Advice.* To request advice from USCIS as to whether a change is substantive, an alien may file an application with a complete description of the change. In cases involving multiple employees, an alien may request that USCIS determine if a merger or other corporate restructuring requires the filing of separate applications by filing a single application and attaching a list of the related receipt numbers for the employees involved and an explanation of the change or changes.

* * * * *

(23) * * *

(viii) Information for background checks. USCIS may require an applicant for E–2 CNMI Investor status, including but not limited to any applicant for derivative status as a spouse or child, to submit biometrics as required under 8 CFR 103.16.

* * * * *

(h) * * *

(2) *Petitions*—(i) *Filing of petitions*—(A) *General.* A United States employer seeking to classify an alien as an H–1B, H–2A, H–2B, or H–3 temporary employee must file a petition on the form prescribed by USCIS in accordance with the form instructions.

* * * * *

(ii) *Multiple beneficiaries.* Up to 25 named beneficiaries may be included in an H–1C, H–2A, H–2B, or H–3 petition if the beneficiaries will be performing the same service, or receiving the same training, for the same period, and in the same location. If more than 25 named beneficiaries are being petitioned for, an additional petition is required. Petitions for H–2A and H–2B workers from countries not designated in accordance with paragraph (h)(6)(i)(E) of this section must be filed separately.

* * * * *

(5) * * *

(i) * * *

(B) *Multiple beneficiaries.* The total number of beneficiaries of a petition or series of petitions based on the same temporary labor certification may not exceed the number of workers indicated on that document. A single petition can include more than one named beneficiary if the total number is 25 or less and does not exceed the number of positions indicated on the relating temporary labor certification.

* * * * *

(19) * * *

(i) A United States employer (other than an exempt employer defined in paragraph (h)(19)(iii) of this section, or an employer filing a petition described in paragraph (h)(19)(v) of this section) who files a petition or application must include the additional American Competitiveness and Workforce Improvement Act (ACWIA) fee referenced in 8 CFR 106.2, if the petition is filed for any of the following purposes:

* * * * *

(m) * * *

(14) * * *

(ii) *Application.* A M–1 student must apply for permission to accept employment for practical training on Form I–765, with fee as contained in 8 CFR part 106, accompanied by a properly endorsed Form I–20 by the designated school official for practical training. The application must be submitted before the program end date listed on the student's Form I–20 but not more than 90 days before the program end date. The designated school official must certify on Form I–538 that—

* * * * *

(o) * * *

(2) * * *

(iv) * * *

(F) *Multiple beneficiaries.* More than one O–2 accompanying alien may be included on a petition if they are assisting the same O–1 alien for the same events or performances, during the same period, and in the same location. Up to 25 named beneficiaries may be included per petition.

* * * * *

(p) * * *

(2) * * *

(iv) * * *

(F) *Multiple beneficiaries.* More than one beneficiary may be included in a P petition if they are members of a team or group, or if they will provide essential support to P–1, P–2, or P–3 beneficiaries performing in the same location and in the same occupation. Up to 25 named beneficiaries may be included per petition.

* * * * *

(r) * * *

(3) *Definitions.* As used in this section, the term:

* * * * *

Petition means the form or as may be prescribed by USCIS, a supplement containing attestations required by this section, and the supporting evidence required by this part.

* * * * *

(5) *Extension of stay or readmission.* An R–1 alien who is maintaining status or is seeking readmission and who satisfies the eligibility requirements of this section may be granted an extension of R–1 stay or readmission in R–1 status for the validity period of the petition, up to 30 months, provided the total period of time spent in R–1 status does not exceed a maximum of five years. A Petition for a Nonimmigrant Worker to request an extension of R–1 status must be filed by the employer with a supplement prescribed by USCIS containing attestations required by this section, the fee specified in 8 CFR part 106, and the supporting evidence, in accordance with the applicable form instructions.

* * * * *

(w) * * *

(5) *Petition requirements.* An employer who seeks to classify an alien as a CW–1 worker must file a petition with USCIS and pay the requisite petition fee plus the CNMI education funding fee and the fraud prevention and detection fee as prescribed in the form instructions and 8 CFR part 106. If the beneficiary will perform services for more than one employer, each employer must file a separate petition with fees with USCIS.

* * * * *

(14) * * *

(iii) If the eligible spouse and/or minor child(ren) are present in the CNMI, the spouse or child(ren) may apply for CW–2 dependent status on Form I–539 (or such alternative form as USCIS may designate) in accordance with the form instructions. The CW–2 status may not be approved until approval of the CW–1 petition.

(15) *Biometrics and other information.* The beneficiary of a CW–1 petition or the spouse or child applying for a grant or, extension of CW–2 status, or a change of status to CW–2 status, must submit biometric information as requested by USCIS.

* * * * *

§ 214.3 [Amended]

■ 33. Section 214.3 is amended:

■ a. By removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (h)(1)(i); and

■ b. By removing ''8 CFR 103.7(b)(1)(ii)(B)'' and adding in its place ''8 CFR 103.7(d)(2)'' in paragraph (h)(2) introductory text.

§ 214.6 [Amended]

■ 34. Section 214.6 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraphs (g)(1), (h)(1)(i), (h)(2), and (i)(2).

§ 214.11 [Amended]

■ 35. Section 214.11 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraphs (d)(2)(iii) and (k)(1).

■ 36. Section 214.14 is amended by revising paragraphs (c)(1) introductory text to read as follows:

§ 214.14 Alien victims of certain qualifying criminal activity.

* * * * *

(c) * * *

(1) *Filing a petition.* USCIS has sole jurisdiction over all petitions for U nonimmigrant status. An alien seeking U–1 nonimmigrant status must submit, Form I–918, Petition for U Nonimmigrant Status, and initial evidence to USCIS in accordance with this paragraph and the instructions to Form I–918. A petitioner who received interim relief is not required to submit initial evidence with Form I–918 if he or she wishes to rely on the law enforcement certification and other

evidence that was submitted with the request for interim relief.

* * * * *

PART 216—CONDITIONAL BASIS OF LAWFUL PERMANENT RESIDENCE STATUS

■ 37. The authority citation for part 216 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1154, 1184, 1186a, 1186b, and 8 CFR part 2.

§ 216.4 [Amended]

■ 38. Section 216.4 is amended by removing ''§ 103.7(b) of this chapter'' and adding in its place ''8 CFR 106.2'' in paragraph (a)(1).

§ 216.5 [Amended]

■ 39. Section 216.5 is amended by removing ''§ 103.7(b) of this Chapter '' and adding in its place ''8 CFR 106.2'' in paragraph (b).

§ 216.6 [Amended]

■ 40. Section 216.6 is amended by removing ''8 CFR 103.7(b)(1) of this chapter '' and adding in its place ''8 CFR 106.2'' in paragraph (a)(1).

PART 217—VISA WAIVER PROGRAM

■ 41. The authority citation for part 217 continues to read as follows:

Authority: 8 U.S.C. 1103, 1187; 8 CFR part 2.

§ 217.2 [Amended]

■ 42. Section 217.2 is amended by removing ''§ 103.7(b)(1)'' and adding in its place ''8 CFR 103.7(d)(4)'' in its place in paragraph (c)(2).

PART 223—REENTRY PERMITS, REFUGEE TRAVEL DOCUMENTS, AND ADVANCE PAROLE DOCUMENTS

■ 43. The authority citation for part 223 continues to read as follows:

Authority: 8 U.S.C. 1103, 1181, 1182, 1186a, 1203, 1225, 1226, 1227, 1251; Protocol Relating to the Status of Refugees, November 1, 1968, 19 U.S.T. 6223 (TIAS) 6577; 8 CFR part 2.

§ 223.2 [Amended]

■ 44. Section 223.2 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (a).

PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

■ 45. The authority citation for part 235 continues to read as follows:

Authority: 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323, 69 FR 241, 3 CFR, 2004 Comp., p.278), 1201, 1224, 1225, 1226, 1228, 1365a note, 1365b, 1379, 1731–32; Title VII of Public Law 110–229; 8 U.S.C. 1185 note (section 7209 of Pub. L. 108–458); Pub. L. 112–54.

§ 235.1 [Amended]

■ 46. Section 235.1 is amended by removing ''§ 103.7(b)(1) of this chapter'' and adding in its place ''8 CFR 103.7(d)(3)'' in paragraphs (g)(1)(iii) and (g)(2).

§ 235.7 [Amended]

■ 47. Section 235.7 is amended by removing ''§ 103.7(b)(1) of this chapter'' and ''§ 103.7(b)(1)'' and adding in their place ''8 CFR 103.7(d)(7)'' in paragraph (a)(4)(v).

§ 235.12 [Amended]

■ 48. Section 235.12 is amended by removing ''8 CFR 103.7(b)(1)(ii)(M)'' and adding in its place ''8 CFR 103.7(d)(13)'' in paragraph (d)(2).

§ 235.13 [Amended]

■ 49. Section 235.13 is amended by removing ''8 CFR 103.7(b)(1)(ii)(N)'' and adding in its place ''8 CFR 103.7(d)(14)'' in paragraph (c)(5).

PART 236—APPREHENSION AND DETENTION OF INADMISSIBLE AND DEPORTABLE ALIENS; REMOVAL OF ALIENS ORDERED REMOVED

■ 50. The authority citation for part 236 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1103, 1182, 1224, 1225, 1226, 1227, 1231, 1362; 18 U.S.C. 4002, 4013(c)(4); 8 CFR part 2.

§ 236.14 [Amended]

■ 51. Section 236.14 is amended by removing ''§ 103.7(b)(1) of this chapter'' and adding in its place ''8 CFR 106.2'' in paragraph (a).

§ 236.15 [Amended]

■ 52. Section 236.15 is amended by removing ''§ 103.7(b)(1) of this chapter'' and adding in its place ''8 CFR 106.2'' in paragraph (e).

PART 240—VOLUNTARY DEPARTURE, SUSPENSION OF DEPORTATION AND SPECIAL RULE CANCELLATION OF REMOVAL

■ 53. The authority citation for part 240 continues to read as follows:

Authority: 8 U.S.C. 1103; 1182, 1186a, 1224, 1225, 1226, 1227, 1251, 1252 note, 1252a, 1252b, 1362; secs. 202 and 203, Pub. L. 105–100 (111 Stat. 2160, 2193); sec. 902, Pub. L. 105–277 (112 Stat. 2681); 8 CFR part 2.

■ 54. Section 240.63 is amended by revising paragraph (a) to read as follows:

§ 240.63 Application process.

(a) *Form and fees.* Except as provided in paragraph (b) of this section, the application must be made on the form prescribed by USCIS for this program and filed in accordance with the instructions for that form. An applicant who submitted to EOIR a completed Form EOIR–40, Application for Suspension of Deportation, before the effective date of the form prescribed by USCIS may apply with the Service by submitting the completed Form EOIR–40 attached to a completed first page of the application. Each application must be filed with the required fees as provided in 8 CFR 106.2.

* * * * *

PART 244—TEMPORARY PROTECTED STATUS FOR NATIONALS OF DESIGNATED STATES

■ 55. The authority citation for part 244 continues to read as follows:

Authority: 8 U.S.C. 1103, 1254, 1254a note, 8 CFR part 2.

§ 244.6 [Amended]

■ 56. Section 244.6 is amended by revising paragraph (a) to read as follows:

§ 244.6 Application.

(a) An application for Temporary Protected Status must be submitted in accordance with the form instructions, the applicable country-specific **Federal Register** notice that announces the procedures for TPS registration or re-registration and, except as otherwise provided in this section, with the appropriate fees as described in 8 CFR part 106.

* * * * *

■ 57. Section 244.17 is amended by revising paragraph (a) to read as follows:

§ 244.17 Periodic Registration.

(a) Aliens granted Temporary Protected Status must re-register periodically in accordance with USCIS instructions. Such registration applies to nationals of those foreign states designated for more than one year by DHS or where a designation has been extended for a year or more. Applicants for re-registration must apply during the period provided by USCIS. Re-registration applicants do not need to pay the fee that was required for initial registration except the biometric services fee, unless that fee is waived in the applicable form instructions, and if requesting an employment authorization document, the application fee for an Application for Employment Authorization. By completing the application, applicants attest to their continuing eligibility. Such applicants do not need to submit additional supporting documents unless USCIS requests that they do so.

* * * * *

PART 245—ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE

■ 58. The authority citation for part 204 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1255; Pub. L. 105–100, section 202, 111 Stat. 2160, 2193; Pub. L. 105–277, section 902, 112 Stat. 2681; Pub. L. 110–229, tit. VII, 122 Stat. 754; 8 CFR part 2.

§ 245.7 [Amended]

■ 59. Section 245.7 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (a).

§ 245.10 [Amended]

■ 60. Section 245.10 is amended by removing ''§ 103.7(b)(1) of this chapter'' and adding in its place ''8 CFR 106.2'' in paragraph (c) introductory text.

§ 245.15 [Amended]

■ 61. Section 245.15 is amended:
■ a. By removing ''§ 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (c)(2)(iv)(A);
■ b. By removing and reserving paragraph (c)(2)(iv)(B);
■ c. By removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (g)(1);
■ d. By removing ''§ 103.7(b)(1) of this chapter'' and adding in its place ''8 CFR 106.2'' in paragraph (h)(1);
■ e. By removing and reserving paragraph (h)(2); and
■ f. By removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraphs (n)(1), (t)(1), and (t)(2)(i).

§ 245.18 [Amended]

■ 62. Section 245.18 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraphs (d)(1) and (k).

§ 245.21 [Amended]

■ 63. Section 245.21 is amended:
■ a. By removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in the first sentence of paragraph (b) and removing the second sentence in paragraph (b); and
■ b. By removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraphs (f), (h), and (i).

§ 245.23 [Amended]

■ 64. Section 245.23 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (e)(1)(i) and by removing and reserving paragraph (e)(1)(iii).

§ 245.24 [Amended]

■ 65. Section 245.24 is amended:
■ a. By removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraphs (d)(2) and by removing and reserving paragraph (d)(3); and
■ b. By removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraphs (h)(1)(ii) and (i)(1)(iii) and by removing and reserving paragraph (i)(1)(iv).

PART 245a—ADJUSTMENT OF STATUS TO THAT OF PERSONS ADMITTED FOR TEMPORARY OR PERMANENT RESIDENT STATUS UNDER SECTION 245A OF THE IMMIGRATION AND NATIONALITY ACT

■ 66. The authority citation for part 245a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1255a and 1255a note.

■ 67. Section 245a.2 is amended by revising paragraph (e)(3) to read as follows:

§ 245a.2 Application for temporary residence.

* * * * *

(e) * * *

(3) A separate application must be filed by each applicant with the fees required by 8 CFR 106.2.

* * * * *

■ 68. Section 245a.3 is amended by revising paragraph (d)(3) to read as follows:

§ 245a.3 Application for adjustment from temporary to permanent resident status.

* * * * *

(d) * * *

(3) A separate application must be filed by each applicant with the fees required by 8 CFR 106.2.

* * * * *

■ 69. Section 245a.4 is amended by revising paragraph (b)(5)(iii) to read as follows:

§ 245a.4 Adjustment to lawful resident status of certain nationals of countries for which extended voluntary departure has been made available.

* * * * *

(b) * * *

(5) * * *

(iii) A separate application must be filed by each applicant with the fees required by 8 CFR 106.2.

* * * * *

■ 70. Section 245a.12 is amended:
■ a. By removing ''Missouri Service Center'' and adding in its place ''National Benefit Center'' in paragraphs (b) introductory text and (c);
■ b. By revising paragraph (d) introductory text;
■ c. By removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (d)(1); and
■ d. By removing and reserving paragraphs (d)(2), (4), and (6).

The revision reads as follows:

§ 245a.12 Filing and applications.

* * * * *

(d) *Application and supporting documentation.* Each applicant for LIFE Legalization adjustment of status must submit the form prescribed by USCIS completed in accordance with the form instructions accompanied by the required evidence.

* * * * *

§ 245a.13 [Amended]

■ 71. Section 245a.13 is amended:
■ a. By removing ''§ 103.7(b)(1) of this chapter'' and adding in its place ''8 CFR 106.2'' in paragraph (d)(1); and (e)(1).
■ b. By removing ''Missouri Service Center'' and adding in its place ''National Benefit Center'' in paragraphs (e) introductory text and (e)(1); and
■ c. By removing ''§ 103.7(b)(1) of this chapter'' and adding in its place ''8 CFR 106.2'' in paragraph (e)(1).

§ 245a.18 [Amended]

■ 72. Section 245a.18 is amended by removing ''Missouri Service Center'' and adding in its place ''National Benefit Center'' in paragraph (c)(1).

§ 245a.19 [Amended]

■ 73. Section 245a.19 is amended by removing ''Missouri Service Center'' and adding in its place ''National Benefit Center'' in paragraph (a).

§ 245a.20 [Amended]

■ 74. Section 245a.20 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (a)(2).

§ 245a.33 [Amended]

■ 75. Section 245a.33 is amended by removing ''§ 103.7(b)(1) of this chapter'' and adding in its place ''8 CFR 106.2'' in paragraph (a) and by removing ''Missouri Service Center'' and adding in its place ''National Benefit Center'' in paragraphs (a) and (b).

PART 248—CHANGE OF NONIMMIGRANT CLASSIFICATION

■ 76. The authority citation for part 248 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1184, 1258; 8 CFR part 2.

§ 248.3 [Amended]

■ 77. Section 248.3 is amended by removing ''8 CFR 103.7(b)'' and adding in its place ''8 CFR 106.2'' in its place in the introductory text and by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (h) introductory text.

PART 264—REGISTRATION AND FINGERPRINTING OF ALIENS IN THE UNITED STATES

■ 78. The authority citation for part 248 continues to read as follows:

Authority: 8 U.S.C. 1103, 1201, 1303–1305; 8 CFR part 2.

§ 264.2 [Amended]

■ 79. Section 264.2 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraphs (c)(1)(i) and (c)(2)(i).

§ 264.5 [Amended]

■ 80. Section 264.5 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (a).

§ 264.6 [Amended]

■ 81. Section 264.6 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (b).

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 82. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599.

■ 83. Section 274a.12 is amended by revising paragraphs (b)(9), (13), and (14) to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(b) * * *

(9) A temporary worker or trainee (H–1, H–2A, H–2B, or H–3), pursuant to 8 CFR 214.2(h), or a nonimmigrant specialty occupation worker pursuant to section 101(a)(15)(H)(i)(b)(1) of the Act. An alien in this status may be employed only by the petitioner through whom the status was obtained. In the case of a professional H–2B athlete who is traded from one organization to another organization, employment authorization for the player will automatically continue for a period of 30 days after acquisition by the new organization, within which time the new organization is expected to file a new petition for H–2B classification. If a new petition is not filed within 30 days, employment authorization will cease. If a new petition is filed within 30 days, the professional athlete's employment authorization will continue until the petition is adjudicated. If the new petition is denied, employment authorization will cease. In the case of a nonimmigrant with H–1B status, employment authorization will automatically continue upon the filing of a qualifying petition under 8 CFR 214.2(h)(2)(i)(H) until such petition is adjudicated, in accordance with section 214(n) of the Act and 8 CFR 214.2(h)(2)(i)(H);

* * * * *

(13) An alien having extraordinary ability in the sciences, arts, education, business, or athletics (O–1), and an accompanying alien (O–2), pursuant to 8 CFR 214.2(o). An alien in this status may be employed only by the petitioner through whom the status was obtained. In the case of a professional O–1 athlete who is traded from one organization to another organization, employment authorization for the player will automatically continue for a period of 30 days after the acquisition by the new organization, within which time the new organization is expected to file a new petition for O nonimmigrant classification. If a new petition is not filed within 30 days, employment authorization will cease. If a new petition is filed within 30 days, the professional athlete's employment authorization will continue until the petition is adjudicated. If the new petition is denied, employment authorization will cease.

(14) An athlete, artist, or entertainer (P–1, P–2, or P–3), pursuant to 8 CFR 214.2(p). An alien in this status may be employed only by the petitioner through whom the status was obtained. In the case of a professional P–1 athlete who is traded from one organization to another organization, employment authorization for the player will automatically continue for a period of 30 days after the acquisition by the new organization, within which time the new organization is expected to file a new petition for P–1 nonimmigrant classification. If a new petition is not filed within 30 days, employment authorization will cease. If a new petition is filed within 30 days, the professional athlete's employment authorization will continue until the petition is adjudicated. If the new petition is denied, employment authorization will cease;

* * * * *

PART 286—IMMIGRATION USER FEE

■ 84. The authority citation for part 286 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1356; Title VII of Public Law 110–229; 8 CFR part 2.

§ 286.9 [Amended]

■ 85. Section 286.9 is amended by removing ''§ 103.7(b)(1)'' and adding in its place ''8 CFR 103.7(d)'' in paragraph (a).

PART 301—NATIONALS AND CITIZENS OF THE UNITED STATES AT BIRTH

■ 86. The authority citation for part 301 continues to read as follows:

Authority: 8 U.S.C. 1103, 1401; 8 CFR part 2.

§ 301.1 [Amended]

■ 87. Section 301.1 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (a)(1).

PART 319—SPECIAL CLASSES OF PERSONS WHO MAY BE NATURALIZED: SPOUSES OF UNITED STATES CITIZENS

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

Authority: 8 U.S.C. 1103, 1430, 1443.

§ 319.11 [Amended]

■ 89. Section 319.11 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (a) introductory text.

PART 320—CHILD BORN OUTSIDE THE UNITED STATES AND RESIDING PERMANENTLY IN THE UNITED STATES; REQUIREMENTS FOR AUTOMATIC ACQUISITION OF CITIZENSHIP

■ 90. The authority citation for part 320 continues to read as follows:

Authority: 8 U.S.C. 1103, 1443; 8 CFR part 2.

§ 320.5 [Amended]

■ 91. Section 320.5 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraphs (b) and (c).

PART 322—CHILD BORN OUTSIDE THE UNITED STATES; REQUIREMENTS FOR APPLICATION FOR CERTIFICATE OF CITIZENSHIP

■ 92. The authority citation for part 322 continues to read as follows:

Authority: 8 U.S.C. 1103, 1443; 8 CFR part 2.

§ 322.3 [Amended]

■ 93. Section 322.3 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (a) and by removing ''§ 103.7(b)(1) of this chapter'' and adding in its place ''8 CFR 106.2'' (b)(1) introductory text.

§ 322.5 [Amended]

■ 94. Section 322.5 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraphs (b) and (c).

PART 324—SPECIAL CLASSES OF PERSONS WHO MAY BE NATURALIZED: WOMEN WHO HAVE LOST UNITED STATES CITIZENSHIP BY MARRIAGE AND FORMER CITIZENS WHOSE NATURALIZATION IS AUTHORIZED BY PRIVATE LAW

■ 95. The authority citation for part 324 continues to read as follows:

Authority: 8 U.S.C. 1103, 1435, 1443, 1448, 1101 note.

§ 324.2 [Amended]

■ 96. Section 324.2 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (b).

PART 334—APPLICATION FOR NATURALIZATION

■ 97. The authority citation for part 334 continues to read as follows:

Authority: 8 U.S.C. 1103, 1443; 8 CFR part 2.

§ 334.2 [Amended]

■ 98. Section 334.2 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (a).

PART 341—CERTIFICATES OF CITIZENSHIP

■ 99. The authority citation for part 341 continues to read as follows:

Authority: Pub. L. 82–414, 66 Stat. 173, 238, 254, 264, as amended; 8 U.S.C. 1103, 1409(c), 1443, 1444, 1448, 1452, 1455; 8 CFR part 2.

§ 341.1 [Amended]

■ 100. Section 341.1 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2''.

§ 341.5 [Amended]

■ 101. Section 341.5 is amended by removing ''8 CFR 103.7'' and adding in its place ''8 CFR 106.2'' in paragraph (e).

PART 343a—NATURALIZATION AND CITIZENSHIP PAPERS LOST, MUTILATED, OR DESTROYED; NEW CERTIFICATE IN CHANGED NAME; CERTIFIED COPY OF REPATRIATION PROCEEDINGS

■ 102. The authority citation for part 343a continues to read as follows:

Authority: 8 U.S.C. 1101 note, 1103, 1435, 1443, 1454, and 1455.

§ 343a.1 [Amended]

■ 103. Section 343a.1 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR part 106'' in paragraph (a).

PART 343b—SPECIAL CERTIFICATE OF NATURALIZATION FOR RECOGNITION BY A FOREIGN STATE

■ 104. The authority citation for part 343b continues to read as follows:

Authority: 8 U.S.C. 1103, 1443, 1454, 1455.

§ 343b.1 [Amended]

■ 105. Section 343b.1 is amended by removing the term ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in the first sentence.

PART 392—SPECIAL CLASSES OF PERSONS WHO MAY BE NATURALIZED: PERSONS WHO DIE WHILE SERVING ON ACTIVE DUTY WITH THE UNITED STATES ARMED FORCES DURING CERTAIN PERIODS OF HOSTILITIES

■ 106. The authority citation for part 392 continues to read as follows:

Authority: 8 U.S.C. 1103, 1440 and note, and 1440–1; 8 CFR part 2.

§ 392.4 [Amended]

■ 107. Section 392.4 is amended by removing ''8 CFR 103.7(b)(1)'' and adding in its place ''8 CFR 106.2'' in paragraph (e).

Kevin K. McAleenan,

Acting Secretary .

[FR Doc. 2019–24366 Filed 11–8–19; 4:45 pm]

BILLING CODE 9111–97–P

FEDERAL REGISTER

Vol. 84 Thursday,

No. 220 November 14, 2019

Part IV

Department of Homeland Security

8 CFR Parts 208 and 274a

Asylum Application, Interview, and Employment Authorization for Applicants; Proposed Rule

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 208 and 274a

[CIS No. 2648–19; DHS Docket No. USCIS–2019–0011]

RIN 1615–AC27

Asylum Application, Interview, and Employment Authorization for Applicants

AGENCY: Department of Homeland Security.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Department of Homeland Security (DHS) is proposing to modify its current regulations governing asylum applications, interviews, and eligibility for employment authorization based on a pending asylum application.

DATES: Written comments and related material to this proposed rule, including the proposed information collections, must be received to the online docket via *www.regulations.gov,* or to the mailing address listed in the **ADDRESSES** section below, on or before January 13, 2020.

ADDRESSES: You may submit comments on this proposed rule using one of the following methods:

- *Federal eRulemaking Portal [preferred]: http://www.regulations.gov.* Follow the website instructions for submitting comments.
- *Mail:* Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW, Washington, DC 20529. To ensure proper handling, please reference DHS Docket No. USCIS–2019–0011 in your correspondence. Mail must be postmarked by the comment submission deadline.

FOR FURTHER INFORMATION CONTACT:
Maureen Dunn, Chief, Division of Humanitarian Affairs, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue NW, Suite 1100, Washington, DC 20529–2140; Telephone (202) 272–8377.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Public Participation
II. Executive Summary
  A. Major Provisions of the Regulatory Action
  B. Summary of Costs and Benefits, and Transfer of Payment
III. Purpose of the Proposed Rule
  A. Efforts To Reform the Asylum System
  B. Need for Reform
IV. Background
  A. Legal Authority
  B. Eligibility for Asylum
  C. Affirmative vs. Defensive Asylum Filings
  D. Employment Authorization for Asylees and Asylum Applicants
  E. Asylum and EAD Adjudications
V. Discussion of the Proposed Rule
  A. 365-Day Waiting Period To Apply for Asylum-Application-Based EADs
  B. One-Year Filing Deadline
  C. Criminal Bars to Eligibility
  D. Procedural Reforms
  E. Termination of Employment Authorization
  1. Denial of Asylum Application by USCIS Asylum Officer
  2. Termination After Denial by IJ
  3. Automatic Extensions of Employment Authorizations and Terminations
  F. Aliens Who Have Established Credible or Reasonable Fear of Persecution or Torture and Who Have Been Paroled Into the United States
  G. Illegal Entry
  H. Effective Date of the Final Rule
VI. Statutory and Regulatory Requirements
  A. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)
  1. Summary
  2. Background and Purpose of Rule
  3. Population
  4. Transfers, Costs, and Benefits of This Proposed Rule
  B. Regulatory Flexibility Act (RFA)
  C. Congressional Review Act
  D. Unfunded Mandates Reform Act of 1995 (UMRA)
  E. Executive Order 13132 (Federalism)
  F. Executive Order 12988 (Civil Justice Reform)
  G. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)
  H. Family Assessment
  I. National Environmental Policy Act (NEPA)
  J. National Technology Transfer and Advancement Act
  K. Executive Order 12630 (Governmental Actions and Interference With Constitutionally Protected Property Rights)
  L. Executive Order 13045 (Protection of Children From Environmental Health Risks and Safety Risks)
  M. Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use)
  N. Paperwork Reduction Act (PRA)

Table of Abbreviations

ASC—Application Support Center
BCR—Biometrics Collection Rate
BFR—Biometrics Fee Ratio
BIA—Board of Immigration Appeals
BLS—Bureau of Labor Statistics
CAT—Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CBP—U.S. Customs and Border Protection
CFR—Code of Federal Regulations
CPMS—Customer Profile Management System
DHS—U.S. Department of Homeland Security
DOJ—Department of Justice
DOS—Department of State
E.O.—Executive Order
EAD—Employment Authorization Document
EOIR—Executive Office for Immigration Review
FBI—Federal Bureau of Investigation
FDNS—Fraud Detection and National Security Directorate
FIFO—First In/First Out
Form I–589—Application for Asylum and for Withholding of Removal
Form I–765—Application for Employment Authorization
Form I–863—Notice of Referral to Immigration Judge
FY—Fiscal Year
GSA—General Services Administration
HSA—Homeland Security Act of 2002
ICE—U.S. Immigration and Customs Enforcement
IIRIRA—Illegal Immigration Reform and Immigrant Responsibility Act of 1996
INA—Immigration and Nationality Act
IRCA—Immigration Reform and Control Act of 1986
INS—Immigration and Naturalization Service
LCA—Labor Condition Application
LIFO—Last In, First Out
NEPA—National Environmental Policy Act
NTA—Notice to Appear
OMB—Office of Management and Budget
PM—Presidential Memorandum
PRA—Paperwork Reduction Act
RFA—Regulatory Flexibility Act
Secretary—Secretary of Homeland Security
UMRA—Unfunded Mandates Act of 1995
U.S.C.—United States Code
USCIS—U.S. Citizenship and Immigration Services

I. Public Participation

All interested parties are invited to participate in this rulemaking by submitting written data, views, comments, and arguments on all aspects of this proposed rule. DHS also invites comments that relate to the economic, legal, environmental, or federalism effects that might result from this proposed rule. Comments must be submitted in English or include an English translation. Comments that will provide the most assistance to DHS in implementing these changes will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that supports such recommended change.

Instructions: If you submit a comment, you must include the agency name (U.S. Citizenship and Immigration Services) and the DHS Docket No. USCIS–2019–0011 for this rulemaking. Please note that DHS has published a notice of proposed rulemaking (NPRM) entitled ''Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I–765 Employment Authorization Applications,'' DHS Docket No. USCIS–2018–0001, separate from this NPRM. The two NPRMs include distinct proposals, and for this proposed rule, DHS will only consider comments submitted to Docket No. USCIS–2019–0011. Please ensure that you submit your comments to the correct docket.

Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary public comment submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Docket: For access to the docket and to read background documents or comments received, go to *http://www.regulations.gov,* referencing DHS Docket No. USCIS–2019–0011. You may also sign up for email alerts on the online docket to be notified when comments are posted or a final rule is published.

II. Executive Summary

DHS seeks to reduce incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications to obtain employment authorization filed by asylum applicants seeking an employment authorization document pursuant to 8 CFR 274a.12(c)(8) (hereinafter ''(c)(8) EAD'' or ''EAD'') or other non-asylum-based forms of relief such as cancellation of removal, and to discourage illegal entry into the United States. DHS also seeks to reduce incentives for aliens to intentionally delay asylum proceedings in order to extend the period of employment authorization based on the pending application, and to simplify the adjudication process. DHS seeks to prevent those asylum applicants who have committed certain crimes from obtaining a (c)(8) employment authorization document, and to make the decision to grant (c)(8) employment authorization to asylum applicants discretionary, in line with USCIS' statutory authority.

DHS is proposing to modify its current regulations governing asylum applications, interviews, and eligibility for employment authorization based on a pending asylum application. DHS proposes to modify its regulations in the following areas:

- *Extend the waiting period to apply for employment authorization:* DHS proposes that asylum applicants wait 365 calendar days from the date their asylum applications are received by USCIS or the Department of Justice, Executive Office for Immigration Review (DOJ–EOIR) before they may apply for and receive an EAD. DHS also proposes that USCIS will deny (c)(8) EAD applications if there are any unresolved applicant-caused delays on the date of the EAD adjudication.
- *Eliminate the issuance of recommended approvals for a grant of affirmative asylum:* DHS proposes that USCIS will no longer issue recommended approvals for asylum. These are typically cases where an asylum officer has made a preliminary determination to grant asylum but has not yet received the results of the mandatory, confidential investigation of the alien's identity and background.
- *Revise eligibility for employment authorization:* DHS proposes to exclude aliens who, absent good cause, entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry from eligibility for (c)(8) employment authorization. DHS also proposes to exclude from eligibility for employment authorization aliens who have failed to file for asylum within one year of their last entry, unless and until an asylum officer or Immigration Judge (IJ) determines that an exception to the statutory requirement to file for asylum within one year applies. Because the one-year filing deadline does not apply to unaccompanied alien children, under this proposal, the one-year filing deadline would not exclude unaccompanied alien children from eligibility to obtain an employment authorization document. DHS also proposes to exclude from eligibility aliens whose asylum applications have been denied by an asylum officer or an IJ during the 365-day waiting period or before the request for initial employment authorization has been adjudicated. DHS further proposes to exclude from eligibility for employment authorization aliens who have: (1) Been convicted of any aggravated felony as defined under section 101(a)(43) of the INA, 8 U.S.C. 1101(a)(43), (2) been convicted of any felony in the United States or serious non-political crime outside the United States or (3) been convicted of certain public safety offenses in the United States. If an applicant has unresolved domestic arrests or pending charges involving domestic violence, child abuse, possession or distribution of controlled substances,[1] or driving under the influence of drugs or alcohol, USCIS will decide at its discretion if it will grant the applicant employment authorization, based on the totality of the circumstances. DHS seeks public comment on whether these and additional crimes should be included as bars to employment authorization. DHS also proposes to make the decision to grant (c)(8) employment authorization discretionary to align with the discretionary authority Congress conferred in INA 208(d)(2), 8 U.S.C. 1158(d)(2). DHS is also clarifying that only applicants for asylum who are located in the United States may apply for employment authorization. DHS is adding a severability clause in the event that, for whatever reason, any of the provisions are not implemented.
- *Revise the provisions for EAD termination:* DHS proposes revising when (c)(8) employment authorization terminates. DHS proposes that when a USCIS asylum officer denies an alien's request for asylum, any employment authorization associated with a pending asylum application will be terminated effective on the date of asylum application denial. If a USCIS asylum officer determines that the alien is not eligible for asylum, the asylum officer will typically refer the case to DOJ–EOIR. DHS proposes that if USCIS refers a case to DOJ–EOIR, employment authorization would continue, and the alien would be eligible to continue applying for EAD renewals, if needed, until the IJ renders a decision on the asylum application. If the IJ denies the asylum application, the alien's employment authorization would terminate 30 days after denial, unless the alien filed a timely appeal with the Board of Immigration Appeals (BIA). Renewal of employment authorization would be available to the alien during the pendency of the appeal to the BIA. DHS, however, would prohibit employment authorization during the Federal court appeal process, but the alien could reapply for a (c)(8) EAD if the Federal court remanded the asylum case to BIA.
- *Change provisions for filing an asylum application:* DHS proposes to remove the requirement that USCIS return an incomplete application within 30 days or have it deemed complete for

[1] *See* section 102 of the Controlled Substances Act (21 U.S.C. 802).

adjudication purposes. DHS also proposes that amending an asylum application, requesting an extension to submit additional evidence beyond a time that allows for its meaningful consideration prior to the interview, or failing to appear to receive a decision as designated, will constitute an applicant-caused delay, which, if not resolved by the date the application for employment authorization is adjudicated, will result in the denial of that employment authorization application. DHS also is clarifying the effect of an applicant's failure to appear for either an asylum interview or a scheduled biometric services appointment on a pending asylum application.

- *Limit EAD validity periods:* DHS proposes to clarify that the validity period of (c)(8) employment authorization is discretionary and further proposes that any (c)(8) EAD validity period, whether initial or renewal, will not exceed increments of two years. USCIS may set shorter validity periods for initial and renewal (c)(8) EADs.
- *Incorporate biometrics collection requirements into the employment authorization process for asylum seekers:* DHS proposes to incorporate biometrics collection into the employment authorization process for asylum applicants, which would require applicants to appear at an Application Support Center (ASC) for biometrics collection and pay a biometric services fee. At present, biometrics collection generally refers to the collection of fingerprints, photographs, and signatures.[2] Such biometrics collection will allow DHS to submit a (c)(8) applicant's fingerprints to the Federal Bureau of Investigation (FBI) for a criminal history check, facilitate identity verification, and facilitate (c)(8) EAD card production. DHS will require applicants with a pending initial or renewal (c)(8) EAD on the effective date of this rule to appear at an ASC for biometrics collection but DHS will not collect the biometrics services fee from these aliens. DHS will contact applicants with pending applications and provide notice of the place, date and time of the biometrics appointment.
- *Clarify employment authorization eligibility for aliens who have been paroled after being found to have a credible or reasonable fear of persecution or torture:* DHS is clarifying that aliens who have been paroled after establishing a credible fear or reasonable fear of persecution or torture under 8 CFR 208.30 may not request a discretionary grant of employment authorization under 8 CFR 274a.12(c)(11), but may still apply for a (c)(8) EAD, if eligible. DHS seeks public comment on this proposal and whether the (c)(11) category (parole-based EADs) should be further limited, such as to provide employment authorization only to those DHS determines are needed for foreign policy, law enforcement, or national security reasons, especially since parole is meant only as a temporary measure to allow an alien's physical presence in the United States until the need for parole is accomplished or the alien can be removed.

Specify the effective date: DHS proposes to apply changes made by this rule only to initial and renewal applications for employment authorization under 8 CFR 274a.12(c)(8) and (c)(11) filed on or after the effective date of the final rule, with limited exceptions. DHS will apply two of the proposed ineligibility provisions—those relating to criminal offenses and failure to file the asylum application within one year of the alien's last entry to the US—to initial and renewal applications for employment authorization applications pending on the effective date of the final rule. In order to implement the criminal ineligibility provision, DHS will require applicants with an initial or renewal (c)(8) EAD application pending on the effective date of this rule to appear at an ASC for biometrics collection but DHS will not collect the biometrics services fee from these aliens. DHS will contact applicants with pending applications and provide notice of the place, date and time of the biometrics appointment. If applicable, initial applications filed before the effective date of this rule by members of the *Rosario* class will not be subject to any of the provisions of this proposed rule.[3] DHS seeks public comment on whether other aliens, such as those affected by the Settlement Agreement in *American Baptist Churches* v. *Thornburgh,* 760 F. Supp. 796 (N.D.Cal.1991), or those whose asylum applications predate the 1995 asylum reforms, should be subject to all, some or none of the provisions in this rule.

DHS is updating the regulations to reflect the amendments made by this proposed rule, and proposing revisions to existing USCIS information collections to accompany the proposed regulatory changes.

A. Major Provisions of the Regulatory Action

DHS proposes to include the following major changes:

- *Amending 8 CFR 208.3, Form of application.* The amendments to this section propose to remove the language providing that an application for asylum will automatically be deemed ''complete'' if USCIS fails to return the incomplete application to the alien within a 30-day period. This provision is inconsistent with how all other applications and petitions for immigration benefits are treated, creates an arbitrary circumstance for treating a potentially incomplete asylum application as complete, and imposes an unnecessary administrative burden on USCIS. DHS proposes to conform its current process for determining when an asylum application is received and complete to the general rules governing all other immigration benefits under 8 CFR 103.2, in addition to the specific asylum rules under 8 CFR 208.3 and 208.4. The regulations at 8 CFR 103.2(a)(7) state that USCIS will record the receipt date as of the actual date the benefit request is received at the designated filing location, whether electronically or in paper, provided that it is signed with a valid signature, executed, and filed in compliance with the regulations governing that specific benefit request. If a fee is required, the benefit request must also include the proper fee. Benefit requests not meeting these acceptance criteria are rejected at intake. Rejected benefit requests do not retain a filing date.
- *Amending 8 CFR 208.4, Filing the application.* The proposed amendments to this section provide that a request to amend a pending application for asylum or to supplement such an application may be treated as an applicant-caused delay, and if unresolved on the date the employment authorization application

[2] *See https://www.uscis.gov/forms/forms-information/preparing-your-biometric-services-appointment* (describing biometrics as including fingerprints, photographs, and digital signature) (last visited July 11, 2019).

[3] On May 22, 2015, plaintiffs in *Rosario* v. *USCIS,* No. C15–0813JLR (W.D. Wash.), brought a class action in the U.S. District Court for the Western District of Washington to compel USCIS to comply with the 30-day provision of 8 CFR 208.7(a)(1). On July 26, 2018, the court enjoined USCIS from further failing to adhere to the 30-day deadline for adjudicating EAD applications. DHS published a proposed rule to remove this timeframe on September 9, 2019, where it proposed to grandfather into the 30-day adjudication timeframe those class members who filed their initial EAD applications prior to the effective date of any final rule that changes the 30-day DHS timeline. To ensure compliance with the court order and consistency with the 30-day proposed rule, USCIS further proposes not to apply this rule to any initial EAD application filed by a *Rosario* class member that is pending as of the effective date of this rule, so long as the *Rosario* injunction remains in effect. USCIS has not included proposed regulatory text to this effect, but would include such text in the event that members of the *Rosario* class remain as of the date of publication of a final rule.

is adjudicated, will result in the denial of the application for employment authorization.

• *Amending 8 CFR 208.7, Employment authorization.*[4]

○ *Jurisdiction.* The proposed amendments to this section clarify that USCIS has jurisdiction over all applications for employment authorization based on pending or approved applications for asylum.

○ *365-day Waiting Period.* The proposed amendments to this section also replace the 150-day waiting period and the 180-day asylum EAD clock. The proposed amendments will make asylum applicants eligible to apply for employment authorization 365 calendar days from the date their asylum application is received. The 365-day period was based on an average of the current processing times for asylum applications which can range anywhere from six months to over 2 years, before there is an initial decision, especially in cases that are referred to DOJ–EOIR from an asylum office. The amendments propose that if any unresolved applicant-caused delays in the asylum adjudication exist on the date the (c)(8) EAD application is adjudicated, the EAD application will be denied. Consistent with the current regulation, DHS also proposes to exclude from eligibility aliens whose asylum applications have been denied by an asylum officer or an IJ during the waiting period of at least 365-days or before the adjudication of the initial request for employment authorization.

○ *One Year Filing Deadline.* The proposed amendments to this section also exclude from eligibility for employment authorization aliens who have failed to file for asylum within one year unless and until an asylum officer or IJ determines that an exception to the statutory requirement to file for asylum within one year applies.

○ *Illegal Entry.* The proposed amendments to this section also make any alien who entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry ineligible to receive a (c)(8) EAD, with limited exceptions.

○ *Criminal convictions.* The rule proposes amendments to this section include excluding from (c)(8) EAD eligibility any alien who has (1) been convicted of an aggravated felony as described in section 101(a)(43) of the INA, 8 U.S.C. 1101(a)(43), (2) been convicted of any felony[5] in the United States, (3) been convicted of a serious non-political crime outside the United States, (4) been convicted in the United States of domestic violence or assault (except aliens who have been battered or subjected to extreme cruelty and who were not the primary perpetrators of violence in their relationships), child abuse or neglect; possession or distribution of controlled substances; or driving or operating a motor vehicle under the influence of alcohol or drugs, regardless of how the offense is classified by the state, local, or tribal jurisdiction. USCIS will consider, on a case-by-case basis, whether an alien who has unresolved domestic charges or arrests that involve domestic violence, child abuse, possession or distribution of controlled substances, or driving under the influence of drugs or alcohol, warrant a favorable exercise of discretion for a grant of employment authorization.

○ *Recommended Approvals.* The proposed amendments to this section also remove the language referring to ''recommended approvals.'' Under this proposal, USCIS would no longer issue grants of recommended approvals as a preliminary decision for affirmative asylum adjudications.

○ *EAD Renewals.* The proposed amendments would permit renewals during the pendency of the asylum application, including in immigration court and at the BIA, for such periods as determined by USCIS in its discretion, but not to exceed increments of two years.

○ *Submission of biometrics.* The proposed amendments would require applicants to submit biometrics at a scheduled biometrics services appointment for all initial and renewal applications for employment authorization. DHS will require applicants with a pending initial or renewal (c)(8) EAD on the effective date of this rule to appear at an ASC for biometrics collection but DHS will not collect the biometrics services fee from these aliens. DHS will contact applicants with pending applications and provide notice of the place, date and time of the biometrics appointment.

○ *Termination After Denial by USCIS Asylum Officer.* The proposed amendments to this section provide that when a USCIS asylum officer denies an alien's request for asylum any employment authorization associated with a pending asylum application, including any automatic extension of employment authorization, will be terminated effective on the date the asylum application is denied. If a USCIS asylum officer determines that the alien has no lawful immigration status and is not eligible for asylum, the asylum officer will refer the case to DOJ–EOIR and place the alien in removal proceedings. Employment authorization will be available to the alien while in removal proceedings and the application for asylum is under review before an IJ.

○ *Termination After Denial by an IJ or the BIA.* The rule proposes that if USCIS refers a case to DOJ–EOIR, employment authorization would continue for 30-days following the date that the IJ denies the asylum application to account for a possible appeal of the denial to the BIA. If the alien files a timely appeal, employment authorization would continue, and the alien would be able to file a renewal EAD application, if otherwise eligible. Employment authorization would be prohibited during the Federal court appeal process, but the alien could request a (c)(8) EAD if the case is remanded to DOJ–EOIR for a new decision.

○ *Eligibility.* The amendments to the section also clarify existing USCIS policy that only an applicant who is in the United States may apply for employment authorization.

○ *Severability.* The amendments also include a severability clause. This section is drafted with provisions separated into distinct parts. In the event that any provision is not implemented for whatever reason, DHS intends that the remaining provisions be implemented as an independent rule in accordance with the stated purpose of this rule.

• *Amending 8 CFR 208.9, Procedure for interview before an asylum officer.* The amendments to this section clarify that an applicant's failure to appear to receive and acknowledge receipt of the decision following an interview and an applicant's request for an extension to submit additional evidence are applicant-caused delays for purposes of eligibility for employment authorization. The amendments also remove references to the ''Asylum EAD clock.'' This section is further amended to provide that documentary evidence must be submitted no later than 14 calendar days before the interview with an asylum officer takes place to improve administrative efficiency and aid in the meaningful examination and exploration of evidence in preparation for and during the interview. As a

[4] DHS has published a notice of proposed rulemaking (NPRM) entitled ''Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I–765 Employment Authorization Applications,'' DHS Docket No. USCIS–2018–0001, separate from this NPRM, which addresses application processing times. Processing times are therefore not addressed here.

[5] *See* 18 U.S.C. 3156(a)(3) (the term ''felony'' means an offense punishable by a maximum term of imprisonment of more than one year).

matter of discretion, the asylum officer may consider evidence submitted within the fourteen (14) calendar days in advance of the interview date or may grant the applicant a brief extension of time during which the applicant may submit additional evidence.

• *Amending 8 CFR 208.10, Failure to appear for an interview before an asylum officer or for a biometric services appointment for the asylum application.* The amendments to this section seek to clarify that an asylum applicant's failure to appear for an asylum interview or biometric services appointment may lead to referral or dismissal of the asylum application, and may be treated as an applicant-caused delay affecting eligibility for employment authorization. In addition, the rule clarifies that USCIS is not obligated to send any notice to the applicant about his or her failure to appear at a scheduled biometrics appointment or an asylum interview as a prerequisite to making a decision on the application, which may include dismissing the asylum application or referring it to an IJ. These amendments are intended to facilitate more timely and efficient case processing when applicants fail to appear for essential appointments. Finally, the amendments replace references to fingerprint processing and fingerprint appointments with the term presently used by USCIS—''biometric services appointment.''

• *Amending 8 CFR 274a.12, Classes of aliens authorized to accept employment.* The amendments to this section remove the language in 8 CFR 274a.12(c)(8) referring to ''recommended approvals.'' The amendments also delete an obsolete reference to the Commissioner of the former Immigration and Naturalization Service (INS) and replace it with a reference to USCIS. Amendments to this section also clarify that aliens who have been paroled into the United States after being found to have a credible fear or reasonable fear of persecution or torture may apply for employment authorization under 8 CFR 274a.12(c)(8), if eligible, but may not apply under 8 CFR 274a.12(c)(11) (parole-related EADs). The amendments also provide that employment authorization will not be granted if a denial of an asylum application is under judicial review, in conformity with amendments proposed at 8 CFR 208.7. DHS seeks public comment on this proposal and whether the (c)(11) category (parole-based EADs) should be further limited, such as to provide employment authorization only to those DHS determines are needed for foreign policy, law enforcement, or national security reasons, especially since parole is meant only as a temporary measure to allow an alien's physical presence in the United States until the need for parole is accomplished or the alien can be removed.

• *Amending 8 CFR 274a.13, Application for employment authorization.* The proposed amendments to this section remove unnecessary references to the supporting documents required for submission with applications for employment authorization based on a pending asylum application and clarify that such employment authorization applications, like all other applications, petitions, or requests for immigration benefits, must be filed on the form designated by USCIS, in accordance with the form instructions, and along with any applicable fees. DHS is also proposing to amend 8 CFR 274a.13(a)(1) so that USCIS has discretion to grant applications for employment authorization filed by asylum applicants pursuant to 8 CFR 274a.12(c)(8) in keeping with its discretionary statutory authority under INA 208(d)(2), 8 U.S.C. 1158(d)(2). To conform the current automatic extension and termination provisions to the changes proposed under 8 CFR 208.7(b), the amendments to this section provide that any employment authorization granted under 8 CFR 274a.12(c)(8) that was automatically extended pursuant 8 CFR 274a.13(d)(1) will automatically terminate on the date the asylum officer, IJ, or the BIA denies the asylum application.

• *Amending 8 CFR 274a.14, Termination of employment authorization.* For purposes of clarity, the amendment to this section adds a new paragraph at 8 CFR 274a.14(a)(1) that cross-references any automatic EAD termination provision elsewhere in DHS regulations, including the automatic termination provisions being proposed by this rule in 8 CFR 208.7(b).

• *Effective date:* With limited exceptions, the rules in effect on the date of filing form I–765 will govern all initial and renewal applications for a (c)(8) EAD based on a pending asylum application and a (c)(11) EAD based on a grant of parole after establishing a credible fear or reasonable fear of persecution or torture. The criminal provisions and the failure to file the asylum application within one year of last entry will apply to initial and renewal EAD applications pending on the date the final rule is published. In order to implement the criminal ineligibility provision, DHS will require applicants with a pending initial or renewal (c)(8) EAD on the effective date of this rule to appear at an ASC for biometrics collection but DHS will not collect the biometrics services fee from these aliens. DHS will provide notice of the place, date and time of the biometrics appointment to applicants with pending (c)(8) EAD application. If applicable, initial (c)(8) EAD applications filed before the effective date by members of the *Rosario* class would not be affected by this proposed rule. DHS will allow aliens with pending asylum applications that have not yet been adjudicated and who already have received employment authorization before the final rule's effective date to retain their (c)(8) employment authorization until the expiration date on their EAD, unless the employment authorization is terminated or revoked on grounds in the existing regulations. DHS will also allow aliens who have already received employment authorization before the final rule's effective date under the (c)(11) eligibility category based on parole/credible fear to retain that employment authorization until their EAD expires, unless the employment authorization is terminated or revoked on grounds in the existing regulations. The proposals in this rule will not impact the adjudication of applications to replace lost, stolen, or damaged (c)(8) or (c)(11) EADs.

B. Summary of Costs, Benefits, and Transfer Payments

This proposed rule amends the (c)(8) EAD system primarily by extending the period that an asylum applicant must wait in order to be employment authorized, and by disincentivizing asylum applicants from causing delays in the adjudication of their asylum application. The Department has considered that asylum applicants may seek unauthorized employment without possessing a valid employment authorization document, but does not believe this should preclude the Department from making procedural adjustments to how aliens gain access to a significant immigration benefit. The provisions seek to reduce the incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications primarily to obtain employment authorization and remain for years in the United States for economic purposes

The quantified maximum population this rule would apply to about 305,000 aliens in the first year the rule could take effect and about 290,000 annually thereafter. DHS assessed the potential impacts from this rule overall, as well as the individual provisions, and provides quantitative estimates of such impacts where possible and relevant. For the provisions involving biometrics and the removal of recommended approvals, the quantified analysis covers the entire populations. For the 365-day EAD filing time proposal, the quantified analysis also covers the entire population; however, DHS relies on historical data to estimate the costs for affirmative cases and certain assumptions to provide a maximum potential estimate for the remaining affected population. For the provisions that would potentially end some EADs early, DHS could estimate only the portion of the costs attributable to affirmative cases because DHS has no information available to estimate the number of defensive cases affected.

DHS provides a qualitative analysis of the provisions proposing to terminate EADs earlier for asylum cases denied/dismissed by an IJ; remove employment eligibility for asylum applicants under the (c)(11) category, and; bar employment authorization for asylum applicants with certain criminal history, who did not enter at a U.S. port of entry, or who, with little exception, did not file for asylum within one year of their last arrival to the United States. As described in more detail in the unquantified impacts section, DHS does not have the data necessary to quantify the impacts of these provisions.

To take into consideration uncertainty and variation in the wages that EAD holders earn, all of the monetized costs rely on a lower and upper bound, benchmarked to a prevailing minimum wage and a national average wage, which generates a range. Specific costs related to the provisions proposed are summarized in Table 1. For the provisions in which impacts could be monetized, the single midpoint figure for the wage-based range is presented.[6]

TABLE 1—SUMMARY OF COSTS AND TRANSFERS OF THE PROPOSED RULE

Provision summary	Annual costs and transfers (mid-point)
I. Quantified:	
365-day EAD filing wait period (for DHS affirmative asylum cases and partial estimates for DHS referrals to DOJ).	Population: 39,000. Cost: $542.7 million (quantified impacts for 39,000 of the 153,458 total population). Reduction in employment tax transfers: $83.2 million (quantified impacts for 39,000 of the 153,458). Cost basis: Annualized equivalence cost. Summary: Lost compensation for a portion of DHS affirmative asylum cases that benefitted from initial EAD approvals who would have to wait longer to earn wages under the proposed rule; nets out cost-savings for persons who would no longer file under the rule; includes partial estimate of DHS referral cases to DOJ–EOIR and the apropos estimated tax transfers. It does not include impacts for defensively filed cases.
Biometrics requirement	Population for initial and renewal EADs: 289,751. Population for pending EADs: 14,451. Cost: $37,769,580. Reduction in employment tax transfers: None. Cost basis: Maximum costs of the provision, which would apply to the first year the rule could take effect. Summary: For initial and renewal EADs, there would be time-related opportunity costs plus travel costs of submitting biometrics, as well as $85 fee for (c)(8) I–765 initial and renewal populations subject to the biometrics and fee requirements. A small filing time burden to answer additional questions and read associated form instructions in the I–765 is consolidated in this provision's costs. There would also be time-related opportunity costs plus travel costs of submitting biometrics for EADs pending on the effective date of the final rule.
Eliminate recommended approvals.	Population: 1,930 annual. Cost: $13,907,387. Reduction in employment tax transfers: $2,127,830. Cost basis: Annualized equivalence cost. Summary: Delayed earnings and tax transfers that would have been earned for an average of 52 calendar days earlier with a recommended approval.
Terminate EADs if asylum application denied/dismissed (DHS).	Population: 575 (current and future). Cost: $31,792,569. Reduction in employment tax transfers: $4,864,263. Cost basis: Maximum costs of the provision, which would apply to the first year the rule could take effect. Summary: Forgone earnings and tax transfers from ending EADs early for denied/dismissed DHS affirmative asylum applications. This change would affect EADs that are currently valid and EADs for affirmative asylum applications in the future that would not be approved. DHS acknowledges that as a result of this proposed change, businesses that have hired such workers would incur labor turnover costs earlier than without this rule.
365-day EAD filing wait period (for the residual population).	Population: 114,458. Cost: $1,189.6 million–$3,600.4 million (quantified impacts for the remaining 114,458 of the 153,458). Reduction in employment tax transfers: $182.0 million–$550.9 million (quantified impacts for the remaining 114,458 of the 153,458). Cost basis: Annualized equivalence cost. Summary: Lost compensation for the population of approved annual EADs for which DHS does not have data to make a precise cost estimate; The costs reported are a maximum because the potential impact is based on the maximum impact of 151 days; in reality there would be lower-cost segments to this population and filing-cost savings as well.
II. Unquantified:	
Revise (c)(11) category from I–765.	Population: 13,000. Cost: delayed/foregone earnings. Cost basis; NA.

[6] The populations reported in Table 1 reflect the maximum population that would be covered by the provision. Some of the populations that would incur monetized impacts are slightly different due to technical adjustments.

TABLE 1—SUMMARY OF COSTS AND TRANSFERS OF THE PROPOSED RULE—Continued

Provision summary	Annual costs and transfers (mid-point)
	Summary: DHS does not know how many of the actual population will apply for an EAD via the (c)(8) I–765, but the population would be zero at a minimum and 13,000 at a maximum, with a mid-point of 6,500. The population would possibly incur delayed earnings and tax transfers by being subject to the 365-day EAD clock (it is noted that this population would also incur costs under the biometrics provision, above), or lost earnings if they do not apply for a (c)(8) EAD. There is potentially countervailing cost-savings due to a reduced pool of filers under the proposed rule.
Criminal activity/illegal entry bar.	DHS is unable to estimate the number of aliens impacted. Impacts could involve forgone earnings and lost taxes.
Adjudication of pending (c)(8) I–765 applications under the criminal and one-year-filing provisions.	DHS cannot determine how many of the 14,451 pending EAD filings would be impacted by the criminal and one-year-filing provisions. Impacts could involve forgone earning and tax transfers.
One-year filing deadline	Some portion of the 8,472 annual filing bar referrals could be impacted, which could comprise deferred/delayed or forgone earning and tax transfers. DHS does not have data on filing bar cases referred to DOJ–EOIR.
Terminate EADs if asylum application denied/dismissed (DOJ–EOIR).	DOJ–EOIR has denied an average of almost 15,000 asylum cases annually; however, DHS does not have data on the number of such cases that have an EAD. Costs would involve forgone earnings and tax transfers for any such EADs that would be terminated earlier than they otherwise would, as well as forgone future earnings and tax transfers. DHS acknowledges that as a result of this proposed change businesses that have hired such workers would incur labor turnover costs earlier than without this rule. Businesses unable to replace these workers would also incur productivity losses.

For those provisions that affect the time an asylum applicant is employed, the impacts of this rule would include both distributional effects (which are transfers) and costs.[7] The transfers would fall on the asylum applicants who would be delayed in entering the U.S. labor force or who would leave the labor force earlier than under current regulations. The transfers would be in the form of lost compensation (wages and benefits). A portion of this lost compensation might be transferred from asylum applicants to others that are currently in the U.S. labor force, or, eligible to work lawfully, possibly in the form of additional work hours or the direct and indirect added costs associated with overtime pay. A portion of the impacts of this rule would also be borne by companies that would have hired the asylum applicants had they been in the labor market earlier or who would have continued to employ asylum applicants had they been in the labor market longer, but were unable to find available replacement labor. These companies would incur a cost, as they would be losing the productivity and potential profits the asylum applicant would have provided. Companies may also incur opportunity costs by having to choose the next best alternative to the immediate labor the asylum applicant would have provided and by having to pay workers to work overtime hours. USCIS does not know what this next best alternative may be for those companies. As a result, USCIS does not know the portion of overall impacts of this rule that are transfers or costs, but estimated the maximum monetized impact of this rule in terms of delayed/lost labor compensation. If all companies are able to easily find reasonable labor substitutes for the positions the asylum applicant would have filled, they will bear little or no costs, so $4,461.9 million (annualized at 7%) will be transferred from asylum applicants to workers currently in the labor force or induced back into the labor force (we assume no tax losses as a labor substitute was found). Conversely, if companies are unable to find reasonable labor substitutes for the position the asylum applicant would have filled then $4,461.9 million is the estimated monetized cost of the rule, and $0 is the estimated monetized transfers from asylum applicants to other workers. In addition, under this scenario, because the jobs would go unfilled there would be a loss of employment taxes to the Federal Government. USCIS estimates $682.9 million as the maximum decrease in employment tax transfers from companies and employees to the Federal Government.

The two scenarios described above represent the estimated endpoints for the range of monetized impacts resulting from the provisions that affect the amount of time an asylum applicant is employed. USCIS notes that given that the U.S. unemployment rate is hovering around a 50-year low—at 3.7% as of August 2019—it could be possible that employers may face difficulties finding reasonable labor substitutes. DHS does note that an alternative measure of the unemployment rate from the Bureau of Labor Statistics (the U–6) provides additional information on the labor market not found in the official unemployment rate (the U–3). The U–6 rate is a broader measure of labor underutilization and takes into account workers not included in the official U–3 rate that could potentially benefit from this rule. For example, the U–6 rate considers persons who are neither working nor looking for work but indicate they want and are available for a job and have looked for work sometime in the past twelve months and also considers part-time workers who otherwise want and are available for full time employment. The U–6 rate shows unemployment at 7.2 percent, which is much higher than the official U–3 rate of 3.7 percent.[8]

Included in the broader U–6 unemployment rate is the number of persons employed part time for economic reasons (sometimes referred to as involuntary part-time workers), which BLS estimates is 4.4 million in August 2019. These individuals, who would have preferred full-time

[7] Transfer payments are monetary payments from one group to another that do not affect total resources available to society. *See* OMB Circular A–4 pages 14 and 38 for further discussion of transfer payments and distributional effects. Circular A–4 is available at: *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.*

[8] The full definition of the U–3 and U–6 unemployment rates can be found on the Bureau of Labor Statistics (BLS) website under the ''Local Area Unemployment Statistics (LAUS),'' at: *https://www.bls.gov/lau/stalt.htm.* The actual figures for the U–3 and U–6 unemployment rates are found in table A–15, ''Alternative Measures of Labor Underutilization,'' in the Economic News Release Archives at: *https://www.bls.gov/news.release/archives/empsit_09062019.htm.*

employment, were working part time because their hours had been reduced or they were unable to find full-time jobs.[9] In addition, BLS reports for August 2019 that 1.6 million persons were marginally attached to the labor force. These individuals were not in the labor force, wanted and were available for work, and had looked for a job sometime in the prior 12 months. They were not counted as unemployed in the official U–3 unemployment rate because they had not searched for work in the 4 weeks preceding the BLS survey, but are counted in the U–6 rate.[10] The U–6 rate provides additional evidence that U.S. workers might be available to substitute into the jobs that asylum applicants currently hold.

Because the biometrics requirement proposed in this rule is a cost to applicants and not a transfer, its minimum value of $27.17 million is the minimum cost of the rule. The range of impacts described by these two scenarios, plus the consideration of the biometrics costs, are summarized in Table 2 below (Table 2A and 2B capture the impacts a 3 and 7 percent rates of discount, in order).

TABLE 2A—SUMMARY OF RANGE OF MONETIZED ANNUALIZED IMPACTS AT 3%

Category	Description	Scenario: No replacement labor found for asylum applicants		Scenario: All asylum applicants replaced with other workers		Primary (average of the highest high and the lowest low, for each row)
		Low wage	High wage	Low wage	High wage	
Transfers:						
Transfers—Compensation.	Compensation transferred from asylum applicants to other workers (provisions: 365-day wait + end EADs early + end recommended approvals).	$0.00	$0.00	$1,473,953,451	$4,461,386,308	$2,230,693,154
Transfers—Taxes	Lost employment taxes paid to the Federal Government (provisions: 365-day wait + end EADs early + end recommended approvals).	225,587,337	682,771,643	0.00	0.00	341,385,822
Costs:						
Cost Subtotal—Biometrics.	Biometrics Requirements	27,154,124	45,726,847	27,154,124	45,726,847	36,440,486
Cost Subtotal—Lost Productivity.	Lost compensation used as proxy for lost productivity to companies (provisions: 365-day wait + end EADs early + end recommended approvals).	1,473,953,451	4,461,386,308	0.00	0.00	2,230,693,154
Total Costs		1,501,107,576	4,507,113,155	27,154,124	45,726,847	2,267,133,639

TABLE 2B—SUMMARY OF RANGE OF MONETIZED ANNUALIZED IMPACTS AT 7%

Category	Description	Scenario: No replacement labor found for asylum applicants		Scenario: All asylum applicants replaced with other workers		Primary (average of the highest high and the lowest low, for each row)
		Low wage	High wage	Low wage	High wage	
Transfers:						
Transfers—Compensation.	Compensation transferred from asylum applicants to other workers (provisions: 365-day wait + end EADs early + end recommended approvals).	0.00	0.00	1,474,123,234	4,461,900,172	2,230,950,086
Transfers—Taxes	Lost employment taxes paid to the Federal Government (provisions: 365-day wait + end EADs early + end recommended approvals).	225,613,314	682,850,264	0	0	341,425,132
Costs:						
Cost Subtotal—Biometrics.	Biometrics Requirements	27,171,858	45,766,847	27,171,858	45,766,847	36,469,352
Cost Subtotal—Lost Productivity.	Lost compensation used as proxy for lost productivity to companies (provisions: 365-day wait + end EADs early + end recommended approvals).	1,474,123,234	4,461,900,172	0.00	0.00	2,230,950,086
Total Costs		1,501,295,093	4,507,667,018	27,171,858	45,766,847	2,267,419,438

As required by Office of Management and Budget (OMB) Circular A–4, Table 3 presents the prepared A–4 accounting statement showing the impacts associated with this proposed regulation:

[9] *See* Table A–8, ''Employed Persons by Class of Worker and Part-Time Status'', Persons at work part time for economic reasons: *https://www.bls.gov/news.release/archives/empsit_09062019.htm.*

[10] *See* Table A–16, ''Persons not in the labor force and multiple jobholders by sex, not seasonally adjusted'', Persons marginally attached to the labor force: *https://www.bls.gov/news.release/archives/empsit_09062019.htm.*

TABLE 3—OMB A–4 ACCOUNTING STATEMENT
[$ millions, 2019]
[Period of analysis: 2019–2028]

Category	Primary estimate		Minimum estimate	Maximum estimate	Source citation (RIA, preamble, etc.)
Benefits:					
Monetized Benefits ...	(7%) (3%)	N/A N/A	N/A N/A	N/A N/A	RIA.
Annualized quantified, but un-monetized, benefits.	N/A		N/A	N/A	RIA.
Unquantified Benefits	The benefits potentially realized by the proposed rule are qualitative and accrue to a streamlined system for employment authorizations for asylum seekers that would reduce fraud, improve overall integrity and operational efficiency, and prioritize aliens with bona fide asylum claims. These impacts stand to provide qualitative benefits to asylum seekers, the communities in which they reside and work, the U.S. Government, and society at large. The proposed rule aligns with the Administration's goals of strengthening protections for U.S. workers in the labor market. The proposed biometrics requirement would enhance identity verification and management.				RIA.
Costs:					
Annualized monetized costs (discount rate in parenthesis).	(7%)	$2,267.4	$27.17	$4,507.7	RIA.
	(3%)	2,267.1	27.17	4,507.1	RIA.
Annualized quantified, but un-monetized, costs.	N/A		N/A	N/A	RIA.
Qualitative (unquantified) costs.	In cases where companies cannot find reasonable substitutes for the labor the asylum applicants would have provided, affected companies would also lose profits from the lost productivity. In all cases, companies would incur opportunity costs by having to choose the next best alternative to immediately filling the job the pending asylum applicant would have filled. There may be additional opportunity costs to employers such as search costs. There could also be a loss of Federal, state, and local income tax revenue. Estimates of costs to proposals that would involve DOJ–EOIR defensively-filed asylum applications and DHS-referrals could not be made due to lack of data. Potential costs would involve delayed/deferred or forgone earnings, and possible lost tax revenue. There would also be delayed or forgone labor income and tax transfers for pending EAD applicants impacted by the criminal and one-year filing provisions, renewal applicants, transfers from the (c)(11) group, and filing bar cases, all of whom would be subject to some of the criteria being proposed; in addition, such impacts could also affect those who would be eligible currently for an EAD, or have such eligibility terminated earlier, but would be ineligible for an EAD under the proposed rule.				RIA.
Transfers:					
Annualized monetized transfers: "on budget".	(7%)	$0	$0	$0	RIA.
	(3%)	0	0	0	
From whom to whom?.	N/A				N/A.
Annualized monetized transfers: Compensation.	(7%)	$2,231.0	$0	$4,461.9	RIA.
	(3%)	2,230.7	0	4,461.4	
From whom to whom?.	Compensation transferred from asylum applicants to other workers (provisions: 365-day wait + end EADs early + end recommended approvals). Some of the deferred or forgone earnings could be transferred from asylum applicants to workers in the U.S. labor force or induced into the U.S. labor force. Additional distributional impacts from asylum applicant to the asylum applicant's support network that provides for the asylum applicant while awaiting an EAD; these could involve burdens to asylum applicants' personal private or familial support system, but could also involve public, private, or charitable benefits-granting agencies and non-governmental organizations (NGOs).				RIA.0.0.
Annualized monetized transfers: Taxes.	(7%)	$341.4	$0	$682.9	RIA.
	(3%)	341.4	0	682.8	
From whom to whom?.	A reduction in employment taxes from companies and employees to the Federal Government. There could also be a transfer of Federal, state, and local income tax revenue (provisions: 365-day wait + end EADs early + end recommended approvals).				

Category	Effects	Source citation (RIA, preamble, etc.)
Effects on state, local, and/or tribal governments.	DHS does not know how many low-wage workers could be removed from the labor force due to the proposed rule. There may also be a reduction in state and local tax revenue. Budgets and assistance networks that provide benefits to asylum seekers could be impacted negatively if asylum applicants request additional support.	RIA.
Effects on small businesses.	This proposed rule does not directly regulate small entities, but has indirect costs on small entities. DHS acknowledges that ending EADs linked to denied DHS-affirmative asylum claims and EADs linked to asylum cases under DOJ–EOIR purview would result in businesses that have hired such workers incurring labor turnover costs earlier than without this rule. Such small businesses may also incur costs related to a difficulty in finding workers that may not have occurred without this rule.	RFA.
Effects on wages	None.	RIA.
Effects on growth	None.	RIA.

As will be explained in greater detail later, the benefits potentially realized by the proposed rule are qualitative. This rule would reduce the incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications intended primarily to obtain employment authorization or other forms of non-asylum-based relief from removal, thereby allowing aliens with bona fide asylum claims to be prioritized. A streamlined system for employment authorizations for asylum seekers would reduce fraud and improve overall integrity and operational efficiency. DHS also believes these administrative reforms will encourage aliens to follow the lawful process to immigrate to the United States.[11] These effects stand to provide qualitative benefits to asylum seekers, communities where they live and work, the U.S. government, and society at large.

The proposed rule also aligns with the Administration's goals of strengthening protections for U.S. workers in the labor market. Several employment-based visa programs require U.S. employers to test the labor market, comply with recruiting standards, agree to pay a certain wage level, and agree to comply with standards for working conditions before they can hire an alien to fill the position. These protections do not exist in the (c)(8) EAD program. While this rule would not implement labor market tests for the (c)(8) program, it would put in place mechanisms to reduce fraud and deter those without bona fide claims for asylum from filing applications for asylum primarily to obtain employment authorization or other, non-asylum-based forms of relief from removal. DHS believes these mechanisms will protect U.S. workers.

The proposed biometrics requirement would provide a benefit to the U.S. government by enabling DHS to know with greater certainty the identity of aliens requesting EADs in connection with an asylum application. The biometrics will allow DHS to conduct criminal history background checks to confirm the absence of a disqualifying criminal offense, to vet the applicant's biometrics against government databases (*e.g.,* FBI databases) to determine if he or she matched any criminal activity on file, to verify the applicant's identity, and to facilitate card production. Along with the proposals summarized above and discussed in detail in the preamble and regulatory impact sections of this proposed rule, DHS proposes to modify and clarify existing regulations dealing with technical and procedural aspects of the asylum interview process, USCIS authority regarding asylum, applicant-caused delays in the process, and the validity period for EADs. These provisions are not expected to generate costs. If adopted in a final rule, the rules and criteria proposed herein relating to certain criminal offenses and the one-year-filing bar would apply to pending EAD applications. In order to implement the criminal ineligibility provision, DHS will require applicants with a pending initial or renewal (c)(8) EAD on the effective date of this rule to appear at an ASC for biometrics collection but DHS will not collect the biometrics services fee from these aliens. DHS will contact applicants with pending EAD applications and provide notice of the place, date and time of the biometrics appointment. Some aliens could be impacted and some may not be granted an EAD as they would otherwise under current practice, but DHS does not know how many could be impacted and does not estimate costs for this provision.

III. Purpose of the Proposed Rule

On April 29, 2019, the White House issued a Presidential Memorandum (PM) entitled, ''Presidential Memorandum on Additional Measures to Enhance Border Security and Restore Integrity to Our Immigration System.''[12] The White House, referencing the President's earlier Proclamations noted that ''our immigration and asylum system is in crisis as a consequence of the mass migration of aliens across our southern border'' and that the ''emergency continues to grow increasingly severe. In March, more than 100,000 inadmissible aliens were encountered seeking entry into the United States. Many aliens travel in large caravans or other large organized groups, and many travel with children. The extensive resources required to process and care for these individuals pulls U.S. Customs and Border Protection personnel away from securing our Nation's borders. Additionally, illicit organizations benefit financially by smuggling illegal aliens into the United States and encouraging abuse of our asylum procedures. This strategic exploitation of our Nation's humanitarian programs undermines our Nation's security and sovereignty. The purpose of this memorandum is to strengthen asylum procedures to safeguard our system against rampant abuse of our asylum process.''[13]
The PM directs the Secretary of Homeland Security to propose regulations to bar aliens who have entered or attempted to enter the United States unlawfully from receiving employment authorization prior to being approved for relief and to immediately revoke the employment authorization of aliens who are denied asylum or become subject to a final order of removal.

Through this proposed rule, DHS seeks to address the national emergency and humanitarian crisis at the border[14] by (1) reducing incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications intended primarily to obtain employment authorization, or other forms of non-asylum based relief, and remain for years in the United States due to the backlog of asylum cases, and (2) disincentivizing illegal entry into the United States by proposing that any alien who entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry be ineligible to receive a (c)(8) EAD, with limited exceptions. DHS is also proposing administrative reforms that will ease some of the administrative burdens USCIS faces in accepting and adjudicating applications for asylum and related employment authorization.

As explained more fully below, USCIS believes these reforms will help mitigate the crisis that our immigration and asylum systems are facing as a consequence of the mass migration of aliens across our southern border,[15] as well as improve the current asylum backlog, helping to clear the way for meritorious asylum applications to be received, processed, and adjudicated more quickly, and allowing USCIS to issue employment authorizations more efficiently. The extensive resources required to process and care for these individuals pulls personnel away from securing our Nation's borders. Additionally, illicit organizations benefit financially by smuggling illegal aliens into the United States and encouraging abuse of our asylum procedures. This strategic exploitation of our Nation's humanitarian programs undermines our Nation's security and

[11] The rule may also provide less incentive for those pursuing unauthorized employment in the United States to use the asylum application process to move into authorized employment status.

[12] Presidential Memorandum on AdditionalMeasures to Enhance Border Security and Restore Integrity to Our Immigration System, 2019 Daily Comp. Pres. Doc. 251 (Apr. 29, 2019).

[13] *Id.*

[14] Proclamation No. 9844, 84 FR 4949 (Feb. 15, 2019).

[15] *https://www.whitehouse.gov/presidential-actions/presidential-memorandum-additional-measures-enhance-border-security-restore-integrity-immigration-system/.*

sovereignty.[16] These interests, when weighed against any reliance interest on behalf of impacted aliens, are greater, particularly because of the large increase in number of those seeking asylum at the border, which is operationally unsustainable for DHS long-term.

It is the policy of the Executive Branch to manage humanitarian immigration programs in a safe, orderly manner that provides access to relief or protection from removal from the United States for aliens who qualify, and that promptly denies benefits to and facilitates the removal of those who do not.[17] This rulemaking is part of a series of reforms DHS is undertaking, in coordination with DOJ–EOIR, to improve and streamline the asylum system, so that those with bona fide asylum claims can be prioritized and extended the protections that the United States has offered for over a century, including employment authorization, to aliens legitimately seeking refuge from persecution

A. Efforts To Reform the Asylum System

The Refugee Act of 1980, Public Law 96–212, 94 Stat. 102, was the first comprehensive legislation to establish the modern refugee and asylum system.[18] Congress passed the Refugee Act mainly to replace the ad hoc process that existed at the time for admitting refugees and to provide a more uniform refugee and asylum process.[19] The focus of the Refugee Act was reforming the overseas refugee program. The Refugee Act did not explicitly address how the United States should reform the asylum process or handle the then-sudden influx of asylum seekers, such as occurred with the Mariel boatlift—a mass influx of Cuban citizens and nationals, many of whom with criminal histories, to the United States in 1980.[20] Congress also provided that any alien who had applied for asylum before November 1, 1979, had not been granted asylum, and did not have a final order of deportation or exclusion, could obtain employment authorization.[21]

In 1980, the then-INS issued an interim regulation implementing the asylum provisions of the Refugee Act.[22] This regulation provided that an INS district director could authorize an applicant for asylum to work, in six-month increments, if the alien had filed a non-frivolous application for asylum.[23] The regulation did not define what constituted a ''frivolous'' filing. The regulation also excluded, without explanation, the limitation on the size of the class of aliens who could qualify for employment authorization (*i.e.,* only aliens who had applied for asylum before November 1, 1979, but had not been granted asylum, and did not have a final order of deportation or exclusion). As a result of the regulation, the class of aliens who could seek employment authorization based on an asylum application was interpreted to include past and future asylum seekers.

Congress, however, did not provide adequate resources or enact legislation that would address the ''pull'' factors that led to significant increases in illegal immigration and in asylum filings following enactment of the Refugee Act.[24] In addition, the publication of two INS regulations—the 1986 implementing regulations for the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99–603 (Nov. 6, 1986)[25] and the 1990 asylum regulations—further incentivized illegal immigration and the filing of non-meritorious asylum claims or other forms of relief because of the ease with which aliens could obtain employment authorization, regardless of the basis for the application for employment authorization.[26] In the implementing regulations for IRCA, INS provided that aliens could receive an interim EAD if INS did not adjudicate the application for employment authorization within 60 days (former 8 CFR 274a.12(c) and (d)).[27] The IRCA regulations also required asylum officers to give employment authorization, in one-year increments, to any alien who had filed a non-frivolous[28] asylum application. In the 1990 asylum regulation, INS also mandated that asylum officers give interim EADs to any alien who had filed a non-frivolous asylum application, and that asylum officers continue to renew employment authorization for the time needed to adjudicate the asylum application (former 8 CFR 208.7(a)).[29]

While IRCA's creation of the employer verification system and employer sanctions was designed to reduce the ''pull'' factor created by the availability of higher paying jobs in the United States, the ability to get interim employment authorization within 90 days, regardless of the basis for requesting employment authorization in the first instance, had the exact opposite effect.[30] In addition, because the agency already had a backlog for adjudicating asylum applications, it was unlikely any asylum application would be adjudicated within a 90-day timeframe, which virtually guaranteed that most asylum applicants would be eligible for interim employment authorization.[31]

[16] *Id.*

[17] *https://www.whitehouse.gov/presidential-actions/presidential-memorandum-additional-measures-enhance-border-security-restore-integrity-immigration-system/.*

[18] Congress added the definition of refugee under section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42), based on the 1967 United Nations (U.N.) Protocol relating to the Status of Refugees, 19 U.S.T. 6223, TIAS No. 6577, 606 U.N.T.S. 267 (1967), which the United States ratified in November of 1968. The Refugee Act also made withholding of removal mandatory, authorized adjustment of status for asylees and refugees, expanded the funding available for domestic refugee assistance services, and barred eligibility for asylum for aliens who were convicted of a serious crime, firmly resettled, persecutors, or a danger to the security of the United States.

[19] *See* Public Law 96–212, 94 Stat. 102, § 101(b) and S. Rep. 96–256 (July 23, 1979), at pp. 141–143. Earlier treatment of refugees came from the Displaced Persons Act of 1948, 62 Stat. 1009, as amended, the Refugee Relief Act of 1953, 67 Stat. 400, and the Refugee-Escapee Act of 1957, 71 Stat. 643.

[20] *See, e.g., Immigration Reform and Control Act of 1982: Joint Hearing on H.R. 5872 and S. 2222 Before the Subcommittee on Immigration, Refugees, and International Law, Committee on the Judiciary, House of Representatives, and Subcommittee on Immigration and Refugee Policy, Committee on the Judiciary,* 97th Cong. 2nd Sess, 326–328 (Apr. 1 and 20, 1982) (statement of Attorney General William French).

[21] 94 Stat. 102 at sec. 401(b) and (c).

[22] *See Aliens and Nationality; Refugee and Asylum Procedures,* 45 FR 37392 (June 2, 1980). This interim rule was not finalized until 1983. *See also Aliens and Nationality; Asylum Procedures,* 48 FR 5885–01 (Feb. 9, 1983).

[23] 45 FR at 37394, section 208.4.4.

[24] *See, e.g.,* David A. Martin, *Making Asylum Policy: The 1994 Reforms,* 70 Wash. L. Rev. 725 (July 1995) and David A. Martin, *The 1995 Asylum Reforms,* Ctr. for Immigration Studies (May 1, 2000) for a discussion of the history and consequences of the asylum reforms in 1990s.

[25] IRCA legalized many illegal aliens present in the United States prior to 1986, created new temporary agricultural worker programs, and mandated employment verification and employer sanctions to address the problem of U.S. employers hiring illegal immigrants. One of the main reasons Congress passed IRCA was its growing concern over the large influx of aliens crossing our borders illegally, particularly on the Southwest border, to find jobs. The employer verification system and employer sanctions were designed to address this concern by reducing the ''pull'' factor created by the availability of higher paying jobs in the United States. *See, e.g.,* H.R. Rep. No. 99–682(I) at pp. 5649–5654 (July 16, 1986) (Committee explanation for the need for IRCA to control illegal immigration).

[26] *See Martin, supra* note 2121, at p. 734; *see also David A. Martin, Reforming Asylum Adjudication: On Navigating the Coast of Bohemia,* 138 U. Pa. L. Rev. 1247 (May 1990) at pp. 1267–69, 1288–89, and 1373.

[27] DOJ final rule, *Control of Employment of Aliens,* 52 FR 16216–01 (May 1, 1987). The 60-day period was subsequently extended to 90-days with the publication of the final rule, *Powers and Duties of Service Officers; Availability of Service Records, Control of Employment of Aliens,* 56 FR 41767–01 (Aug. 23, 1991).

[28] DOJ INS also for the first time defined ''frivolous'' to mean ''manifestly unfounded or abusive.'' *See* former 8 CFR 208.7(a) (1991).

[29] DOJ INS final rule, *Aliens and Nationality; Asylum and Withholding of Deportation Procedures,* 55 FR 30674–01 (July 27, 1990).

[30] *See Martin, supra* note 21, at p. 733–36.

[31] In 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994

The combined effect of the statutory employment authorization for asylum applicants, the regulations, and insufficient agency resources resulted in a greater influx of aliens, many of whom were not legitimate asylum seekers, but instead merely sought to work in the United States.[32]

In 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA), Public Law 103–322, 108 Stat. 1796 (Sept. 13, 1994), which provided for expedited exclusion proceedings and summary deportation of aliens with failed asylum claims and provided that no applicant for asylum would be entitled to employment authorization unless the Attorney General (now Secretary of Homeland Security) determined, as a matter of discretion, that employment authorization was appropriate.[33] Congress passed these amendments mainly because the asylum system was being overwhelmed with asylum claims, including frivolous and fraudulent claims filed merely to obtain employment authorization.[34] The hope was that the expedited exclusion proceedings would reduce such claims. During consideration of the VCCLEA, DOJ also conducted a review of the asylum process and published regulations designed to reduce the asylum backlogs, eliminate procedural hurdles that lengthened the process, and deter abuses in the system.[35] For the first time, DOJ implemented a waiting period for asylum seekers—150 days—before they could apply for employment authorization. DOJ based the timeframe on the 150-day processing goals it had set for asylum officers and IJs to complete asylum cases.

In 1996, Congress again amended section 208 when it passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law 104–208, 110 Stat. 3009. Congress retained the expedited exclusion (now removal) procedures to address the influx of thousands of aliens seeking entry into the United States.[36] Congress also reformed the asylum provisions and codified some of the administrative reforms INS made when it published the 1994 asylum regulation. IIRIRA incorporated language that barred an alien not only from eligibility for asylum, but also from any other immigration benefits (such as when an alien filed a frivolous application),[37] added a one-year deadline to file for asylum, and codified INS's regulatory prohibition on asylum seekers being granted discretionary employment authorization before a minimum of 180 days has passed from the date of filing of the asylum application.[38]

B. Need for Reform

Since IIRIRA, there have been no major statutory changes to the asylum provisions to address the immigration realities faced by the United States today. However, since 2016, the United States has experienced an unprecedented surge[39] in the number of aliens who enter the country unlawfully across the southern border. In Fiscal Year 2019, CBP apprehended over 800,000 aliens attempting to enter the United States illegally.[40] These apprehensions are more than double of those in Fiscal Year 2018.[41] If apprehended, many of these individuals claim asylum and remain in the United States while their claims are adjudicated. There is consistent historical evidence that approximately 20 percent or less of such claims will be successful.[42] This surge in border crossings and asylum claims has placed a strain on the nation's immigration system. The large influx has consumed an inordinate amount of the Department of Homeland Security's resources, which includes surveilling, apprehending, screening, and processing the aliens who enter the country, detaining many aliens pending further proceedings, and representing the United States in immigration court proceedings. The surge has also consumed substantial resources at the Department of Justice, whose immigration judges adjudicate asylum claims and whose officials prosecute aliens who violate Federal criminal law. The strain also extends to the judicial system, which must handle petitions to review denials of asylum claims, many of which can take years to reach final disposition, even when the claims for asylum lack merit.

In order to maintain the very integrity of the asylum system, it is imperative that DHS take all necessary measures to create disincentives to come to the United States for aliens who do not fear persecution on the five protected grounds of race, religion, nationality, political opinion, or particular social group, or torture.[43] Fleeing poverty and generalized crime in one's home country does not qualify an individual for asylum in the United States. *See, e.g., Hui Zhuang* v. *Gonzales,* 471 F.3d 884, 890 (8th Cir. 2006) (''Fears of economic hardship or lack of opportunity do not establish a well-founded fear of persecution.'').

Statistics support DHS's assertion that the vast majority of protection claims are not motivated by persecution under the five protected grounds or torture. The historic high in affirmative asylum applications and credible fear receipts in FY 2018[44] is matched by a historic low rate of approval of affirmative asylum applications and credible fear claims in FY 2018.[45]

As noted above, it is the policy of the Executive Branch to manage our humanitarian immigration programs in a safe, orderly manner that provides access to relief or protection from removal from the United States for aliens who qualify, and that promptly

(VCCLEA), Public Law 103–322, 108 Stat. 1796 (Sept. 13, 1994). As part of its findings, Congress stated ''. . . in the last decade applications for asylum have greatly exceeded the original 5,000 annual limit provided in the Refugee Act of 1980, with more than 150,000 asylum applications filed in fiscal year 1993, and the backlog of cases growing to 340,000.'' VCCLEA, at sec. 130010(1).

32 *See Martin, supra* note 21, at p. 733–37.

33 *See* Public Law 103–322, 108 Stat. 1796, at sec. 130005.

34 *See id.* at sec. 130010(1) (findings of the Senate on the need for reforms to the asylum process, including finding of a backlog of cases up to 340,000); *see also* H.R. Conf. Rep. 103–711 (Aug. 21, 1994), at pp. 241–245 and 393–394.

35 DOJ INS final rule, *Rules and Procedures for Adjudication of Applications for Asylum or Withholding of Deportation and for Employment Authorization,* 59 FR 62284–01 (Dec. 5. 1994).

36 *See, e.g.,* H.R. Conf. Rep. 104–828, title III, subtitle A (1996).

37 8 U.S.C. 1158(d)(6) provides:

If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this Act, effective as of the date of a final determination on such application.

38 DHS published an interim final rule implementing IIRIRA in 1997. *See* DOJ INS, *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures,* 62 FR 10312–01 (Mar. 6, 1997). DOJ published a separate final rule December 6, 2000 which finalized the provisions related to the asylum process proposed in the DOJ INS and EOIR joint rule, *New Rules Regarding Proceedings for Asylum and Withholding of Removal,* 63 FR 31945 (June 11, 1998), and in response to comments to the asylum procedures made in response to the IIRIRA interim final rule.

39 *See* CBP Southwest Border Total Apprehensions/Inadmissibles at *https://www.cbp.gov/newsroom/stats/sw-border-migration.*

40 *Id.*

41 *See* CBP Enforcement Statistics at *https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics.*

42 See Executive Office for Immigration Review Adjudication Statistics ''Asylum Decision Rates'' (July 2019), *https://www.justice.gov/eoir/page/file/1104861/download.*

43 *See, e.g., https://www.wbur.org/cognoscenti/2018/08/08/why-do-migrants-flee-central-america-susan-akram, https://www.washingtonpost.com/world/national-security/hunger-not-violence-fuels-guatemalan-migration-surge-us-says/2018/09/21/65c6a546-bdb3-11e8-be70-52bd11fe18af_story.html?noredirect=on; https://time.com/longform/asylum-seekers-border/.*

44 USCIS Asylum Division Volume Projection Committee—FY 2020/2021, June 2019.

45 *Id.*

denies benefits to and facilitates the removal of those who do not.[46] Many protection applications appear to be coming from applicants escaping poor economic situations and generalized violence rather than the five protected grounds for asylum or torture. DHS is proposing more stringent requirements for eligibility for employment authorization, in order to disincentivize aliens who are not legitimate asylum seekers from exploiting a humanitarian program to seek economic opportunity in the United States.

DHS believes that this rule stands alone as an important disincentive for individuals use asylum as a path to seek employment in the United States. DHS further believes that this rule will complement broader interagency efforts to mitigate large-scale migration to the U.S. Southern Border by precluding some asylum seekers from entering the United States.[47] These programs are strengthened by DHS making important procedural adjustments to how those aliens who do enter the United States gain access to such a significant immigration benefit as employment authorization. Further, while some of these aliens may disregard the law and work unlawfully in contravention to these reforms, the Department does not avoid the establishment of regulatory policies because certain individuals might violate the regulations.[48]

Congress gave the Executive Branch the discretion to make employment authorization available by regulation.[49] The current practice of granting employment authorization to aliens before they have been determined eligible for asylum is a ''pull'' factor for the illegal immigration of aliens who are ineligible for any immigration status or benefit in the United States, and there is an urgent need for reform.[50] Employment authorization for foreign nationals seeking asylum is not a right. It is a benefit which must be carefully implemented in order to benefit those it is meant to assist.

IV. Background

A. Legal Authority

The Secretary of Homeland Security's authority to propose the regulatory amendments in this rule can be found in various provisions of the immigration laws. Section 102 of the Homeland Security Act of 2002 (HSA) (Pub. L. 107–296, 116 Stat. 2135), 6 U.S.C. 112 and sections 103(a)(1) and (3) of the INA, 8 U.S.C. 1103(a)(1), (3), charge the Secretary with the administration and enforcement of the immigration and naturalization laws of the United States. Section 402(4) of the HSA, 6 U.S.C. 202(4), expressly authorizes the Secretary, consistent with 6 U.S.C. 236236236 (concerning visa issuance and refusal), to establish and administer rules governing the granting of visas or other forms of permission, including parole, to enter the United States to individuals who are not U.S. citizens or lawful permanent residents. *See also* 6 U.S.C. 271(a)(3), (b) (describing certain USCIS functions and authorities). Section 208 of the INA, 8 U.S.C. 1158, gives the Secretary the discretionary authority to grant asylum to an alien who meets the definition of refugee under section 101(a)(42), 8 U.S.C. 1101(a)(42).[51] Sections 235, 236, and 241 of the INA, 8 U.S.C. 1225, 1226, and 1231, govern the apprehension, inspection and admission, detention and removal, withholding of removal, and release of aliens encountered in the interior of the United States or at or between the U.S. ports of entry. Section 274A of the INA, 8 U.S.C. 1324a, governs employment of aliens who are authorized to be employed in the United States by statute or in the discretion of the Secretary. The Secretary proposes the changes in this rule under these authorities.

B. Eligibility for Asylum

Asylum is a discretionary benefit that can be granted by the Secretary or Attorney General if the alien establishes, among other things, that he or she has experienced past persecution or has a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[52] Under the INA, certain aliens are barred from obtaining asylum, including aliens who are persecutors, have been convicted of a particularly serious crime (which includes aggravated felonies), have committed serious nonpolitical crimes outside of the United States, who are a danger to the security of the United States, have engaged in certain terrorism-related activities or are members of terrorist organizations, or were firmly resettled in a third country.[53]

Aliens seeking asylum generally must apply for asylum within one year from the date of their last arrival in the United States. An alien who files for asylum after the one-year deadline is not eligible to apply for asylum unless the Secretary or Attorney General, in his or her discretion, excuses the late filing.[54] For a late filing to be excused, the alien must demonstrate that changed circumstances materially affected the alien's eligibility for asylum, or extraordinary circumstances delayed

---

[46] *https://www.whitehouse.gov/presidential-actions/presidential-memorandum-additional-measures-enhance-border-security-restore-integrity-immigration-system/.*

[47] On January 25, 2019, DHS announced certain aliens attempting to enter the U.S. illegally or without documentation, including those who claim asylum, will no longer be released into the United States, where they often fail to file an asylum application and/or disappear before an immigration judge can determine the merits of any claim. Instead, these aliens will be returned to Mexico until their hearing date. See ''Policy Guidance for Implementation of the Migrant Protection Protocols'' (Jan. 2019), *https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf.* On July 15, 2019, DHS and DOJ announced a bar to eligibility for asylum to any alien who enters or attempts to enter the United States across the southern border, but who did not apply for protection from persecution or torture where it was available in at least one third country outside the alien's country of citizenship, nationality, or last lawful habitual residence through which he or she transited en route to the United States. See ''DHS and DOJ Issue Third-Country Asylum Rule (July 2019), *https://www.dhs.gov/news/2019/07/15/dhs-and-doj-issue-third-country-asylum-rule.*

[48] Notably, even the former INS remarked on the need for reform, notwithstanding the possibility that aliens may simply disregard the law and work illegally:

The Department also considered the claim that asylum applicants will disregard the law and work without authorization. While this is possible, it also is true that unlawful employment is a phenomenon not limited to asylum applicants, but is found among many categories of persons who have illegally entered or remained in the United States. The Department does not believe that the solution to this problem is to loosen eligibility standards for employment authorization. This is particularly so because of the evidence that many persons apply for asylum primarily as a means of being authorized to work. These rules will discourage applications filed for such reasons and thus enable the INS to more promptly grant asylum—and provide work authorization—to those who merit relief . . .

59 FR 62284–01, 62291.

[49] INA sec. 208(d)(2).

[50] *See Martin, supra* note 21.

[51] A refugee is defined under INA section 101(a)(42), 8 U.S.C. 1101(a)(42), as:

(A) Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or

(B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . . .

[52] INA sec. 208(b), 8 U.S.C. 1158(b).

[53] INA sec. 208(b)(2)(A), 8 U.S.C. 1158(b)(2)(A).

[54] The one-year deadline does not apply to an alien who is an unaccompanied alien child, as defined in 6 U.S.C. 279(g). INA sec. 208(a)(2)(E), 8 U.S.C. 1158(a)(2)(E).

filing during the one-year period.[55] Even if an alien meets all the criteria for asylum, including establishing past persecution or a well-founded fear of future persecution and any exceptions to late filing, the Secretary or Attorney General can still deny asylum as a matter of discretion.[56]

Aliens who are granted asylum cannot be removed or returned to their country of nationality or last habitual residence, are employment authorized incident to their status, and may be permitted to travel outside of the United States with prior consent from the Secretary.[57] Asylum can be terminated if the alien was not eligible for asylum status at the time of the asylum grant or is otherwise no longer eligible for asylum under the law.[58]

C. Affirmative vs. Defensive Asylum Filings

To request asylum, an alien must file an application with either USCIS or with the immigration court, using Form I–589, Application for Asylum and for Withholding of Removal. If the immigration judge or the Board of Immigration Appeals determines that an alien knowingly filed a frivolous application for asylum, the alien is permanently ineligible for asylum and any other benefits or relief under the Act, with the exception of relief from removal through withholding and deferral of removal. INA sec. 208(d)(6), 8 U.S.C. 1158(d)(6); 8 CFR 208.2020, 1208.20.

Asylum applications are characterized by which agency has jurisdiction over the alien's case. If an alien is physically present in the United States, not detained, and has not been placed in removal proceedings, the alien files the asylum application with USCIS. These applications are known as ''affirmative'' filings. If DHS places an alien in removal proceedings, the alien files an application for asylum with an IJ.[59] These applications are known as ''defensive'' filings and include aliens the USCIS asylum officer refers to the IJ for de novo review of their asylum claim.

Aliens who present themselves at a U.S. port of entry (air, sea, or land) are generally deemed applicants for admission.[60] If an immigration officer determines that an alien is inadmissible under section 212(a)(6)(C) or 212(a)(7) of the Act for being in possession of false documents, making false statements, or lacking the required travel documentation, the alien may be placed in expedited removal proceedings under section 235(b)(1) of the Act, 8 U.S.C. 1225(b)(1). Such aliens may indicate an intention to apply for asylum, express a fear of persecution or torture, or a fear of return to their home country and must be interviewed by an asylum officer to determine whether the alien has a credible fear of persecution or torture. INA section 235(b)(1), 8 U.S.C. 1225(b)(1); 8 CFR 235.3(b)(4). If an alien is determined to have a credible fear, ''the alien shall be detained for further consideration of application for asylum.'' INA sec. 235(b)(1)(B)(ii), 8 U.S.C. 1225(b)(1)(B)(ii). Asylum applications based initially on a positive credible fear determination are under the jurisdiction of the immigration courts once a Notice to Appear (NTA) is filed with the court and are considered ''defensively-filed'' applications. Similarly, if an alien has a positive credible fear determination, but is released from detention by ICE, the alien is still considered to be under the jurisdiction of the immigration court once the NTA is filed and must file the application for asylum with the court.

D. Employment Authorization for Asylees and Asylum Applicants

Whether an alien is authorized to work in the United States depends on the alien's status in the United States and whether employment is specifically authorized by statute or only authorized pursuant to the Secretary's discretion. Employment authorization for aliens granted asylum and for asylum applicants is authorized under INA sections 208(c)(1)(B) and (d)(2), respectively. Employment authorization for aliens granted asylum is statutorily mandated and incident to their status. Aliens granted asylum (asylees) are not required to apply for an EAD but can do so under 8 CFR 274a.12(a)(5) if they want to have documentation that reflects that they are employment authorized. Employment authorization for aliens granted withholding of removal or deferral of removal are governed by 8 CFR 274a.12(a)(10) and (c)(18) respectively.

An asylum applicant, however, is not entitled to employment authorization by statute. INA section 208(d)(2), 8 U.S.C. 1158(d)(2). The Secretary, through regulations, may authorize employment for aliens who request asylum while the asylum application is pending adjudication. Even if the Secretary chooses to grant employment authorization to an asylum applicant, under the current statute and regulations, he or she cannot grant such authorization until 180 days after the filing of the application for asylum. *Id.* In practice, this 180-day period is commonly called the ''180-day Asylum EAD Clock.''[61] The goal of the Asylum EAD clock is to deter applicants from delaying their asylum application. Therefore, USCIS does not count, for purposes of eligibility for an EAD, the days that actions by the applicant have resulted in delays to the adjudication of his or her asylum application. However, applicants, practitioners, and USCIS itself have all cited difficulty with accurate clock calculations.[62] In light of these issues, USCIS is proposing to eliminate the clock altogether and, instead, extend the mandatory waiting period to file an asylum-based EAD application. USCIS is also proposing that the EAD application will be denied if the asylum case is subject to an applicant-caused delay at the time the Form I–765(c)(8) application is adjudicated.

While the INA bars certain aliens from being granted asylum who, for example, are persecutors, have been convicted of a particularly serious crime, have committed serious nonpolitical crimes[63] outside of the United States, who are a danger to the security of the United States, have engaged in certain terrorism-related related activities or are members of terrorist organizations, or were firmly resettled in a third country, such aliens may still apply for asylum, and subsequently also apply for an EAD once their application has been pending for 150 days. INA sec. 208(b)(2)(A), 8 U.S.C. 1158(b)(2)(A).

---

[55] INA sec. 208(a)(2)(D), 8 U.S.C. 1158(a)(2)(D).

[56] *See* INA sec. 208(b)(1), 240(c)(4)(ii); 8 U.S.C. 1158(b)(1), 1229a(c)(4)(ii).

[57] INA sec. 208(c)(1), 8 U.S.C. 1158(c)(1).

[58] INA sec. 208(c)(2), 8 U.S.C. 1158(c)(2).

[59] Where an asylum application is filed by an unaccompanied alien child, USCIS has initial jurisdiction over that application, even if the applicant is in removal proceedings. INA sec. 208(b)(3)(C), 8 U.S.C. 1158(b)(3)(C); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Public Law 110–457 (Dec. 23, 2008).

[60] INA sec. 101(a)(13)(C), 8 U.S.C. 1101(a)(13)(C) provides separate exceptions for when a lawful permanent resident will be considered an applicant for admission (*e.g.,* abandoned residence, continuous absence of 180 days, illegal activity after departure from the United States).

[61] EOIR–USCIS joint notice, *The 180-day Asylum EAD Clock Notice, https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/Asylum_Clock_Joint_Notice_-_revised_05-10-2017.pdf* (last updated May 9, 2017).

[62] *See* Dep't of Homeland Security, Citizenship & Immigration Services Ombudsman Report, *Employment Authorization For Asylum Applicants: Recommendations To Improve Coordination And Communication* (Aug. 26, 2011), at p.6.

[63] *See, e.g.,* INA sec. 101(a)(43)(F), 8 U.S.C. 1101(a)(43)(F); INA sec. 212(a)(2)(A)(i)(I), 8 U.S.C. 1182(a)(2)(A)(i)(I); INA sec. 212(a)(2)(B), 8 U.S.C. 1182(a)(2)(B).

Aliens seeking employment authorization generally must apply for an EAD by filing Form I–765, Application for Employment Authorization, with USCIS in accordance with the form instructions, along with any prescribed fee (unless waived). 8 CFR 274a.13. The regulations at 8 CFR 208.7 and 274a.12(c)(8) govern employment authorization for asylum applicants.

E. Asylum and EAD Adjudications

Under existing regulations, there are several important stages and timeframes that can affect the adjudication of asylum applications and (c)(8) EADs: (1) The initial filing of an asylum application; (2) the one-year filing deadline; (3) the 150-day period asylum applicants must wait before they are eligible to file an application for employment authorization; and (4) the additional 30-day period (180-days total) before USCIS may grant (c)(8) employment authorization.

Under current 8 CFR 208.3, if USCIS fails to return the incomplete application for asylum within 30 days to the applicant, the application is automatically deemed complete. Once the asylum application has been accepted for processing, asylum officers review it to determine if all the documents required to make a decision have been submitted. This review also includes a determination of whether the asylum application was filed within the required one-year period. If the alien failed to file within the one-year period, asylum officers and/or IJs then determine whether the alien meets any of the exceptions to the late filing bar. In the case of affirmative asylum filings, if the alien does not meet an exception, the asylum officer has the authority to deny, dismiss, or refer the case to the immigration court. 8 CFR 208.14. Asylum officers refer cases to the immigration court by issuing a NTA, which places the alien into removal proceedings. If the asylum officer refers the complete asylum application to the immigration court, the immigration court conducts a de novo review and determines if the alien meets the required one-year deadline or qualifies for any of the late filing exceptions.

Once the asylum application is accepted, the 150-day waiting period for filing a (c)(8) EAD application begins. The regulations at 8 CFR 208.7(a) further provide that USCIS will have 30 days from the filing date of the EAD application to grant or deny that application. The 180-day asylum EAD ''clock'' therefore includes the 150-day waiting period for filing the (c)(8) EAD application, which is the time while the asylum application is pending with USCIS, or an IJ, and the additional 30-day period that USCIS has to grant or deny the EAD application. The 180-day Asylum EAD Clock excludes delays requested or caused by the applicant and does not run again until the applicant cures the delay or until the next scheduled event in a case, such as a postponed interview due to the delay, or a continued hearing.

USCIS is not permitted to issue an EAD until 180-days after the filing of a complete asylum application (*i.e.* the date an alien can be *issued* an EAD). If a USCIS asylum officer recommends that an asylum application be approved before the required waiting period ends, the alien may apply for employment authorization based on the recommended approval.

As noted, there are a number of actions that can delay or toll the running of the 180-day Asylum EAD Clock. For example, if an applicant fails to appear for a required biometrics appointment, the 180-day clock will stop and not recommence until the alien appears for his or her biometrics appointment. Similarly, if an alien asks to amend or supplement his or her asylum application, fails to appear at an asylum office to receive and acknowledge receipt of the decision, requests an extension after the asylum interview, or reschedules an asylum interview, all of these actions will stop the 180-day Asylum EAD Clock, and the EAD clock will not recommence until the required action is completed.[64] As a result, some aliens may have to wait longer than 180 calendar days before they can be granted employment authorization.

Once an asylum applicant receives an EAD based on a pending asylum application, his or her employment authorization will terminate either on the date the EAD expires or 60 days after the denial of asylum, whichever is longer (affirmatively-filed cases). If the asylum application is denied by an IJ, the BIA, or a denial of asylum is upheld by a Federal court, the employment authorization terminates upon the expiration of the EAD, unless the applicant seeks renewal of employment authorization during the pendency of any administrative or judicial review.

[64] *See id.* EOIR–USCIS joint notice, *The 180-day Asylum EAD Clock Notice,* for additional examples of actions that can affect the 180-day Asylum EAD Clock.

V. Discussion of Proposed Rule

A. 365-Day Waiting Period To Apply for Asylum-Application-Based EADs

DHS is proposing to extend the time period an asylum applicant must wait before he or she is eligible to be granted employment authorization based on a pending asylum application from 180 days to 365 calendar days. *See* proposed 8 CFR 208.7. DHS is proposing this change to a 365-day waiting period to remove the incentives for aliens who are not legitimate asylum seekers to exploit the system and file frivolous, fraudulent, or non-meritorious claims to obtain employment authorization. Currently, if an alien files an application for asylum, the alien can obtain an employment authorization document after just 180 days, not including any days not counted due to an applicant-caused delay. Backlogs at USCIS and the years-long wait for hearings in the immigration courts allow aliens to remain in the United States for many years, be authorized for employment, and ultimately gain equities for an immigration benefit, even if their asylum applications will be denied on their merits.[65] DHS believes that the longer waiting period for filing a (c)(8) EAD application will be a strong deterrent to frivolous, fraudulent, and non-meritorious asylum filings. Further, in light of DHS's assessment[66] that many asylum applications appear to be coming from aliens escaping general criminal violence and poor economic situations in their home countries, rather than the five protected grounds for asylum or torture, it is logical that more stringent requirements for eligibility for employment authorization, such as a substantially longer waiting period for employment authorization, would disincentivize these would-be asylum seekers from coming to the United States in search of economic opportunity. DHS also believes that this deterrent, coupled with last-in, first out (LIFO) asylum-adjudication scheduling discussed below, will lead to meritorious

[65] *See, e.g.,* Doris Meissner, Faye Hipsman, and T. Alexander Aleinikoff, *The U.S. Asylum System in Crisis; Charting a Way Forward,* Migration Policy Institute (Sept. 2018) at pp. 4 and 9–12, for additional discussion on the impact of backlogs and delays in immigration proceedings.

[66] See ''Statement from the Department of Homeland Security following the Acting Secretary's appearance at Georgetown University'' (Oct. 2019), *https://www.dhs.gov/news/2019/10/07/statement-department-homeland-security-following-acting-secretary-s-appearance.* DHS has made this assessment based on internal reporting from regional asylum offices, internal country information assessments, and corroborating journalist sources cited prior in this Notice of Proposed Rule Making.

applications being granted sooner—resulting in immediate work authorization conferred on asylees by INA section 208(c)(1)(B)—and non-meritorious applications being denied sooner—resulting in the prompt removal of aliens who fail to establish eligibility to remain in the United States. DHS acknowledges that the reforms proposed will also apply to individuals with meritorious asylum claims, and that these applicants may also experience economic hardship as a result of heightened requirements for an EAD. However, DHS's ultimate goal is to maintain integrity in the asylum process, sustaining an under-regulated administrative regime is no longer feasible. It is not unreasonable to impose additional time and security requirements on asylum seekers. Asylum seekers already are subject to temporal and security restrictions, and for the United States to scale up those restrictions based on operational needs is entirely reasonable.

DHS is proposing this change to complement its LIFO scheduling priority, re-implemented on January 29, 2018.[67] This priority approach, first established by the asylum reforms of 1995 and used for 20 years until 2014, seeks to deter those who might try to use the existing backlog as a means to obtain employment authorization. Returning to a LIFO interview schedule will allow USCIS to identify frivolous, fraudulent, or otherwise non-meritorious asylum claims earlier and place those aliens into removal proceedings. Under the previous Administration, the Department discontinued LIFO processing, the timing of which corresponded with a significant increase in asylum applications.

In the last decade, USCIS has seen its backlog of asylum applications skyrocket, with the number of new affirmative asylum filings increasing by a factor of 2.5 between FY 2014 and FY 2017.[68] As of March 31, 2019, USCIS currently faces an affirmative asylum backlog of over 327,984 cases. The high volume of cases stems in part from the recent surges in illegal immigration and organized caravans of thousands of aliens, primarily from the Northern Triangle countries (El Salvador, Honduras, and Guatemala), creating a humanitarian and national security crisis at the southern border. USCIS also has had to divert resources and asylum officers from processing affirmative asylum backlog cases to address the continuing high volume of credible fear and reasonable fear cases that require immediate interviews.

DHS proposes to eliminate the 180-day Asylum EAD Clock and instead deny EAD applications that have unresolved, applicant-caused delays existing on the date of EAD adjudication. The proposed elimination of the 180-day EAD clock will resolve some of the difficulties adjudicators face in processing asylum EAD applications. Calculating the current Asylum EAD clock is one of the most complex and time-consuming aspects of EAD adjudications.[69] It requires multipart calculations and the tracking of the start and stop dates for each individual applicant's case. It also requires coordination with DOJ–EOIR for defensively-filed cases that are not under USCIS' jurisdiction.[70] In light of these issues, USCIS is proposing to eliminate the clock altogether and instead extend the mandatory waiting period to file for an EAD and notify applicants that their EAD application will be denied if the asylum case is subject to an applicant-caused delay at the time the Form I–765 (c)(8) application is adjudicated. USCIS believes eliminating the 180-day Asylum EAD clock will significantly streamline the employment authorization process of the (c)(8) EAD because EAD adjudicators will no longer have to calculate the number of days that must be excluded to account for applicant-caused delays or coordinate with DOJ–EOIR to do so, and will instead simply rely on 365 calendar days from the asylum application receipt date to determine when an alien can request employment authorization. DHS has promulgated a separate rulemaking proposing the elimination of the requirement to adjudicate the EAD application within 30 days. *See Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I–765 Employment Authorization Applications*'' DHS Docket No. USCIS–2018–0001, 84 FR 47148 (Sept. 9, 2019).

DHS recognizes that a number of aliens who are legitimate asylum seekers may experience potential economic hardship because of the extended waiting period. However, the asylum system in the United States is completely overwhelmed.[71] DHS is urgently seeking solutions, including mustering an all-volunteer force to assist with processing incoming migrants at the southwest border of the United States.[72] But mitigating this unprecedented pressure on the U.S. immigration system will require more than just adding and reallocating DHS resources. DHS must take steps to address the pull factors bringing economic migrants to the United States.[73] The urgency to maintain the efficacy and the very integrity of the U.S. asylum and immigration system outweighs any hardship that may be imposed by the additional six-month waiting period. The integrity and preservation of the U.S. asylum system takes precedence over potential economic hardship faced by alien arrivals who enjoy no legal status in the United States, whether or not those aliens may later be found to have meritorious claims. DHS seeks public comment on this proposed amendment.

B. One-Year Filing Deadline

As part of the reforms to the asylum process, DHS also is emphasizing the importance of the statutory one-year filing deadline for asylum applications. Both DHS and DOJ–EOIR adjudicate asylum applications filed by aliens who reside in the United States for years before applying for asylum. Many aliens filing for asylum now are aliens who were inspected and admitted or paroled but failed to depart at the end of their authorized period of stay (visa overstays), or who entered without inspection and admission or parole and remained, not because of a fear of persecution in their home country, but for economic reasons.[74] In addition, the

---

[67] USCIS News Release, *USCIS To Take Action to Address Asylum Backlog* (Jan. 31, 2018).

[68] *See supra* note 39.

[69] USCIS acknowledges that many processes have been automated by the Person Centric Query System (PCQS) Asylum EAD Clock Calculator. However, the Asylum EAD Clock Calculator is not fully automated and there are still calculations that are not captured in the Clock Calculator. Additionally, not all scenarios have business rules that have been created. This requires officers to do manual calculations in many scenarios. The elimination of the 180-day Asylum EAD Clock will create overall efficiencies for USCIS given these limitations with the Clock Calculator.

[70] *See, e.g.,* Citizenship & Immigration Services Ombudsman, *Employment Authorization For Asylum Applicants,* at p.6.

[71] *See, e.g.,* Joel Rose and John Burnett, *Migrant Families Arrive in Busloads as Border Crossings Hit 10-Year High,* Nat'l Pub. Radio (March 5, 2019) for observations about the recent surges in illegal immigration on the southern border.

[72] See, *e.g.,* Geneva Sands, *DHS Secretary Nielsen Asks for Volunteers to Help at the Border*, CNN Politics (Mar. 29, 2019); Miriam Jordan, *More Migrants are Crossing the Border This Year. What's Changed?*, N.Y. Times (Mar. 05, 2019).

[73] *See, e.g.,* de Córdoba, Jose. *The Guatemalan City Fueling the Migrant Exodus to America,* The Wall Street Journal, (July 21,2019), *www.wsj.com/articles/the-guatemalan-city-fueling-the-migrant-exodus-to-america-11563738141.*

[74] Even Congress found that the asylum system was being overwhelmed with asylum claims, including frivolous and fraudulent claims filed merely to obtain employment authorization. *See, e.g.,* Public Law 103–322, 108 Stat. 1796, at sec. 130010(3) (findings of the Senate on the need for reforms to the asylum process, including finding

Continued

Asylum Division reports that a contributing factor to the asylum backlog is an increase in the number of applicants who file skeletal or fraudulent asylum applications affirmatively to trigger removal proceedings before the immigration court where they can apply for cancellation of removal, a statutory defense against removal and pathway to lawful permanent resident status available to those who have at least ten years of physical presence in the United States and meet additional eligibility criteria.[75] DHS seeks to address this practice and reduce the asylum backlog by proposing to make aliens ineligible for (c)(8) employment authorization if they fail to file their asylum application within one year of their last arrival in the United States as required by statute. Based on statute and relevant case law, DHS also proposes limited exceptions to the one-year-filing deadline as it relates to eligibility for a (c)(8) EAD, namely those who meet an exception under INA section 208(a)(2)(D) or if the applicant was an unaccompanied alien child on the date the asylum application was first filed. DHS believes that the statutory one-year filing period is a sufficient period of time for bona fide asylum applicants to make their claim with USCIS or an IJ. DHS seeks public comments on these proposed amendments.

C. Criminal Bars to Eligibility

DHS is proposing to expand the bars to the (c)(8) EAD to any alien who has: (1) Been convicted of any aggravated felony as defined in section 101(a)(43) of the INA, 8 U.S.C. 1101(a)(43), (2) been convicted of any felony in the United States or any serious non-political crime outside the United States, or (3) been convicted in the United States of certain public safety offenses involving domestic violence or assault; child abuse or neglect; controlled substances; or driving or operating a motor vehicle under the influence of alcohol or drugs, regardless of how the offense is classified by the state or local jurisdiction. DHS also proposes to consider, on a case-by-case basis, whether aliens who have been convicted of any non-political foreign criminal offense, or have unresolved arrests or pending charges for any non-political foreign criminal offenses, warrant a favorable exercise of discretion.[76] DHS also proposes to consider, on a case-by-case basis, whether an alien who has unresolved domestic charges or arrests that involve domestic violence, child abuse, possession or distribution of controlled substances, or driving under the influence of drugs or alcohol, warrant a favorable exercise of discretion for a grant of employment authorization.

To determine if an asylum applicant seeking employment authorization has a disqualifying criminal history, DHS proposes to require such applicants to appear at an ASC to provide their biometrics for their initial and renewal applications. The biometrics will allow DHS to conduct criminal history background checks to confirm the absence of a disqualifying criminal offense, to vet the applicant's biometrics against government databases (*e.g.,* FBI databases) to determine if he or she matched any criminal activity on file, to verify the applicant's identity, and to facilitate card production. In order to implement the criminal ineligibility provision, DHS will require applicants with a pending initial or renewal (c)(8) EAD on the effective date of this rule to appear at an ASC for biometrics collection but DHS will not collect the biometrics services fee from these aliens. DHS will contact applicants with pending applications and provide notice of the place, date and time of the biometrics appointment.

DHS seeks comment on additional public safety related crimes that should bar (c)(8) EAD eligibility. *See* proposed 8 CFR 208.7 and 274a.12(c)(8). Providing discretionary employment authorization to criminal aliens and aliens who have been convicted for serious crimes that offend public safety, and who have not been determined eligible for asylum.

D. Procedural Reforms

DHS is proposing to clarify that USCIS has jurisdiction over all applications for employment authorization based on a pending or approved asylum application, regardless of whether USCIS or DOJ–EOIR has jurisdiction over the asylum case. DHS is also proposing several procedural changes to streamline the asylum adjudication process. Currently, most applications, petitions, and requests for immigration benefits have specific minimum requirements that must be met before the forms can be accepted for filing. DHS proposes to amend the regulations at 8 CFR 208.3 to remove the language providing that a Form I–589, Application for Asylum and for Withholding of Removal, will be deemed a complete, properly filed application if USCIS fails to return the incomplete Form I–589 to the alien within a 30-day period. *See* proposed 8 CFR 208.333. This procedural change will require asylum applicants to file the asylum application in accordance with the requirements outlined in the regulations and form instructions and is consistent with the general principle that applicants and petitioners bear the burden of filing complete applications and petitions. Applications not properly filed are rejected and returned to the applicant with the reasons for the rejection, consistent with other forms.

DHS also proposes to remove the language referring to ''recommended approvals'' of asylum applications and the benefits of such applicants who receive those notices. *See* proposed 8 CFR 208.3 and 274a.12(c)(8). Recipients of recommended approvals have not fully completed the asylum adjudication process. Previously, USCIS issued such notices even when all required background and security check results had not been received, and recipients of recommended approvals were eligible for employment authorization. However, because Congress has mandated that DHS not approve asylum applications until DHS has received and reviewed all the results of the required background and security checks, DHS has determined that continuing to issue recommended approval notices is contrary to this mandate.[77] In addition,

that the asylum system was being abused ''by fraudulent applicants whose primary interest is obtaining work authority in the United States while their claim languishes in the backlogged asylum processing system.''). *See also* H.R. Rep. No. 99–682(I) at pp. 5649–5654, where Congress discussed the impact of economic migrants on the U.S. economy during consideration of IRCA in 1986:

Now, as in the past, the Committee remains convinced that legislation containing employer sanctions is the most humane, credible, and effective way to respond to the large scale influx of undocumented aliens. While there is no doubt many who enter illegally do so for the best of motives—to seek a better life for themselves and their families—immigration must proceed in a legal, orderly and regulated fashion. As a sovereign nation, we must secure our borders.

* * *

Since most undocumented aliens enter this country to find jobs, the Committee believes it is essential to require employers to share the responsibility to address this serious problem. The need for control is underscored by international demographics. Undocumented aliens tend to come from countries with high population growth and few employment opportunities. The United States is not in a position to redress this imbalance by absorbing these workers into our economy and our population. U.S. unemployment currently stands at 7% and is much higher among the minority groups with whom undocumented workers compete for jobs directly.

[75] *See* CIS Ombudsman, *Annual Report,* at p. 44.

[76] *See, e.g.,* INA sec. 101(a)(43)(F), 8 U.S.C. 1101(a)(43)(F); INA sec. 212(a)(2)(A)(i)(I), 8 U.S.C. 1182(a)(2)(A)(i)(I); INA sec. 212(a)(2)(B), 8 U.S.C. 1182(a)(2)(B).

[77] *See* INA sec. 208(d)(5)(A)(i), 8 U.S.C. 1158(d)(5)(A)(i).

(5) Consideration of asylum applications

USCIS believes it is an inefficient use of resources for USCIS to manage a separate processing regime, which requires USCIS to review the asylum application twice: First to determine if it is initially approvable as a ''recommended approval,'' and then again (after a recommended approval notice has been issued to the applicant) to ensure that the applicant remains eligible for asylum based on the results of the background and security checks. This change would enhance efficiency by removing duplicative case processing tasks and enhance the integrity of the overall asylum process because all information will be considered before issuance of the asylum decision

DHS is also proposing that any documentary evidence submitted fewer than 14 calendar days before the asylum interview (with allowance for a brief extension to submit additional evidence as a matter of discretion) may result in an applicant-caused delay if it delays the adjudication of the asylum application. The purpose of this provision is to improve administrative efficiency and aid in the meaningful examination and exploration of evidence in preparation for and during the interview.

E. Termination of Employment Authorization

DHS proposes revising the rule governing when employment authorization terminates to provide that when USCIS or DOJ–EOIR denies an asylum application, the alien's employment authorization associated with the asylum application will be terminated automatically, effective on the date of denial of the asylum application.

1. Denial of Asylum Application by USCIS Asylum Officer

Currently, the regulations at 8 CFR 208.7(b)(1) provide that an asylum applicant's employment authorization terminates within 60 days after a USCIS asylum officer denies the application or on the date of the expiration of the EAD, whichever is longer. DHS does not believe it is the will of Congress that aliens with denied asylum applications should continue to hold employment authorization once the asylum claim is denied. DHS therefore proposes that when a USCIS asylum officer denies an alien's request for asylum, any employment authorization associated with a pending asylum application will be automatically terminated effective on the date the asylum application is denied. Further, consistent with the current regulation, DHS proposes to exclude from eligibility aliens whose asylum applications have been denied by an asylum officer during the 365-day waiting period or before the adjudication of the initial employment authorization request.

When a USCIS asylum officer refers an affirmative application to DOJ–EOIR, the asylum application remains pending, and the associated employment authorization remains valid while the IJ adjudicates the application. Aliens granted asylum by USCIS or an IJ no longer require, nor are they eligible for, a (c)(8) EAD, but they can apply for an EAD under 8 CFR 274a.12(a)(5) if they want documentation that reflects they are employment authorized.

2. Termination After Denial by IJ

Currently, the regulations at 8 CFR 208.7(b)(2) provide that when an IJ denies an asylum application, the employment authorization terminates on the date the EAD expires, unless the asylum applicant seeks administrative or judicial review. DHS proposes instead that if the IJ denies the alien's asylum application, employment authorization will terminate 30 days after denial to allow time for appeal to the BIA. If a timely appeal is filed, employment authorization will be available to the alien during the BIA appeal process, but prohibited during the Federal court appeal process unless the case is remanded to DOJ–EOIR for a new decision. USCIS believes that restricting access to (c)(8) employment authorization during the judicial review process is necessary to ensure that aliens who have failed to establish eligibility for asylum during two or three levels of administrative review do not abuse the appeals processes in order to remain employment authorized. For the same reason, DHS proposes to exclude from eligibility aliens whose asylum applications have been denied by an IJ during the 365-day waiting period.

3. Automatic Extensions of Employment Authorization and Terminations

To conform the automatic extension and termination provisions proposed under 8 CFR 208.7(b), DHS is also proposing amendments to the current regulations at 8 CFR 274a.13(d), which govern automatic extensions of employment authorization and termination of such extensions. If an asylum applicant's employment authorization will expire before the asylum officer, IJ, or the BIA renders a decision on the asylum application, under current regulations, the alien may file an application to renew the employment authorization. If the renewal EAD application is filed timely, the alien's employment authorization is extended automatically for up to 180 days or the date of the EAD decision, whichever comes first. As previously discussed, when a USCIS asylum officer, IJ, or the BIA denies the asylum application, any employment authorization would terminate on the date of the denial, except for the thirty-day appeal window for an alien to file an appeal before the BIA following an asylum application's denial by an IJ. This rule at proposed 8 CFR 208.7(b)(2) makes clear that employment authorization automatically terminates regardless of whether it is in a period of automatic extension. Therefore, the rule proposes conforming amendments at 8 CFR 274a.13(d)(3), specifying that automatic extensions would be automatically terminated upon a denial of the asylum application, or on the date the automatic extension expires (which is up to 180 days), whichever is earlier. *See* proposed 8 CFR 274a.13(d)(3).

DHS also proposes a technical change that would add a new paragraph at 8 CFR 274a.14(a)(1) to generally reference any automatic termination provision elsewhere in DHS regulations, including the automatic EAD termination provision being proposed by this rule.[78] As 8 CFR 274a.14(a)(1) is a general termination provision, DHS feels that incorporation of a general reference to other termination provisions would help avoid possible confusion regarding the applicability of such other provisions in relation to 8 CFR 274a.14(a)(1).

F. Aliens Who Have Established a Credible Fear or a Reasonable Fear of Persecution or Torture and Who Have Been Paroled Into the United States

DHS proposes clarifying the rule governing employment eligibility for certain aliens who have been paroled into the United States after establishing a credible fear or reasonable fear of persecution or torture. *See* 8 CFR 208.30.

(A) Procedures.—The procedure established under paragraph (1) shall provide that—

(i) *asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State,* including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum;

(emphasis added).

[78] *See* proposed 8 CFR 208.7(b)(2); *see also* 8 CFR 214.2(f)(9)(ii)(F)(2) (automatic termination of F–1 student-based employment authorization based on economic necessary where the student fails to maintain status).

In 2017, DHS issued a memo, ''Implementing the President's Border Security and Immigration Enforcement Improvement Policies,'' which stated that CBP or ICE will only consider the release of aliens from detention based on the parole authority under INA section 212(d)(5) on a case-by-case basis.[79] One such case is when an arriving alien subject to expedited removal establishes a credible fear of persecution or torture, or eligibility for withholding of removal, adequately establishes his or her identity, does not pose a flight risk or danger to the community, and otherwise warrants parole as a matter of discretion. Currently, when DHS exercises its discretion to parole such aliens, officers are instructed to endorse the Form I–94 parole authorization with an express condition that employment authorization not be provided under 8 CFR 274a.12(c)(11) on the basis of the parole. This rule would conform the regulations to that important policy. DHS continues to believe that it would be an inconsistent policy to permit these asylum seekers released on parole to seek employment authorization without being subject to the same statutory requirements and waiting period as non-paroled asylum seekers. Therefore, this rule proposes to clarify, consistent with existing DHS policy, that employment authorization for this category of parolees is not immediately available under the (c)(11) category. Such aliens may still be eligible to apply for a (c)(8) employment authorization to become employment authorized subject to the eligibility changes proposed in this rule. DHS seeks public comment on this proposal and whether the (c)(11) category (parole-based EADs) should be further limited, such as to provide employment authorization only to those DHS determines are needed for foreign policy, law enforcement, or national security reasons, especially since parole is meant only as a temporary measure to allow an alien's physical presence in the United States until the need for parole is accomplished or the alien can be removed.

G. Illegal Entry

DHS proposes to exclude aliens from receiving a (c)(8) EAD if they enter or attempt to enter the United States illegally without good cause. Good cause is defined as a reasonable justification for entering the United States illegally as determined by the adjudicator on a case-by-case basis. Since what may be a reasonable justification for one applicant may not be reasonable when looking at the circumstances of another applicant, DHS believes a case-by-case determination of good cause in a (c)(8) adjudication will incentivize aliens to comply with the law to the extent possible and avoid injury and death associated with illegal entries, and reduce government expenditures related to detecting, apprehending, processing, housing, and transporting escalating numbers of illegal entrants. To the extent that this change could be considered a ''penalty'' within the meaning of Article 31(1) of the 1951 Convention relating to the Status of Refugees, which is binding on the United States by incorporation in the 1967 Protocol relating to the Status of Refugees, DHS believes that it is consistent with U.S. obligations under the 1967 Protocol because it exempts aliens who establish good cause for entering or attempting to enter the United States at a place and time other than lawfully through a U.S. port of entry.

The amendments to this section make any alien who entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry ineligible to receive a (c)(8) EAD, with the limited exception of when an alien demonstrates that he or she: (1) Presented himself or herself without delay to the Secretary of Homeland Security (or his or her delegate); and (2) indicated to a DHS agent or officer an intent apply for asylum or expressed a fear of persecution or torture; and (3) otherwise had good cause for the illegal entry or attempted entry. Examples of reasonable justifications for the illegal entry or attempted entry include, but are not limited to, requiring immediate medical attention or fleeing imminent serious harm, but would not include the evasion of U.S. immigration officers, or entering solely to circumvent the orderly processing of asylum seekers at a U.S. port of entry, or convenience. Asylum is a discretionary benefit that should be reserved only for those who are truly in need of the protection of the United States. It follows that work authorization associated with a pending asylum application should be similarly reserved.

H. Effective Date of the Final Rule

The rules in effect on the date of filing Form I–765 will govern all initial and renewal applications for (c)(8) and (c)(11) employment authorization, with limited exceptions. DHS will apply two proposed provisions—ineligibility based on certain criminal offenses and failure to file the asylum application within one year—to initial and renewal applications for (c)(8) EAD's pending on the effective date of the final rule. In order to implement the criminal ineligibility provision, DHS will require applicants with a pending initial or renewal (c)(8) EAD application on the effective date of this rule to appear at an ASC for biometrics collection but DHS will not collect the biometrics services fee from these aliens. DHS will contact applicants with pending applications and provide notice of the place, date and time of the biometrics appointment. To ensure consistency with a separate proposed rule entitled ''Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I–765 Employment Authorization Applications,'' DHS Docket No. USCIS–2018–0001, 84 FR 47148 (Sept. 9, 2019), DHS proposes that this NPRM will not apply to initial applications filed before the effective date of this rule by members of the *Rosario* class. Under this proposal, DHS would allow aliens with pending asylum applications that have not yet been adjudicated and who already have employment authorization before the final rule's effective date to remain work authorized until the expiration date on their EAD, unless the card is terminated or revoked on grounds in existing regulations. This proposed rule will not have any impact on applications to replace lost, stolen, or damaged (c)(8) EADs. All (c)(11) EAD applications based on parole/credible fear that are received by USCIS on or after the date the final rule is effective will be denied, as that ground for employment authorization is inconsistent with INA 208(d)(2).

VI. Statutory and Regulatory Requirements

A. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if a regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of

[79] *See* Secretary of Homeland Security John Kelly, ''Implementing the President's Border Security and Immigration Enforcement Improvements Policies,'' Section K (Feb. 20, 2017), *https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.*

reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated as a ''significant regulatory action'' that is economically significant, under section 3(f)(1) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has reviewed this rule.

1. Summary

USCIS has considered alternatives and has undertaken a range of initiatives to address the asylum backlog and mitigate its consequences for asylum seekers, agency operations, and the integrity of the asylum system. These efforts include: (1) Revised scheduling priorities including changing from First in, First Out (''FIFO'') order processing to LIFO order; (2) staffing increases and retention initiatives; (3) acquiring new asylum division facilities; (4) assigning refugee officers to the Asylum Division; and (5) conducting remote screenings.[80]

• *Revised Interview Scheduling Priorities:* A significant scheduling change occurred in January 2018 with FIFO scheduling returning to LIFO scheduling order. Previously implemented in 1995, LIFO remained in effect until 2014. Under FIFO scheduling, USCIS generally processed affirmative asylum applications in the order they were filed. The now-operative LIFO scheduling methodology prioritizes newly-filed applications. Some offices already report a 25 percent drop in affirmative asylum filings since implementation of the LIFO scheduling system in January 2018.[81]

• *Staffing Increases and Retention Initiatives:* Since 2015, USCIS has increased the number of asylum officer positions by more than 50 percent, from 448 officers authorized for FY 2015 to 686 officers authorized for FY 2018. Along with these staffing enhancements, USCIS increased the frequency with which it offered its Combined Training and Asylum Division Officer Training Course. Moreover, to address asylum officer turnover, USCIS has made efforts to increase telework options and expand opportunities for advancement.[82]

• *New Asylum Division Facilities:* The Asylum Division also expanded its field operations, opening sub-offices in Boston, New Orleans, and Arlington, VA. Its most significant expansion, however, is just getting underway. Currently, the Asylum Division is establishing an asylum vetting center—distinct from the planned DHS-wide National Vetting Center—in Atlanta, Georgia. This center will allow for the initiation of certain security checks from a central location, rather than at individual asylum offices, in an effort to alleviate the administrative burden on asylum officers and to promote vetting and processing efficiency. USCIS has already begun hiring for the center, which will ultimately staff approximately 300 personnel, composed of both asylum and Fraud Detection and National Security Directorate (FDNS) positions. USCIS expects completion of the center's construction in 2020.[83]

• *Remote Screenings: Telephonic and Videoconference:* In 2016, the Asylum Division established a sub-office of the Arlington Asylum Office dedicated to adjudicating credible and reasonable fear claims. This sub-office performs remote (primarily telephonic) screenings of applicants who are located in detention facilities throughout the country. The Asylum Division states that its practice of performing remote telephonic screenings of credible and reasonable fear claims have enhanced processing efficiency since implementation. These screenings allow asylum offices greater agility and speed in reaching asylum seekers whose arrival patterns in the United States are not always predictable and who may be detained at remote detention facilities.[84]

• *Refugee Officers Assigned to the Asylum Division:* Throughout 2018, USCIS had approximately 100 refugee officers serving 12-week assignments with the Asylum Division at any given time. These refugee officers are able to interview affirmative asylum cases, conduct credible fear and reasonable fear screenings, and provide operational support. USCIS now assigns refugee officers both to asylum offices and DHS's family residential centers.[85]

A simple regulatory alternative to extending the waiting period to 365 days and strengthening eligibility requirements is rescinding work authorization for asylum applicants altogether, which is permissible under INA 208(d)(2). This too would reduce pull factors and alleviate the asylum backlog. However, DHS seeks to balance deterrence of those abusing the asylum process for economic purposes and providing more timely protection to those who merit such protection, which includes immediate and automatic employment authorization when the asylum application is granted. DHS believes the proposed amendments in this rule strike a greater balance between these two goals. The proposed amendments build upon a carefully planned and implemented comprehensive backlog reduction plan and amends the (c)(8) EAD process so that those with bona fide asylum claims can be prioritized and extended the protections, including employment authorization, that the United States offers to aliens seeking refuge from persecution or torture.

a. Baseline

The impacts of this rule are measured against a baseline. This baseline is the best assessment of the way the world would look absent this proposed action. The table below explains each of the proposed provisions of this rule, and the baseline against which the change is measured.

[80] *See* Dep't of Homeland Security, 2018 Citizenship & Immigration Services Ombudsman Annual Report at 44.

[81] *Id.* at 45.

[82] *Id.* at 46.

[83] *Id.*

[84] *Id.*

[85] *Id.* at. 46–47.

TABLE 4—BASELINE AND PROPOSAL BY PROVISION

Description	CFR Citation	Proposal	Baseline
Provisions that affect asylum and employment authorization			
Eliminate the issuance of "Recommended Approvals" for a grant of affirmative asylum.	8 CFR 208.7; 8 CFR 274a.12.	USCIS would no longer issue grants of recommended approvals as a preliminary decision for affirmative asylum adjudications. As such, aliens who previously could apply early for an EAD based on a recommended approval now will be required either to wait 365 days before they could apply for an EAD, or wait until they are granted asylum (if the asylum grant occurs earlier than 365 days).	Aliens who have received a notice of recommended approval are able to request employment authorization prior to the end of the waiting period for those with pending asylum applications.
"Complete" asylum applications	8 CFR 208.3	Removing outdated provision that application for asylum will automatically be deemed "complete" if USCIS fails to return the incomplete application to the alien within a 30-day period.	Application for asylum is automatically deemed "complete" if USCIS fails to return the incomplete application to the alien within a 30-day period.
Eligibility for Employment Authorization—Applicant-caused delay.	8 CFR 208.4; 8 CFR 208.9.	Examples of applicant-caused delays include, but are not limited to the list below. • A request to amend a pending application for asylum or to supplement such an application if unresolved on the date the (c)(8) EAD application is adjudicated;.	No 14-day regulatory restriction on how close to an asylum interview applicants can submit additional evidence.
	• An applicant's failure to appear to receive and acknowledge receipt of the decision following an interview and a request for an extension to submit additional evidence, and;. • Submitting additional documentary evidence fewer than 14 calendar days prior to interview.		
Provisions that affect employment authorization only			
365-day wait	8 CFR 208.7	All aliens seeking a (c)(8) EAD based on a pending asylum application wait 365 calendar days from the receipt of their asylum application before they can file an application for employment authorization.	150-day waiting period plus applicant-caused delays that toll the 180-day EAD clock.
Revise eligibility for employment authorization—One Year Filing Deadline.	8 CFR 208.7	Exclude from (c)(8) EAD eligibility aliens who have failed to file for asylum for one year unless and until an asylum officer or IJ determines that an exception to the statutory requirement to file for asylum within one year applies.	No such restriction.
Revise eligibility for employment authorization—Criminal Convictions.	8 CFR 208.7	In addition to aggravated felons, also exclude from (c)(8) eligibility aliens who have committed certain lesser criminal offenses.	Aggravated felons are not eligible.
Revise eligibility for employment authorization—Illegal Entry.	8 CFR 208.7	Exclude from (c)(8) eligibility aliens who entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry, with limited exceptions.	No such restriction.

TABLE 4—BASELINE AND PROPOSAL BY PROVISION—Continued

Description	CFR Citation	Proposal	Baseline
Termination of EAD after Asylum Denial or Dismissal by USCIS Asylum Officer.	8 CFR 208.7	When a USCIS asylum officer denies or dismisses an alien's request for asylum, the (c)(8) EAD would be terminated effective on the date the asylum application is denied. If a USCIS asylum officer refers the case to an IJ and places the alien in removal proceedings, employment authorization will be available to the alien while the IJ adjudicates the asylum application.	An asylum applicant's EAD terminates within 60 days after a USCIS asylum officer denies the application or on the date of the expiration of the EAD, whichever is longer. When an asylum officer refers an affirmative application to an IJ, the application remains pending and the associated EAD remains valid while the IJ adjudicates the application.
Termination of EAD after Asylum Denial by IJ.	8 CFR 208.7	If the IJ denies the asylum application, employment authorization would continue for 30 days after the date the IJ denies the application to allow for appeal to the BIA. If the alien files a timely appeal of the denied asylum application with the BIA, employment authorization eligibility would continue through the BIA appeal.	8 CFR 208.7(b)(2) provides that when an IJ denies an asylum application, the EAD terminates on the date the EAD expires, unless the asylum applicant seeks administrative or judicial review.
Termination of EAD after Asylum Denial Affirmed by the BIA.	8 CFR 208.7	Employment authorization would not be granted after the BIA affirms a denial of the asylum application and while the case is under review in Federal court, unless the case is remanded to DOJ–EOIR for a new decision.	Asylum applicants are currently allowed to renew their (c)(8) EADs while their cases are under review in Federal court.
Eligibility for Employment Authorization—Failure to appear.	8 CFR 208.10	An applicant's failure to appear for an asylum interview or biometric services appointment may lead to the dismissal or referral of his or her asylum application and may be deemed an applicant-caused delay affecting employment authorization eligibility.	No such restriction.
Limit EAD validity periods	8 CFR 208.7	USCIS will, in its discretion, determine validity periods for initial and renewal EADs but such periods will not exceed two years. USCIS may set shorter validity periods.	No such restriction.
Incorporate biometrics requirements into the employment authorization process for asylum seekers.	8 CFR 208.7	Asylum applicants applying for (c)(8) employment authorization must submit biometrics at a scheduled biometrics services appointment. This requirement would also apply to applicants with a pending initial or renewal (c)(8) EAD application on the effective date of this; though DHS will not collect the biometric services fee from these aliens.	No such requirement. However, there is a requirement to submit biometrics with an asylum application.
Eligibility for Employment Authorization—aliens who have been paroled after being found to have a credible fear of persecution or torture.	8 CFR 274a.12	Aliens who have been paroled into the United States after being found to have credible fear or reasonable fear of persecution or torture may not apply for employment authorization under 8 CFR 274a.12(c)(11). They may, however, continue to apply for an EAD under 8 CFR 274a.12(c)(8) if their asylum application has been; pending for more than 365 days and they meet the remaining eligibility requirements.	Consistent with current DHS policy guidance.
Application for EAD	8 CFR 274a.13	Clarifying that EAD applications must be filed in accordance with the general filing requirements in 8 CFR 103.2(a), 208.3, and 208.4.	N/A.
Application for EAD	8 CFR 274a.13(a)(1)	Provides USCIS discretion to grant (c)(8) EAD applications consistent with INA 208(d)(2).	Current regulations do not give the agency discretion to issue (c)(8) EADs. 8 CFR 274a.13(a)(1) currently states: The approval of applications filed under 8 CFR 274a.12(c), *except for 8 CFR 274a.12(c)(8),* are within the discretion of USCIS.

TABLE 4—BASELINE AND PROPOSAL BY PROVISION—Continued

Description	CFR Citation	Proposal	Baseline
Application for EAD—automatic extensions and automatic terminations.	8 CFR 274a.13(d)(3); 8 CFR 208.7(b)(2).	For asylum applications denied, any EAD that was automatically extended pursuant to 8 CFR 274a.13(d)(1) based on a timely filed renewal application will automatically terminate on the date the asylum officer, the IJ, or BIA denies the asylum application, or on the date the automatic extension expires (which is up to 180 days), whichever is earlier.	For asylum applications denied, any EAD that was automatically extended pursuant to 8 CFR 274a.13(d)(1) will terminate at the expiration of the EAD or 60 days after the denial of asylum, whichever is longer.
Cross-reference to any automatic termination provision.	8 CFR 274a.14	Cross-reference to any automatic termination provision elsewhere in DHS regulations, including the automatic termination provision being proposed by this rule.	N/A.
Specify the effective date	....	EAD applications, including renewals, filed on or after the effective date will be adjudicated under the rule, except for the criminal and one-year-filing bar provisions, and except for initial applications filed by *Rosario* class members.	N/A.

b. Costs and Benefits

This proposed rule amends the (c)(8) EAD system so that those with bona fide asylum claims can be prioritized and extended the protections, including employment authorization, that United States offers to aliens seeking refugee from persecution by reducing the asylum backlog. The provisions seek to reduce the incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications primarily to obtain employment authorization or other, non-asylum-based forms of relief from removal, and remain for years in the United States for economic purposes.

The quantified maximum population this rule would apply to is about 305,000 aliens in the first year the rule could take effect and about 290,000 annually thereafter. DHS assessed the potential impacts from this rule overall, as well as the individual provisions, and provides quantitative estimates of such impacts where possible and relevant. For the provisions involving biometrics and the removal of recommended approvals, the quantified analysis covers the entire populations. For the 365-day EAD filing time proposal, the quantified analysis also covers the entire population; however, DHS relies on historical data to estimate the costs for affirmative cases and certain assumptions to provide a maximum potential estimate for the remaining affected population. For the provisions that would potentially end some EADs early, DHS could estimate only the portion of the costs—those attributable to affirmative cases—because DHS has no information available to estimate the number of defensive cases affected.

DHS provides a qualitative analysis of the provisions proposing to remove employment eligibility for asylum applicants under the (c)(11) category; terminate EADs earlier for asylum cases denied/dismissed by an IJ, and; bar employment authorization for asylum applicants with certain criminal history, who did not enter at a U.S. port of entry, or who, with little exception, did not file for asylum within one year of their last arrival to the United States. As described in more detail in the unquantified impacts section, DHS does not have the data necessary to quantify the impacts of these provisions.

To take into consideration uncertainty and variation in the wages that EAD holders earn, all of the monetized costs rely on a lower and upper bound, benchmarked to a prevailing minimum wage and a national average wage, which generates a range. Specific costs related to the provisions proposed are summarized in Table 5. For the four provisions in which the impacts, or a portion of the impacts, could be monetized, the single midpoint figure for the wage-based range is presented.[86]

TABLE 5—SUMMARY OF COSTS AND TRANSFERS OF THE PROPOSED RULE

Provision summary	Annual costs and transfers (mid-point)
III. Quantified:	
365-day EAD filing wait period (for DHS affirmative asylum cases and partial estimates for DHS referrals to DOJ).	Population: 39,000. Cost: $542.7 million (quantified impacts for 39,000 of the 153,458 total population). Reduction in employment tax transfers: $83.2 million (quantified impacts for 39,000 of the 153,458). Cost basis: Annualized equivalence cost. Summary: Lost compensation for a portion of DHS asylum cases that benefitted from initial EAD approvals who would have to wait longer to earn wages under the proposed rule; nets out cost-savings for persons who would no longer file under the rule; includes partial estimate of DHS referral cases to DOJ–EOIR and the apropos estimated tax transfers. It does not include impacts for defensively filed cases.
Biometrics requirement	Population for initial and renewal EADs: 289,751. Population for pending EADs: 14,451. Cost: $37,769,580. Reduction in employment tax transfers: None.

[86] The populations reported in Table 55 reflect the maximum population that would be covered by the provision. Some of the populations that would incur monetized impacts are slightly different due to technical adjustments.

TABLE 5—SUMMARY OF COSTS AND TRANSFERS OF THE PROPOSED RULE—Continued

Provision summary	Annual costs and transfers (mid-point)
	Cost basis: Maximum costs of the provision, which would apply to the first year the rule could take effect. Summary: For initial and renewal EADs, there would be time-related opportunity costs plus travel costs of submitting biometrics, as well as $85 fee for (c)(8) I–765 initial and renewal populations subject to the biometrics and fee requirements. A small filing time burden to answer additional questions and read associated form instructions in the I–765 is consolidated in this provision's costs. There would also be time-related opportunity costs plus travel costs of submitting biometrics for EADs pending on the effective date of the final rule.
Eliminate recommended approvals.	Population: 1,930 annual. Cost: $13,907,387. Reduction in employment tax transfers: $2,127,830. Cost basis: Annualized equivalence cost. Summary: Delayed earnings and tax transfers that would have been earned for an average of 52 calendar days earlier with a recommended approval.
Terminate EADs if asylum application denied/dismissed (DHS).	Population: 575 (current and future). Cost: $31,792,569. Reduction in employment tax transfers: $4,864,263. Cost basis: Maximum costs of the provision, which would apply to the first year the rule could take effect. Summary: Forgone earnings and tax transfers from ending EADs early for denied/dismissed DHS affirmative EADs asylum applications. This change would affect EADs that are currently valid and EADs for affirmative asylum applications in the future that would not be approved. DHS acknowledges that as a result of this proposed change, businesses that have hired such workers would incur labor turnover costs earlier than without this rule.
365-day EAD filing wait period (for the residual population).	Population: 114,458. Cost: $1,189.6 million—$3,600.4 million (quantified impacts for the remaining 114,458 of the 153,458). Reduction in employment tax transfers: $182.0 million—$550.9 million (quantified impacts for the remaining 114,458 of the 153,458). Cost basis: Annualized equivalence cost. Summary: Lost compensation for the population of approved annual EADs for which DHS does not have data to make a precise cost estimate; The costs reported are a maximum because the potential impact is based on the maximum impact of 151 days; in reality there would be lower-cost segments to this population and filing-cost savings as well.
IV. Unquantified:	
Revise (c)(11) category from I–765.	Population: 13,000. Cost: delayed/foregone earnings. Cost basis: NA. Summary: DHS does not know how many of the affected population will apply for an EAD via the (c)(8) I–765, but the population would be zero at a minimum and 13,000 at a maximum, with a mid-point of 6,500. The population would possibly incur delayed earnings and tax transfers by being subject to the 365-day EAD clock (it is noted that this population would also incur costs under the biometrics provision, above), or lost earnings if they do not apply for a (c)(8) EAD. There is potentially countervailing cost-savings due to a reduced pool of filers under the proposed rule.
Criminal activity/illegal entry bar.	DHS is unable to estimate the number of aliens impacted. Impacts could involve forgone earnings and lost taxes.
Adjudication of pending (c)(8) I–765 under the criminal and one-year-filing provisions.	DHS cannot determine how many of the 14,451 pending EAD filings would be impacted by the criminal and one-year-filing provisions. Impacts could involve forgone earning and tax transfers.
One-year filing deadline	Some portion of the 8,472 annual filing bar referrals could be impacted, which could comprise deferred/delayed or forgone earning and tax transfers. DHS does not have data on filing bar cases referred to DOJ–EOIR.
Terminate EADs if asylum application denied/dismissed (DOJ–EOIR).	DOJ–EOIR has denied an average of almost 15,000 asylum cases annually; however, DHS does not have data on the number of such cases that have an EAD. Costs would involve forgone earnings and tax transfers for any such EADs that would be terminated earlier than they otherwise would, as well as forgone future earnings and tax transfers. DHS acknowledges that as a result of this proposed change, businesses that have hired such workers would incur labor turnover costs earlier than without this rule.
Renewal EADS	The proposed rule would impose the conditions in the rule to renewal filers. Some may be delayed or precluded from renewing their EADs, or incur Form I–765 filing fees and opportunity costs for re-filing.

For those provisions that affect the time an asylum applicant is employed, the impacts of this rule would include both distributional effects (which are transfers) and costs.[87] The distributional impacts would fall on the asylum applicants who would be delayed in entering the U.S. labor force or who would leave the labor force earlier than under current regulations. The distributional impacts (transfers) would

[87] Transfer payments are monetary payments from one group to another that do not affect total resources available to society. *See* OMB Circular A–4 pages 14 and 38 for further discussion of transfer payments and distributional effects. Circular A–4 is available at: *https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf.*

[88] The full definition of the U–3 and U–6 unemployment rates can be found on the Bureau of Labor Statistics (BLS) website under the ''Local Area Unemployment Statistics (LAUS),'' at: *https://www.bls.gov/lau/stalt.htm.* The actual figures for the U–3 and U–6 unemployment rates are found in table A–15, ''Alternative Measures of Labor Underutilization,'' in the Economic News Release Archives at: *https://www.bls.gov/news.release/archives/empsit_09062019.htm.*

[89] *See* Table A–8, ''Employed Persons by Class of Worker and Part-Time Status'', Persons at work part time for economic reasons: *https://www.bls.gov/news.release/archives/empsit_09062019.htm.*

[90] *See* Table A–16, ''Persons not in the labor force and multiple jobholders by sex, not seasonally adjusted'', Persons marginally attached to the labor force: *https://www.bls.gov/news.release/archives/empsit_09062019.htm.*

be in the form of lost compensation (wages and benefits). A portion of this lost compensation might be transferred from asylum applicants to others that are currently in the U.S. labor force, or, eligible to work lawfully, possibly in the form of additional work hours or the direct and indirect added costs associated with overtime pay. A portion of the impacts of this rule would also be borne by companies that would have hired the asylum applicants had they been in the labor market earlier or who would have continued to employ asylum applicants had they been in the labor market longer, but were unable to find available replacement labor. These companies would incur a cost, as they would be losing the productivity and potential profits the asylum applicant would have provided. Companies may also incur opportunity costs by having to choose the next best alternative to the immediate labor the asylum applicant would have provided. USCIS does not know what this next best alternative may be for those companies. As a result, USCIS does not know the portion of overall impacts of this rule that are transfers or costs, but estimated the maximum monetized impact of this rule in terms of delayed/lost labor compensation. If all companies are able to easily find reasonable labor substitutes for the positions the asylum applicant would have filled, they will bear little or no costs, so $4,461.9 million (annualized at 7%) will be transferred from asylum applicants to workers currently in the labor force or induced back into the labor force (we assume no tax losses as a labor substitute was found). Conversely, if companies are unable to find reasonable labor substitutes for the position the asylum applicant would have filled then $4,461.9 million is the estimated maximum monetized cost of the rule that could be a transfer, and $0 is the estimated minimum in monetized transfers from asylum applicants to other workers. In addition, under this scenario, because the jobs would go unfilled there would be a loss of employment taxes to the Federal Government. USCIS estimates $682.9 million as the maximum decrease in employment tax transfers from companies and employees to the Federal Government. The two scenarios described above represent the estimated endpoints for the range of monetized impacts resulting from the provisions that affect the amount of time an asylum applicant is employed. USCIS notes that given that the U.S. unemployment rate is hovering around a 50-year low—at 3.7% as of August 2019—it could be possible that employers may face difficulties finding reasonable labor substitutes. DHS does note that an alternative measure of the unemployment rate from the Bureau of Labor Statistics (the U–6) provides additional information on the labor market not found in the official unemployment rate (the U–3). The U–6 rate is a broader measure of labor underutilization and takes into account workers not included in the official U–3 rate that could potentially benefit from this rule. For example, the U–6 rate considers persons who are neither working nor looking for work but indicate they want and are available for a job and have looked for work sometime in the past twelve months and also considers part-time workers who otherwise want and are available for full time employment. The U–6 rate shows unemployment at 7.2 percent, which is much higher than the official U–3 rate of 3.7 percent. [88]

Included in the broader U–6 unemployment rate is the number of persons employed part time for economic reasons (sometimes referred to as involuntary part-time workers), which BLS estimates is 4.4 million in August 2019. These individuals, who would have preferred full-time employment, were working part time because their hours had been reduced or they were unable to find full-time jobs.[89] In addition, BLS reports for August 2019 that 1.6 million persons were marginally attached to the labor force. These individuals were not in the labor force, wanted and were available for work, and had looked for a job sometime in the prior 12 months. They were not counted as unemployed in the official U–3 unemployment rate because they had not searched for work in the 4 weeks preceding the BLS survey, but are counted in the U–6 rate.[90] The U–6 rate provides additional evidence that U.S. workers might be available to substitute into the jobs that asylum applicants currently hold.

Because the biometrics requirement proposed in this rule is a cost to applicants and not a transfer, its minimum value of $27.17 million is the minimum cost of the rule. The range of impacts described by these two scenarios, plus the consideration of the biometrics costs, are summarized in Table 6 below (Table 6A and 6B capture the impacts a 3 and 7 percent rates of discount, in order).

TABLE 6A—SUMMARY OF RANGE OF MONETIZED ANNUALIZED IMPACTS AT 3%

Category	Description	Scenario: No replacement labor found for asylum applicants		Scenario: All asylum applicants replaced with other workers		Primary (average of the highest high and the lowest low, for each row)
		Low wage	High wage	Low wage	High wage	
Transfers:						
Transfers—Compensation.	Compensation transferred from asylum applicants to other workers (provisions: 365-day wait + end EADs early + end recommended approvals).	$0.00	$0.00	$1,473,953,451	$4,461,386,308	$2,230,693,154
Transfers—Taxes	Lost employment taxes paid to the Federal Government (provisions: 365-day wait + end EADs early + end recommended approvals).	225,587,337	682,771,643	0.00	0.00	341,385,822
Costs:						
Cost Subtotal—Biometrics.	Biometrics Requirements	27,154,124	45,726,847	27,154,124	45,726,847	36,440,486
Cost Subtotal—Lost Productivity.	Lost compensation used as proxy for lost productivity to companies (provisions: 365-day wait + end EADs early + end recommended approvals).	1,473,953,451	4,461,386,308	0.00	0.00	2,230,693,154
Total Costs		1,501,107,576	4,507,113,155	27,154,124	45,726,847	2,267,133,639

TABLE 6B—SUMMARY OF RANGE OF MONETIZED ANNUALIZED IMPACTS AT 7%

Category	Description	Scenario: No replacement labor found for asylum applicants		Scenario: All asylum applicants replaced with other workers		Primary (average of the highest high and the lowest low, for each row)
		Low wage	High wage	Low wage	High wage	
Transfers:						
Transfers—Compensation.	Compensation transferred from asylum applicants to other workers (provisions: 365-day wait + end EADs early + end recommended approvals).	$0.00	$0.00	$1,474,123,234	$4,461,900,172	$2,230,950,086
Transfers—Taxes	Lost employment taxes paid to the Federal Government (provisions: 365-day wait + end EADs early + end recommended approvals).	225,613,314	682,850,264	0	0	341,425,132
Costs:						
Cost Subtotal—Biometrics.	Biometrics Requirements	27,171,858	45,766,847	27,171,858	45,766,847	36,469,352
Cost Subtotal—Lost Productivity.	Lost compensation used as proxy for lost productivity to companies (provisions: 365-day wait + end EADs early + end recommended approvals).	1,474,123,234	4,461,900,172	0.00	0.00	2,230,950,086
Total Costs		1,501,295,093	4,507,667,018	27,171,858	45,766,847	2,267,419,438

As required by Office of Management and Budget (OMB) Circular A–4, Table 7 presents the prepared A–4 accounting statement showing the costs associated with this proposed regulation:

TABLE 7—OMB A–4 ACCOUNTING STATEMENT

[$ millions, 2019] [Period of analysis: 2019–2028]

Category	Primary estimate		Minimum estimate	Maximum estimate	Source citation (RIA, preamble, etc.)
Benefits:					
Monetized Benefits	(7%)	N/A	N/A	N/A	RIA.
	(3%)	N/A	N/A	N/A.	
Annualized quantified, but un-monetized, benefits	N/A		N/A	N/A	RIA.
Unquantified Benefits	The benefits potentially realized by the proposed rule are qualitative and accrue to a streamlined system for employment authorizations for asylum seekers that would reduce fraud, improve overall integrity and operational efficiency, and prioritize aliens with bona fide asylum claims. These impacts stand to provide qualitative benefits to asylum seekers, the communities in which they reside and work, the U.S. Government, and society at large. The proposed rule aligns with the Administration's goals of strengthening protections for U.S. workers in the labor market. The proposed biometrics requirement would enhance identity verification and management.				RIA.
Costs:					
Annualized monetized costs (discount rate in parenthesis)	(7%)	2,267.4	27.17	4,507.7	RIA.
	(3%)	2,267.1	27.17	4,507.1	RIA.
Annualized quantified, but un-monetized, costs	N/A		N/A	N/A	RIA.
Qualitative (unquantified) costs	In cases where companies cannot find reasonable substitutes for the labor the asylum applicants would have provided, affected companies would also lose profits from the lost productivity. In all cases, companies would incur opportunity costs by having to choose the next best alternative to immediately filling the job the pending asylum applicant would have filled. There may be additional opportunity costs to employers such as search costs. There could also be a loss of Federal, state, and local income tax revenue. Estimates of costs to proposals that would involve DOJ–EOIR defensively-filed asylum applications and DHS-referrals could not be made due to lack of data. Potential costs would involve delayed/deferred or forgone earnings, and possible lost tax revenue.				RIA.
	There would also be delayed or forgone labor income and tax transfers for pending EAD applicants impacted by the criminal and one-year filing provisions, renewal applicants, transfers from the (c)(11) group, and filing bar cases, all of whom would be subject to some of the criteria being proposed; in addition, such impacts could also affect those who would be eligible currently for an EAD but would be ineligible for an EAD, or have such eligibility terminated earlier, under the proposed rule.				RIA.
Transfers:					
Annualized monetized transfers: "on budget"	(7%)	0	0	0	RIA.
	(3%)	0	0	0	
From whom to whom?	N/A				
Annualized monetized transfers: compensation	(7%)	2,231.0	0	4,461.9	RIA.
	(3%)	2,230.7	0	4,461.4	
From whom to whom?	Compensation transferred from asylum applicants to other workers (provisions: 365-day wait + end EADs early + end recommended approvals). Some of the deferred or forgone earnings could be transferred from asylum applicants to workers in the U.S. labor force or induced into the U.S. labor force. Additional distributional impacts from asylum applicant to the asylum applicant's support network that provides for the asylum applicant while awaiting an EAD; these could involve burdens to asylum applicants' personal private or familial support system, but could also involve public, private, or charitable benefits-granting agencies and non-governmental organizations (NGOs).				RIA.
Annualized monetized transfers: taxes	(7%)	341.4	0	682.9	RIA.
	(3%)	341.4	0	682.8	
From whom to whom?	A reduction in employment taxes from companies and employees to the Federal Government. There could also be a transfer of Federal, state, and local income tax revenue (provisions: 365-day wait + end EADs early + end recommended approvals)				

Category	Effects	Source citation (RIA, preamble, etc.)
Effects on state, local, and/or tribal governments	DHS does not know precisely how many low age workers could be removed from the labor force due to the proposed rule. There may also be a reduction in state and local tax revenue. Budgets and assistance networks that provide benefits to asylum seekers could be impacted negatively if asylum applicants request additional support.	RIA.
Effects on small businesses	This proposed rule does not directly regulate small entities, but has indirect costs on small entities. DHS acknowledges that ending EADs linked to denied DHS-affirmative asylum claims and EADs linked to asylum cases under DOJ–EOIR purview would result in businesses that have hired such workers incurring labor turnover costs earlier than without this rule. Such small businesses may also incur costs related to a difficulty in finding workers that may not have occurred without this rule.	RFA.
Effects on wages	None.	RIA.
Effects on growth	None.	RIA.

As will be explained in greater detail later, the benefits potentially realized by the proposed rule are qualitative. This rule would reduce the incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications intended primarily to obtain employment authorization or other, non-asylum-based forms of relief from removal, thereby allowing aliens with bona fide asylum claims to be prioritized. A streamlined system for employment authorizations for asylum seekers would reduce fraud and improve overall integrity and operational efficiency. DHS also believes these administrative reforms will encourage aliens to follow the lawful process to immigrate to the United States. These effects stand to provide qualitative benefits to asylum seekers, communities where they live and work, the U.S. government, and society at large.

The proposed rule also aligns with the Administration's goals of strengthening protections for U.S. workers in the labor market. Several employment-based visa programs require U.S. employers to test the labor market, comply with recruiting standards, agree to pay a certain wage level, and agree to comply with standards for working conditions before they can hire an alien to fill the position. These protections do not exist in the (c)(8) EAD program. While this rule would not implement labor market tests for the (c)(8) program, it would put in place mechanisms to reduce fraud and deter those without bona fide claims for asylum from filing applications for asylum primarily to obtain employment authorization or other, non-asylum-based forms of relief from removal. DHS believes these mechanisms will protect U.S. workers.

The proposed biometrics requirement would provide a benefit to the U.S. government by enabling DHS to know with greater certainty the identity of aliens requesting EADs in connection with an asylum application. The biometrics will allow DHS to conduct criminal history background checks to confirm the absence of a disqualifying criminal offense, to vet the applicant's biometrics against government databases (*e.g.,* FBI databases) to determine if he or she matched any criminal activity on file, to verify the applicant's identity, and to facilitate card production. Along with the proposals summarized above and discussed in detail in the preamble and regulatory impact sections of this proposed rule, DHS plans to modify and clarify existing regulations dealing with technical and procedural aspects of the asylum interview process, USCIS authority regarding asylum, applicant-caused delays in the process, and the validity period for EADs. These provisions are not expected to generate costs. If adopted in a final rule, the rules and criteria proposed herein relating to certain criminal offenses and the one-year-filing bar would apply to pending EAD applications. In order to implement the criminal ineligibility provision, DHS will require applicants with a pending initial or renewal (c)(8) EAD on the effective date of this rule to appear at an ASC for biometrics collection but DHS will not collect the biometrics services fee from these aliens. DHS will provide notice of the place, date and time of the biometrics appointment to applicants with pending EAD applications. Some aliens could be impacted and some may not be granted an EAD as they would otherwise under current practice, but DHS does not know how many could be impacted and does not estimate costs for this provision.

2. Background and Purpose of Rule

The purpose of this proposed rule is to reform, improve, and streamline the asylum process, so that those with bona fide asylum claims can be prioritized and extended protection, including immediate employment authorization based on an approved asylum application. The provisions seek to reduce incentives to file frivolous, fraudulent, or otherwise non-meritorious asylum applications and other forms of non-asylum based relief primarily to obtain employment authorization. As is detailed in the preamble, it has been decades since significant reforms were made to the asylum process, and there have been no major statutory changes to the asylum provisions to address the current aspects of the immigration laws that incentivize illegal immigration to the United States and frivolous asylum filings.

DHS has seen a surge in illegal immigration into the United States, and USCIS currently faces a critical asylum backlog that has crippled the agency's ability to timely screen and vet applicants awaiting a decision.

As a result of regulatory review required by E.O. 13767, Border Security and Immigration Enforcement Improvements, DHS identified the regulations that were inconsistent with this order and is revising them in this proposed rule. While working with Congress on legal reforms to deter frivolous, fraudulent, and non-meritorious filings, DHS is also taking administrative steps to improve the asylum application process, pursuant to the Secretary's authorities over immigration policy and enforcement. The broad goal is to minimize abuse of the system by inadmissible or removable aliens who are not eligible for asylum, but who seek to prolong their stay in the United States. The proposed changes will remove incentives for illegal aliens to cross the border for economic reasons and better allow DHS to process bona fide asylum seekers in an expedited manner. As a result, bona fide asylum applications would be adjudicated timelier, and the significant benefits associated with grants of asylum would be realized sooner.[91]

Information and data pertinent to the ensuing analysis is provided. A thorough qualitative discussion of the asylum application and related employment authorization application process is available in the preamble. Table 8 provides data concerning DHS affirmative asylum filings via Form I–589 for the five-year span of fiscal years 2014–2018.[92]

[91] A grant of asylum allows an alien to remain in the United States, creates a path to lawful permanent residence and citizenship, and allows for certain family members to obtain lawful immigration status. *See* INA sec. 208(b)(3) (allowing derivative asylum for asylee's spouse and unmarried children); INA sec. 208(c)(1) (prohibiting removal or return of an alien granted asylum to alien's country of nationality, or in the case of a person have no nationality, the country of last habitual residence); INA sec. 209(b) (allowing adjustment of status of aliens granted asylum); INA sec. 316(a) (describing requirements for naturalization of lawful permanent residents). An asylee is authorized to work in the United States and may receive financial assistance from the Federal Government. *See* INA sec. 208(c)(1)(B) (authorizing aliens granted asylum to engage in employment in the United States); 8 U.S.C. 1612(a)(2)(A), (b)(2)(A), 1613(b)(1) (describing eligibility for Federal Government assistance).

[92] The data are collected from monthly ''Affirmative Asylum Statistics'' reports, which are publicly available at the USCIS data reporting website under the ''Asylum'' search filter: *https://www.uscis.gov/tools/reports-studies/immigration-forms-datareport.* The data were applicable as of April 1, 2019.

TABLE 8—USCIS FORM I–589 AFFIRMATIVE ASYLUM PETITION DATA
[FY 2014–2018]

FY	Receipts	Approvals	Denials	Admin. close	Referrals—DOJ–EOIR	Pending pool
2014	56,912	11,841	707	1,849	15,969	46,928
2015	84,236	15,999	458	3,010	20,353	85,593
2016	115,888	10,762	138	3,785	16,564	152,516
2017	142,760	15,229	137	5,825	29,639	252,627
2018	108,031	19,978	927	9,436	52,221	314,453
5-year total	507,827	73,809	2,367	23,905	134,746	
Average	101,565	14,762	473	4,781	26,949	170,423

As can be gathered from Table 8, denials for DHS affirmative asylum filings are low, and approvals are also low, relatively speaking. Foremost, DHS administratively closes 4.7 percent of receipts.[93] More significantly, DHS refers a large share of cases to DOJ–EOIR. The average referral rate is 26.5 percent, which ranged from a low of 14.4 percent to a high of 49.2 over the period. Measured against receipts, the average approval and denial rates are 14.5 percent and .5 percent, respectively. However, if the basis is recalibrated to ''adjudicated cases''—the sum of approvals, denials, referrals (interviewed), and filing bar referrals—more salient approval and denial rates of 38.2 and 1.2 percent, respectively, are obtained. These rates are more tractable because they remove the impact of administrative closures, referrals that did not involve an USCIS interview, and most importantly, the effect embodied in the growth of the pending (hence not yet processed cases) pool. Against ''adjudicated cases,'' DHS referred more than three-fifths (60.6 percent) of asylum cases to DOJ–EOIR, and this share does not include non-interview referrals. As it relates to the total of all referrals, on average the share attributed to interview, filing bar, non-interview cases is 56, 29, and 14 percent, respectively.[94]

In Table 8, the average across the five-year period is provided. It is noted that the pending pool of applications has surged, as is evidenced by the fact that the 2017 and 2018 figures for end-of-year pending pool far exceeded the overall five-year average. For receipts, there has also been substantial growth, though filings declined markedly in 2018 from 2017.

Data pertaining to DOJ–EOIR defensively-filed asylum cases was obtained and relevant data are collated in Table 9.[95]

TABLE 9—DOJ–EOIR ASYLUM CASELOAD AND DECISIONS
[FY 2014—2018]

FY	USCIS referrals to DOJ–EOIR	Defense filed	Total filed	Cases granted	Cases denied	Other outcome	Admin. closed
2014	16,258	31,196	47,454	8,562	9,292	10,418	9,540
2015	17,289	46,203	63,492	8,113	8,847	11,018	15,420
2016	12,718	69,349	82,067	8,684	11,737	12,883	21,623
2017	22,143	121,418	143,561	10,539	17,632	14,745	10,889
2018	49,118	111,887	161,005	13,161	26,594	22,328	2,098
5-year total	117,526	380,053	497,579	49,059	74,102	71,392	117,526
Average	23,505	76,011	99,516	9,812	14,820	14,278	23,505

[93] USCIS administratively closes I–589s where no decision can be made on the application by USCIS for various reasons, including, but not limited to: (1) lack of jurisdiction over the I–589 where the applicant is already in removal proceedings before EOIR and not a UAC (in those cases, the case is administratively closed but no NTA is issued since the person is already in proceedings); (2) an application is abandoned, withdrawn, or the applicant fails to show up for the interview or biometric services appointment after rescheduling options are exhausted (in those cases, no decision is made on eligibility but an NTA would be issued if the person is out of status and is still in the U.S.); (3) the applicant has a final administrative removal or ICE has reinstated a prior removal order (in those cases, the I–589 would be administratively closed and the person would be referred for a reasonable fear screening).

[94] The adjudicated basis also excludes some other minor categories such as ''dismissals,'' which comprise a handful of cases each year. It is noted that the definitional basis for adjudicated cases is the same as (or similar to with minor adjustments) the basis that DHS uses in much of its public facing and official reporting on asylum. Relevant calculations: The FY 2014–2018 average of ''adjudicated'' cases, as defined in the text, is 193,301. Dividing the annual average approvals of 73,809 by 193,301 yields the approval rate of 38.2 percent. Dividing the annual average denials of 2,387 by 193,301 yields the denial rate of 1.2 percent. The non-interview referral rate is obtained by dividing the sum of annual average filing bar and interview referrals, of 117,125, by 193,301 yields 60.6 percent. The annual average of total referrals is 134,746. The sum of interview, filing bar, and non-interview cases, in order of, 74,763, 42,362, and 17,621, is 134,746. Diving each of the former by the latter yield 56, 29, and 14 percent, respectively.

[95] The DOJ–EOIR data is publicly available under the ''Statistics and Reports'' suite, ''Workload and Adjudication Statistics'' section at *https://www.justice.gov/eoir/workload-and-adjudication-statistics.* The data are found in the ''Asylum Decision Rates'' and ''Total Asylum Applications'' reports, at *https://www.justice.gov/eoir/page/file/1104861/download,* and *https://www.justice.gov/eoir/page/file/1106366/download,* in order. The data reflect the updated data as of January 30, 2019.

[96] DHS Asylum cases referred to DOJ–EOIR over the period (Table 888) on average are a higher by about 13 percent on average, than the DOJ–EOIR Affirmative asylum filings. The primary reason is UAC cases. DHS counts them as referrals, but, since they are already in EOIR's caseload as an NTA has been filed in these cases, USCIS does not enter them into CASE–ISS and transfer the application through the usual referral process. EOIR counts them as defensively-filed asylum cases as opposed to affirmative asylum cases that have been referred.

TABLE 9—DOJ–EOIR ASYLUM CASELOAD AND DECISIONS—Continued

[FY 2014—2018]

FY	USCIS referrals to DOJ–EOIR	Defense filed	Total filed	Cases granted	Cases denied	Other outcome	Admin. closed
Share of completions	....	....	....	15.7%	23.7%	22.9%	37.7%

The first data column in Table 9 captures DHS referrals to DOJ–EOIR, and generally corresponds with data in the fifth data column of Table 8.[96] As the data indicate, asylum filings at DOJ–EOIR have also increased sharply over the five-year period, noting that the increase in defensive filings over the last three years has been particularly strong. Defensive cases also comprise the bulk of filings, more than tripling affirmative filings on average. Over the entire five-year period there were 312,079 total completions, noting that this tally comprises grants, denials, cases that were administratively closured, and ''others.'' The latter comprises defensively-filed asylum applications that were abandoned, not adjudicated, or withdrawn.

Table 10 provides data on (c)(8) I–765 filings, and DHS notes that these apply to both DHS affirmative filings (including referrals to DOJ–EOIR) and those filings connected to defensively-filed asylum cases.

TABLE 10—DHS I–765(C)(8) FILING DATA FOR DHS AFFIRMATIVE FILINGS (INCLUDING REFERRALS TO DOJ–EOIR), AND DEFENSIVE CASES

[FY 2014—2018]

FY	Initials			Renewals		
	Receipts	Approve	Deny	Receipts	Approve	Deny
2014	62,169	48,596	10,547	45,103	42,940	2,517
2015	106,030	85,606	13,080	72,559	63,631	3,221
2016	169,970	152,283	14,330	128,610	115,555	4,156
2017	261,782	234,080	21,179	212,255	166,208	4,854
2018	262,991	246,725	29,091	62,289	91,010	4,685
5-year total	862,942	767,290	88,227	520,816	479,344	19,433
Average	172,588	153,458	17,645	104,163	95,869	3,887

As Table 10 indicates, the number of employment authorization applications filed under the (c)(8) eligibility category has increased steadily since 2014, although the trend appears to have levelled off in 2018 (it is too early to tell if this will continue) at a historically high level. Over the entire period, 89 percent of initial filings for work authorization were approved. There is also a relatively high rate of renewal filings, and 62.5 percent of initial approvals were followed by an approved renewal.[97]

DHS obtained and performed analysis on a data set capturing a portion of (c)(8) Form I–765 information that covers principal applicants and dependents who also filed an I–589 Form with DHS (*i.e.* DHS affirmative cases, including DOJ–EOIR referrals), from 2014 through 2018.[98] Details and caveats concerning this data set are dealt with in detail in ensuing discussion of the costs of the proposed 365 EAD filing time wait. Based on analysis of this data, several time-centered variables are developed that are relevant to the forthcoming analysis. These indicators are produced and displayed in Table 11.

[97] Relevant calculations: for approval rate, 153,458 average approvals/172,588 average receipts = .889, and for renewal rate, 95,869 average renewals/153,458 initial approvals = .6247. Both decimals are rounded and multiplied by 100.

[98] The (c)(8) I–765 data was provided by the USCIS Office of Performance and Quality (OPQ) from file tracking data (data accessed on Jan. 19, 2019).

TABLE 11—CALCULATED TIME INTERVALS FOR DHS AFFIRMATIVE FILINGS [INCLUDING DOJ–EOIR REFERRALS)
(Average calendar days, FY 2014—2018]

FY	I–589 affirmative filing to I–765(c)(8) filing interval	I–765(c)(8) process time for affirmative cases	I–589 process time for DHS affirmative cases (excl. DOJ–EOIR referral cases)	Time between I–589 filing with DHS and referral to DOJ–EOIR	I–589 affirmative filing to I–765(c)(8) approval interval
2014	223	83	820	590	307
2015	228	84	812	737	312
2016	231	68	537	476	298
2017	210	67	380	278	277
2018	181	43	190	84	223
5-Yr Average	215	69	* N/A	* N/A	283

* DHS does not show a 5-year average for these time intervals because they are directly affected by the change from FIFO to LIFO processing.

The data presented in Table 11 capture average calendar days.[99] The 'I–589 process time' reflects the filing time to decision for DHS affirmative cases only, as DHS does not have data on I–589 process time for cases referred to DOJ–EOIR. The following column captures the average time interval between when an I–589 was filed with DHS and when it was referred to DOJ–EOIR. The final column captures the average time interval between when an I–589 was filed with DHS and a (c)(8) I–765 was approved. As is readily seen, there have been substantial declines in all of the intervals.

Before developing the general and provision-specific populations that the rule could impact, a final data element is provided. In January 2018, USCIS reinstituted its LIFO scheduling priority for asylum applications. DHS partitioned out LIFO cases starting after January 2018 until the end of January 2019 to capture a full calendar year of time. The mean processing time was 166 days, which is even lower than the 190-day average for DHS adjudicated cases displayed in Table 11 for the fiscal year 2018.

3. Population

In this section, the baseline population estimates are conducted for the rule in general and each specific provision. The term ''baseline'' applies to the maximum population that the rule could involve. However, an important consideration in this regard is that there could be feedback from one provision that affects the baseline population. In the ensuing section on costs, the baseline figures will be tuned and modified to reflect the specific populations that could be impacted by the proposed provisions. These adjusted populations will be the ones incurring specified cost impacts.

The proposed rule would require aliens who file for an EAD under the (c)(8) asylum category to submit biometrics and pay the $85 biometric services fee. This biometrics requirement is the encompassing provision that captures the largest population under the rule. There will also be a small burden increase associated with the Form I–765. Asylum applicants filing for employment authorization under (c)(8) will be required to attend a biometric services appointment and will also need to answer new, additional questions on the form relating to new eligibility requirements, and read the associated instructions. USCIS estimates that the biometric services appointment will add an additional 1 hour and 10 minutes, while reading the instructions and answering the questions will add an estimated 15 minutes to the overall Form I–765 time burden for this category of filers. The encompassing population is the average of 172,588 initial filers would incur the small time burden and biometrics requirement (Table 10). In addition, current EAD holders who file for renewals would also submit biometrics and pay the $85 biometric services fee. Currently, initial (c)(8) I–765 filers do not pay the I–765 filing fee, but renewal filers do, and this proposed rule does not suggest a change to the protocol. The annual average renewal (c)(8) I–765 filing population is 104,163 (Table 10).

The proposed rule would require all asylum applicants to wait 365 calendar days before filing for an initial EAD. Currently, applicants have a 150-day waiting period before they can file for an initial (c)(8) EAD. However, applicants whose initial EAD applications are denied would not be affected, and renewal EADs would not be affected by the proposed 365-day waiting period. Hence, the baseline population for the 365-calendar-day waiting period provision is the average number of initial (c)(8) I–765 approvals from FY 2014–2018, which is 153,458 (Table 10).

DHS is proposing to eliminate the preferential category of recommended approvals for asylum, under which an asylum applicant can file an EAD request upon initial favorable review by an asylum officer, prior to completion of all background, security, and related checks. Currently, aliens who have received a notice of recommended approval are able to request employment authorization ahead of the waiting period for those with pending asylum applications. From FY 2014 to FY 2018, DHS issued 15,359 recommended approvals, or 3,072 on average annually. This population would be subject to the proposed rule.

The proposed rule would make any alien who entered or attempted to enter the United States illegally ineligible for a discretionary EAD, absent mitigating circumstances discussed in the preamble. DHS does not know how many persons would have been subject to this provision in the past, and cannot determine this population going forward. The proposed rule also would bar any alien who has been convicted of or charged with a serious crime from eligibility for a discretionary EAD, with some exceptions, as is discussed in

[99] The final data column captures the important ''wait'' time, between the filing date of the I–589 asylum petition and the approval of a (c)(8) I–765. This interval captures the amount of time an individual has between filing for asylum and being able to work and earn labor income. This metric is not exact though, as once a favorable decision is made concerning the EAD application, it takes some time to finalize and send the approval notice.

detail in the preamble. DHS does not know how many persons would have been subject to this provision in the past and cannot determine this sub-population going forward. While individual adjudicative and security-related records can capture evidence and factors related to criminal activity, such information is not available in a dataset that can be queried for the requisite type of analysis and estimation needed.

DHS proposes to terminate an alien's employment authorization connected to affirmative asylum applications on the date the asylum application is denied or dismissed by USCIS. Currently, such EADs terminate within 60 days after a USCIS asylum officer denies the application or on the date of the expiration of the EAD, whichever is longer. DHS analysis reveals that about 215 EADs were approved annually on average concomitant to denied DHS affirmative asylum claims; as of the present write-up, 360 such EADs are valid. The proposal to eliminate EADs linked to DHS affirmative asylum denials would end the validity of those EADs earlier than they otherwise end.

DHS is also proposing to revise its regulations prescribing when employment authorization terminates following the denial of an asylum application by an IJ or BIA. DHS cannot determine how many DOJ–EOIR cases (either via DHS referral or defensive) apply to either the annual or existing population because DHS does not have granular data on DOJ–EOIR cases that would facilitate analysis of EADs. This rule proposes that employment authorization would continue for 30 days following the date that an IJ denies an asylum application to allow for a possible appeal of the denial to the BIA. Currently, such EADs are allowed to naturally expire according to the terms of their EAD, unless the applicant seeks administrative or judicial review.

The rule is proposing that EAD applications under the (c)(8) asylum category that are pending adjudication when the rule takes effect would be subject to the criminal and one-year-bar provisions proposed in the rule. File tracking data reveals that as of April 1, 2019, 14,451 pending EAD applications would be impacted, as they would be subject to some of the criteria in the proposed rule.[100] Some of these pending cases that would be granted an EAD under the current process could be denied as a result of the rule, but DHS has no way of predicting how many would be affected as such. In order to implement the criminal ineligibility provision for the pending population, DHS would require applicants with a pending initial or renewal (c)(8) EAD on the effective date of this rule to appear at an ASC for biometrics collection, but would not collect the biometrics services fee from these aliens.

DHS proposes to bar from eligibility for employment authorization aliens who failed to file for asylum within one year of their last arrival in the United States, as required by law, if an asylum officer or IJ determines that an exception to the one-year filing bar does not apply. This bar would not apply to unaccompanied alien children. From FY 2014 to FY 2018, DHS referred 42,362 cases to DOJ–EOIR based on the one-year filing bar, for an annual average of 8,472.

The proposed rule seeks to clarify that aliens who are paroled from custody after receiving a positive credible fear or reasonable fear determination are not eligible to seek immediate work authorization under 8 CFR 274a.12(c)(11), although, historically, USCIS has granted many of these requests. Aliens could still file under the (c)(8) category, if eligible. However, they would be subject to the proposed 365-day wait period. From FY 2014 to FY 2018, an average of 13,000 applications sought employment authorization through the (c)(11) category.

Table 12 presents a summary of the populations that could be affected by the proposed rule.

TABLE 12—SUMMARY OF ASYLUM EAD POPULATIONS UNDER THE PROPOSED RULE

[Annual]

Abbreviated provision (description)	Population estimate
A. I–765(c)(8) initial filers—biometrics	172,588.
B. I–765(c)(8) renewal filers—biometrics	104,163.
C. Enact 365-day EAD filing wait period	153,458.
D. Eliminate recommended approvals	3,072.
E. Bar criminals from obtaining EADs	Unknown.
F. End EADs for denied/dismissed asylum claims	• DHS affirmative = 215 annually and 360 currently valid. • Affirmative referrals to DOJ–EOIR = Unknown. • DOJ–EOIR defensive = Unknown.
G. Bar for illegal entry into the U.S.	Unknown.
H. One-year asylum filing bar	8,472.
I. Pending (c)(8) I–765 under proposed conditions	14,451.
J. Clarify(c)(11) I–765 eligibility	13,000.
Total Proposed Rule Population	304,562.

In order to derive the total population potentially impacted by the rule, we add the annual flow volumes of the encompassing current biometrics (and time burden) population of 172,588 and the renewal filing volume of 104,163, which total to 276,751. To this sub-total, adding the potential 13,000 (c)(11) filers yields 289,751, which is the encompassing biometrics population. Since the other sub-populations collated in Table 12 are, by definition, (c)(8) I–765 filers, we do not add them to the flow volume, to safeguard against double-counting. But for the first year, the expected annual population of 289,751 is annotated to include two pools that would be impacted by the proposed rule; (i) the population of pending (c)(8) I–765 applications (14,451); and, (ii) the 360 existing EADs

[100] This population estimate is based on current volumes and may vary depending on when this rule becomes final.

that are connected to denied affirmative asylum claims that could be ended early. These two pools total to 14,811 which, when added to the expected annual flow volume, yields a maximum population of 304,562, which could be expected in the first year the rule takes effect. Starting in year two, the population would expectedly revert to the annualized flow volume of 289,751, because the two added pools would not be a factor after the first year.

Having estimated the general population subject to the rule and the sub-populations germane to the specific provisions, DHS next conducts the economic impact assessment, noting, as was done in the introduction to this section, that the populations reported above are adjusted for technical considerations regarding the effects.[101]

4. Transfers, Costs and Benefits of This Proposed Rule

a. Costs

This section will be parsed into three modules. In Module 1, some key assumptions that will apply to multiple provisions are established. Module 2 develops quantitative costs and transfers for relevant provisions, while Module 3 covers costs and transfers that are not amenable to quantification.

Module 1. Data and Assumptions

As was mentioned in the ''Population'' section above, DHS obtained a data set capturing (c)(8) I–765 filing data for initial applicants. This data include a large number of variables. DHS also obtained information on affirmatively-filed asylum applications, and integrated elements of the two data sets to capture information on affirmative asylum applicants who also filed for an EAD. Our analysis is based on this large scale data set that captured numerous variables important to the analysis. Several key assumptions and foundations apply across multiple provisions, which, in favor of brevity and readability, are introduced up front and only discussed hereafter where necessary.

For the proposed provisions that would delay or prohibit an asylum applicant from earning work authorization, the impacts of this rule would include both distributional effects (which are transfers) and costs. These distributional impacts would fall to the EAD holders in the form of lost or delayed compensation (wages and benefits). A portion of this lost compensation would be transferred from these aliens to others that are currently in the U.S. labor force, possibly in the form of additional work hours or overtime pay. A portion of the impacts of this rule would also be costs borne by companies that would have hired the asylum applicants had they been in the labor market earlier, but were unable to find available replacement workers. Companies may also incur opportunity costs by having to choose the next best alternative to immediately filling the job the asylum applicant would have filled. As a result, DHS does not know the portion of overall impacts of this rule that are transfers or costs. If companies can find replacement labor for the position the asylum applicant would have filled, this rule would have primarily distributional effects in the form of transfers from asylum applicants to others already in the labor market (or workers induced to return to the labor market). If companies cannot find reasonable substitutes for the labor the asylum applicants would have provided, this rule would primarily be a cost to these companies through lost productivity and profits. USCIS uses the lost compensation to asylum applicants as a measure of the overall impact of the provisions that would delay or prohibit an asylum applicant from obtaining work authorization—either as distributional impacts (transfers) or as a proxy for businesses' cost for lost productivity.

Furthermore, in instances where a company cannot hire replacement labor for the position the asylum applicant would have filled, such delays may result in tax transfer considerations to the government. It is difficult to quantify income tax transfers because individual tax situations vary widely, but DHS estimates the potential reduction in transfer payments to employment tax programs, namely Medicare and Social Security, which have a combined tax rate of 7.65 percent (6.2 percent and 1.45 percent, respectively).[102] With both the employee and employer not paying their respective portion of Medicare and Social Security taxes, the total estimated reduction in tax transfer payments from employees and employers to Medicare and Social Security is 15.3 percent.[103] We will rely on this total tax rate where applicable.

The assessments of possible distributional impacts rely on the implicit assumption that everyone who received an approved (c)(8) EAD entered the labor force and found work, and thus earned wages of labor. We believe this assumption is justifiable because applicants would generally not have expended the direct and opportunity costs of applying for an EAD if they did not expect to recoup an economic benefit. Furthermore, the unemployment rate is currently, and has been recently, low by historical standards, currently sitting at 3.6 percent, making it likely that such labor force entrants have found work.[104]

Because the (c)(8) EAD does not include or require, at the initial or renewal stage, any data on employment, and, since it does not involve an associated labor condition application (LCA), DHS has no information on wages, occupations, industries, or businesses that may employ such workers. In some DHS rulemakings, the estimates of distributional impacts and time-related opportunity costs were linked to the Federal minimum wage for new entrants to the labor force. The Federal minimum wage is $7.25, which, when adjusted for benefits by a multiple of 1.46, is $10.59 per hour, with an annual salary of $15,080.[105] This reliance is grounded in the notion that most of the relevant EAD holders would not have been in the labor force long, and would thus not be expected to earn relatively high wages. In this proposed rulemaking, we rely on a slightly more robust ''prevailing'' minimum wage of $8.25. As is reported by the Economic Policy Institute (EPI, 2016), many states have their own minimum wage, and,

[101] Preliminary data revisions indicate that the (c)(8) I–765 filings and approvals in 2018 and 2017 could be higher than reported herein (Table 10). Finalized adjustments to the populations based on revised and validated data will be made at the appropriate stage of final rule development.

[102] The various employment taxes are discussed in more detail at *https://www.irs.gov/businesses/small-businesses-self-employed/understanding-employment-taxes. See* IRS Publication 15, Circular E, Employer's Tax Guide for specific information on employment tax rates. *https://www.irs.gov/pub/irs-pdf/p15_18.pdf. See* More Than 44 Percent of Americans Pay No Federal Income Tax (September 16, 2018), available at: *https://www.marketwatch.com/story/81-million-americans-wont-pay-any-federal-income-taxes-this-year-heres-why-2018-04-16.*

[103] Calculation: (6.2 percent Social Security + 1.45 percent Medicare) x 2 employee and employer losses = 15.3 percent total estimated tax loss to government.

[104] This unemployment rate reflects the Bureau of Labor Statistics (BLS) most recent data, for April 2019. It can be found in the ''Employment Situation Summary'' of the Economic News Release section: *https://www.bls.gov/news.release/empsit.toc.htm.*

[105] The benefits-to-wage multiplier is calculated by the BLS as (Total Employee Compensation per hour)/(Wages and Salaries per hour) = $36.32/$24.91 = 1.458 (1.46 rounded). *See* Economic News Release, Employer Cost for Employee Compensation (March 2019), U.S. Dept. of Labor, BLS, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group (March 19, 2019), available at *https://www.bls.gov/news.release/archives/ecec_03192019.pdf.* Calculation for annual Federal minimum salary: Hourly wage of $10.59 × 2,080 annual work hours = $15,080.

even within states, there are multiple tiers.[106] Although the minimum wage could be considered a lower-end bound on true earnings, the prevailing minimum wage is fully loaded, at $12.05, which is 13.8 percent higher than the Federal minimum wage.[107] While DHS does not rule out the possibility that some portion of the population might earn wages at the average level for all occupations, without solid a priori or empirical information we believe that providing a range with the lower bound relying on the prevailing minimum wage is justifiable. Therefore, for the purpose of this analysis, USCIS uses both the prevailing minimum hourly wage rate of $8.25 to estimate a lower bound and a national average wage rate of $24.98 to take into consideration the variance in average wages across states as an upper bound. The fully-loaded average hourly wage is $36.47. All of the quantified estimates of costs and transfer payments in this analysis incorporate lower and upper bounds based on these wages.[108]

Most of the cost impacts will result from delayed or forgone earnings to asylum applicants. Since the data analysis centers on calendar days, and costs are specifically linked to hours, we apply a scalar developed as follows. Calendar days are transformed into work days to account for the actuality that typically, 5 out of 7, or 71.4 percent, of the calendar week is allotted to work-time, and that a workday is typically 8 hours. Based on the prevailing minimum wage of $12.05, the combined scalar is $68.83, and, based on the average wage it is $208.32.[109] In summary, based on the prevailing minimum wage relied upon, each calendar day generates $68.83 dollars in relevant delayed or forgone earnings. It follows that for the upper wage bound that each calendar day generates $208.32 dollars in relevant delayed or forgone earnings/delayed earnings.

Module 2. Quantified Cost Impacts and Transfers

As was mentioned above, DHS proposes to require all asylum applicants to wait 365 calendar days before filing for an initial EAD. Currently, applicants have a 150-day waiting period before they can file for an initial (c)(8) EAD. The baseline population specific to the 365-day wait period is the average annual flow of initial (c)(8) EAD approvals (153,458, Table 10), as there would not be a cost for denied applicants. However, the DHS data set alluded to above captures about 39,000 annual affirmatively filed cases, including cases later referred to DOJ–EOIR, for which DHS could conduct analysis on, which represents about a quarter of the approval population. Of the 153,458 average annual EAD approvals, DHS is able to conduct a quantified analysis of the impacts of the proposed 365-day wait on only these 39,000 affirmative asylum applicants it has in this dataset, below. The analysis of the 365-day proposed EAD filing wait involves the interaction between data germane to the asylum cases and the EAD simultaneously. In this context, we discuss several reasons why the analyzable set share is relatively low. Foremost, it captures no defensively-filed asylum cases. Second, it does not capture cases germane to pending asylum cases—it captures cases in which a DHS decision or referral to DOJ–EOIR was made. Third, the data had to be obtained by developing a program to query several disparate data sets at once and match data between them in a structured format, with dozens of data points and indicators for each case. For cases in which one or more of the key data points was missing or not viable, the analysis as required was not possible. DHS parsed and filtered the data to exclude extreme outliers and erroneous data to obtain the most viable and tractable data amenable for the analysis. For the EADs associated with affirmative asylum filings adjudicated by DHS for which data are available, a reasonably detailed estimation of the impacts from changing the wait period to file for employment authorization from the 150-day EAD clock to 365 days can be conducted. For affirmative cases referred to DOJ–EOIR by DHS for which data are available some estimation can be performed, but not with the same extent of precision and completeness, due to data constraints. This part of the analysis focuses on the DHS affirmative asylum cases for which complete data is available, and for DHS affirmative cases referred to DOJ–EOIR, for which some data is available. DHS does not have complete data for the ''residual'' population, and estimates a maximum potential impact for this population separately.

The analysis of the 365-day wait begins with consideration that some aliens, for whatever reason, did not file for an EAD until after 365 days. Our analysis of the approximately 39,000 I–765 (c)(8) initial EAD approvals for affirmative asylum indicate that this group comprises 10.2 percent of the 39,000 approved EADs with available data. Technically, this group, comprising 3,978 EADs, would not be impacted by the proposed 365-day wait, and, adjusting for them yields a ''narrowed'' baseline of 35,022. While the percentage filing for an EAD after 365 days could vary in the future, it is integrated herein for the cost estimates.

As noted above, the impact of the proposed provision depends on the interaction between the asylum decision and the EAD approval, since a granted asylum application provides de facto work authorization. Therefore, the narrowed baseline can be decomposed into specific cost-segments to more appropriately hone the potential impacts. There has been a substantial reduction in DHS affirmative asylum processing time over the five-year span 2014–2018, and the adoption of LIFO processing has further contributed to the reduction. As noted above, in January 2018, USCIS reinstituted LIFO processing. Although DHS typically relies on 3- or 5-year averages in most cost benchmarks, in this specific case, since LIFO is more likely to be representative of the future than an average of four years of FIFO and one year of LIFO, and, since it appears to have had a significant impact on asylum processing times, the costs are benchmarked to the calendar year of time covering the end of January 2018 to the end of January 2019 for DHS affirmative asylum decisions.

Of the narrowed baseline, DHS referrals to DOJ–EOIR comprise 74.4 percent (26,056 cases) and DHS affirmative adjudication comprises 25.6 percent (8,966 cases) annually. The narrowed baseline for DHS affirmative asylum is parsed into four groups, A–D, that capture different cost segments germane to the potential interaction between approved asylum and the EAD and expected future conditions. Group A comprises DHS affirmative asylum adjudicated prior to 365 days, in which the EAD was ''binding''. The latter

[106] The EPI report is available at: *https://www.epi.org/publication/when-it-comes-to-the-minimum-wage-we-cannot-just-leave-it-to-the-states-effective-state-minimum-wages-today-and-projected-for-2020//.* There are multiple tiers of minimum wages across many states that apply to size of business (revenue and employment), occupations, working hours, and other criteria. Some of these variations per state are described at: *https://www.minimum-wage.org.*

[107] Calculations (1) for prevailing minimum wage: $8.25 hourly wage × benefits burden of 1.46 = $12.05; (2) (($12.05 wage-$10.59 wage)/$10.59)) wage = .1378, which rounded and multiplied by 100 = 13.8 percent.

[108] The average wage for all occupations is found BLS Occupational Employment Statistics, May 2018 National Occupational Employment and Wage Estimates, and reflects the 2017 average for all occupations nationally. The data is found at: *https://www.bls.gov/oes/2018/may/oes_nat.htm#00-0000.* Calculation: hourly wage of $24.98 × benefits burden (1.46) = $36.47.

[109] Calculations: .714 × 8 hours per day × $12.05 wage = $68.83, and .714 × 8 hours per day × $36.47 wage = $208.32 (rounded).

impart that the EAD was approved prior to the asylum decision. For Group A, because the asylum application for these applicants would be adjudicated prior to the proposed 365-day wait period, the cost in terms of the proposed rule is the time interval between the current wait time and asylum approval. To explain this via an example, consider an individual that currently files for an EAD at the 150-day mark and has it approved 40 days later, at 190 days. If the concomitant asylum adjudication is at the 200-day mark, the true benefit the EAD could provide is 10 days (assuming the asylum claim is approved). Table 13 is introduced, which shows that Group A represented 11 percent of the narrowed baseline, or 3,852 aliens annually, and the average impact in terms of the EAD benefit is 53 days (in Table 13 all the shares are provided on the basis of the narrow baseline).

Group B similarly consists of DHS affirmative asylum adjudicated prior to 365 days, but in contradistinction to Group A, under Group B the EAD was ''non-binding''—which means the grant of asylum could provide de facto work authorization, as it was adjudicated before the EAD. Because of this, Group B would not incur a cost impact in terms of delayed earnings from the proposed provision. For this 9.5 percent of the narrowed baseline, or 3,327 aliens, the EAD benefit was zero (as it was non-binding). Essentially, the EAD approval was inconsequential, and invoked a net cost because the filing costs were sunk. Hence, the cost in terms of the proposed rule is nil, but the forgone filing (sunk) costs can appropriately be credited as cost-savings.

A key takeaway is that Groups A and B would potentially not file for an EAD in the future, since the asylum application was adjudicated in less than the proposed 365-day wait period to apply for employment authorization. Moreover, a key inference is that under LIFO, the majority of DHS affirmative asylum cases were adjudicated in less than one year. Accordingly, forgone filing costs for the 7,180 aliens are accredited a cost-savings. There is no filing fee for the initial (c)(8) EAD, and the time burden is currently 4.5 hours, which includes the time associated with submitting two passport-style photos along with the application. The Department of State (DOS) estimates that passport photos cost about $20 per application.[110] At the lower wage bound of $12.05, the time related cost is $54.23, which, when added to the photo cost of $20, yields a per person cost of $74.25 (rounded to $74.3). The cost savings accruing to this group (A and B) would be $533,438 annually. At the high wage bound, cost-savings per person would be $184.10 and cost-savings to the group would be $1,321,748 annually. DHS notes that this cost-savings estimate assumes the full sub-population would not file under the circumstances. However, as was mentioned in the preamble, some aliens might file for an EAD after being granted asylum if they want to have documentation that reflects that they are employment authorized.

Group C involves DHS affirmative asylum adjudicated after 365 days. It is within this context that some assumptions need to be established. We assume that in the future, all EAD filers would file at exactly 365 days and the processing time would be the global average of 69 days (Table 11), noting that the processing time relies on the five-year average as it is not directly impacted by the change to LIFO asylum processing). These assumptions make the analysis tractable and do not impose a loss of generality. For Group C, the asylum claim is decided after 434 days, which is the sum of the proposed 365 day wait and the average 69 EAD processing days. This group of 981 cases comprises 2.8 percent of the narrowed baseline. For this group, the EAD is binding (universally) and the impact accrues to the difference between the global average current EAD-wait time of 283 days (Table 11) and 434 days, which is 151 days.

For Group D, affirmative asylum is currently adjudicated between 365 and 434 days. For Group D, the EAD was approved before the asylum decision, and was therefore binding. But under the proposed rule, retaining the assumptions from above concerning average EAD processing time of 69 days, the EAD would ''switch'' to a non-binding state because it would be granted after the asylum application was adjudicated. As a result, there would be two impacts. The distributional effect to Group D is equal to the current EAD benefit (the current EAD benefit would, by definition, be strictly greater than zero). The average calendar-day impact to this 2.3 percent of the narrowed baseline, or 806 aliens, is calculated to be 130 days. Secondly, because under the proposed rule the asylum application would be adjudicated after 365 days but before the EAD approval, the EAD filing costs would become sunk (*i.e.* while the applicant would apply for an EAD, it would not result in any benefit). Based on the population of 806 and the per-person filing cost of $74.30 and $184.10, reflecting the wage bounds, sunk filing costs would be $59,849 and $148,294, respectively. Subtracting this amount from the filing cost savings (Groups A and B) generates ''net cost-savings'' that would range from $473,588 to $1,321,748.[111]

The remainder of the narrowed EAD approval baseline applies to DHS referrals to DOJ–EOIR, which comprise 26,056 cases (Group E). DHS cannot partition these cases into cost segments akin to Groups A–D for DHS referrals to DOJ–EOIR. While the data does allow DHS to calculate the average wait time in terms of when asylum was filed and when the EAD was approved, because we do not have data concerning the decision on the asylum application, the interaction between the EAD and Asylum decision cannot be calculated. DHS analysis indicates that the impact is 133 days, and it is requisite to justify why this figure is reported as opposed to the 151-day impact for Group C. In practice, the average wait time and EAD processing times for Group C differ very slightly from the global averages reported in Table 11, but the difference is not statistically significant. However, the current wait for DHS referrals—measured strictly as the time interval between the filing for affirmative asylum and the EAD approval—is larger, at 301 days, and the difference is statistically significant.[112] As a result the difference in day-impact between Group C (151 days) and Group E (133 days) is 18 days, which is exactly the difference in current wait times between the two, at 283 and 301, in order.

[110] DOS estimates an average cost of $10 per passport photo in the Paperwork Reduction Act (PRA). Supporting Statement found under OMB control number 1450–0004. A copy of the Supporting Statement is found on *Reginfo.gov* at: *http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201102-1405-001* (see question #13 of the Supporting Statement).

[111] Conceptually, a fifth group, could be added, under for which asylum was adjudicated after 365 days but before the EAD approval. There would be no earnings impact as a result of this provision, but analysis reveals that no cases would fit this conceptual category.

[112] The tests of significance for differences in the means for the global population and Group C population report exact probability values (p-values) of .124 and .179, allowing determination that the minute differences are not significant at the 95 percent level of confidence. The p-value for the difference in the mean of 301 for DHS referrals is .042, allowing determination that it is significantly different than the global of 283.

TABLE 13—NARROWED BASELINE OF EAD APPROVALS THAT COULD BE ANALYZED

Group	Population	Share (%)	Group description	Average days
Group A	3,852	11.0	DHS asylum adjudicated <365 days; EAD binding.	53
Group B	3,327	9.5	DHS asylum adjudicated <365 days; EAD non-binding.	0
Group C	981	2.8	DHS asylum adjudicated >434 days; EAD binding by definition.	151
Group D	806	2.3	DHS asylum adjudicated between 365–434 days; EAD currently binding.	130
Group E	26,056	74.4	DHS referrals to DOJ–EOIR	133

DHS notes that while working with averages makes the analysis tractable and clearer, a caveat is that we rely on the assumption that the (c)(8) I–765 processing time is the same before and after the rule.[113] In a sense too, we assume that the I–589 processing times, when we benchmark to the LIFO protocol, will be the same as well. If either change, the costs developed in Table 14 could vary. There could be two sources of such variation in the monetized costs. First, the populations of the subgroups would change, and, second, the day impacts could also change.

Table 14 (A and B) breaks out the cost for each group presented in Table 13. The population germane to each group is repeated, as is the day impact. The following three columns translate the information into quantified costs. The data presented are undiscounted, with the low wage estimates provided in Table 14(A) and the upper bound wage estimates provided in Table 14(B).

TABLE 14(A)—PROPOSED 365-DAY EAD FILING WAIT COST PROJECTIONS BASED ON THE LOWER WAGE BOUND

[Undiscounted, annual]

Group	Population	Day impact	Costs per person (day impact × $68.83)	Costs (population × costs per person)	Tax impacts (costs × 15.3%)
A	3,852	53	$3,648	$14,053,590	$2,150,199
B	3,327	0	0	0	0
C	981	151	10,393	10,191,866	1,559,355
D	806	130	8,948	7,207,587	1,102,761
E	26,056	133	9,154	238,530,155	36,495,114
Subtotals				269,983,197	41,307,429
Minus: net costs-savings =				473,588	
Equals: grand total =				269,509,609	41,307,429

TABLE 14(B)—PROPOSED 365-DAY EAD FILING WAIT COST PROJECTIONS BASED ON THE UPPER BOUND WAGE BOUND (UNDISCOUNTED, ANNUAL)

[Undiscounted, annual]

Group	Population	Day impact	Costs per person (day impact × $208.32)	Costs (population × costs per person)	Tax impacts (costs × 15.3%)
A	3,852	53	$11,041	$42,534,415	$6,507,766
B	3,327	0	0	0	0
C	981	151	31,456	30,846,571	4,719,525
D	806	130	27,082	21,814,391	3,337,602
E	26,056	133	27,707	721,932,323	110,455,645
Subtotals				817,127,700	125,020,538
Minus: net costs-savings =				1,173,454	
Equals: grand total =				815,954,246	125,020,538

Subtracting the net cost-savings from the subtotals yields the total costs of the rule in terms of lost or delayed earnings from the proposed 365-day wait for 39,000 of the 153,458 EADs affected annually, which could range from

[113] DHS is also separately publishing an NPRM entitled ''Removal of 30-Day Processing Provision for Asylum Applicant-Related Form I–765 Employment Authorization Applications,'' DHS Docket No. USCIS–2018–0001, separate from this NPRM. If adopted as a Final Rule, that NPRM would affect current EAD processing times.

$269.5 million to $815.9 million annually, depending on the wage of the asylum worker. Similarly, the reduction in tax transfer payments from employers and employees could range from $41.3 million to $125 million annually, depending on the wage and if companies cannot find reasonable substitutes for the labor the asylum applicant would have provided. The annual midrange for costs and taxes are $542.7 million and $83.2 million annually, in order. However, DHS notes that the lack of data about DHS referrals precluded our ability to parse out potentially lower cost segments of the 26,056 annual affirmative cases referred to DOJ–EOIR, as we were able to do with DHS-adjudicated asylum applications. This inability likely results in a dual effect. First, for some segments, the day gap would be lower than the average 133 days, thus reducing deferred or lost wages and tax transfers. In addition, there would be cost savings that would accrue to forgone filings as some might not need to file a (c)(8) I–765. As it relates to defensively-filed asylum cases, as was seen in groups A–D of affirmative cases, there could be cost-savings from no longer filing an I–765, and for cases in which the EAD was filed after 365 days, the proposed rule would not have an impact.

In the above section, DHS analyzes 39,000 of the 153,458 affected EAD approvals for which DHS could obtain specific data to assess the impacts of the proposed 365-day EAD filing wait time. In this section, DHS analyzes the remaining 114,458, the ''residual'' population, which contains three groups of EAD cases linked to asylum: (i) What is likely a small number of DHS affirmative cases for which viable data could not be ascertained; (ii) DHS affirmative asylum cases in which the asylum claim was pending; and (iii) defensive cases. Since we have incomplete data on this population, USCIS estimates the day-impact as the difference between the future projected 434 days and the global current average of 283 days (EAD wait time), or 151 days.

For the residual population, the cost impact at the low wage bound is $10,393 each (151 days multiplied by $68.83), which, at a population of 114,458, generates $1,189.6 million in lost earnings and generates $182.0 million in tax transfers annually. The cost impact at the upper wage bound is $31,456 each (151 days multiplied by $208.32), which, at a population of 114,458, generates $3,600.4 million in lost earnings and generates $550.9 million in tax transfers annually.

The costs reported above represent a maximum estimate of the potential impact for this residual population. This is because DHS lacks data on the how many days after filing for asylum these applicants apply for an EAD and how many days after filing for an EAD these applicants receive an asylum decision, which would allow DHS to parse the lower cost segments. Specifically, there may be a portion of the residual population that currently waits more than 365-days to apply for an EAD. The estimated 151-day delay would be overstated for this group and would decrease the above estimated impact. Additionally, there may be a portion of the residual population that would receive an asylum decision in less than 434 days. The estimated 151-day impact would also be overstated for this group. Furthermore, aliens who receive an asylum decision in less than 434 days would not have to file for an EAD under the proposed rule, resulting in cost savings for forgone future filings. However, DHS notes that a large number of defensive cases are unlikely to be adjudicated before 434 days. Although DHS does not have the information to map defensive asylum cases to the associated EADs, DHS was able to obtain data on defensive asylum claims that captured the date the asylum case was received, and the completion date. Our analysis reveals that for FY 2014–2018 the average time interval between the two days was 624 days. Since defensive asylum processing times have been on average (over the studied period) greater than 434 days, relying on the 151-day impact period is a reasonable estimate. Nevertheless, because 151 days is by definition the maximum impact allowable in our impact setup, the estimates are still overstated because at least some of the defensive cases (and the DHS affirmative cases not included in the 39,000 batch with analyzable information) would invoke asylum decisions less than 434 days. As a result, the true day-impact for some of the residual population would be strictly less than 151 days.

This rule also proposes to incorporate a biometrics requirement into the employment authorization process for asylum seekers. Specifically, aliens will be required to appear at an ASC for biometrics collection and pay a biometrics services fee. The proposed biometrics requirement would apply to (c)(8) I–765 filers, for both initial and renewal EAD applications. Biometrics are currently collected for all (both affirmative and defensive) Form I–589 applicants, and they are exempt from paying the $85 biometric services fee. However, biometrics are not currently collected when asylum applicants apply for employment authorization. The proposed rule would not impact the asylum filing biometrics protocol, but would require biometrics collection at the EAD filing stage for (c)(8) I–765 applicants, as well as payment of the $85 biometric services fee.

To estimate the cost of this biometrics requirement, we begin with the population of 289,751, which, tallied earlier, comprises the initial, renewal, and potential (c)(11) transfer populations. Biometrics are also not currently collected for (c)(11) I–765 filers and thus would also be a new requirements for these 13,000 annual filers. First, as the analysis for the 365-day filing wait period demonstrated, a portion of filers, Groups A and B from above (20.5 percent), would potentially not file under the rule because the asylum decision would precede the EAD approval under the proposed rule (under the LIFO protocol). We scale the population by this percentage to yield an adjusted population of 230,352 (289,751 multiplied by (1 minus .205). Under the proposed collection requirement there will be exemptions and waivers that apply to both biometrics submission and the concomitant $85 biometric services fee (that are outside the purview of the rule). DHS cannot predict exactly how these waivers and exemptions will apply, but develops proxy metrics to allow for equitable estimations to populations not yet existent, in context. Therefore, the second stages of the population adjustment require a more detailed, technical approach. This approach is developed next.

When an individual appears at a DHS–USCIS ASC for a biometric collection appointment, their biometrics are digitally collected and stored in the Customer Profile Management System (CPMS) database, which is the USCIS data repository for biometrics submissions. DHS obtained biometric submission data from CPMS for the five-year period 2013–2017. The five-year average across all USCIS immigration forms was 3,619,794. Detailed analysis of the biometrics submissions data reveals that a small group of nine forms accounted for the vast majority, 90.5 percent, of the average biometrics submissions. These forms are: (1) Form N–400, Application for Naturalization; (2) Form I–90, Application to Replace Permanent Resident Card; (3) Form I–765, Application for Employment Authorization; (4) Form I–485, Application to Register Permanent Residence or Adjust Status; (5) Form I–

589, Application for Asylum and Withholding of Removal; (6) Form I–821D, Consideration of Deferred Action for Childhood Arrivals; (7) Form I–131, Application for Travel Document; (8) Form I–751, Petition to Remove the Conditions on Residence; and (9) Form I–601A, Application for Provisional Unlawful Presence Waiver (noted here are that two of the forms, I–765 and I–589 are involved in the presently proposed rule). The remainder majority of forms are characterized by very small populations, very few biometrics submissions (for which many accounted for zero submissions in terms of percentage and number), and unspecified form types. The biometrics volumes for the prevalent group of nine forms (''PREV–9'') are presented in Table 15.

TABLE 15—BIOMETRIC SUBMISSIONS BY FORM GROUPING

[FY 2013–FY 2017]

Form	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	5-Year avg.	Share
PREV–9:							
N–400	778,172	779,221	772,648	961,092	1,013,252	860,877	23.78
I–90	554,918	790,069	780,050	743,589	770,552	727,836	20.11
I–765	421,011	391,650	800,711	489,553	588,008	538,187	14.87
I–485	459,298	506,991	494,664	500,369	547,755	501,815	13.86
I–589	95,938	116,668	173,248	230,900	304,308	184,212	5.09
I–821D	350,339	102,192	242,101	125,489	224,899	209,004	5.77
I–131	89,146	87,012	87,755	88,977	86,299	87,838	2.43
I–751	185,587	172,478	93,359	71,823	83,417	121,333	3.35
I–601A	16,381	37,293	48,978	52,654	67,494	44,560	1.23
PREV–9 (all)	2,950,790	2,983,574	3,493,514	3,264,446	3,685,984	3,275,662	90.5%
Other Forms	241,605	198,537	709,577	328,339	242,604	344,132	9.5%
Total	3,192,395	3,182,111	4,203,091	3,592,785	3,928,588	3,619,794	100%

The remaining 88 percent of forms comprise less than 10 percent of average biometrics submissions. The future population for biometrics submission under the proposed rule does not yet exist, in context. To estimate the future population, a method needs to be developed to extrapolate functional conditions from the existing state of affairs. To accomplish this, a biometrics collection rate (BCR), a formula estimating the proportion of biometric submissions out of the total age-eligible population within a form type, is developed. The BCR formula is motivated below (Formula 1):

Formula 1: Biometrics Collection Rate (BCR)

$$BCR = \frac{BI}{P}$$

Where BCR represents the Biometrics Collection Rate for a specific form type, BI represents ''intensity,'' the average number of aliens who currently submit biometrics by that form type in a fiscal year, and P represents the volume of age-eligible benefit requests associated with a form type by fiscal year. The calculations for the BCR for PREV–9 are shown in Table 16. The average biometrics submissions are repeated from Table 15 as the five-year average, and the average age eligible population is also the five-year average. The results in Table 16 call for explanation.

TABLE 16—BIOMETRICS COLLECTION RATE BY FORM GROUPING

[FY 2013–FY 2017]

	Average biometrics submissions	Average age eligible filing population	BCR
PREV–9 set:			
I–765	538,187	1,892,366	0.284
I–131	87,838	409,699	0.214
N–400	860,877	839,601	1.025
I–90	727,836	703,707	0.985
I–485	501,815	612,148	0.820
I–821D	209,004	370,838	0.564
I–589	184,212	127,499	1.445
I–751	121,333	164,441	0.738
I–601A	44,560	45,633	0.976
Two added forms:			
I–918	43,235	52,805	.819
I–914	1,907	2004	.952
Raw BCR for regrouped set	....	....	.8363

The BCR for different form types varies due to the eligibility categories and age characteristics of the filers and dependents. For the Forms N–400 and I–589, the BCR is higher than unity. The reason is that biometrics are currently routinely collected on all principal applicants for these forms as well as derivative family members who generally submit biometrics alongside the principal applicant. Two forms, the I–131 and I–765, have low BCRs, even though biometrics are routinely collected for these forms. But these BCRs are ''artificially'' low because of concurrent filings; in many cases biometrics are submitted via a concurrent form. As has been stated earlier, the goal is to broadly collect biometrics from (c)(8) I–765 filers, but there will be exemptions and waivers (that have nothing to do with the proposed rule).[114] Hence, a proxy for BCR estimation should be less than unity, but be positive and relatively high, and while some analyst subjectivity is involved in our methodology, given the unknowns, it is a rational approach. The BCRs for the four forms in PREV–9 not discounted immediately above due to ''artificially'' high/low BCRs are assessed to be reasonable and have a good deal of range, from .564 to .985. Since it is desirable to have as many relevant forms as possible in the proxy collection, we examined the BCRs for the remaining [specific] forms and proceeded to add two, which are the only forms external to PREV–9 that have high BCRs: Form I–914, Application for T Nonimmigrant Status, and Form I–918, Petition for U Nonimmigrant Status. The respective BCRs for these two additional forms, in order, are .952 and .819, as is shown in Table 15. Recalibrating, this rebranded group of 7 forms represent just 9 percent of the form captures under CPMS (including the non-specific types) but nearly half (46 percent) of average biometrics submissions.

For the seven proper forms, we obtain the unweighted average BCR of 83.63 percent. We do not have *a priori* information on which specific forms (or a subgroup of them) would have a BCR closest to the not yet existing, in context, rule population. Similarly, there is no ''target'' or desired BCR that we seek to impugn to this population under the proposed rule. Hence, we use the raw average as opposed to a weighted one, because the former weights each BCR in the group equally. Scaling the adjusted population of 230,352 baseline biometrics by .8363 yields a projected biometrics submitting population (BSP) of 192,643.

Before estimating the costs of the biometrics requirement, another proxy metric is needed, and hence another formula is required. Not all of the biometrics submissions will involve the $85 biometric services fee, as there will be applicable exemptions and waivers (that have nothing to do with the proposed rule). To estimate the fee paying population, DHS uses the total volume of biometric services fee payments and the overall volume of biometric submissions to derive a biometrics fee ratio (BFR), a formula identifying the portion of aliens who pay the $85 biometric services fee out of the total population of those submitting biometrics who may be required to pay the fee (*e.g.* excluding I–589 applicants because they are not required to pay the corresponding biometrics fee).

The formula for the BFR calculation is provided below (Formula 2):

Formula 2: Biometrics Fee Ratio

$$BFR = \frac{F}{BI}$$

Where BFR represents the Biometrics Fee Ratio, F is the estimated number of aliens who pay the biometric services fee in a fiscal year and BI represents the number of biometrics submissions in a given fiscal year, which was initialized above in the BCR setup. The fee-paying volume for biometrics services is available from FY 2015 to FY 2017 only. The BFR is calculated by comparing the biometric fee paying volumes to total biometrics submissions. In FY 2017, for example, a BFR of 0.77 results by dividing a volume of 2.80 million biometric services fee payments by a total of 3.62 million biometrics submissions.[115] Stated somewhat differently, for every known non-exempt benefit request with a biometrics submission, DHS estimates that about 77 percent of aliens pay the biometric services fee while the remaining 23 percent of aliens receive a fee exemption, a biometric services fee waiver, or fall outside of the current age restrictions for submitting the $85 biometric services fee. Table 17 provides the BFR calculations for each fiscal year, including the total and three-year average. The generalized BFR that obtains is .755, which is weighted for the volume size each year, since it is derived from the total that will be used for subsequent calculations.[116]

TABLE 17—BIOMETRIC FEE RATIO, ALL FORMS

[FY 2015–FY 2017]

Fiscal year	Fee-paying volume	Biometric submissions (excludes Form I–589)	Biometrics fee rate (BFR)
FY 2015	2,765,927	4,029,843	0.686
FY 2016	2,746,261	3,361,885	0.817
FY 2017	2,801,648	3,624,280	0.773

[114] Waivers are limited and would apply when there the applicant is unable to provide fingerprints because of a medical condition.

[115] Calculation: 2,801,648 fee-paying volume for FY 2017/(3,928,588 total biometrics collection volume for FY 2017—304,308 Form I–589 biometrics collection volume for FY 2017) = 0.77. The Form I–589 is excluded in the BFR calculations because there is no fee associated with this form.

[116] Calculation: 2,771,279 average Fee-Paying Volume/3,672,003 average biometric collection volume exclusive of Form I–589 biometric submissions = 0.75 (rounded).

TABLE 17—BIOMETRIC FEE RATIO, ALL FORMS—Continued

[FY 2015–FY 2017]

Fiscal year	Fee-paying volume	Biometric submissions (excludes Form I–589)	Biometrics fee rate (BFR)
Total	8,313,836	11,016,008	
Average	2,771,279	3,672,003	0.755

Applying the average BFR of .755 to the BSP biometrics population of 192,643 yields an estimated 145,446 biometric services fee payments (BFP) annually.

Having undertaken several steps to develop the appropriate BSP and ensuing BFP, the costs germane to the biometrics requirement can be developed. The submission of biometrics would require that aliens travel to an ASC for the biometric services appointment.[117] In past rulemakings, DHS estimated that the average round-trip distance to an ASC is 50 miles, and that the average travel time for the trip is 2.5 hours.[118] The cost of travel also includes a mileage charge based on the estimated 50 mile round trip at the 2019 General Services Administration (GSA) rate of $0.58 per mile.[119] Because an individual would spend 1 hour and 10 minutes (1.17 hours) at an ASC to submit biometrics, summing the ASC time and travel time yields 3.67 hours. At this point we will also incorporate the added time burden of 15 minutes (.25 hours), for additional Form I–765 questions and instructions, in order to consolidate the costs. The total time is therefore 3.92 hours. At the low and high wage bounds, the opportunity costs of time are $47.24 and $142.96. The travel cost is $29, which is the per mileage reimbursement rate of .58 multiplied by 50 mile travel distance. Summing the time-related and travel costs generates a per person biometrics submission cost of $76.24, at the low wage bound and $171.96 at the high wage bound.

The total annual cost for the BSP would be $14,686,363 at the low end and $33,127,424 at the high end. Multiplying the estimated BFP by the $85 fee yields $12,362,891 annual biometric services fee costs. In addition, DHS is proposing to require applicants with a pending initial or renewal (c)(8) EAD application on the effective date of the final rule to appear at an ASC for biometrics collection; but, DHS would not collect the biometrics services fee from these aliens. Based on the file tracking data as of April 1, 2019, DHS estimates that 14,451 pending EAD applications would be impacted. Multiplying the 14,451 by the BCR provides a pending population estimate of 12,085 (rounded). Since DHS would not collect the biometrics services fee from this population, costs to applicants would only include time-related and travel costs which would range from $921,389 to $2,078,200.[120]

Combining the costs to the BSP and fee payments for the BFP, and the costs to the pending population, the costs of the biometrics provision, at the low and high wage, in order, are estimated at $27,970,644 and $47,568,515 in the first year and $27,049,255 and $45,490,315, annually thereafter.

DHS is also proposing to eliminate the recommended approvals for asylum, under which an asylum applicant can file an EAD request upon initial favorable review by an asylum officer, prior to completion of all background, security, and related checks. No individual having already benefitted from the preferential treatment would be adversely impacted. However, DHS must treat the earnings from recommended approvals that would have occurred in the future as costs because the proposed rule would eliminate these earnings. For the average 3,072 annual recommended approvals, not all applied for EADs, and not all of those that applied were granted EADs. The data reveals that the share of recommended approvals that eventually were approved for EADs was 62.8 percent, yielding 1,930 annual cases. The data was organized by fiscal year and the requisite time interval was calculated by subtracting the date of the associated asylum filing from the EAD approval date. The results are presented in Table 18:

TABLE 18—IMPACT OF RECOMMENDED APPROVALS

[Average calendar days from asylum filing to EAD approval, FY 2014–2018]

Fiscal year	No recommended approval	Recommended approval	Day difference
2014	330	246	83
2015	317	262	56
2016	305	264	41
2017	310	268	42
2018	234	193	40

[117] DHS expects the majority of biometrics appointments to occur in the United States at an ASC. However, in certain instances aliens may submit biometrics at an overseas USCIS office or DOS Embassy or consulate. However, because DHS does not currently have data tracking the specific number of biometric appointments that occur overseas, it uses the cost and travel time estimates for submitting biometrics at an ASC as an approximate estimate for all populations submitting biometrics in support of a benefit request.

[118] *See* DHS Final Rule, *Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives,* 78 FR 535 (Jan. 3, 2013).

[119] The General Services Administration mileage rate of $0.58, effective January 1, 2019, available at: *https://www.gsa.gov/travel/plan-book/transportation-airfare-rates-pov-rates/privately-owned-vehicle-pov-mileage-reimbursement-rates.*

[120] As previously estimated, time-related and travel costs per person result in $76.24 at a lower wage and $171.96 at a higher wage. Therefore, the costs to applicants with pending applications are estimated by multiplying $76.24 and $171.96 by the population estimate of 12,085. DHS also notes that this population estimate is based on current volumes and may vary depending on when this rule becomes final.

TABLE 18—IMPACT OF RECOMMENDED APPROVALS—Continued

[Average calendar days from asylum filing to EAD approval, FY 2014–2018]

Fiscal year	No recommended approval	Recommended approval	Day difference
2014–2018 average			52

As Table 18 reveals, recommended approvals have benefited by having EADs commence validity an average of 52 days sooner than others. This 52-day raw average day tally translates into a scaled impact of $3,579 per person at the low wage and (52-day impact × $68.83), and $10,833 at the high wage (52-day impact × $208.32). Multiplying these costs by 1,930 annual cases yields a total labor income impact of $6,907,779 and $20,907,387, in order. Similarly, the reduction in tax transfer payments from employers and employees to the government could range from $1,056,890 to $3,198,770 annually, depending on the wage and if companies cannot find reasonable substitutes for the labor the asylum applicant would have provided. The midpoint of the range for costs and taxes are $13,907,387 and $2,127,830, in order.

DHS is also proposing to revise its regulations prescribing when employment authorization terminates following the denial of an asylum application. Under the baseline, DHS affirmative-asylum denials have concomitant approved EADs terminated within 60 days after the adverse asylum decision or on the date of the expiration of the EAD, whichever is longer. This rule proposes that employment authorization would instead be terminated effective on the date the affirmative asylum application is denied. However, if DHS refers the case to DOJ-EOIR, employment authorization will be available to the alien while in removal proceedings. DHS analysis of the data reveals that 360 EADs associated with a denied DHS Affirmative asylum application are currently valid that could be terminated earlier than they otherwise would, when the rule goes into effect. In addition to the costs of potentially terminated EADs in the first year, the analysis reveals about 215 EADs have been issued to concomitant asylum denials annually.

For the pool of 360 current EADs, the time remaining between the present date of analysis (a proxy for the rule becoming effective) and the time left on each EAD was calculated. As stated above, under the baseline, the EADs linked to these DHS affirmative-asylum would end within 60 days after the adverse asylum decision, or, on the date of the expiration of the EAD, whichever is longer. For the cases with less than 60 days left, calculating the precise cost of the rule to these cases would require a complex analysis of the interaction between two variables, the asylum decision date and the EAD validity period, as well as the rule proxy date. To make the analysis tractable, we assign these cases the 60-day period, noting that this assignment would likely somewhat overstate the costs to these cases. After the recalibration to 60 days for the cases in with less than 60 days remaining, the average time left on the EADs is 356 days. For the annual flow of 290 EADs, the cost basis is the day-time difference between the adverse asylum decision and the end of the EAD validity. For these cases the average impact is 471 days.

The costs of the provision to end some EADs early can now be tallied, since the appropriate impact metrics have been calculated. For the existing EADs, the cost impact at the low wage bound is $24,503 each (356 days multiplied by 68.83), which is $8,821,253 in lost earnings and generates $1,349,652 in tax transfers. The cost impact at the upper wage bound is $74,162 each (356 days multiplied by $208.32), which is $26,698,291 in lost earnings and generates $4,084,839 in tax transfers. These specific costs and tax transfers would be incurred the first year the rule could take effect.

For the annual flow of 215 annual EADs, the cost impact at the low wage bound is $32,149 each (471 days multiplied by 68.83), which is $6,970,070 in lost earnings and generates $1,066,421 in tax transfers. For the annual flow of 215 EADs, the cost impact at the upper wage bound is $98,119 each (471 days multiplied by 208.32), which is $21,095,525 in lost earnings and generates $3,227,616 in tax transfers. These costs and transfers would be incurred annually.

Adding up the costs and transfers for both the existing and future EADs that could be impacted, for the first year the rule could take effect, the costs would be $15,791,323 at the lower wage bound and $47,793,816 at the upper wage bound. Similarly, taxes would range from $2,416,072 to $7,312,454. The midpoint estimate for total costs and taxes, in order, are $31,792,569, and $4,864,263.

Having estimated the costs and tax transfers for the provisions in which costs and transfers could be quantified, we now tally them and present the total quantified costs and transfers of the proposed rule. There are essentially three quantified modules. First is the flow volume of costs that will be incurred in each of ten years. As was shown above, for the proposed biometrics requirement, costs were allotted to the time-related opportunity costs associated with submitting biometrics, the cost of travel, a form burden increase, and the biometrics service fee payments. For the proposal to eliminate recommended approvals, costs were developed as delayed earnings of labor. For the proposal to end some EADs early, cost flows are attributed to forgone future earnings (for DHS affirmative cases only). For the 365-day EAD filing clock, costs were assigned to forgone or delayed earnings as well. For this provision, a robust analysis was offered for the 39,000 DHS affirmative asylum cases that could be analyzed, and a slightly less robust analysis was presented for DHS referrals to DOJ–EOIR, due to data constraints. Lastly, a maximum estimate of forgone earnings was estimated for the residual population under the 365-day filing clock. There is also a net cost-savings due to the potential that some current filers may not need to file for an EAD in the future.

Second, with the exception of the biometrics proposal, the other provisions for which quantified cost flows are allocated, above, also incur a reduction in tax transfer payments from employers and employees to the government if companies cannot find reasonable substitutes for the labor the asylum applicant would have provided. As a third module, there could be a first year added cost and also a tax transfer applicable to the existing pool of 360 EADs that could be ended early. Table 19 presents the flow costs for the relevant provisions, undiscounted and in order of the low (A) and high wage (B) bounds relied upon. The cost figures for the 365-day EAD wait include the net cost-savings.

TABLE 19(A)—ANNUAL FLOW COSTS FOR PROVISIONS OF THE PROPOSED RULE IN WHICH COSTS COULD BE MONETIZED—LOW WAGE BOUND

[Undiscounted, 2019–2028]

Year	365 day EAD filing	Biometrics	End some EADs early	Eliminate recommended approvals	Residual (365 day EAD filing)	Annual total
1	$269,509,609	$27,970,644	$15,791,323	$6,907,779	$1,189,561,994	$1,509,741,349
2	269,509,609	27,049,255	6,970,070	6,907,779	1,189,561,994	1,499,998,706
3	269,509,609	27,049,255	6,970,070	6,907,779	1,189,561,994	1,499,998,706
4	269,509,609	27,049,255	6,970,070	6,907,779	1,189,561,994	1,499,998,706
5	269,509,609	27,049,255	6,970,070	6,907,779	1,189,561,994	1,499,998,706
6	269,509,609	27,049,255	6,970,070	6,907,779	1,189,561,994	1,499,998,706
7	269,509,609	27,049,255	6,970,070	6,907,779	1,189,561,994	1,499,998,706
8	269,509,609	27,049,255	6,970,070	6,907,779	1,189,561,994	1,499,998,706
9	269,509,609	27,049,255	6,970,070	6,907,779	1,189,561,994	1,499,998,706
10	269,509,609	27,049,255	6,970,070	6,907,779	1,189,561,994	1,499,998,706
Undiscounted 10-year total	2,695,096,086	271,413,939	78,521,952	69,077,788	11,895,619,940	15,009,729,703

TABLE 19(B)—ANNUAL FLOW COSTS FOR PROVISIONS OF THE PROPOSED RULE IN WHICH COSTS COULD BE MONETIZED—UPPER WAGE BOUND

[Undiscounted, 2019–2028]

Year	365 day EAD filing	Biometrics	End some EADs early	Eliminate recommended approvals	Residual (365 day EAD filing)	Annual total
1	$815,954,246	$47,568,515	$47,793,816	$20,906,995	$3,600,390,848	$4,532,614,420
2	815,954,246	45,490,315	21,095,525	20,906,995	3,600,390,848	4,503,837,930
3	815,954,246	45,490,315	21,095,525	20,906,995	3,600,390,848	4,503,837,930
4	815,954,246	45,490,315	21,095,525	20,906,995	3,600,390,848	4,503,837,930
5	815,954,246	45,490,315	21,095,525	20,906,995	3,600,390,848	4,503,837,930
6	815,954,246	45,490,315	21,095,525	20,906,995	3,600,390,848	4,503,837,930
7	815,954,246	45,490,315	21,095,525	20,906,995	3,600,390,848	4,503,837,930
8	815,954,246	45,490,315	21,095,525	20,906,995	3,600,390,848	4,503,837,930
9	815,954,246	45,490,315	21,095,525	20,906,995	3,600,390,848	4,503,837,930
10	815,954,246	45,490,315	21,095,525	20,906,995	3,600,390,848	4,503,837,930
Undiscounted 10-year total	8,159,542,463	456,981,350	237,653,539	209,069,952	36,003,908,480	45,067,155,790

The data in Table 19 are utilized to attain the discounted costs of the proposed rule. Since the first year of the rule's effects will include the additional costs applicable to ending some EADs early, the annual effect is not constant across all ten years is not the same, and therefore, the average annualized equivalence cost will be different across interest rates. The total ten-year present values, in order of 3 and 7 percent rates of discount, are $12,804,752,094 and $10,544,468,497. In the same order, the average annualized equivalence costs are $1,501,107,575 and $1,501,295,092. At the upper wage bound, the total ten-year present values, in order of 3 and 7 percent rates of discount, are $38,446,589,427 and $31,659,966,864. In the same order, the average annualized equivalence costs are $4,507,113,156 and $4,507,667,019.

Table 20 reports the total quantified tax transfers for the proposed rule, based on the provisions for which quantification is possible.

TABLE 20—ANNUAL TAX TRANSFERS FOR PROVISIONS UNDER WHICH TAXES COULD BE ESTIMATED AND MONETIZED

[Undiscounted]

Provision	Low wage bound	Upper wage bound
365 day EAD filing wait	$41,307,429	$125,020,538
Biometrics	0	0
End Some EADs early	1,066,421	3,227,615
Eliminate Recommended Approvals	1,056,890	3,198,770
Residual 365-day filing wait	182,002,985	550,859,800
Subtotal annual tax transfers	225,433,725	682,306,7243
Plus: First year added tax of ending some EADs early	1,349,652	4,084,839
Equals: Total tax transfers in first year	226,783,377	686,391,562

Finally, this section concludes with Table 21, which collates the monetized impacts of the rule, in terms of both costs (A) and taxes (B), and provides the midrange of them.

TABLE 21(A)—MONETIZED COSTS OF THE PROPOSED RULE

[Discounted, $ millions, 2019–2028]

	Low wage	Upper range	Range midpoint
3 percent discount (ten-year PV)	$12,804.8	$38,446.6	$25,625.7
7 percent discount (ten-year PV)	10,544.5	31,660.0	21,102.2
3 percent discount (average annual equivalence)	1,501.1	4,507.1	3,004.1
7 percent discount (average annual equivalence)	1,501.3	4,507.7	3,004.5

TABLE 21(B)—MONETIZED TAX TRANSFERS OF THE PROPOSED RULE

[$ millions, 2019–2028]

	Low wage	Upper range	Range midpoint
3 percent discount (ten-year)	1,924.3	5,824.2	3,874.2
7 percent discount (ten-year)	1,584.6	4,796.1	3,190.3
3 percent discount (average annual equivalence)	225.6	682.8	454.2
7 percent discount (average annual equivalence)	225.6	682.9	454.2

Module 3. Unquantified Costs and Transfers

There are several populations related to specific proposals that would incur costs due to the proposed rule, but, given data constraints, DHS is unable to measure the possible costs and transfer payments in a quantitative fashion.

DHS proposes to exclude, with certain exceptions, aliens who entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry from eligibility for (c)(8) employment authorization. The rule also proposes to exclude from eligibility for (c)(8) employment authorization aliens who have been convicted of any U.S. felony or any serious non-political crime outside the United States, or who have been convicted of certain public safety offenses in the United States. DHS is unable to estimate the population that would be impacted by the provisions dealing with illegal entry and criminality. If any person incumbent to these populations would be delayed in or precluded from obtaining an EAD, the distributional impacts in terms of earnings would apply, as would, potentially, tax transfers.

DHS proposes to apply changes made by this rule to all initial and renewal applications for employment authorization filed on or after the effective date of the final rule, with limited exceptions. DHS would apply two of the proposed ineligibility provisions—those relating to certain criminal offenses and failure to file the asylum application within one year of the alien's last entry to the US—to initial and renewal applications for employment authorization pending on the effective date of the final rule. DHS estimates 14,451 potentially affected pending applications. DHS estimates an annual renewal population of 104,163. DHS cannot quantify how many of the 14,451 pending EAD filings or 104,163 annual renewals would be subject to the criminal and one-year-filing provisions when the rule goes into effect or how many would be precluded from obtaining an EAD. Lost compensation for pending and renewal EAD applicants precluded from obtaining an EAD would result in costs to businesses and/or distributional impacts in the form of transfers, depending on if the business is able to find replacement labor for the job the asylum applicant would have filled. If businesses are unable to find replacement labor, it would both result in a loss of business productivity and also in a reduction in taxes transferred from asylum applicants and employers to Federal, state and local governments.

DHS also proposes to deny (c)(8) EAD applications filed on or after the effective date by aliens who have failed to file for asylum within one year of their last arrival in the United States, as required by law, unless and until an asylum officer or IJ determines that an exception to the one-year filing bar does not apply. DHS makes about 8,472 such referrals to DOJ-EOIR each year (Table 12). For aliens who are granted an exception to the bar, it is possible that they would likely face deferred earnings and lost taxes along the lines we have developed for the quantified costs, due to delays in filing subject to the IJ decision. Others would likely not be granted an EAD and would lose earnings altogether. DHS has no data that would enable estimation of these effects as a result of the one-year filing bar provision. Specifically, while DHS does have data on the filing bar referrals and the associated I–765s, we do not have data on the outcome of these filing bar referrals. EADs linked to defensive asylum cases could also be impacted by the filing bar conditions proposed.

As discussed previously, DHS is also proposing to revise its regulations prescribing when employment authorization terminates following the denial of an asylum application. In the above quantified analysis DHS estimates the cost of these changes for asylum cases denied by an asylum officer. DHS discusses here the impacts for asylum cases denied by an IJ. Under the baseline, when an IJ denies an asylum application, the EAD terminates on the date the EAD expires, unless the asylum applicant seeks administrative or judicial review. This rule proposes that for cases USCIS refers to DOJ-EOIR and cases defensively filed with DOJ-EOIR, employment authorization would continue for 30 days following the date that the IJ denies the asylum application to account for a possible appeal of the denial to the BIA. If the alien files a timely appeal, employment authorization would continue, and the alien would be able to file a renewal EAD application. As shown in Table 9, from 2014–2018 DOJ-EOIR denied an average of 14,820 asylum applications annually. However, the data available to DHS does not map DOJ-EOIR case dispositions to DHS employment authorizations, and thus we cannot estimate how many denied or dismissed asylum claims by an IJ or BIA are connected to authorized EADs, either on an annualized flow or current pool basis. For DHS affirmative asylum, the populations (215 and 360, in order) were small. The numbers are likely to be higher for DOJ-EOIR, since DHS makes so many referrals to them, and, since DOJ-EOIR solely handles defensive cases. Aliens with an EAD who are denied asylum would eventually be out of the labor force even without this rule. Therefore, the cost for an employer to replace the employee (turnover cost) is not a cost of this rule. However, this rule would impact the timing of when such workers would be separated, which could vary. This rule would result in employers incurring such turnover costs earlier than without this rule.

This proposed rule seeks to clarify that aliens with a positive credible fear finding are not eligible to seek immediate work authorization under 8 CFR 274a.12(c)(11), although, historically USCIS has granted many of these requests, an average of approximately 13,000 annually. Such aliens would still be eligible to apply for a (c)(8) employment authorization to become employment authorized subject to the eligibility changes proposed in this rule, including the proposed 365-day waiting period. Accordingly, applicants that apply for an EAD from the current (c)(11) category may experience a delay in earnings. It is possible that some of the applicants under this scenario would have their asylum decision within 365 days and thus would potentially not file for an EAD. It is recalled that an adjustment was made for this possibility in the development of the biometrics requirement provision costs. It is also possible that some may not file as transfers for other reasons. As a result, the actual affected population would most likely be below 13,000. USCIS is unable to develop a cost of lost or delayed earnings for this group because DHS does not have the related asylum information, so DHS does not have the data necessary to correctly segment the costs.

In some cases, the changes in protocol could result in applicant-caused delays in receiving an EAD because the purpose of the rule is to generate disincentives to applicants to cause any delays in the adjudication of their asylum application. Any such delays in earnings could generate economic hardship to aliens in terms of delayed earnings. The proposed rule would amend existing language to clarify that an applicant's failure to appear to receive and acknowledge receipt of the decision following an interview and a request for an extension to submit additional evidence will be considered applicant-caused delays for purposes of eligibility for employment authorization. DHS further proposes that any documentary evidence submitted fewer than 14 calendar days before the asylum interview (with allowance for a brief extension to submit additional evidence as a matter of discretion) may result in an applicant-caused delay if it delays the adjudication of the asylum application. The purpose of this provision is to improve administrative efficiency and aid in the meaningful examination and exploration of evidence in preparation for and during the interview. The purpose of the rule is to generate disincentives to applicants to cause any delays in the adjudication of their asylum application. While DHS has no way of predicting how the disincentives might take effect, in some cases, the changes in protocol could result in applicant-caused delays in receiving an EAD, and therefore could impose costs. DHS welcomes public input on this topic.

In addition to the major provisions being proposed, there are numerous technical changes, clarifications to existing language, and amendments to existing language. DHS seeks to clarify how an asylum applicant's failure to appear for an asylum interview or biometric services appointment will affect his or her eligibility for asylum or employment authorization and proposes a new timeframe and standard for rescheduling an asylum interview for the asylum application. In addition, DHS clarifies that USCIS is not obligated to send any notice to the applicant about his or her failure to appear at a scheduled biometric services appointment or an asylum interview as a prerequisite to denying the asylum application or referring it to an IJ. These amendments are intended to facilitate more timely and efficient case processing when applicants fail to appear for essential appointments. Finally, the amendments replace references to fingerprint processing and fingerprint appointment with the presently employed ''biometric services appointment.''

DHS also proposes to remove the language providing that an application for asylum will automatically be deemed ''complete'' if USCIS fails to return the incomplete application to the applicant within a 30-day period. There is no impact from this change because USCIS is already returning incomplete applications, and this rule would remove outdated regulatory text that no longer applies.

The rule also codifies certain protocols related to the length of EAD validity and DHS authorities in the asylum process. These amendments and technical codifications outlined above and discussed in more detail in the preamble could impact the specific protocol, timing, and variations in which applicants interact with DHS over the asylum and concomitant EAD process.

b. Benefits

The benefits potentially realized by the proposed rule are qualitative. It is not possible to monetize the benefits. Aliens with bona fide asylum claims will be prioritized because the incentives for aliens to file frivolous, fraudulent, or otherwise non-meritorious asylum applications intended primarily to obtain employment authorization will be reduced. A streamlined system for employment authorizations for asylum seekers would reduce fraud and improve overall integrity and operational efficiency, thereby benefiting the U.S. Government and the public.

The proposed changes will remove incentives for aliens to enter the United States illegally for economic reasons and allow DHS to process bona fide asylum seekers who present themselves at the U.S. ports of entry in an expedited manner. DHS also believes these administrative reforms will encourage aliens to follow the lawful process to immigrate to the United States, which will reduce injuries and deaths that occur during dangerous illegal entries, and reduce expenditures by government agencies that are charged with enforcing the immigration laws of the United States. These impacts stand to provide qualitative benefits to asylum seekers, the communities in which they reside and work, the U.S. Government, and society at large.

The proposed rule is also beneficial in the context that providing employment authorization to inadmissible and removable undermines the removal scheme created by Congress and incentivizes such aliens to come to and remain in the United States.[121] Doing so also undermines the Administration's goals of strengthening protections for U.S. workers in the labor market.[122]

[121] In a few limited circumstances, Congress has authorized the Secretary to grant employment authorization, as a matter of discretion, to aliens who are inadmissible or deportable and even when they have a final order of removal from the United States. *See, e.g.,* INA sec. 236(a)(3), 8 U.S.C. 1226(a)(3) (discretionary employment authorization for inadmissible or removable aliens with pending removal proceedings); INA sec. 241(a)(7), 8 U.S.C. 1231(a)(7) (discretionary employment authorization for certain aliens with final orders of removal).

[122] Aliens who file adjustment of status applications even if they do not ultimately qualify for adjustment of status to permanent residence and aliens who are temporarily placed in deferred action, are allowed to apply for EADs. If DHS

Continued

Several employment-based visa programs require U.S. employers to test the labor market, comply with recruiting standards, agree to pay a certain wage level, and agree to comply with standards for working conditions before they can hire an alien to fill the position. These protections do not exist in the (c)(8) EAD program.

The proposed biometrics requirement would provide a benefit to the U.S. Government by enabling DHS to know with greater certainty the identity of aliens seeking (c)(8) EADs and more easily vet those aliens for benefit eligibility. This would also provide DHS with the ability to limit identity fraud because biometrics are unique physical characteristics that are difficult to falsify and do not change over time.

c. Impact to Labor Force and Taxes

The proposed rule, when finalized, is not expected to have a significant impact on states or the national labor force. The national civilian labor force is 163,922,000, for which the proposed rule's maximum population of 304,562 (first year) and 289,751 (each year after) would represent just .19, and .18 percent of the labor force, in order.[123] It is possible that if all or a large share of the relevant EAD holders were concentrated in a specific metropolitan statistical area, the population relevant to the proposed rule could represent a larger share of the labor force (locally), but DHS does not expect impacts to the labor market.

The provisions would generate costs in terms of distributional impacts in the form of deferred and lost compensation. Additionally, some of the lost tax transfers could be incurred by states. The total reduction in employment tax transfers from employers and employees to the Federal Government could range from $225.6 million to $682.9 million annually (annualized at 7%). There could also be a reduction in income tax transfers from employers and employees that could impact individual states and localities.

In addition, some states, municipalities, or other geographic entities could have budgets that assist persons awaiting asylum. Of the period in which asylum applicants wait for an EAD is extended, there could be an impact to those entities, and possibly, to family, social, or other assistance networks.

B. Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, or governmental jurisdictions with populations of less than 50,000.[124]

This proposed rule would make significant changes to the process by which aliens seeking asylum in the United States can apply for EADs while their asylum claims are pending either with DHS or DOJ–EOIR. DHS has estimated that rule would cover a maximum quantified population of about 305,000 aliens, with smaller sub-populations applicable to specific, individual provisions. We assess that this rule's proposed changes do not fall under the RFA because they directly regulate individuals who are not, for purposes of the RFA, within the definition of small entities established by 5 U.S.C. 601(6).

As previously explained, several of the provisions being proposed may result in deferred or forgone labor earnings compensation for asylum applicants. In addition, some aliens would not be able to obtain an EAD in the future that otherwise could currently. However, these provisions do not directly regulate employers.

While the RFA does not require agencies to examine the impact of indirect costs to small entities, DHS is unable to identify the next best alternative to hiring a pending asylum applicant and is therefore unable to reliably estimate the potential indirect costs to small entities from this proposed rule but requests comments from the public that would assist in understanding costs not described herein.

(1) A Description of the Reasons Why the Action by the Agency Is Being Considered

The rule is being proposed in order to reform the asylum application and associated employment authorization application process in order to prioritize bona fide claims and reduce frivolous and non-meritorious asylum filings. The proposed rule is necessary because it has been a long time since significant statutory changes have been made to the asylum provisions that would effectively address the current aspects of the immigration laws that incentivize illegal immigration and frivolous asylum filings. Furthermore, the rule could address several of the ''pull'' factors that encourage aliens to enter the United States without being inspected and admitted or paroled and to file non-meritorious asylum claims to obtain employment authorization or other non-asylum based forms of relief from removal. These ''pull'' factors have led, in part, to a significant increase in illegal immigration and in asylum filings, which has generated a severe backlog of cases and an overwhelming volume of non-meritorious cases.

(2) A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The objective of the proposed rule is to disassociate employment authorization from asylum applications and minimize the abuse of the asylum process by inadmissible or removable aliens who are not eligible for asylum but seek to prolong their stay in the United States for economic reasons. The proposed changes will remove incentives for aliens to enter the United States illegally for economic reasons and allow DHS to process bona fide asylum seekers who present themselves at U.S. ports of entry in an expedited manner. DHS also believes these administrative reforms will encourage aliens to follow the lawful process to immigrate to the United States.

The authority of the Secretary of Homeland Security (Secretary) for these regulatory amendments is found in various sections of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.,* and the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, 6 U.S.C. 101 *et seq.* General authority for issuing the proposed rule is found in section 103(a) of the INA, 8 U.S.C. 1103(a), which authorizes the Secretary to administer and enforce the

approves the application for employment authorization, these aliens receive ''open market'' EADs—meaning that they may accept employment in any field and may be hired by any U.S. employer without the U.S. employer having to demonstrate that there were no available U.S. workers or guarantee that that it will pay the prevailing wage or maintain certain work conditions. As a result, such aliens are more likely to directly compete with U.S. workers for employment.

[123] Relevant calculations: 304,888/163,922,000 = .00186, which is rounded and multiplied by 100 to equal .19 percent, and 289,751/163,922,000 = .00177, which is rounded and multiplied by 100 to equal .18 percent. The labor force figure represents the civilian labor force, seasonally adjusted, for August 2019, and is found in ''Table A–1. Employment status of the civilian population by sex and age,'' Economic News Release at: *https://www.bls.gov/news.release/archives/empsit_09062019.htm.*

[124] A small business is defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act, 15 U.S.C. 632.

immigration and nationality laws and to establish such regulations as he deems necessary for carrying out such authority.

(3) A Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

This proposed rule would directly change aspects of the asylum process related to how and when asylum applicants can apply for and obtain EADs, when asylum applicants' employment authorization is terminated, as well as their eligibility for EADs. The rule would delay asylum applicants' employment authorization, remove certain aliens' eligibility for employment, and terminate certain aliens' employment eligibility earlier than without this rule. This rule does not directly regulate small entities and thus the number of small entities to which the proposed rule would directly regulate is zero. However, this rule would indirectly impact small entities that may employ affected EAD holders. DHS does not have information on where affected aliens obtain employment and thus is unable to estimate the number of small entities that may be indirectly impacted by this rule.

(4) A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

This proposed rule would not directly impose any reporting, recordkeeping, or other compliance requirements on small entities. Additionally, this rule would not require any additional professional skills.

(5) Identification, to the Extent Practicable, of All Relevant Federal Rules That May Duplicate, Overlap or Conflict With the Proposed Rule

DHS is unaware of any relevant Federal rule that may duplicate, overlap, or conflict with the proposed rule. DHS is the sole administrator of employment authorization applications. DOJ may issue conforming changes to its regulations at a later date. DHS is also in the process of drafting proposed rulemaking broadening biometrics collection. Although the Form I–765 is involved in this separate broad biometrics collection proposal, the present proposed rule focuses specifically on the I–765(c)(8) eligibility category. There could be some overlap between the two proposed rules, but such overlap is not expected to create new costs or burdens.

(6) Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

DHS is not aware of any alternatives to the proposed rule that accomplish the stated objectives and that would minimize the economic impact of the proposed rule on small entities as this rule imposes no direct costs on small entities. DHS requests comments and seeks alternatives from the public that will accomplish the same objectives.

C. Congressional Review Act

This proposed rule is a major rule as defined by 5 U.S.C. 804, also known as the ''Congressional Review Act,'' as enacted in section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, 110 Stat. 847, 868 *et seq.* Accordingly, this rule, if enacted as a final rule, would be effective at least 60 days after the date on which Congress receives a report submitted by DHS under the Congressional Review Act, or 60 days after the final rule's publication, whichever is later.

D. Unfunded Mandates Reform Act of 1995 (UMRA)

The Unfunded Mandates Reform Act of 1995 (UMRA) 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 a $100 million or more expenditure (adjusted annually for inflation) in any one year by state, local, and tribal governments, in the aggregate, or by the private sector.

Because this proposed rulemaking does not impose any Federal mandates on State, local, or tribal governments, in the aggregate, or the private sector, this rulemaking does not contain such a written statement.

E. Executive Order 13132 (Federalism)

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. DHS does not expect that this proposed rule would impose substantial direct compliance costs on State and local governments or preempt State law. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

G. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would 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.

H. Family Assessment

DHS has assessed this action in accordance with section 654 of the Treasury General Appropriations Act, 1999, Public Law 105–277, Div. A. With respect to the criteria specified in section 654(c)(1), DHS has determined that the proposed rule will delay the ability for initial applicants to work and limiting or prohibit some from working based on criminal and immigration history, which will decrease disposable income of those applicants with families. A portion of this lost compensation might be transferred from asylum applicants to others that are currently in the U.S. labor force, or, eligible to work lawfully, possibly in the form of additional work hours or the direct and indirect added costs associated with overtime pay. DHS does not know how many applicants contribute to family disposable income. The total lost compensation to the pool of potential asylum applicants could range from about $319 million to $930 million annually, depending on the wages the asylum applicant would have earned. For the reasons stated elsewhere in this preamble, however, DHS has determined that the benefits of the action justify the potential financial impact on the family.

I. National Environmental Policy Act (NEPA)

DHS analyzes actions to determine whether NEPA applies to them and if so what degree of analysis is required. DHS Directive (Dir) 023–01 Rev. 01 and Instruction (Inst.) 023–01–001 rev. 01 establish the procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508. The CEQ regulations allow Federal agencies to establish, with CEQ review and concurrence, categories of actions (''categorical exclusions'') which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 40 CFR 1507.3(b)(1)(iii), 1508.4. DHS Instruction 023–01–001 Rev. 01 establishes such Categorical Exclusions that DHS has found to have no such effect. Inst. 023–01–001 Rev. 01 Appendix A Table 1. For an action to be categorically excluded, DHS Inst. 023–01–001 Rev. 01 requires the action to satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the Categorical Exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Inst. 023–01–001 Rev. 01 section V.B(1)–(3). This proposed rule would amend the administrative procedure for filing an affirmative asylum application in the United States, and strengthen eligibility requirements for employment authorization based on a pending asylum application.

DHS analyzed this action and has concluded that NEPA does not apply due to the excessively speculative nature of any effort to conduct an impact analysis. Nevertheless, if NEPA did apply to this action, the action clearly would come within our categorical exclusion A.3(d) as set forth in DHS Inst. 023–01–001 Rev. 01, Appendix A, Table 1.

This rule is not part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, if NEPA were determined to apply, this rule would be categorically excluded from further NEPA review.

J. National Technology Transfer and Advancement Act

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standard bodies. This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

K. Executive Order 12630 (Governmental Actions and Interference With Constitutionally Protected Property Rights)

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

L. Executive Order 13045 (Protection of Children From Environmental Health Risks and Safety Risks)

Executive Order 13045 requires agencies to consider the impacts of environmental health risk or safety risk that may disproportionately affect children. DHS has reviewed this proposed rule and determined that this rule is not a covered regulatory action under Executive Order 13045. Although the rule is economically significant, it would not create an environmental risk to health or risk to safety that might disproportionately affect children. Therefore, DHS has not prepared a statement under this executive order.

M. Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use)

Executive Order 13211 requires agencies to consider the impact of rules that significantly impact the supply, distribution, and use of energy. DHS has reviewed this proposed rule and determined that this proposed rule would not have a significant adverse effect on the supply, distribution, or use of energy. Therefore, this proposed rule does not require a Statement of Energy Effects under Executive Order 13211.

N. Paperwork Reduction Act (PRA)

Under the Paperwork Reduction Act of 1995, Public Law 104–13, agencies are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. Table 19 shows a summary of the forms that are part of this rulemaking.

TABLE 19—SUMMARY OF IMPACTS TO USCIS FORMS

Form	Form name	New or updated form	General purpose of form
I–589	Application for Asylum and for Withholding of Removal.	Update—revises and adds instructions for employment authorization while asylum application is pending.	This form is used by applicants to apply for asylum or withholding of removal under the Act or the Convention Against Torture (CAT).
I–765	Application for Employment Authorization.	Update—revises and adds instructions and questions for aliens seeking employment authorization under the (c)(8) eligibility category.	This form is used by applicants to request employment authorization from USCIS.

USCIS Form I–589

DHS invites comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0067 in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

1. Evaluate whether the collection of the information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection

(1) Type of Information Collection: Revision of a Currently Approved Collection.

(2) Title of the Form/Collection: Application for Asylum and for Withholding of Removal

(3) Agency form number, if any, and the applicable component of the DHS sponsoring the collection: Form I–589; USCIS.

(4) Affected public who will be asked or required to respond, as well as a brief abstract: Primary: Individuals and households. The data collected on this form will be used by USCIS to determine if the alien is eligible for asylum or withholding of removal.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The estimated total number of respondents for the information collection Form I–589 is 114,000 and the estimated hour burden per response is 12 hours; the estimated total number of respondents for the information collection Biometrics is 110,000 and the estimated hour burden per response is 1.17 hours.

(6) An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection is 1,496,700 hours.

(7) An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this information collection is $46,968,000.

USCIS Form I–765

DHS invites comment on the impact to the proposed collection of information. In accordance with the PRA, the information collection notice is published in the **Federal Register** to obtain comments regarding the proposed edits to the information collection instrument.

Comments are encouraged and will be accepted for 60 days from the publication date of the proposed rule. All submissions received must include the OMB Control Number 1615–0040 in the body of the letter and the agency name. To avoid duplicate submissions, please use only *one* of the methods under the **ADDRESSES** and I. Public Participation section of this rule to submit comments. Comments on this information collection should address one or more of the following four points:

5. Evaluate whether the collection of the information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

6. Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

7. Enhance the quality, utility, and clarity of the information to be collected; and

8. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of Information Collection

(1) Type of Information Collection: Revision of a currently approved collection.

(2) Title of the Form/Collection: Application for Employment Authorization

(3) Agency form number, if any, and the applicable component of the DHS sponsoring the collection: Form I–765; USCIS

(4) Affected public who will be asked or required to respond, as well as a brief abstract:

Primary: Individuals and households. USCIS requires an alien seeking employment authorization to file the Form I–765. The data collected on this form will be used by USCIS to determine if the individual seeking employment authorization qualifies under the categories of aliens who may apply for employment authorization under 8 CFR 274a.12.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The estimated total number of respondents for the information collection Form I–765 is 2,036,026 and the estimated hour burden per response is 4.75 hours; the estimated total number of respondents for the information collection biometrics is 346,589 and the estimated hour burden per response is 1.17 hours; the estimated total number of respondents for the information collection Form I–765WS is 41,912 and the estimated hour burden per response is .50 hours; the estimated total number of respondents for the information collection passport-style photographs is 2,036,026 and the estimated hour burden per response is .50 hours.

(6) An estimate of the total public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection is 11,115,602 hours.

(7) An estimate of the total public burden (in cost) associated with the collection: The estimated total annual cost burden associated with this information collection is $669,852,554.

List of Subjects

8 CFR Part 208

Administrative practice and procedure, Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

Accordingly, DHS proposes to amend parts 208 and 274a of chapter I, subchapter B, of title 8 of the Code of Federal Regulations as follows:

PART 208—PROCEDURES FOR ASYLUM AND WITHHOLDING OF REMOVAL

■ 1. The authority citation for part 208 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1158, 1226, 1252, 1282; Title VII of Public Law 110–229; 8 CFR part 2.

■ 2. Amend § 208.3 by revising paragraph (c)(3) to read as follows:

§ 208.3 Form of application.

* * * * *

(c) * * *

(3) An asylum application must be properly filed in accordance with 8 CFR part 103 and the filing instructions. Receipt of a properly filed asylum application will commence the 365-day period after which the applicant may file an application for employment authorization in accordance with § 208.7 and 8 CFR 274a.12 and 274a.13.

* * * * *

■ 3. Amend § 208.4 by revising paragraph (c) to read as follows:

§ 208.4 Filing the application.

* * * * *

(c) *Amending an application after filing.* Upon the request of the alien, and as a matter of discretion, the asylum officer or Immigration Judge with jurisdiction may permit an asylum applicant to amend or supplement the application. Any delay in adjudication or in proceedings caused by a request to amend or supplement the application will be treated as a delay caused by the applicant for purposes of § 208.7 and 8 CFR 274a.12(c)(8).

■ 4. Revise § 208.7 to read as follows:

§ 208.7 Employment authorization.

(a) *Application and decision.* (1)(i) *In General.* Subject to the restrictions contained in sections 208(d) and 236(a) of the Act, and except as otherwise provided in paragraphs (b) and (c) of this section, an applicant for asylum who is in the United States may apply for employment authorization pursuant to 8 CFR 274a.12(c)(8) and 274a.13(a)(2) of this chapter. The applicant must request employment authorization on the form and in the manner prescribed by USCIS and according to the form instructions, and must submit biometrics at a scheduled biometrics services appointment. USCIS has exclusive jurisdiction over all applications for employment authorization and employment authorization documentation based on a pending application for asylum under 8 CFR 274a.12(c)(8), regardless of whether the asylum application is pending with USCIS or the Executive Office for Immigration Review. Employment authorization is not permitted during any period of judicial review of the asylum application, but may be requested if a Federal court remands the case to the Board of Immigration Appeals. USCIS may grant initial employment authorization under 8 CFR 274a.12(c)(8) for a period that USCIS determines is appropriate at its discretion, not to exceed increments of two years.

(ii) *Period for filing.* An applicant for asylum cannot apply for initial employment authorization earlier than 365 calendar days after the date USCIS or the immigration court receives the asylum application in accordance with 8 CFR part 103 or 8 CFR 1003.31, respectively, and the filing instructions on the application. If an asylum application is denied by USCIS before a decision on an initial or renewal application for employment authorization, the application for employment authorization will be denied.

(iii) *Asylum applicants who are ineligible for employment authorization.* An applicant for asylum is not eligible for employment authorization if:

(A) The applicant was convicted in the United States or abroad of any aggravated felony as described in section 101(a)(43) of the Act;

(B) The applicant was convicted in the United States of any felony as defined in 18 U.S.C. 3156(a)(3);

(C) The applicant was convicted of any serious non-political crime outside the United States. USCIS will consider, on a case-by-case basis, whether aliens who have been convicted of any non-political foreign criminal offense, or have unresolved arrests or pending charges for any non-political foreign criminal offenses, warrant a favorable exercise of discretion for a grant of employment authorization;

(D) The applicant was convicted in the United States of a public safety offense involving:

(*1*) Domestic violence, domestic assault, or any other domestic or spousal battery-type offense unless the applicant has been subjected to extreme cruelty, is not and was not the primary perpetrator of the violence in the relationship, and is not otherwise ineligible. If an applicant has unresolved domestic arrests or pending charges, USCIS will decide at its discretion if it will grant the applicant employment authorization, based on the totality of the circumstances.

(*2*) Child abuse, child neglect, or any other offense against a child, regardless of an element of sexual or inappropriate touching. If an applicant has unresolved domestic arrests or pending charges, USCIS will decide at its discretion if it will grant the applicant employment authorization, based on the totality of the circumstances.

(*3*) Controlled substances, including possession, possession with intent to distribute, or delivery. If an applicant has unresolved domestic arrests or pending charges, USCIS will decide at its discretion if it will grant the applicant employment authorization, based on the totality of the circumstances.

(*4*) Driving or operating a motor vehicle under the influence of alcohol or drugs, regardless of how the arresting, charging, or convicting jurisdiction classifies the offense. If an applicant has unresolved domestic arrests or pending charges, USCIS will decide at its discretion if it will grant the applicant employment authorization, based on the totality of the circumstances.

(E) An asylum officer or an Immigration Judge has denied the applicant's asylum application within the 365-day period or before the adjudication of the initial request for employment authorization;

(F) The applicant filed his or her asylum application beyond the one-year filing deadline, unless and until the asylum officer or Immigration Judge determines that the applicant meets an exception for late filing as provided in section 208(a)(2)(D) of the Act and 8 CFR 208.4 and 1208.4, or unless the applicant was an unaccompanied alien child on the date the asylum application was first filed;

(G) The applicant is an alien who entered or attempted to enter the United States at a place and time other than lawfully through a U.S. port of entry, unless the alien demonstrates that he or she:

(*1*) Presented himself or herself without delay to the Secretary of Homeland Security or his or her delegate;

(*2*) Indicated to the Secretary of Homeland Security or his or her delegate an intention to apply for asylum or expresses a fear of persecution or torture; and

(*3*) Has good cause for the illegal entry or attempted entry, provided such good cause does not include the evasion of U.S. immigration officers, convenience, or for the purpose of circumvention of the orderly processing of asylum seekers at a U.S. port of entry.

(iv) *Applicability.* Paragraphs (a)(1)(iii)(A) through (D) of this section apply to applications that were filed prior to and remain pending on [effective date of final rule].

(v) *Delay.* Any delay requested or caused by the applicant on his or her asylum application that is still outstanding or has not been remedied when USCIS adjudicates the application for employment authorization under 8 CFR 274a.12(c)(8) will result in a denial of such application. Examples of applicant-caused delays include, but are not limited to the list below:

(A) A request to amend or supplement an asylum application that causes a delay in its adjudication or in proceedings as permitted in 8 CFR 208.4(c);

(B) Failure to appear to receive and acknowledge receipt of the decision as specified in 8 CFR 208.9(d);

(C) A request for extension to submit additional evidence fewer than 14-days prior to the interview date as permitted by 8 CFR 208.9(e);

(D) Failure to appear for an asylum interview, unless excused by USCIS as described in 8 CFR 208.10(b)(1) for the failure to appear;

(E) Failure to appear for scheduled biometrics collection on the asylum application;

(F) A request to reschedule an interview for a later date;

(G) A request to transfer a case to a new asylum office or interview location, including when the transfer is based on a new address;

(H) A request to provide additional evidence for an interview;

(I) Failure to provide a competent interpreter at an interview; and

(J) Failure to comply with any other request needed to determine asylum eligibility.

(b) *Renewal and termination*—(1) *Renewals.* USCIS may renew employment authorization under 8 CFR 274a.12(c)(8) in increments determined by USCIS in its discretion, but not to exceed increments of two years. Employment authorization is not permitted during any period of judicial review, but may be requested if a Federal court remands the case to the Board of Immigration Appeals. For employment authorization to be renewed under this section, the alien must request employment authorization on the form and in the manner prescribed by USCIS and according to the form instructions. USCIS will require that an alien establish that he or she has continued to pursue an asylum application before USCIS, an Immigration Judge, or the Board of Immigration Appeals and that he or she continues to meet the eligibility criteria for employment authorization set forth in 8 CFR 208.7(a). For purposes of renewal of employment authorization, pursuit of an asylum application before an Immigration Judge or the Board of Immigration Appeals is established by submitting a copy of the referral notice or Notice to Appear placing the alien in proceedings, any hearing notices issued by the immigration court, evidence of a timely filed appeal if the alien appealed the denial of the asylum application to the Board of Immigration Appeals, or remand order to the Immigration Judge or Board of Immigration Appeals.

(i) *Referrals to an Immigration Judge.* Employment authorization granted after the required 365-day waiting period will continue for the remaining period authorized (unless otherwise terminated or revoked) if the asylum officer refers the alien's asylum application to an immigration judge . In accordance with 8 CFR 208.7(b)(1), the alien may be granted renewals of employment authorization while under such review by the Immigration Judge.

(ii) *Appeals to the Board of Immigration Appeals.* If the Immigration Judge denies the alien's asylum application, any remaining period of employment authorization will continue for the period authorized (unless otherwise terminated or revoked) during the period for filing an appeal with the Board of Immigration Appeals under 8 CFR 1003.38(b) or, if an appeal is timely filed within such period, during the pendency of the appeal with the Board of Immigration Appeals. In accordance with 8 CFR 208.7(b)(1), the alien may be granted renewals of employment authorization during these periods while the appeal is under review by the Board of Immigration Appeals and any remand to the Immigration Judge.

(2) *Terminations.* The alien's employment authorization granted pursuant to 8 CFR 274a.12(c)(8) will automatically terminate effective on the date the asylum officer denies the asylum application, thirty days after an Immigration Judge denies the asylum application unless timely appealed to the Board of Immigration Appeals, or the Board of Immigration Appeals affirms or upholds a denial, regardless of whether any automatic extension period pursuant to 8 CFR 274a.13(d)(3) is in place.

(c) *Severability.* The provisions in this section are intended to be independent severable parts. In the event that any provision in this section is not implemented, DHS intends that the remaining provisions be implemented as an independent rule.

■ 5. Amend § 208.9 by adding subject headings for paragraphs (a) through (c), revising paragraphs (d) and (e), and adding subject headings for paragraphs (f) and (g) to read as follows:

§ 208.9 Procedure for interview before an asylum officer.

(a) *Jurisdiction.* * * *

(b) *Requirements for Interview.* * * *

(c) *Conduct of Interview.* * * *

(d) *Completion of the interview.* Upon completion of the interview:

(1) The applicant or the applicant's representative will have an opportunity to make a statement or comment on the evidence presented. The asylum officer may, in his or her discretion, limit the length of such statement or comment and may require its submission in writing.

(2) USCIS will inform the applicant that he or she must appear in person to receive and to acknowledge receipt of the decision of the asylum officer and any other accompanying material at a time and place designated by the asylum officer, except as otherwise provided by the asylum officer. An applicant's failure to appear to receive and acknowledge receipt of the decision will be treated as delay caused by the applicant for purposes of 8 CFR 208.7.

(e) *Extensions.* The asylum officer will consider evidence submitted by the applicant together with his or her asylum application. The applicant must submit any documentary evidence at least 14 calendar days in advance of the interview date. As a matter of discretion, the asylum officer may consider evidence submitted within the 14-day period prior to the interview date or may grant the applicant a brief extension of time during which the applicant may submit additional evidence. Any such extension will be treated as a delay caused by the applicant for purposes of § 208.7.

(f) *Record..* * * *

(g) *Interpreter.* * * *

* * * * *

■ 6. Revise § 208.10 to read as follows:

§ 208.10 Failure to appear for an interview before an asylum officer or for a biometric services appointment for the asylum application.

(a) *Failure to appear for asylum interview or for a biometric services appointment.* (1) The failure to appear for an interview or biometric services appointment may result in:

(i) Waiver of the right to an interview or adjudication by an asylum officer;

(ii) Dismissal of the application for asylum;

(iii) Referral of the applicant to the immigration court; or,

(iv) Denial of employment authorization.

(2) There is no requirement for USCIS to send a notice to an applicant that he or she failed to appear for his or her asylum interview or biometrics services appointment prior to issuing a decision on the application. Any rescheduling request for the asylum interview that has not yet been fulfilled on the date the application for employment authorization is adjudicated under 8 CFR 274a.12(c)(8) will be treated as an applicant-caused delay for purposes of 8 CFR 208.7.

(b) *Rescheduling missed appointments.* USCIS, in its sole discretion, may excuse the failure to appear for an interview or biometrics services appointment and reschedule the missed appointment as follows:

(1) *Asylum Interview.* If the applicant demonstrates that he or she was unable to make the appointment due to exceptional circumstances.

(2) *Biometrics services appointment.* USCIS may reschedule the biometrics services appointment as provided in 8 CFR part 103.

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 7. The authority citation for part 274a is revised to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1105a, 1324a; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599.

■ 8. Amend § 274a.12 by adding the phrase '', unless otherwise provided in this chapter'' at the end of the last sentence in paragraph (c) introductory text and revising paragraphs (c)(8) and (11).

The revisions read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(c) * * *

(8) An alien who has filed a complete application for asylum or withholding of deportation or removal pursuant to 8 CFR parts 103 and 208, whose application has not been decided, and who is eligible to apply for employment authorization under 8 CFR 208.7 because the 365-day period set forth in that section has expired. Employment authorization may be granted according to the provisions of 8 CFR 208.7 of this chapter in increments to be determined by USCIS but not to exceed increments of two years.

* * * * *

(11) Except as provided in paragraphs (b)(37) and (c)(34) of this section, 8 CFR 212.19(h)(4), and except for aliens paroled from custody after having established a credible fear or reasonable fear of persecution or torture under 8 CFR 208.30, an alien paroled into the United States temporarily for urgent humanitarian reasons or significant public benefit pursuant to section 212(d)(5) of the Act.

* * * * *

■ 9. Amend § 274a.13 by revising paragraphs (a)(1) and (2) and (d)(3) to read as follows:

§ 274a.13 Application for employment authorization.

(a) * * *

(1) Aliens seeking initial or renewed employment authorization under 8 CFR 274a.12(c) must apply on the form designated by USCIS with prescribed fee(s) and in accordance with the form instructions. The approval of applications filed under 8 CFR 274a.12(c) is within the discretion of USCIS. Where economic necessity has been identified as a factor, the alien must provide information regarding his or her assets, income, and expenses.

(2) An initial employment authorization request for asylum applicants or for renewal or replacement of employment authorization submitted in relation to a pending claim for asylum, in accordance with 8 CFR 208.7 and 8 CFR 274a.12(c)(8), must be filed on the form designated by USCIS in accordance with the form instructions with prescribed fee(s).

* * * * *

(d) * * *

(3) *Termination.* Employment authorization automatically extended pursuant to paragraph (d)(1) of this section will automatically terminate the earlier of up to 180 days after the expiration date of the Employment Authorization Document (Form I–766), or on the date USCIS denies the request for renewal. Employment authorization granted under 8 CFR 274a.12(c)(8) and automatically extended pursuant to paragraph (d)(1) of this section is further subject to the termination provisions of 8 CFR 208.7(b)(2).

* * * * *

■ 10. Amend § 274a.14 by:

■ (a) Removing ''or'' at the end of paragraph (a)(1)(ii);

■ (b) Removing the period and adding in its place ''; or'' at the end of paragraph (a)(1)(iii); and

■ (c) Adding paragraph (a)(1)(iv).

The addition reads as follows:

§ 274a.14 Termination of employment authorization.

(a) * * *

(1) * * *

(iv) Automatic termination is provided elsewhere in this chapter.

Kevin K. McAleenan,

Acting Secretary.

[FR Doc. 2019–24293 Filed 11–13–19; 8:45 am]

BILLING CODE 9111–97–P

FEDERAL REGISTER

Vol. 84 Thursday,

No. 220 November 14, 2019

Part V

The President

Proclamation 9964—National Apprenticeship Week, 2019
Proclamation 9965—World Freedom Day, 2019

Federal Register
Vol. 84, No. 220
Thursday, November 14, 2019

Presidential Documents

Title 3—

The President

Proclamation 9964 of November 8, 2019

National Apprenticeship Week, 2019

By the President of the United States of America

A Proclamation

Our Nation's robust economy continues to flourish, creating new opportunities for Americans and securing our continued dominance of global markets. As President, I have reduced tax burdens and eliminated unnecessary regulations, producing the lowest unemployment rate in 50 years and more job openings than there are job seekers for 19 months in a row. My Administration is committed to helping all Americans take advantage of this historically strong job market and secure lasting prosperity by ensuring they have access to skills-training that will enable them to launch successful careers in any industry. As we observe National Apprenticeship Week, we celebrate the growing optimism of workers across our country and strengthen our resolve to continue empowering our workers to achieve the American Dream.

Encouraging the creation and expansion of apprenticeships is a cornerstone of my commitment to helping improve employment prospects for students and workers. My Administration continues to make unprecedented investments to ensure apprenticeships remain accessible to all Americans, allocating more than $300 million to that mission this year alone. We awarded nearly $184 million to the Scaling Apprenticeship Through Sector-Based Strategies grant program to encourage private-public partnerships in high-growth industries, including information technology, advanced manufacturing, and healthcare. We have also invested $160 million to expand the number of apprentices in Registered Apprenticeship programs nationwide, helping to increase the number and diversity of apprentices in every State.

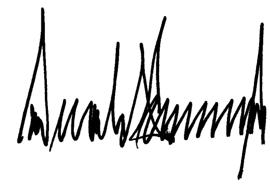
Through workplace and classroom education, apprentices gain valuable knowledge and credentials, drastically improving their future career trajectory. Apprenticeship programs enable Americans to simultaneously earn and learn while avoiding burdensome student loans. They also guarantee American companies access to the skilled employees they need to accelerate growth and innovation. We have achieved great success increasing the availability of these invaluable programs, with 240,000 new apprentices hired and 3,300 new programs launched just last year.

I am determined to build upon our economic successes and encourage business leaders, industry experts, and educational institutions to seize the opportunity to expand career-changing apprenticeship programs. I have called on the private sector to invest in the education and skills training of their future and current workers so that all Americans are prepared for the jobs of today and tomorrow. To date, more than 360 companies have committed to investing in over 14 million students and workers through our Pledge to America's Workers. My Administration is also developing standards for industry-recognized apprenticeship programs, which will assist workers in obtaining the knowledge they need to secure family-sustaining careers by taking advantage of high-quality, demand-driven opportunities. Additionally, we are supporting the growth of youth apprenticeship programs that combine academic and technical classroom instruction with work experience and increasing awareness among middle and high school students about the many benefits of apprenticeships.

This week, we recommit our efforts to fostering greater opportunity for current and future workers by supporting expanded access to apprenticeships. By increasing training and educational programs, we will renew our Nation's workforce and help hardworking Americans create a brighter future for themselves and their families while further strengthening our robust economy.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim November 11 through November 17, 2019, as National Apprenticeship Week.

IN WITNESS WHEREOF, I have hereunto set my hand this eighth day of November, in the year of our Lord two thousand nineteen, and of the Independence of the United States of America the two hundred and forty-fourth.



[FR Doc. 2019–24875
Filed 11–13–19; 11:15 am]
Billing code 3295–F0–P

Presidential Documents

Proclamation 9965 of November 8, 2019

World Freedom Day, 2019

By the President of the United States of America

A Proclamation

Thirty years ago, the people of East and West Berlin came together to tear down a symbol of totalitarianism. For more than 10,000 days, the Berlin Wall stood as a troubling reminder of a deeply divided world, an evil obstacle to freedom and individual liberty. When the wall finally came down, it marked a triumphant defeat of communism, a monumental victory for democratic principles, and a righteous end to the nearly five-decades-long Cold War. On World Freedom Day, we remember those who suffered as they longed for freedom behind the Iron Curtain, and we recognize those relentlessly fighting today to break free from the shackles of oppression.

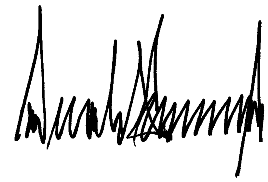
Any system of government that impedes the God-given rights of the people is destined to fail because the flame of liberty cannot be extinguished. As President Ronald Reagan said at the Brandenburg Gate in West Berlin, ''The totalitarian world produces backwardness because it does such violence to the spirit, thwarting the human impulse to create, to enjoy, to worship.'' On that fateful day in 1989, we saw—with every falling piece of rubble—that the human impulse for freedom cannot long be suppressed. Regimes that attempt to stop the free flow of ideas, the right of a people to choose their own government, and the blessings of free enterprise will inevitably suffer the same fate as the Berlin Wall.

While authoritarian powers seek to collapse the progress and alliances that have developed in the three decades since the fall of the Berlin Wall, the United States stands firm in our commitment to uphold the democratic values at the bedrock of every free society. Today, our Nation works in tandem with our allies and partners to safeguard the precious freedoms that fuel prosperity and ensure stability around the globe. Bad actors will continually try to weaken our cause and sow discord, but democratic bonds will always prevail.

This World Freedom Day, we pay tribute to the heroes who helped liberate Eastern and Central Europe from communist oppression, securing liberty for millions. We also reaffirm our support of those everywhere who pursue the noble cause of freedom.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim November 9, 2019, as World Freedom Day. I call upon the people of the United States to observe this day with appropriate ceremonies and activities, reaffirming our dedication to freedom and democracy.

IN WITNESS WHEREOF, I have hereunto set my hand this eighth day of November, in the year of our Lord two thousand nineteen, and of the Independence of the United States of America the two hundred and forty-fourth.



[FR Doc. 2019–24876
Filed 11–13–19; 11:15 am]
Billing code 3295–F0–P

Reader Aids

Federal Register

Vol. 84, No. 220

Thursday, November 14, 2019

CUSTOMER SERVICE AND INFORMATION

Federal Register/Code of Federal Regulations	
General Information, indexes and other finding aids	**202–741–6000**
Laws	**741–6000**
Presidential Documents	
Executive orders and proclamations	**741–6000**
The United States Government Manual	**741–6000**
Other Services	
Electronic and on-line services (voice)	**741–6020**
Privacy Act Compilation	**741–6050**

ELECTRONIC RESEARCH

World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.govinfo.gov.**

Federal Register information and research tools, including Public Inspection List and electronic text are located at: **www.federalregister.gov.**

E-mail

FEDREGTOC (Daily Federal Register Table of Contents Electronic Mailing List) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new**, enter your email address, then follow the instructions to join, leave, or manage your subscription.

PENS (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html and select** *Join or leave the list (or change settings);* then follow the instructions.

FEDREGTOC and **PENS** are mailing lists only. We cannot respond to specific inquiries.

Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

FEDERAL REGISTER PAGES AND DATE, NOVEMBER

58595–59288 1
59289–59524 4
59525–59710 5
59711–59916 6
59917–60306 7
60307–60882 8
60883–61516 12
61517–61818 13
61819–62430 14

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.

3 CFR

Proclamations:
9956 59693
9957 59697
9958 59699
9959 59701
9960 59703
9961 59705
9962 59707
9963 61811
9964 62427
9965 62429
Executive Orders:
13495 (Revoked by EO 13897) 59709
13896 58595
13897 59709
Administrative Orders:
Notices:
Notice of October 31, 2019 59287
Notice of November 12, 2019 61815
Notice of November 12, 2019 61817
Presidential Determinations:
No. 2020–01 of October 18, 2019 59519
No. 2020–02 of October 18, 2019 59521
No. 2020–03 of October 25, 2019 59917

5 CFR

Proposed Rules:
8301 60346

7 CFR

966 59289
1470 60883
1600 59919
1610 59919
1700 59919
1735 59919
1737 59919
1740 59919
1744 59919
1751 59919
2003 59919
2200 59919
2201 59919
Proposed Rules:
932 59736

8 CFR

103 60307
217 60316
Proposed Rules:
103 62280
106 62280
204 62280
208 62374
211 62280
212 62280
214 62280
216 62280
223 62280
235 62280
236 62280
240 62280
244 62280
245 62280
245a 62280, 62374
248 62280
264 62280
274a 62280
301 62280
319 62280
320 62280
322 62280
324 62280
334 62280
341 62280
343a 62280
343b 62280
392 62280

9 CFR

327 60318
557 .... 59678, 59682, 59685

10 CFR

Proposed Rules:
430 61836
810 59315

12 CFR

1 61776
3 .... 59230, 61776, 61804
5 61776
6 61776
23 61776
24 61776
32 61776
34 61776
44 61974
50 59230
160 61776
192 61776
201 59923
204 59924
206 61776
208 61776
211 61776
215 61776
217 .... 59032, 59230, 61776, 61804
223 61776
225 .... 59032, 61776
238 .... 59032, 61776
242 59032
243 59194
248 61974
249 59230

251 61776
252 59032
303 61776
324 .....59230, 61776, 61804
329 59230
337 61776
347 61776
351 61974
362 61776
365 61776
381 59194
390 61776

Proposed Rules:
45 59970
237 59970
246 60944
349 59970
624 59970
701 59989
1221 59970

13 CFR

Proposed Rules:
121 60846
124 60846
125 60846
126 60846
127 60846
134 60846

14 CFR

39 .....59292, 59711, 59713, 59716, 59718, 59926, 60325, 60328, 60900, 60903, 60906, 61517, 61520, 61523, 61526, 61529, 61533
71 .....58599, 58600, 61537
95 60330
97 .....59294, 59296

Proposed Rules:
39 .....58634, 58636, 58638, 59315, 59739, 60001, 60003, 60007, 60349, 60351
71 60354

15 CFR

744 61538
801 60912
922 61546

16 CFR

Proposed Rules:
Ch. II 60010
1112 60949
1130 60949
1236 60949

17 CFR

75 61974
255 61974

Proposed Rules:
160 60963

20 CFR

Proposed Rules:
617 60150
618 60150

21 CFR

1308 60333

Proposed Rules:
1 59452
11 59452
16 59452
129 59452
1141 60966

23 CFR

Proposed Rules:
650 61494

26 CFR

1 59297
57 61547

Proposed Rules:
1 .....59318, 60011, 60812

27 CFR

478 60333

29 CFR

500 59928
501 59928
580 59928
801 59928
2700 59931

Proposed Rules:
90 60150
778 59590

31 CFR

1010 59302

Proposed Rules:
150 59320

32 CFR

233 59720
504 59723
584 60916
Ch. XII 59723

33 CFR

100 .....59525, 59526, 60334, 61819
117 60916
165 .....59526, 59754, 59726, 60334, 60337

Proposed Rules:
117 59741
165 .....59602, 60025, 61583

34 CFR

600 58834
602 58834
603 58834
654 58834
668 58834
674 58834

Proposed Rules:
Ch. III 61585

37 CFR

201 60917
202 .....60917, 60918

Proposed Rules:
383 60356

38 CFR

17 61548

39 CFR

3020 61552

Proposed Rules:
3050 60031

40 CFR

52 .....59527, 59728, 60920, 60927, 61560, 61819
60 61563
63 58601
81 60927
180 .....58623, 59932, 60932, 60937
282 58627
300 60339

Proposed Rules:
Ch. I 60986
51 59743
52 .....58641, 59325, 59327, 59331, 59743, 60968, 61592, 61850
63 58936
70 .....59743, 60968
71 59743
97 61850
141 61684
142 61684
170 58666
228 59744
261 60975
282 58674
300 60357
710 60363
721 59335

41 CFR

Proposed Rules:
60–1 59746
60–300 59746
60–741 59746

42 CFR

405 .....60648, 61142
409 60478
410 .....60648, 61142
412 61142
413 60648
414 .....60478, 60648, 61142
416 61142
419 61142
484 60478
486 .....60478, 61142
600 59529

43 CFR

2 61820
3000 59730

44 CFR

64 59548

45 CFR

102 59549
1169 59313

47 CFR

1 59567
54 .....59937, 61829
90 61831

Proposed Rules:
1 59605
73 .....59605, 59756
90 61863

48 CFR

Ch. 7 61832

Proposed Rules:
207 60988
212 60988
215 60988
227 60988
252 60988

49 CFR

614 59568

Proposed Rules:
234 60032
395 59761
396 60990

50 CFR

17 59570
622 .....60344, 61568
648 .....59588, 59735
679 .....59588, 59968
697 61569

Proposed Rules:
10 60998
17 .....60278, 60371
300 60040
622 61003
648 59349

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 13, 2019

Public Laws Electronic Notification Service (PENS)

PENS is a free electronic mail notification service of newly enacted public laws. To subscribe, go to *http://listserv.gsa.gov/archives/publaws-l.html*

Note: This service is strictly for E-mail notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.