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The Code of Federal Regulations is sold by the Superintendent of Documents.

## FEDERAL RESERVE SYSTEM

### 12 CFR Part 209

[Regulation I; Docket No. R-1689]

RIN 7100-AF 67

### Federal Reserve Bank Capital Stock

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Final rule.

**SUMMARY:** The Board of Governors (Board) is publishing a final rule that applies an inflation adjustment to the threshold for total consolidated assets in Regulation I. Federal Reserve Bank (Reserve Bank) stockholders that have total consolidated assets above the threshold receive a different dividend rate on their Reserve Bank stock than stockholders with total consolidated assets at or below the threshold. The Federal Reserve Act requires that the Board annually adjust the total consolidated asset threshold to reflect the change in the Gross Domestic Product Price Index, published by the Bureau of Economic Analysis (BEA). Based on the change in the Gross Domestic Product Price Index as of September 26, 2019, the total consolidated asset threshold will be \$10,715,000,000 through December 31, 2020.

**DATES:** This final rule is effective January 15, 2020.

**FOR FURTHER INFORMATION CONTACT:** Evan Winerman, Senior Counsel (202/872-7578), Legal Division; or Jamie Noonan, Lead Financial Institutions Policy Analyst (202/530-6296), Reserve Bank Operations and Payments Systems Division. For users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263-4869.

### SUPPLEMENTARY INFORMATION:

#### I. Background

Regulation I governs the issuance and cancellation of capital stock by the Reserve Banks. Under section 5 of the

Federal Reserve Act<sup>1</sup> and Regulation I,<sup>2</sup> a member bank must subscribe to capital stock of the Reserve Bank of its district in an amount equal to six percent of the member bank's capital and surplus. The member bank must pay for one-half of this subscription on the date that the Reserve Bank approves its application for capital stock, while the remaining half of the subscription shall be subject to call by the Board.<sup>3</sup>

Section 7(a)(1) of the Federal Reserve Act<sup>4</sup> provides that Reserve Bank stockholders with \$10 billion or less in total consolidated assets shall receive a six percent dividend on paid-in capital stock, while stockholders with more than \$10 billion in total consolidated assets shall receive a dividend on paid-in capital stock equal to the lesser of six percent and "the rate equal to the high yield of the 10-year Treasury note auctioned at the last auction held prior to the payment of such dividend."

Section 7(a)(1) requires that the Board adjust the threshold for total consolidated assets annually to reflect the change in the Gross Domestic Product Price Index, published by the BEA.

Regulation I implements section 7(a)(1) of the Federal Reserve Act by (1) defining the term "total consolidated assets,"<sup>5</sup> (2) incorporating the statutory dividend rates for Reserve Bank stockholders<sup>6</sup> and (3) providing that the Board shall adjust the threshold for total consolidated assets annually to reflect the change in the Gross Domestic Product Price Index.<sup>7</sup> The Board has explained that it "expects to make this adjustment [to the threshold for total consolidated assets] using the final second quarter estimate of the Gross Domestic Product Price Index for each

year, published by the Bureau of Economic Analysis."<sup>8</sup>

#### II. Adjustment

The Board annually adjusts the \$10 billion total consolidated asset threshold based on the change in the Gross Domestic Product Price Index between the second quarter of 2015 (the baseline year) and the second quarter of the current year.<sup>9</sup> The second quarter 2019 Gross Domestic Product Price Index estimate published by the BEA in September 2019 (112.173) is 7.15 percent higher than the second quarter 2015 Gross Domestic Product Price Index estimate published by the BEA in September 2019 (104.684). Based on this change in the Gross Domestic Product Price Index, the threshold for total consolidated assets in Regulation I will be \$10,715,000,000 as of January 15, 2020.

#### III. Administrative Law Matters

##### *Administrative Procedure Act*

The provisions of 5 U.S.C. 553(b) relating to notice of proposed rulemaking have not been followed in connection with the adoption of these amendments. The amendments involve expected, ministerial adjustments that are required by statute and Regulation I and are consistent with a method previously set forth by the Board.<sup>10</sup> Accordingly, the Board finds good cause for determining, and so determines, that notice in accordance with 5 U.S.C. 553(b) is unnecessary.

##### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) does not apply to a rulemaking where a general notice of proposed rulemaking is not required.<sup>11</sup> As noted previously, the Board has determined that it is unnecessary to publish a general notice of proposed rulemaking for this final rule. Accordingly, the RFA's requirements relating to an initial and

<sup>1</sup> 12 U.S.C. 287.

<sup>2</sup> 12 CFR 209.4(a).

<sup>3</sup> 12 U.S.C. 287 and 12 CFR 209.4(c)(2).

<sup>4</sup> 12 U.S.C. 289(a)(1).

<sup>5</sup> 12 CFR 209.1(d)(3) ("Total consolidated assets means the total assets on the stockholder's balance sheet as reported by the stockholder on its Consolidated Report of Condition and Income (Call Report) as of the most recent December 31, except in the case of a new member or the surviving stockholder after a merger 'total consolidated assets' means (until the next December 31 Call Report becomes available) the total consolidated assets of the new member or the surviving stockholder at the time of its application for capital stock").

<sup>6</sup> 12 CFR 209.4(e), (c)(1)(ii), and (d)(1)(ii); 209.2(a); and 209.3(d)(3).

<sup>7</sup> 12 CFR 209.4(f).

<sup>8</sup> 81 FR 84415, 84417 (Nov. 23, 2016).

<sup>9</sup> The BEA makes ongoing revisions to its estimates of the Gross Domestic Product Price Index for historical calendar quarters. The Board calculates annual adjustments from the baseline year (rather than from the prior-year total consolidated asset threshold) to ensure that the adjusted total consolidated asset threshold accurately reflects the cumulative change in the BEA's most recent estimates of the Gross Domestic Product Price Index.

<sup>10</sup> See 12 CFR 209.4(f) and n. 8 and accompanying text, *supra*.

<sup>11</sup> 5 U.S.C. 603 and 604.

final regulatory flexibility analysis do not apply.

#### *Paperwork Reduction Act*

In accordance with the Paperwork Reduction Act of 1995,<sup>12</sup> the Board has reviewed this final rule. No collections of information pursuant to the Paperwork Reduction Act are contained in the final rule.

#### List of Subjects in 12 CFR Part 209

Banks and banking, Federal Reserve System, Reporting and recordkeeping requirements, Securities.

#### Authority and Issuance

For the reasons set forth in the preamble, the Board amends Regulation I, 12 CFR part 209, as follows:

#### **PART 209—ISSUE AND CANCELLATION OF FEDERAL RESERVE BANK CAPITAL STOCK (REGULATION I)**

■ 1. The authority citation for part 209 continues to read as follows:

**Authority:** 12 U.S.C. 222, 248, 282, 286–288, 289, 321, 323, 327–328, and 466.

■ 2. In part 209, remove all references to “\$10,518,000,000” and add in their place “\$10,715,000,000”, wherever they appear.

By order of the Board of Governors of the Federal Reserve System, acting through the Secretary of the Board under delegated authority, December 11, 2019.

**Ann Misback,**

*Secretary of the Board.*

[FR Doc. 2019–27012 Filed 12–13–19; 8:45 am]

**BILLING CODE 6210–01–P**

#### **FARM CREDIT ADMINISTRATION**

##### **12 CFR Part 624**

[Docket No. 2019–05012]

RIN 3052–AD34

#### **Margin and Capital Requirements for Covered Swap Entities; Correction**

**AGENCY:** Farm Credit Administration.

**ACTION:** Correcting amendment.

**SUMMARY:** The Farm Credit Administration (FCA or we) is correcting an interim final rule that published in the **Federal Register** on March 19, 2019, which we jointly issued with four other Agencies. The joint interim final rule amended the regulations governing Margin and Capital Requirements for Covered Swap Entities to address the status of certain

non-cleared swaps and non-cleared security-based swaps if the United Kingdom withdraws from the European Union without a negotiated settlement.

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

#### **FOR FURTHER INFORMATION CONTACT:**

Jeremy R. Edelstein, Associate Director, Finance & Capital Market Team, Timothy T. Nerdahl, Senior Policy Analyst, Office of Regulatory Policy, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090, (703) 883–4414, TTY (703) 883–4056; or Richard A. Katz, Senior Counsel, Office of General Counsel, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102–5090, (703) 883–4020, TTY (703) 883–4056.

**SUPPLEMENTARY INFORMATION:** In FR Doc. 2019–05012 appearing on page 9950 in the **Federal Register** on Tuesday, March 19, 2019, § 624.1 published with two paragraphs designated as (h)(2)(iv). The second instance of paragraph (h)(2)(iv) is being redesignated as paragraph (h)(2)(vi).

#### **List of Subjects in 12 CFR Part 624**

Accounting, Agriculture, Banks, Banking, Capital, Cooperatives, Credit, Margin requirements, Reporting and recordkeeping requirements, Risk, Rural areas, Swaps.

Accordingly, 12 CFR part 624 is corrected by making the following correcting amendment:

#### **PART 624—MARGIN AND CAPITAL REQUIREMENTS FOR COVERED SWAP ENTITIES**

■ 1. The authority citation for part 624 continues to read as follows:

**Authority:** 7 U.S.C. 6s(e), 15 U.S.C. 780–10(e), 12 U.S.C. 2154, 12 U.S.C. 2243, 12 U.S.C. 2252, and 12 U.S.C. 2279bb–1.

##### **§ 624.1 [Amended]**

■ 2. Section 624.1 is amended by redesignating the second paragraph (h)(2)(iv) as paragraph (h)(2)(vi).

Dated: December 10, 2019.

**Dale Aultman,**

*Secretary, Farm Credit Administration Board.*

[FR Doc. 2019–26884 Filed 12–13–19; 8:45 am]

**BILLING CODE 6705–01–P**

#### **DEPARTMENT OF TRANSPORTATION**

##### **Federal Aviation Administration**

##### **14 CFR Part 39**

[Docket No. FAA–2019–0326; Product Identifier 2018–NM–166–AD; Amendment 39–19808; AD 2019–23–14]

RIN 2120–AA64

#### **Airworthiness Directives; The Boeing Company Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for all The Boeing Company Model 737–100, –200, –200C, –300, –400, and –500 series airplanes. This AD was prompted by significant changes made to the airworthiness limitations (AWLs) related to fuel tank ignition prevention and the nitrogen generation system. This AD requires revising the existing maintenance or inspection program, as applicable, to include new or revised AWLs. The FAA is issuing this AD to address the unsafe condition on these products.

**DATES:** This AD is effective January 21, 2020.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of January 21, 2020.

**ADDRESSES:** For service information identified in this final rule, contact Boeing Commercial Airplanes, Attention: Contractual & Data Services (C&DS), 2600 Westminister Blvd., MC 110–SK57, Seal Beach, CA 90740–5600; phone: 562–797–1717; internet: <https://www.myboeingfleet.com>. You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA–2019–0326.

#### **Examining the AD Docket**

You may examine the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA–2019–0326; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, the regulatory evaluation, any comments received, and other information. The address for Docket

<sup>12</sup> 44 U.S.C. 3506; 5 CFR 1320.

Operations is U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** Serj Harutunian, Aerospace Engineer, Propulsion Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712-4137; phone: 562-627-5254; fax: 562-627-5210; email: [serj.harutunian@faa.gov](mailto:serj.harutunian@faa.gov).

#### **SUPPLEMENTARY INFORMATION:**

#### **Discussion**

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to all The Boeing Company Model 737-100, -200, -200C, -300, -400, and -500 series airplanes. The NPRM published in the **Federal Register** on June 10, 2019 (84 FR 26778). The NPRM was prompted by significant changes made to the AWLs related to fuel tank ignition prevention and the nitrogen generation system. The NPRM proposed to require revising the existing maintenance or inspection program, as applicable, to include new or revised AWLs.

The FAA is issuing this AD to address the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

#### **Comments**

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

#### **Support for the NPRM**

Air Line Pilots Association, International (ALPA) agreed with the intent of the NPRM.

#### **Effect of Winglets on Accomplishment of the Proposed Actions**

Aviation Partners Boeing stated that the installation of winglets per Supplemental Type Certificate (STC) ST01219SE does not affect the accomplishment of the manufacturer's service instructions.

The FAA agrees with the commenter that STC ST01219SE does not affect the accomplishment of the manufacturer's service instructions. Therefore, the installation of STC ST01219SE does not affect the ability to accomplish the actions required by this AD. The FAA has not changed this AD in this regard.

#### **Request for Additional Affected AD**

Boeing requested that the FAA include AD 2018-04-12, Amendment 39-19208 (83 FR 9178, March 5, 2018) ("AD 2018-04-12"), as an affected AD in the proposed AD. Boeing pointed out that AD 2018-04-12 requires operators to incorporate certain AWLs included in certain previous revisions of Boeing 737-100/200/200C/300/400/500 Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D6-38278-CMR. Boeing explained that the specific AWLs referenced by AD 2018-04-12 are still present in the latest revision mandated by this AD, but are at a later revision, and as such, should be considered terminating action for the requirements of paragraph (h) of AD 2018-04-12. Boeing noted that AD 2013-13-15, Amendment 39-17503 (78 FR 42415, July 16, 2013) ("AD 2013-13-15"), has similar requirements to those in AD 2018-04-12, and that those similar requirements in AD 2013-13-15 are terminated as specified in paragraph (j)(3) of the proposed AD.

The FAA agrees with the commenter's request for the reasons provided. The FAA has added paragraph (b)(7) to this AD to specify that AD 2018-04-12 is affected by this AD, and paragraph (j)(7) to this AD to specify that the requirements of paragraph (h) of AD 2018-04-12 are terminated by the revision required by paragraph (g) of this AD.

#### **Clarification That Previous Alternative Methods of Compliance (AMOCs) Are Not Approved For This AD**

The regulatory text of the NPRM did not include a paragraph specifying that AMOCs previously approved for the ADs specified in paragraph (j) of this AD are approved for the corresponding requirements of this AD. For clarity, the FAA has added paragraph (k)(4) to this AD to specify that AMOCs that were previously approved for the ADs specified in paragraph (j) of this AD are not approved as AMOCs for this AD.

#### **Conclusion**

The FAA reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this final rule with the changes described previously and minor editorial changes. The FAA has determined that these minor changes:

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

The FAA also determined that these changes will not increase the economic burden on any operator or increase the scope of this final rule.

#### **Related Service Information Under 1 CFR Part 51**

The FAA reviewed Boeing 737-100/200/200C/300/400/500 Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D6-38278-CMR, dated March 2019. This service information describes AWLs that include airworthiness limitation instructions (ALI) and critical design configuration control limitations (CDCCL) tasks related to fuel tank ignition prevention and the nitrogen generation system. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

#### **Costs of Compliance**

The FAA estimates that this AD affects 381 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

The FAA has determined that revising the existing maintenance or inspection program takes an average of 90 work-hours per operator, although the FAA recognizes that this number may vary from operator to operator. In the past, the FAA has estimated that this action takes 1 work-hour per airplane. Since operators incorporate maintenance or inspection program changes for their affected fleet(s), the FAA has determined that a per-operator estimate is more accurate than a per-airplane estimate. Therefore, the FAA estimates the total cost per operator to be \$7,650 (90 work-hours × \$85 per work-hour).

#### **Authority for This Rulemaking**

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

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

develop on products identified in this rulemaking action.

This AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes and associated appliances to the Director of the System Oversight Division.

### Regulatory Findings

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

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

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Will not affect intrastate aviation in Alaska, and
- (3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

### List of Subjects in 14 CFR Part 39

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

### Adoption of the Amendment

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

## PART 39—AIRWORTHINESS DIRECTIVES

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

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

### § 39.13 [Amended]

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

#### 2019-23-14 The Boeing Company:

Amendment 39-19808; Docket No. FAA-2019-0326; Product Identifier 2018-NM-166-AD.

#### (a) Effective Date

This AD is effective January 21, 2020.

#### (b) Affected ADs

This AD affects the ADs specified in paragraphs (b)(1) through (7) of this AD.

- (1) AD 2008-10-09 R1, Amendment 39-16148 (74 FR 69264, December 31, 2009) (“AD 2008-10-09 R1”).
- (2) AD 2011-12-09, Amendment 39-16716 (76 FR 33988, June 10, 2011) (“AD 2011-12-09”).
- (3) AD 2013-13-15, Amendment 39-17503 (78 FR 42415, July 16, 2013) (“AD 2013-13-15”).
- (4) AD 2013-25-05, Amendment 39-17701 (78 FR 78701, December 27, 2013) (“AD 2013-25-05”).
- (5) AD 2016-18-16, Amendment 39-18647 (81 FR 65864, September 26, 2016) (“AD 2016-18-16”).
- (6) AD 2017-17-09, Amendment 39-18999 (82 FR 40477, August 25, 2017) (“AD 2017-17-09”).
- (7) AD 2018-04-12, Amendment 39-19208 (83 FR 9178, March 5, 2018) (“AD 2018-04-12”).

#### (c) Applicability

This AD applies to all The Boeing Company Model 737-100, -200, -200C, -300, -400, and -500 series airplanes, certificated in any category.

#### (d) Subject

Air Transport Association (ATA) of America Code 28, Fuel; 47, Nitrogen Generation System.

#### (e) Unsafe Condition

This AD was prompted by a determination that new or revised airworthiness limitations (AWLs) are necessary related to fuel tank ignition prevention and the nitrogen generation system. The FAA is issuing this AD to address the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

#### (f) Compliance

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

#### (g) Maintenance or Inspection Program Revision

(1) For The Boeing Company Model 737-100, -200, and -200C series airplanes: Within 60 days after the effective date of this AD, revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in Section C, including Subsections C.1, C.2, and C.3 of Boeing 737-100/200/200C/300/400/500 Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D6-38278-CMR, dated March 2019, except as provided in paragraph (h) of this AD. The initial compliance time for the ALI tasks are within the applicable compliance times specified in paragraphs (g)(1)(i) through (x) of this AD.

(i) For AWL No. 28-AWL-01, “External Wires Over Center Fuel Tank”: Within 120 months after the most recent inspection was performed as specified in AWL No. 28-AWL-01, or within 12 months after the

effective date of this AD if no initial inspection has been performed.

(ii) For AWL No. 28-AWL-03, “Fuel Quantity Indicating System (FQIS)—Out Tank Wiring Lightning Shield to Ground Termination”: Within 120 months after accomplishment of the actions specified in Boeing Service Bulletin 737-28A1178, or within 120 months after the most recent inspection was performed as specified in AWL No. 28-AWL-03, whichever is later.

(iii) For AWL No. 28-AWL-21, “Center Tank Fuel Boost Pump Automatic Shutoff System”: Within 12 months after accomplishment of the actions specified in Boeing Service Bulletin 737-28A1228, or within 12 months after the most recent inspection was performed as specified in AWL No. 28-AWL-21, whichever is later.

(iv) For AWL No. 28-AWL-22, “Auxiliary Tank Fuel Boost Pump Automatic Shutoff System”: Within 12 months after accomplishment of the actions specified in Boeing Service Bulletin 737-28A1228, or within 12 months after the most recent inspection was performed as specified in AWL No. 28-AWL-22, whichever is later.

(v) For AWL No. 28-AWL-23, “Over-Current and Arcing Protection Electrical Design Features Operation—Boost Pump Ground Fault Interrupter (GFI)”: Within 12 months after accomplishment of the actions specified in Boeing Service Bulletin 737-28A1212, or within 12 months after the most recent inspection was performed as specified in AWL No. 28-AWL-23, whichever is later.

(vi) For AWL No. 28-AWL-24, “Center Tank Fuel Boost Pump Power Failed On Protection System”: Within 12 months after accomplishment of the actions specified in Boeing Service Bulletin 737-28A1227, or within 12 months after the most recent inspection was performed as specified in AWL No. 28-AWL-24, whichever is later.

(vii) For AWL No. 28-AWL-25, “Auxiliary Fuel Tank Boost Pump Power Failed On Protection System”: Within 12 months after accomplishment of the actions specified in Boeing Service Bulletin 737-28A1227, or within 12 months after the most recent inspection was performed as specified in AWL No. 28-AWL-25, whichever is later.

(viii) For AWL No. 28-AWL-29, “AC Fuel Boost Pump Installation”: Within 72 months after the most recent inspection was performed as specified in AWL No. 28-AWL-29, or within 12 months after the effective date of this AD if no inspection has been performed in the last 72 months.

(ix) For AWL No. 47-AWL-04, “Nitrogen Generation System (NGS)—Thermal Switch”: Within 22,500 flight hours after accomplishment of the actions specified in Boeing Service Bulletin 737-47-1005; within 22,500 flight hours after accomplishment of the actions specified in Boeing Service Bulletin 737-47-1008; or within 22,500 flight hours after the most recent inspection was performed as specified in AWL No. 47-AWL-04; whichever is latest.

(x) For AWL No. 47-AWL-05, “Nitrogen Generation System (NGS)—Nitrogen Enriched Air (NEA) Distribution Ducting Integrity”: Within 14,500 flight hours after accomplishment of the actions specified in Boeing Service Bulletin 737-47-1005; within

14,500 flight hours after accomplishment of the actions specified in Boeing Service Bulletin 737-47-1008; or within 14,500 flight hours after the most recent inspection was performed as specified in AWL No. 47-AWL-05; whichever is latest.

(2) For The Boeing Company Model 737-300, -400, and -500 series airplanes: Within 60 days after the effective date of this AD, revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in Section C, including Subsections C.1, C.2, and C.3 of Boeing 737-100/200/200C/300/400/500 Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D6-38278-CMR, dated March 2019; except as provided in paragraph (h) of this AD. The initial compliance time for the ALI tasks are within the applicable compliance times specified in paragraphs (g)(2)(i) through (xi) of this AD.

(i) For AWL No. 28-AWL-01, "External Wires Over Center Fuel Tank": Within 120 months after the most recent inspection was performed as specified in AWL No. 28-AWL-01, or within 12 months after the effective date of this AD if no initial inspection has been performed.

(ii) For AWL No. 28-AWL-03, "Fuel Quantity Indicating System (FQIS)—Out Tank Wiring Lightning Shield to Ground Termination": Within 120 months after accomplishment of the actions specified in Boeing Service Bulletin 737-28A1175; within 120 months after accomplishment of the actions specified in Boeing Service Bulletin 737-28A1183; within 120 months after accomplishment of the actions specified in Boeing Service Bulletin 737-28A1186; or within 120 months after the most recent inspection was performed as specified in AWL No. 28-AWL-03; whichever is latest.

(iii) For AWL No. 28-AWL-20, "Center Tank Fuel Boost Pump Automatic Shutoff System": Within 12 months after accomplishment of the actions specified in Boeing Service Bulletin 737-28A1216, or within 12 months after the most recent inspection was performed as specified in AWL No. 28-AWL-20, whichever is later.

(iv) For AWL No. 28-AWL-21, "Auxiliary Tank Fuel Boost Pump Automatic Shutoff System": Within 12 months after accomplishment of the actions specified in Boeing Service Bulletin 737-28A1216, or within 12 months after the most recent inspection was performed as specified in AWL No. 28-AWL-21, whichever is later.

(v) For AWL No. 28-AWL-22, "Over-Current and Arcing Protection Electrical Design Features Operation—Boost Pump Ground Fault Interrupter (GFI)": Within 12 months after accomplishment of the actions specified in Boeing Service Bulletin 737-28A1212, or within 12 months after the most recent inspection was performed as specified in AWL No. 28-AWL-22, whichever is later.

(vi) For AWL No. 28-AWL-23, "Center Tank Fuel Boost Pump Power Failed On Protection System": Within 12 months after accomplishment of the actions specified in Boeing Service Bulletin 737-28A1227, or within 12 months after the most recent inspection was performed as specified in AWL No. 28-AWL-23, whichever is later.

(vii) For AWL No. 28-AWL-24, "Auxiliary Fuel Tank Boost Pump Power Failed On Protection System": Within 12 months after accomplishment of the actions specified in Boeing Service Bulletin 737-28A1227, or within 12 months after the most recent inspection was performed as specified in AWL No. 28-AWL-24, whichever is later.

(viii) For AWL No. 28-AWL-27, "AC Fuel Boost Pump Installation": Within 72 months after the most recent inspection was performed as specified in AWL No. 28-AWL-27, or within 12 months after the effective date of this AD if no inspection has been performed in the last 72 months.

(ix) For AWL No. 28-AWL-31, "Cushion Clamps and Teflon Sleeve Installed on Out-of-Tank Wire Bundles Installed on Brackets that are Mounted Directly on the Fuel Tanks": Within 144 months after accomplishment of the actions specified in Boeing Service Bulletin 737-28A1228.

(x) For AWL No. 47-AWL-04, "Nitrogen Generation System (NGS)—Thermal Switch": Within 22,500 flight hours after accomplishment of the actions specified in Boeing Service Bulletin 737-47-1005; within 22,500 flight hours after accomplishment of the actions specified in Boeing Service Bulletin 737-47-1008; or within 22,500 flight hours after the most recent inspection was performed as specified in AWL No. 47-AWL-04; whichever is latest.

(xi) For AWL No. 47-AWL-05, "Nitrogen Generation System (NGS)—Nitrogen Enriched Air (NEA) Distribution Ducting Integrity": Within 14,500 flight hours after accomplishment of the actions specified in Boeing Service Bulletin 737-47-1005; within 14,500 flight hours after accomplishment of the actions specified in Boeing Service Bulletin 737-47-1008; or within 14,500 flight hours after the most recent inspection was performed as specified in AWL No. 47-AWL-05; whichever is latest.

#### (h) Additional Acceptable Wire Types and Sleeving

As an option to accomplishing the actions required by paragraph (g) of this AD, the changes specified in paragraphs (h)(1) and (2) of this AD are acceptable.

(1) Where AWL No. 28-AWL-05 identifies wire types BMS 13-48, BMS 13-58, and BMS 13-60, the following wire types are acceptable: MIL-W-22759/16, SAE AS22759/16 (M22759/16), MIL-W-22759/32, SAE AS22759/32 (M22759/32), MIL-W-22759/34, SAE AS22759/34 (M22759/34), MIL-W-22759/41, SAE AS22759/41 (M22759/41), MIL-W-22759/86, SAE AS22759/86 (M22759/86), MIL-W-22759/87, SAE AS22759/87 (M22759/87), MIL-W-22759/92, and SAE AS22759/92 (M22759/92); and MIL-C-27500 and NEMA WC 27500 cables constructed from these military or SAE specification wire types, as applicable.

(2) Where AWL No. 28-AWL-05 identifies TFE-2X Standard wall for wire sleeving, the following sleeving materials are acceptable: Roundit 2000NX and Varglas Type HO, HP, or HM.

#### (i) No Alternative Actions, Intervals, or Critical Design Configuration Control Limitations (CDCCLs)

After the existing maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (e.g., inspections), intervals, or CDCCLs may be used unless the actions, intervals, and CDCCLs are approved as an alternative method of compliance (AMOC) in accordance with the procedures specified in paragraph (k) of this AD.

#### (j) Terminating Actions for Certain AD Requirements

Accomplishment of the revision required by paragraph (g) of this AD terminates the requirements specified in paragraphs (j)(1) through (7) of this AD for that airplane:

(1) All requirements of AD 2008-10-09 R1.

(2) The revision required by paragraph (l) of AD 2011-12-09.

(3) The revision required by paragraph (h) of AD 2013-13-15.

(4) The revision required by paragraph (j) of AD 2013-25-05.

(5) The revision required by paragraphs (l) and (n) of AD 2016-18-16.

(6) The revision required by paragraph (h) of AD 2017-17-09.

(7) The revision required by paragraph (h) of AD 2018-04-12.

#### (k) Alternative Methods of Compliance (AMOCs)

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

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

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

(4) AMOCs that were previously approved for the ADs specified in paragraph (j) of this AD are not approved as AMOCs for this AD.

#### (l) Related Information

For more information about this AD, contact Serj Harutunian, Aerospace Engineer, Propulsion Section, FAA, Los Angeles ACO Branch, 3960 Paramount Boulevard, Lakewood, CA 90712-4137; phone: 562-627-5254; fax: 562-627-5210; email: serj.harutunian@faa.gov.

**(m) Material Incorporated by Reference**

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

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

(i) Boeing 737–100/200/200C/300/400/500 Airworthiness Limitations (AWLs) and Certification Maintenance Requirements (CMRs), D6–38278–CMR, dated March 2019.

(ii) [Reserved]

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

(4) You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email [fedreg.legal@nara.gov](mailto:fedreg.legal@nara.gov), or go to: <https://www.archives.gov/federal-register/cfr/ibr-locations.html>.

Issued in Des Moines, Washington, on November 20, 2019.

**Dorr Anderson,**

*Acting Director, System Oversight Division, Aircraft Certification Service.*

[FR Doc. 2019–26963 Filed 12–13–19; 8:45 am]

**BILLING CODE 4910–13–P**

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 71**

[Docket No. FAA–2019–0563; Airspace Docket No. 19–ANE–4]

**RIN 2120–AA66**

**Amendment of Class E Airspace; Pittsfield, MA**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This action amends Class E airspace extending upward from 700 feet above the surface at Pittsfield Municipal Airport, Pittsfield, MA, to accommodate airspace reconfiguration due to the redesign of the Localizer (LOC)/Distance Measuring Equipment (DME) Runway (RWY) 26 approach. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations at this airport. This action also updates the geographic coordinates of this airport.

**DATES:** Effective 0901 UTC, January 30, 2020. The Director of the Federal Register approves this incorporation by reference action under Title 1 Code of Federal Regulations part 51, subject to the annual revision of FAA Order 7400.11 and publication of conforming amendments.

**ADDRESSES:** FAA Order 7400.11D, Airspace Designations and Reporting Points, and subsequent amendments can be viewed on line at [https://www.faa.gov/air\\_traffic/publications/](https://www.faa.gov/air_traffic/publications/).

For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11D at NARA, email [fedreg.legal@nara.gov](mailto:fedreg.legal@nara.gov) or go to <https://www.archives.gov/federal-register/cfr/ibr-locations.html>.

**FOR FURTHER INFORMATION CONTACT:** John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Ave, College Park, GA 30337; telephone (404) 305–6364.

**SUPPLEMENTARY INFORMATION:****Authority for This Rulemaking**

The FAA’s authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency’s authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends Class E airspace extending upward from 700 feet above the surface for Pittsfield Municipal Airport, Pittsfield, MA, due to the redesign of the LOC/DME RWY 26 approach.

**History**

The FAA published a notice of proposed rulemaking in the **Federal Register** (84 FR 41938, August 16, 2019) for Docket No. FAA–2019–0563 to amend Class E airspace extending upward from 700 feet above the surface for Pittsfield Municipal Airport, Pittsfield, MA, due to the redesign of the LOC/DME RWY 26 approach.

Interested parties were invited to participate in this rulemaking effort by submitting written comments on the proposal to the FAA. No comments were received.

Class E airspace designations are published in Paragraph 6005 of FAA Order 7400.11D, dated August 8, 2019, and effective September 15, 2019, which is incorporated by reference in 14 CFR part 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

**Availability and Summary of Documents for Incorporation by Reference**

This document amends FAA Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective September 15, 2019. FAA Order 7400.11D is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11D lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

**The Rule**

This amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 amends Class E airspace extending upward from 700 feet above the surface at Pittsfield Municipal Airport, Pittsfield, MA, by increasing the airport radius to 9.6 miles (from 4 miles), enlarging the northeast extension of the airport to 6-miles each side of a 064° bearing of the airport, extending from the 9.6-mile radius to 18-miles northeast of the airport, and eliminating the southwest extension of the airport to accommodate airspace reconfiguration due to the redesign of the LOC/DME RWY 26 approach into the airport. Also, the geographic coordinates of the airport are adjusted to coincide with the FAA’s aeronautical database. These changes are necessary for continued safety and management of IFR operations at this airport.

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

**Regulatory Notices and Analyses**

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a

regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that only affects air traffic procedures and air navigation, it is certified that this rule, when promulgated, does not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

### Environmental Review

The FAA has determined that this action qualifies for categorical exclusion under the National Environmental Policy Act in accordance with FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures," paragraph 5–6.5a. This airspace action is not expected to cause any potentially significant environmental impacts, and no extraordinary circumstances exist that warrant preparation of an environmental assessment.

### Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

### Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

### PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

- 1. The authority citation for part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

#### § 71.1 [Amended]

- 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, effective September 15, 2019, is amended as follows:

*Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.*

\* \* \* \* \*

#### ANE MA E5 Pittsfield, MA [Amended]

Pittsfield Municipal Airport, MA

(Lat. 42°25'39" N, long. 73°17'27" W)

That airspace extending upward from 700 feet above the surface within a 9.6-mile radius of the Pittsfield Municipal Airport, and within 6-miles each side of the 064° bearing of the airport, extending from the 9.6-mile radius to 18-miles northeast of the airport.

Issued in College Park, Georgia, on December 4, 2019.

**Ryan Almasy,**

*Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.*

[FR Doc. 2019–26857 Filed 12–13–19; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 310

[Docket No. FDA–2017–N–6924]

RIN 0910–AH47

### Regulation Requiring an Approved New Drug Application for Drugs Sterilized by Irradiation

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA, the Agency, or we) is issuing a final rule repealing a regulation that requires an FDA-approved new drug application (NDA) or abbreviated new drug application (ANDA) for any drug product that is sterilized by irradiation (the irradiation regulation). Repealing the irradiation regulation will mean that over-the-counter (OTC) drug products that are generally recognized as safe and effective, are not misbranded, and comply with all applicable regulatory requirements can be marketed legally without an NDA or ANDA, even if they are sterilized by irradiation. FDA is taking this action because the irradiation regulation is out of date and unnecessary.

**DATES:** This rule is effective January 15, 2020.

**ADDRESSES:** For access to the docket to read background documents or comments received, go to <https://www.regulations.gov> and insert the docket number found in brackets in the heading of this final rule 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:** Sudha Shukla, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 5234, Silver Spring, MD 20993–0002, 301–796–3345.

**SUPPLEMENTARY INFORMATION:**

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### I. Executive Summary

In this final rule, FDA repeals the irradiation regulation, which provided that any drug sterilized by irradiation was a new drug. OTC drugs marketed pursuant to the OTC Drug Review that are generally recognized as safe and effective, are not misbranded, and comply with all applicable regulatory requirements now can be marketed legally without an FDA-approved NDA or ANDA, even if the drugs are sterilized by irradiation. As the Agency explained in the proposed rule published in the **Federal Register** of September 12, 2018 (83 FR 46121), FDA is taking this action because the Agency no longer concludes that drugs sterilized by irradiation are necessarily new drugs. The technology of controlled nuclear radiation for sterilization of drugs is now well understood. In addition, drugs that are marketed pursuant to the OTC Drug Review must be manufactured in compliance with current good manufacturing practices (CGMPs). Appropriate and effective sterilization of drugs, including by irradiation, is adequately addressed by the CGMP requirements. Repealing the irradiation regulation eliminates a requirement that is no longer necessary and will not diminish public health protections.

The estimated one-time costs of this rule range from \$25 to \$32. Avoiding the unnecessary preparation and review of a premarket drug application will generate an estimated one-time cost savings that range from about \$0.40 million to \$2.16 million. Over 10 years with a 7 percent discount rate, the annualized net cost savings range from \$0.05 million to \$0.29 million, with a primary estimate of \$0.06 million; with a 3 percent discount rate, the annualized net cost savings range from \$0.05 million to \$0.25 million, with a primary estimate of \$0.05 million. Over an infinite horizon, we assume that one sponsor will benefit from this deregulatory action every 10 years; the present value of the net cost savings over the infinite horizon range from \$0.76 million to \$4.11 million with a 7

percent discount rate and from \$1.52 million to \$8.21 million with a 3 percent discount rate.

## II. Background

On February 24, 2017, E.O. 13777, “Enforcing the Regulatory Reform Agenda” (<https://www.gpo.gov/fdsys/pkg/FR-2017-03-01/pdf/2017-04107.pdf>) was issued (82 FR 12285). One of the provisions in the E.O. requires Agencies to evaluate existing regulations and make recommendations to the Agency head regarding their repeal, replacement, or modification, consistent with applicable law. As part of this initiative, FDA is repealing the irradiation regulation as specified in this rule.

In the November 29, 1955, issue of the **Federal Register**, FDA issued a statement of interpretation relating to the sterilization of drugs by irradiation (20 FR 8747 at 8748).<sup>1</sup> In the statement, FDA explained that there was an interest in the utilization of newly developed sources of radiation for the sterilization of drugs. The Agency went on to state that it was necessary in the interest of protecting the public health to establish by adequate investigations that the irradiation treatment does not cause the drug to become unsafe or otherwise unsuitable for use. For this reason, all drug products sterilized by irradiation would be regarded as new drugs within the meaning of section 201(p) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 321(p)), which would mean that an effective new drug application would be required for such products.

In 1996, FDA proposed to revise the statement and consolidate it with similar provisions into a single list of drugs that have been determined by previous rulemaking procedures to be new drugs within the meaning of section 201(p) of the FD&C Act (61 FR 29502 at 29503 to 29504 (June 11, 1996)). The Agency proposed to remove from the regulatory text any existing background information describing the Agency’s basis for its determination of new drug status.

In 1997, FDA finalized these provisions, now located in § 310.502 (21 CFR 310.502), entitled “Certain drugs accorded new drug status through rulemaking procedures” (62 FR 12083 at

12084 (March 14, 1997)). Section 310.502(a) sets forth a list of drugs that have been determined by rulemaking procedures to be “new drugs” within the meaning of section 201(p) of the FD&C Act. Included on the list was “[s]terilization of drugs by irradiation” (§ 310.502(a)(11)). Because this regulation reflected an FDA determination that the drugs on the list are “new drugs,” an NDA or ANDA had to be submitted and approved by FDA before those drugs could be marketed legally.

When the paragraph now reflected in § 310.502(a)(11) was published in 1955, the technology of controlled nuclear radiation for sterilization of drugs was not well understood. In addition, neither the OTC drug monograph system nor the CGMP requirements existed. The authorizing legislation that the CGMP regulations implement, section 501(a)(2)(B) of the FD&C Act (21 U.S.C. 351(a)(2)(B)), was enacted in 1962 (“Drug Amendments of 1962,” October 10, 1962, Public Law 87–781, Title I, sec. 101), and the first CGMP regulations followed in 1963 (“Part 133—Drugs; Current Good Manufacturing Practice in Manufacture, Processing, Packing, or Holding,” 28 FR 6385 (June 20, 1963) available at: <https://www.loc.gov/item/fr028120/>). The regulations creating procedures for establishing OTC drug monographs were issued in 1972 (37 FR 9464 (May 11, 1972)) available at: <https://www.loc.gov/item/fr037092/>).

Today, as the proposed rule explained (83 FR 46121 at 46123 to 46124), the technology of controlled nuclear radiation for sterilization of drugs is well understood, and all drug products marketed under the OTC Drug Review are subject to the requirement set forth in 21 CFR 330.1(a) that they be manufactured in compliance with current good manufacturing practices, as established by parts 210 and 211 (21 CFR parts 210 and 211). The CGMP requirements in parts 210 and 211 encompass sterilization, including by irradiation. As a result, as discussed in the proposed rule (83 FR 46121 at 46124), § 310.502(a)(11) can be repealed and manufacturers will still be obligated to ensure that, if they use radiation: (1) The drug products that they purport to be sterile are in fact sterile and (2) their use of radiation does not have a detrimental effect on their drug products’ identity, strength, quality, purity, or stability.

## III. Legal Authority

We are issuing this final rule under the drugs and general administrative provisions of the FD&C Act (sections

201, 301, 501, 502, 503, 505, 510, 701, 702, and 704 (21 U.S.C. 321, 331, 351, 352, 353, 355, 360, 371, 372, and 374)) and under section 361 of the Public Health Service Act (PHS Act) (42 U.S.C. 264). The FD&C Act gives us the authority to issue and enforce regulations designed to help ensure that drug products are safe, effective, and manufactured according to current good manufacturing practices, while section 361 of the PHS Act gives us the authority to issue and enforce regulations designed to prevent the introduction, transmission, or spread of communicable diseases.

## IV. Comments on the Proposed Rule

We received five comment letters on the proposed rule by the close of the comment period, all from individuals. Each of the five comment letters contained general remarks supporting the proposed rule.

## V. Effective Date

This final rule is effective January 15, 2020.

## VI. Economic Analysis of Impacts

We have examined the impacts of the final rule under E.O. 12866, E.O. 13563, E.O. 13771, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). E.O.s 12866 and 13563 direct us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). E.O. 13771 requires that the costs associated with significant new regulations “shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.” We believe that this final rule is not a significant regulatory action as defined by E.O. 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because few entities will be affected and the net effect will be cost savings to affected firms, we certify that the final rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before issuing “any rule that includes any Federal mandate that may result in the expenditure by

<sup>1</sup> Available at: <https://www.loc.gov/item/fr020231/>. A month later, this provision was included in § 3.45 in the republication of chapter 21 of the Code of Federal Regulations (CFR) in the **Federal Register**. See 20 FR 9525 at 9554 (December 20, 1955), available at: <http://cdn.loc.gov/service/ll/fedreg/fr020/fr020246/fr020246.pdf>. In 1975, FDA republished and recodified the rule in 21 CFR 200.30. See 40 FR 13996 at 13997 (March 27, 1975), available at: <https://www.loc.gov/item/fr040060/>.

State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year.” The current threshold after adjustment

for inflation is \$154 million, using the most current (2018) Implicit Price Deflator for the Gross Domestic Product. This final rule would not result in an

expenditure in any year that meets or exceeds this amount.

Table 1 summarizes our estimate of the annualized costs and benefits of the final rule.

**TABLE 1—SUMMARY OF BENEFITS, COSTS, AND DISTRIBUTIONAL EFFECTS OF THE RULE**  
[\$ million]

Category	Primary estimate	Low estimate	High estimate	Units			Notes
				Year dollars	Discount rate (%)	Period covered (years)	
<b>Benefits:</b>							
Annualized Monetized \$millions/year .....	\$0.06	\$0.05	\$0.29	2018	7	10	Benefits are cost savings. Benefits are cost savings.
	0.05	0.05	0.25	2018	3	10	
Annualized Quantified .....				2018	7	10	
				2018	3	10	
Qualitative .....							
<b>Costs:</b>							
Annualized Monetized \$millions/year .....	0.00	0.00	0.00	2018	7	10	Less than \$100. Less than \$100.
	0.00	0.00	0.00	2018	3	10	
Annualized Quantified .....				2018	7	10	
				2018	3	10	
Qualitative .....							
<b>Transfers:</b>							
Federal Annualized Monetized \$millions/year ....	0.16	0.16	0.16	2018	7	10	User Fee. User Fee.
	0.14	0.14	0.14	2018	3	10	
	From:			To:			
Other Annualized Monetized \$millions/year .....				2018	7	10	
				2018	3	10	
	From:			To:			
<b>Effects:</b>							
State, Local, or Tribal Government: None.							
Small Business: None.							
Wages: None.							
Growth: None.							

In line with Executive Order 13771, in table 2 we estimate present and annualized values of costs and cost savings over an infinite time horizon.

With a 7 percent discount rate, the estimated annualized net cost-savings equal \$0.06 million in 2016 dollars over an infinite horizon. Based on these cost

savings, this final rule would be considered a deregulatory action under E.O. 13771.

**TABLE 2—EXECUTIVE ORDER 13771 SUMMARY**  
[In \$ millions 2016 dollars, over an infinite horizon]

	Primary (7%)	Lower bound (7%)	Upper bound (7%)	Primary (3%)	Lower bound (3%)	Upper bound (3%)
Present Value of Costs .....	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
Present Value of Cost Savings .....	0.88	0.75	4.01	1.75	1.50	8.01
Present Value of Net Costs .....	(0.88)	(0.75)	(4.01)	(1.75)	(1.50)	(8.01)
Annualized Costs .....	0.00	0.00	0.00	0.00	0.00	0.00
Annualized Cost Savings .....	0.06	0.05	0.28	0.05	0.05	0.24
Annualized Net Costs .....	(0.06)	(0.05)	(0.28)	(0.05)	(0.05)	(0.24)

**Note:** Net costs are calculated as costs minus cost savings. Values in parentheses denote net negative costs (i.e., cost-savings).

We have developed a comprehensive Economic Analysis of Impacts that assesses the impacts of the final rule. The full analysis of economic impacts is available in the docket for this final rule (Ref. 1) and at: <https://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm>.

**VII. Analysis of Environmental Impact**

We have determined under 21 CFR 25.30(h) and 25.31(a) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment

nor an environmental impact statement is required.

**VIII. Paperwork Reduction Act of 1995**

This final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget

under the Paperwork Reduction Act of 1995 is not required.

### IX. Federalism

We have analyzed this final rule in accordance with the principles set forth in E.O. 13132. We have determined that the rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, we conclude that the rule does not contain policies that have federalism implications as defined in the E.O. and, consequently, a federalism summary impact statement is not required.

### X. Consultation and Coordination With Indian Tribal Governments

We have analyzed this rule in accordance with the principles set forth in E.O. 13175. We have determined that the rule does not contain policies that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. Accordingly, we conclude that the rule does not contain policies that have tribal implications as defined in the E.O. and, consequently, a tribal summary impact statement is not required.

### XI. Reference

The following reference is on display in the Dockets Management Staff (see **ADDRESSES**), and is available for viewing by interested persons between 9 a.m. and 4 p.m. Monday through Friday; it is also available electronically at <https://www.regulations.gov>. FDA has verified the website addresses, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

1. FDA Final Regulatory Impact Analysis, "Regulation Requiring an Approved New Drug Application for Drugs Sterilized by Irradiation," available at <https://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/default.htm>.

#### List of Subjects in 21 CFR Part 310

Administrative practice and procedure, Drugs, Labeling, Medical devices, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and the Public Health Service Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 310 is amended as follows:

## PART 310—NEW DRUGS

■ 1. The authority citation for part 310 continues to read as follows:

**Authority:** 21 U.S.C. 321, 331, 351, 352, 353, 355, 360b–360f, 360j, 360hh–360ss, 361(a), 371, 374, 375, 379e, 379k–1; 42 U.S.C. 216, 241, 242(a), 262.

■ 2. In § 310.502, revise paragraph (a) introductory text and remove and reserve paragraph (a)(11) to read as follows:

#### § 310.502 Certain drugs accorded new drug status through rulemaking procedures.

(a) The drugs listed in this paragraph (a) have been determined by rulemaking procedures to be new drugs within the meaning of section 201(p) of the Federal Food, Drug, and Cosmetic Act. An approved new drug application under section 505 of the Federal Food, Drug, and Cosmetic Act and part 314 of this chapter is required for marketing the following drugs:

\* \* \* \* \*

Dated: December 9, 2019.

**Brett P. Giroir,**

*Acting Commissioner of Food and Drugs.*

[FR Doc. 2019–27046 Filed 12–13–19; 8:45 am]

**BILLING CODE 4164–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Parts 807, 812, and 814

[Docket No. FDA–2018–N–0628]

RIN 0910–AH48

#### Medical Device Submissions: Amending Premarket Regulations That Require Multiple Copies and Specify Paper Copies To Be Required in Electronic Format

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA, Agency, or we) is issuing a final rule amending requirements for medical device premarket submissions to remove paper and multiple copies and replace them with requirements for a single submission in electronic format. This action would reduce the number of copies in electronic format required, thus improving and making more efficient the FDA's premarket submission program for medical devices.

**DATES:** This rule is effective January 15, 2020.

**ADDRESSES:** For access to the docket to read background documents or comments received, go to <https://www.regulations.gov> and insert the docket number found in brackets in the heading of this final rule 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:** Diane Garcia, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. G609, Silver Spring, MD 20993, 301–796–6559, email: [Diane.Garcia@fda.hhs.gov](mailto:Diane.Garcia@fda.hhs.gov).

#### SUPPLEMENTARY INFORMATION:

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#### I. Executive Summary

##### A. Purpose of the Final Rule

FDA is issuing this final rule to amend regulations on medical device premarket submissions to remove requirements for paper and multiple copies and replace them with requirements for a single submission in electronic format to improve the FDA's medical device premarket submission program and create a more efficient submission program. Because a medical device premarket submission in electronic format is easily reproducible, the requirement for multiple copies, whether in electronic format or paper form, is no longer necessary. FDA believes it is beneficial to the public to limit any burden and expense to

submitters caused by requiring additional copies.

*B. Summary of the Major Provisions of the Final Rule*

Under this final rule, FDA is amending its regulations on medical device submissions to remove requirements for paper and multiple copies and replace them with requirements for a single submission in electronic format. This requirement for a single submission in electronic format applies to all submission types enumerated in section 745A(b)(1) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 379k-1); under this final rule, FDA is only amending those regulations that specifically mention paper and/or multiple copies of regulatory submissions and are not consistent with this final rule. Therefore, this final rule will amend regulations for the following submission types: Premarket Notification (510(k) submissions (21 CFR 807.90); Confidentiality of Information Certifications (21 CFR 807.95); Investigational Device Exemption (IDE) applications (21 CFR 812.20); Premarket Approval Applications (PMAs) (21 CFR 814.20); PMA supplements (21 CFR 814.39); and Humanitarian Device Exemption (HDE) Applications (21 CFR 814.104). These regulations cover both Center for Devices and Radiological Health (CDRH) and Center for Biologics Evaluation and Research (CBER) regulated devices. Submissions in electronic format include eCopies, submissions created and submitted on CD, DVD, or flash drive and mailed to FDA, and eSubmissions, submission package produced by an electronic submission template.

This final rule will also amend sections of the regulations that identify FDA’s mailing address for submissions and replace those addresses with a website address for CDRH and CBER that provides the current mailing addresses.

*C. Legal Authority*

FDA is issuing this final rule from the same authority under which FDA initially issued these regulations: 21 U.S.C. 321, 331, 351, 352, 353, 355, 360, 360h-360j, 360c-360j, 360bbb-8b, 371, 372, 373, 374, 375, 379, 379e, 381, 382, 393; 42 U.S.C. 216, 241, 262, 263b-263n, 264, 271. In addition, section 745A of the FD&C Act provides FDA authority with respect to electronic format for submissions and any appeals, and section 701(a) of the FD&C Act (21 U.S.C. 371(a)) grants FDA general rulemaking authority to issue

regulations for the efficient enforcement of the FD&C Act.

*D. Costs and Benefits*

The final rule amends device regulations describing the number of copies firms must submit with a premarket presubmission or submission. The final rule also amends all device regulations containing a reference to the specific form of a submission to require a submission in electronic format. The final rule will produce cost savings for firms without imposing any additional regulatory burdens for submissions or affecting the Agency’s ability to review submissions. Firms will incur minimal administrative costs to read and understand the rule. We expect the economic impact of this regulation to be a total net costs savings yielding positive net benefits.

We estimate that the final rule will result in annualized benefits of \$1.76 million at a 3 percent discount rate and \$1.76 million at a 7 percent discount rate, over 10 years. We also estimate that the final rule will result in annualized costs of \$0.75 million at a 3 percent discount rate and \$0.87 million at a 7 percent discount rate, over 10 years.

**II—TABLE OF ABBREVIATIONS/COMMONLY USED ACRONYMS IN THIS DOCUMENT**

Term, abbreviation, or acronym	What it means
510(k) .....	Premarket Notification.
Agency .....	Food and Drug Administration.
CFR .....	Code of Federal Regulations.
eCopy .....	Submissions created and submitted on CD, DVD, or flash drive and mailed to FDA.
eSubmissions	Submission package produced by an electronic submission template.
EO .....	Executive Order.
FD&C Act .....	Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 <i>et seq.</i>
FDA .....	Food and Drug Administration.
FDARA .....	FDA Reauthorization Act of 2017 (Pub. L. 115-52).
FDASIA .....	Food and Drug Administration Safety and Innovation Act (Pub. L. 112-144).
HDE .....	Humanitarian Device Exemption.
IDE .....	Investigational Device Exemption
PMA .....	Premarket Approval Application.

**II. Background**

*A. Need for the Regulation/History of the Rulemaking*

On February 24, 2017, E.O. 13777, “Enforcing the Regulatory Reform Agenda” was issued. One of the provisions in the E.O. requires Agencies to evaluate existing regulations and make recommendations to the Agency head regarding their repeal, replacement, or modification, consistent with applicable law. As part of this initiative, FDA is updating regulations as specified in this final rule.

FDA’s current medical device regulations that require multiple copies and paper submissions predate the authority provided to FDA in the FD&C Act to require submissions in electronic format (see 21 CFR parts 807, 812, and 814 and section 745A of the FD&C Act).

The FD&C Act was amended by the Food and Drug Administration Safety and Innovation Act (FDASIA) (Pub. L. 112-144) (see section 745A(b) of the FD&C Act and section 1136 of FDASIA). The amendments in FDASIA provided that after FDA issued guidance on the submission of electronic copies (eCopies), the submission of eCopies would be required for pre submissions and submissions and any supplements to these pre submissions and submissions for medical devices. (For sections requiring submission, see sections 510(k), 513(f)(2)(A), 515(c), (d) and (f), 520(g) and (m), and 564 of the FD&C Act (21 U.S.C. 360(k), 360c(f)(2)(A), 360e(c), (d) and (f), 360j(g) and (m), and 360bbb-3 or section 351 of the Public Health Service Act (42 U.S.C. 262).) Congress granted explicit statutory authorization to FDA to implement eCopy requirements by providing through guidance the standards and criteria for waivers and exemptions (section 745(b)(1) and (2) of the FD&C Act).

On January 2, 2013, FDA published the guidance entitled “eCopy Program for Medical Device Submissions” (eCopy guidance). The issuance of the eCopy guidance marked the beginning of the eCopy program. The 2013 guidance was superseded by an updated guidance of the same title issued on December 3, 2015. The eCopy guidance recommends that one paper copy should be submitted, and that any additional copies required under the regulations be submitted as eCopies. While the eCopy guidance did not change the overall number of copies required for any submission, the guidance states that eCopies should be provided in lieu of some of the paper copies. The guidance also outlines other requirements for eCopies. The eCopy

guidance provides instructions for the processing and technical standards for eCopies based on FDA's experience with the program (Ref. 1).

In 2017, the FD&C Act was amended by the FDA Reauthorization Act of 2017 (FDARA) (Pub. L. 115–52) (see section 745A(b)(3) of the FD&C Act and section 207 of FDARA). The amended provisions in the FD&C Act require presubmissions and submissions (the same types of submissions as required eCopies), any supplements to such presubmissions or submissions for devices, and any appeals of action taken with respect to such presubmissions or submissions, including devices under the Public Health Service Act, to be submitted solely in electronic format as specified by FDA in guidance (section 745A(b)(3) of the FD&C Act).

FDA is amending current medical device regulations that require multiple copies and paper submissions to improve the efficiency of the review process by allowing immediate availability of an electronic version for review, rather than relying solely on the paper version. Because a submission in electronic format is easily reproducible, the requirement for multiple copies (whether in electronic format or paper form) is no longer necessary. Furthermore, FDA believes it is beneficial to the public to limit any burdens and expenses to submitters caused by requiring additional copies.

In the **Federal Register** of September 13, 2018 (83 FR 46444), FDA issued a proposed rule entitled “Medical Device Submissions: Amending Premarket Regulations That Require Multiple Copies and Specify Paper Copies To Be Allowed in Electronic Format” and requested public comments by December 12, 2018.

FDA believes this rule will result in meaningful burden reduction while allowing the Agency to achieve our public health mission and fulfill statutory obligations.

#### *B. Summary of Comments to the Proposed Rule*

In response to the proposed rule, FDA received 14 comments—from industry organizations, individuals, and anonymous. The comments on the proposed rule were all generally supportive of the proposed amendments regarding submissions in electronic format. Commenters expressed that premarket submissions in electronic format will make the process more efficient, faster, lower the costs, and promote innovation as well as speed up accessibility for patient care. Commenters also noted that the submissions in electronic format will

reduce paper, errors and allow storage and easy access to submissions. One of the commenters suggested including additional regulations for submissions in electronic format and recommended corresponding changes to the proposed amendments.

#### *C. General Overview of the Final Rule*

FDA is issuing this final rule to amend regulations for medical device premarket submissions to remove the requirements for multiple copies of submissions and to instead require a single submission in electronic format. The revised submissions include premarket notification submissions (510(k) submissions) (§ 807.90); confidentiality of information certification (§ 807.95); investigational device exemption applications (§ 812.20); PMAs (§ 814.20), including PMA supplements (§ 814.39); and humanitarian device exemption applications (§ 814.104). This final rule also affects submissions for CBER regulated devices.

This final rule will also amend the regulations that identify FDA's mailing addresses for submissions by replacing those addresses with website addresses for CDRH and CBER that provide the current mailing addresses.

The submission of an eCopy is separate and distinct from FDA's electronic submission programs (eSubmitter), which include the CDRH's 510(k) eSubmissions Pilot Program (79 FR 24732, May 1, 2014). Nevertheless, FDA considers both eCopies, submissions created and submitted on a CD, DVD, or flash drive and mailed to FDA, and eSubmissions, submission package produced by an electronic submission template, to be submissions in electronic format. While eCopy provides for submissions to be in electronic format, the eCopy submissions must still be mailed to FDA. By contrast, eSubmitter allows for electronic submissions to be transmitted over the internet. FDA has been moving toward transforming all regulatory submissions from mailed copies to electronic means via the internet. Since January 1999, FDA has accepted voluntary electronic submissions through eSubmitter. FDA presently utilizes the Electronic Submission Gateway for the receipt and processing of many types of electronic regulatory submissions (Ref. 2).

#### **IV. Legal Authority**

FDA is issuing this final rule from the same authority under which FDA initially issued these regulations: 21 U.S.C. 321, 331, 351, 352, 353, 355, 360, 360h–360j, 360c–360j, 360bbb–8b, 371,

372, 373, 374, 375, 379, 379e, 381, 382, 393; 42 U.S.C. 216, 241, 262, 263b–263n, 264, 271. In addition, section 745A of the FD&C Act provides FDA authority with respect to electronic format for submissions and any appeals, and section 701(a) of the FD&C Act grants FDA general rulemaking authority to issue regulations for the efficient enforcement of the FD&C Act.

#### **V. Comments on the Proposed Rule and FDA Response**

##### *A. Introduction*

In response to the proposed rule announcing FDA's intent to amend requirements for medical device premarket submissions to remove paper and multiple copies and replace them with requirements for a single submission in electronic format, FDA received 14 comments—from industry organizations, individuals, and anonymous.

We describe and respond to the comments in section V.B. We have numbered each comment to help distinguish between different comments. We have grouped similar comments under the same number for purposes of our responses. The number assigned to each comment or comment topic is purely for organizational purposes and does not signify the comment's value or importance or the order in which comments were received.

##### *B. Description of Comments and FDA Response*

Several commenters made general remarks supporting the proposed rule without focusing on a particular proposed provision. In the following paragraphs, we discuss and respond to such general comments as well as more specific comments.

(Comment 1) Several commenters were supportive of the implementation of the proposed amendments to regulations on medical device submissions to remove requirements for paper and multiple copies and replace them with requirements for a single submission in electronic format. The commenters suggested that single copy submissions in electronic format will be easier, improve efficiency of the review process, reduce paper, costs, errors, and support innovation. The commenters also suggested that submissions in electronic format will provide easy storage and access to records and reduce the time for creating the submissions. Most of the commenters did not suggest any further edits to the proposed rule. A commenter suggested assigning IDs or reference numbers to each product to

advance post market surveillance of medical devices.

(Response 1) FDA agrees with the commenters that submission in electronic format will improve the efficiency with lower costs and easier storage and access to records. Regarding the comment related to the ID/reference numbers, FDA did not modify the final rule based on this comment as it is outside the scope of the requirement for a single submission in electronic format. Accordingly, in response to this comment, FDA did not make any changes in the final rule.

(Comment 2) A commenter supported the implementation of the rule but also suggested that electronic submissions be made via the internet, in an Extensible Markup Language (XML) format. The commenter suggested that FDA should be developing specifications for industry submission authoring software that would integrate directly into FDA's review platform; the commenter explained that this type of submission authoring software could create elements of structured data within a submission.

(Response 2) In response, FDA acknowledges the advantages of electronic submissions. FDA notes that the rule is written broadly enough to permit electronic submissions and allow for structured data when such platforms are available. Accordingly, we have made no change in the final rule.

(Comment 3) A commenter suggested applying a logical and least burdensome approach in all FDA guidances, regulatory decisions, and administrative processes. The commenter further indicated that they supported removing paper and multiple copies and replacing them with a single submission in electronic format.

(Response 3) FDA acknowledges this comment and agrees that the least burdensome principles should be considered in all FDA guidances, regulatory decisions and administrative processes (Ref. 3). FDA believes this final rule limits any burdens and expenses to submitters caused by requiring multiple copies of a submission. Accordingly, in response to this comment, FDA did not make any changes in the final rule.

(Comment 4) A commenter acknowledged the benefits of the rule and supported implementation with a recommendation to amend the rule and include additional regulations within the scope and description of the rule. Specifically, the commenter proposed revising FDA's regulation for devices to remove the requirement for multiple copies of submissions and to instead require one electronic version for those

regulations noted in the proposed rule in addition to the following: Content and format of a 510(k) summary (§ 807.92); content and format of a 510(k) statement (§ 807.93); format of a class III certification (§ 807.94); supplemental applications (§ 812.35); reports (§ 812.150); reports (§ 814.84); PMA amendments and submitted PMAs (§ 814.37); and post approval requirements and reports (§ 814.126).

(Response 4) FDA agrees with the commenter that this rule should apply to all premarket regulatory submissions that are specified in section 745A(b) of the FD&C Act. The requirement for a single submission in electronic format applies to all submission types that fall within the provisions listed in section 745A(b) of the FD&C Act; under this final rule, FDA is only amending those regulations that specifically mention paper and/or multiple copies of such regulatory submissions and are not consistent with this final rule. Any regulations that are currently silent on the method for submitting such regulatory submissions to the FDA will not be modified as they remain consistent with the final rule. Accordingly, in response to this comment, FDA did not make any changes in the final rule.

## VI. Effective Date

The final rule will become effective 30 days after the date of publication in the **Federal Register**.

## VII. Economic Analysis of Impacts

We have examined the impacts of the final rule under E.O. 12866, E.O. 13563, E.O. 13771, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). E.O.s 12866 and 13563 direct us to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). E.O. 13771 requires that the costs associated with significant new regulations “shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.” We believe that this final rule is not a significant regulatory action as defined by E.O. 12866.

The Regulatory Flexibility Act requires us to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the final rule amends the existing premarket regulations requiring multiple copies and paper submissions

to instead require submissions in electronic format without imposing any new requirements, we certify that the final rule will not have a significant economic impact on a substantial number of small entities.

The Unfunded Mandates Reform Act of 1995 (section 202(a)) requires us to prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing “any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year.” The current threshold after adjustment for inflation is \$154 million, using the most current (2018) Implicit Price Deflator for the Gross Domestic Product. This final rule will not result in an expenditure in any year that meets or exceeds this amount.

This final rule will amend the device regulations describing the number of copies firms must submit with a premarket presubmission or submission. The final rule will also amend all device regulations containing a reference to the specific form of a submission media (*i.e.*, paper copies) to require a submission in electronic format. The final rule will produce cost-savings for firms without imposing any additional regulatory burdens for submissions or affecting the Agency's ability to review submissions. Firms will incur minimal administrative costs to read and understand the rule. We expect the economic impact of this regulation to be a total net costs savings yielding positive net benefits.

We have developed a comprehensive final Economic Analysis of Impacts that assesses the impacts of the final rule. The full analysis of economic impacts is available in the docket for this final rule (Ref. 4) and at <https://www.fda.gov/about-fda/reports/economic-impact-analyses-fda-regulations>.

### Summary of Costs and Benefits

Table 1 summarizes the benefits, costs, and distributional effects of the final rule. We estimate that the final rule will result in annualized net benefits of \$1.76 million with a 3 percent discount rate and \$1.76 million with a 7 percent discount rate, over 10 years. We also estimate that the final rule will result in annualized costs of \$0.75 million at a 3 percent discount rate and \$0.87 million at a 7 percent discount rate, over 10 years.

TABLE 1—SUMMARY OF BENEFITS, COSTS, AND DISTRIBUTIONAL EFFECTS OF FINAL RULE

Category	Primary estimate	Low estimate	High estimate	Units			Notes
				Year dollars	Discount rate (%)	Period covered (years)	
<b>Benefits:</b>							
Annualized Monetized \$millions/year .....	\$1.76	\$0.63	\$3.73	2017	7	10	Benefits are cost savings. Benefits are cost savings.
Annualized Quantified .....	1.76	0.63	3.73	2017	3	10	
Qualitative .....					7		
					3		
<b>Costs:</b>							
Annualized Monetized \$millions/year .....	0.87	0.87	0.87	2017	7	10	
Annualized Quantified .....	0.75	0.75	0.75	2017	3	10	
Qualitative .....					7		
					3		
<b>Transfers:</b>							
Federal Annualized Monetized \$millions/year .....					7		
					3		
	From:			To:			
Other Annualized Monetized \$millions/year .....					7		
					3		
	From:			To:			

In line with E.O. 13771, in Table 2 we present annualized values of costs and cost savings over an infinite time horizon. With a 7 percent discount rate,

the estimated annualized net cost-savings equal \$1.31 million in 2016 dollars over an infinite horizon. Based on these cost savings, this final rule, is

considered a deregulatory action under E.O. 13771.

TABLE 2—SUMMARY OF THE EXECUTIVE ORDER 13771 IMPACTS OF THE FINAL RULE OVER AN INFINITE TIME HORIZON [2016 \$ millions]

	Primary estimate (7%)	Primary estimate (3%)
Present Value of Costs .....	\$6.43	\$6.43
Present Value of Cost Savings .....	26.45	59.40
Present Value of Net Costs .....	(20.01)	(52.97)
Annualized Costs .....	0.42	0.19
Annualized Cost Savings .....	1.73	1.73
Annualized Net Costs .....	(1.31)	(1.54)

Note: Values in parentheses denote net negative costs (i.e., cost-savings).

**VIII. Analysis of Environmental Impact**

We have determined under 21 CFR 25.30(h) and 25.34(a) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

**IX. Paperwork Reduction Act of 1995**

FDA concludes that this final rule contains no collection of information subject to review by the Office of Management and Budget under the Paperwork Reduction Act of 1995. Rather, the final rule removes requirements to submit multiple paper copies of certain medical device

presubmissions and submissions and replaces them with one copy in an electronic format.

**X. Federalism**

We have analyzed this final rule in accordance with the principles set forth in E.O. 13132. FDA has determined that the rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, we conclude that the rule does not contain policies that have federalism implications as defined in the E.O. and,

consequently, a federalism summary impact statement is not required.

**XI. Consultation and Coordination With Indian Tribal Governments**

We have analyzed this final rule in accordance with the principles set forth in E.O. 13175. We have determined that the rule does not contain policies that would 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. Accordingly, we conclude that the rule does not contain policies that have tribal implications as defined in the

Executive Order and, consequently, a tribal summary impact statement is not required.

## XII. References

The following references are on display at Dockets Management Staff (see **ADDRESSES**) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available electronically at <https://www.regulations.gov>. FDA has verified the website addresses, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

1. “eCopy Program for Medical Device Submissions; Guidance for Industry and Food and Drug Administration Staff” available at: <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/ecopy-program-medical-device-submissions>.

2. Electronic Submission Gateway procedure for electronic regulatory submission is available at: <https://www.fda.gov/industry/electronic-submissions-gateway/about-esg>.

3. “The Least Burdensome Provisions: Concept and Principles; Guidance for Industry and Food and Drug Administration Staff” available at: <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/least-burdensome-provisions-concept-and-principles>.

4. Economic impacts analysis for this final rule available at: <https://www.fda.gov/about-fda/economic-impact-analyses-fda-regulations/medical-device-submissions-amending-premarket-regulations-require-multiple-copies-and-specify-paper>.

## List of Subjects

### 21 CFR Part 807

Confidential business information, Imports, Medical devices, Reporting and recordkeeping requirements.

### 21 CFR Part 812

Health records, Medical devices, Medical research, Reporting and recordkeeping requirements.

### 21 CFR Part 814

Administrative practice and procedure, Confidential business information, Medical devices, Medical research, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under the authority delegated to the Commissioner of Food and Drugs, 21 CFR parts 807, 812, and 814 are amended as follows:

## PART 807—ESTABLISHMENT REGISTRATION AND DEVICE LISTING FOR MANUFACTURERS AND INITIAL IMPORTERS OF DEVICES

■ 1. The authority citation for part 807 is revised to read as follows:

**Authority:** 21 U.S.C. 321, 331, 351, 352, 360, 360c, 360e, 360i, 360j, 360bbb–8b, 371, 374, 379k–1, 381, 393; 42 U.S.C. 264, 271.

■ 2. Amend § 807.90 by revising paragraph (a), removing and reserving paragraph (b), and revising paragraph (c) to read as follows:

### § 807.90 Format of a premarket notification submission.

\* \* \* \* \*

(a)(1) For devices regulated by the Center for Devices and Radiological Health, be addressed to the current address displayed on the website <https://www.fda.gov/cdrhsubmissionaddress>.

(2) For devices regulated by the Center for Biologics Evaluation and Research, be addressed to the current address displayed on the website <https://www.fda.gov/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/CBER/ucm385240.htm>; or for devices regulated by the Center for Drug Evaluation and Research, be addressed to the Central Document Room, Center for Drug Evaluation and Research, Food and Drug Administration, 5901–B Ammendale Rd., Beltsville, MD 20705–1266. Information about devices regulated by the Center for Biologics Evaluation and Research is available at <https://www.fda.gov/BiologicsBloodVaccines/BloodBloodProducts/ApprovedProducts/default.htm>.

(3) All inquiries regarding a premarket notification submission should be sent to the address in this section or one of the current addresses displayed on the Food and Drug Administration’s website.

\* \* \* \* \*

(c) Be submitted as a single version in electronic format.

\* \* \* \* \*

■ 3. Amend § 807.95 by revising paragraph (b)(1) introductory text to read as follows:

### § 807.95 Confidentiality of information.

\* \* \* \* \*

(b) \* \* \*

(1) The person submitting the premarket notification submission requests in the submission that the Food and Drug Administration hold as confidential commercial information the

intent to market the device and submits a certification to the Commissioner:

\* \* \* \* \*

## PART 812—INVESTIGATIONAL DEVICE EXEMPTIONS

■ 4. The authority citation for part 812 is revised to read as follows:

**Authority:** 21 U.S.C. 331, 351, 352, 353, 355, 360, 360c–360f, 360h–360j, 360bbb–8b, 371, 372, 374, 379e, 379k–1, 381, 382, 383; 42 U.S.C. 216, 241, 262, 263b–263n.

■ 5. Amend § 812.19 by revising paragraphs (a)(1) and (2) to read as follows:

### § 812.19 Addresses for IDE correspondence.

(a) \* \* \*

(1) For devices regulated by the Center for Devices and Radiological Health, send it to the current address displayed on the website <https://www.fda.gov/cdrhsubmissionaddress>.

(2) For devices regulated by the Center for Biologics Evaluation and Research, send it to the current address displayed on the website <https://www.fda.gov/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/CBER/ucm385240.htm>.

\* \* \* \* \*

■ 6. Amend § 812.20 by revising paragraph (a)(3) to read as follows:

### § 812.20 Application.

(a) \* \* \*

(3) A sponsor shall submit a signed “Application for an Investigational Device Exemption” (IDE application), together with accompanying materials in electronic format, to one of the addresses in § 812.19, and if eCopy by registered mail or by hand. Subsequent correspondence concerning an application or a supplemental application shall be submitted in electronic format and if eCopy by registered mail or by hand.

\* \* \* \* \*

## PART 814—PREMARKET APPROVAL OF MEDICAL DEVICES

■ 7. The authority citation for part 814 is revised to read as follows:

**Authority:** 21 U.S.C. 351, 352, 353, 360, 360c–360j, 360bbb–8b, 371, 372, 373, 374, 375, 379, 379e, 379k–1, 381.

■ 8. Amend § 814.20 by:

■ a. Revising paragraph (b) introductory text and paragraph (b)(2);

■ b. Removing the phrase “of the act” and adding in its place “of the Federal Food, Drug, and Cosmetic Act” in paragraphs (b)(5) introductory text, (b)(5)(i), and (b)(10);

- c. Removing the comma at the end of paragraph (b)(5)(i) and adding a semicolon in its place;
- d. Revising paragraphs (c) and (e) introductory text;
- e. Removing the commas at the ends of paragraphs (e)(1) and (2) and adding semicolons in their place; and
- f. Revising paragraphs (f) and (h)(1) and (2).

The revisions read as follows:

**§ 814.20 Application.**

\* \* \* \* \*

(b) Unless the applicant justifies an omission in accordance with paragraph (d) of this section, a PMA shall include in electronic format:

\* \* \* \* \*

(2) A table of contents that specifies the volume and page number for each item referred to in the table. A PMA shall include separate sections on nonclinical laboratory studies and on clinical investigations involving human subjects. A PMA shall be submitted as a single version. The applicant shall include information that it believes to be trade secret or confidential commercial or financial information in the PMA and identify the information that it believes to be trade secret or confidential commercial or financial information.

\* \* \* \* \*

(c) Pertinent information in FDA files specifically referred to by an applicant may be incorporated into a PMA by reference. Information in a master file or other information submitted to FDA by a person other than the applicant will not be considered part of a PMA unless such reference is authorized in a record submitted to FDA by the person who submitted the information or the master file. If a master file is not referenced within 5 years after the date that it is submitted to FDA, FDA will return the master file to the person who submitted it.

\* \* \* \* \*

(e) The applicant shall periodically update its pending application with new safety and effectiveness information learned about the device from ongoing or completed studies that may reasonably affect an evaluation of the safety or effectiveness of the device or that may reasonably affect the statement of contraindications, warnings, precautions, and adverse reactions in the draft labeling. The update report shall be consistent with the data reporting provisions of the protocol. The applicant shall submit any update report in electronic format and shall include in the report the number assigned by FDA to the PMA. These

updates are considered to be amendments to the PMA. The time frame for review of a PMA will not be extended due to the submission of an update report unless the update is a major amendment under § 814.37(c)(1). The applicant shall submit these reports—

\* \* \* \* \*

(f) If a color additive subject to section 721 of the Federal Food, Drug, and Cosmetic Act is used in or on the device and has not previously been listed for such use, then, in lieu of submitting a color additive petition under part 71 of this chapter, at the option of the applicant, the information required to be submitted under part 71 may be submitted as part of the PMA. When submitted as part of the PMA, the information shall be submitted in electronic format. A PMA for a device that contains a color additive that is subject to section 721 of the Federal Food, Drug, and Cosmetic Act will not be approved until the color additive is listed for use in or on the device.

\* \* \* \* \*

(h) \* \* \*

(1) For devices regulated by the Center for Devices and Radiological Health, send it to the current address displayed on the website <https://www.fda.gov/cdrhsubmissionaddress>.

(2) For devices regulated by the Center for Biologics Evaluation and Research, send it to the current address displayed on the website <https://www.fda.gov/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/CBER/ucm385240.htm>.

\* \* \* \* \*

- 9. Amend § 814.39 by revising paragraph (c)(1) to read as follows:

**§ 814.39 PMA supplements.**

\* \* \* \* \*

(c)(1) All procedures and actions that apply to an application under § 814.20 also apply to PMA supplements except that the information required in a supplement is limited to that needed to support the change. A summary under § 814.20(b)(3) is required for only a supplement submitted for new indications for use of the device, significant changes in the performance or design specifications, circuits, components, ingredients, principles of operation, or physical layout of the device, or when otherwise required by FDA. The applicant shall submit a PMA supplement in electronic format and shall include information relevant to the proposed changes in the device. A PMA supplement shall include a separate section that identifies each change for which approval is being requested and

explains the reason for each such change. The applicant shall submit additional information, if requested by FDA, in electronic format. The time frames for review of, and FDA action on, a PMA supplement are the same as those provided in § 814.40 for a PMA.

\* \* \* \* \*

- 10. Amend § 814.104 by revising paragraphs (d) introductory text and (d)(1) and (2) to read as follows:

**§ 814.104 Original applications.**

\* \* \* \* \*

(d) *Address for submissions and correspondence.* All original HDEs, amendments and supplements, as well as any correspondence relating to an HDE, must be provided in electronic format. These materials must be sent or delivered to one of the following:

(1) For devices regulated by the Center for Devices and Radiological Health, send it to the current address found on the website <https://www.fda.gov/cdrhsubmissionaddress>.

(2) For devices regulated by the Center for Biologics Evaluation and Research, send it to the current address displayed on the website <https://www.fda.gov/AboutFDA/CentersOffices/OfficeofMedicalProductsandTobacco/CBER/ucm385240.htm>.

\* \* \* \* \*

Dated: December 9, 2019.

**Brett P. Giroir,**

*Acting Commissioner of Food and Drugs.*

[FR Doc. 2019–27047 Filed 12–13–19; 8:45 am]

**BILLING CODE 4164–01–P**

**DEPARTMENT OF JUSTICE**

**Drug Enforcement Administration**

**21 CFR Part 1301**

[Docket No. DEA–511]

**Technical Correction to Regulation Regarding Registration**

**AGENCY:** Drug Enforcement Administration, Department of Justice.

**ACTION:** Final rule; technical correction.

**SUMMARY:** This final rule corrects an erroneous cross-reference in a Drug Enforcement Administration regulation involving registration and ocean vessels, aircraft, and other entities. This change will provide clarity.

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

**FOR FURTHER INFORMATION CONTACT:** Scott A. Brinks, Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701

Morrisette Drive, Springfield, Virginia 22152; Telephone: (571) 362-3261.

#### SUPPLEMENTARY INFORMATION:

##### Legal Authority

The Controlled Substances Act (CSA) grants the Attorney General authority to promulgate rules and regulations relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances; as well as the maintenance and submission of records and reports of registrants; and that are necessary and appropriate for the efficient execution of his statutory functions. 21 U.S.C. 821, 827, 871(b). The Attorney General is further authorized by the CSA to promulgate rules and regulations relating to the registration and control of importers and exporters of controlled substances. 21 U.S.C. 958(f). The Attorney General has delegated this authority to the Administrator of the DEA. 28 CFR 0.100(b).

##### Technical Correction

This rule revises a reference to “§ 1307.11(a)(4)” in 21 CFR 1301.25(f)(3) to the correct reference, “§ 1307.11(a)(1)(iv).” This change is not substantive and is only intended to improve the clarity of 21 CFR 1301.25(f)(3).

##### Regulatory Analyses

###### *Administrative Procedure Act*

The Administrative Procedure Act (APA) (5 U.S.C. 553) does not require notice and the opportunity for public comment where the agency for good cause finds that notice and public comment are unnecessary, impracticable, or contrary to the public interest under 5 U.S.C. 553(b)(B). This rule contains a technical correction; it imposes no new or substantive requirement on the public or DEA registrants. As such, DEA has determined that notice and the opportunity for public comment on this rule are unnecessary. Because this is not a substantive rule and as DEA finds good cause under 5 U.S.C. 553(d)(3) for the above reason, this final rule will take effect upon date of publication in the **Federal Register**.

*Executive Orders 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 13771 (Reducing Regulation and Controlling Regulatory Costs)*

This final rule was developed in accordance with the principles of Executive Orders 12866, 13563, and 13771. Executive Order 12866 directs

agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). Executive Order 13563 is supplemental to, and reaffirms, the principles, structures, and definitions governing regulatory review as established in Executive Order 12866. The Office of Information and Regulatory Affairs has deemed this rulemaking not significant under E.O. 12866. This rule is not an E.O. 13771 regulatory action because this rule is not significant under E.O. 12866.

###### *Executive Order 12988, Civil Justice Reform*

This final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate drafting errors and ambiguity, minimize litigation, provide a clear legal standard for affected conduct, and promote simplification and burden reduction.

###### *Executive Order 13132, Federalism*

This final rule does not have federalism implications warranting the application of Executive Order 13132. The final rule does not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government.

###### *Executive Order 13175, Consultation and Coordination With Indian Tribal Governments*

This final rule does not have tribal implications warranting the application of Executive Order 13175. This rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

###### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612) applies to rules that are subject to notice and comment under section 553(b) of the APA. As noted in the above discussion regarding applicability of the APA, the DEA was not required to publish a general notice of proposed rulemaking prior to this final rule. Consequently, the RFA does not apply.

###### *Unfunded Mandates Reform Act of 1995*

The DEA has determined and certified pursuant to the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1501 *et seq.*, that this action will not result in any federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year. Therefore, neither a Small Government Agency Plan nor any other action is required under the provisions of UMRA.

###### *Paperwork Reduction Act of 1995*

This action does not involve a collection of information requirement under the Paperwork Reduction Act, 44 U.S.C. 3501-3521. This action would not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

###### *Congressional Review Act*

This rule is not a major rule as defined by the Congressional Review Act (CRA), 5 U.S.C. 804. This rule will not result in: An annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets. However, pursuant to the CRA, the DEA is submitting a copy of this final rule to both Houses of Congress and to the Comptroller General.

##### List of Subjects in 21 CFR Part 1301

Administrative practice and procedure, Drug traffic control, Security measures.

For the reasons set out above, 21 CFR part 1301 is amended as follows:

#### **PART 1301—REGISTRATION OF MANUFACTURERS, DISTRIBUTORS, AND DISPENSERS OF CONTROLLED SUBSTANCES**

■ 1. The authority citation for part 1301 continues to read as follows:

**Authority:** 21 U.S.C. 821, 822, 823, 824, 831, 871(b), 875, 877, 886a, 951, 952, 956, 957, 958, 965 unless otherwise noted.

**§ 1301.25 [Amended]**

■ 2. Amend § 1301.25(f)(3) by removing “1307.11(a)(4)” and adding in its place “1307.11(a)(1)(iv)”.

Dated: December 4, 2019.

**Uttam Dhillon,**

*Acting Administrator.*

[FR Doc. 2019-27097 Filed 12-13-19; 8:45 am]

BILLING CODE 4410-09-P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 52

[Docket No. USCG-2019-0929]

#### Board for Correction of Military Records; Technical Amendment

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Board for Correction of Military Records of the Coast Guard (BCMR) is updating its mailing address in the Code of Federal Regulations. On April 29, 2019 the BCMR moved from 245 Murray Lane, Washington, DC 20528 to 2707 Martin Luther King Jr. Avenue SE, Washington, DC 20528. This rule only updates the BCMR’s mailing address for submitting an application for correction of a Coast Guard record and does not create or change any substantive requirements.

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

**ADDRESSES:** Documents mentioned in this preamble as being available in the docket are part of docket number USCG-2019-0929, which is available at <https://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** For information about this document call or email Julia Andrews, Chair, BCMR, telephone 202-447-4099, email at [cgbcmr@hq.dhs.gov](mailto:cgbcmr@hq.dhs.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Discussion of the Rule

On April 29, 2019 the Board for Correction of Military Records of the Coast Guard (BCMR) mailing address changed from 245 Murray Lane, Washington, DC 20528 to 2707 Martin Luther King Jr. Avenue SE, Stop 0485, Washington, DC 20528-0485. Through this technical amendment, the BCMR is making a corresponding change to the BCMR’s mailing address in the Code of Federal Regulations (CFR) in 33 CFR 52.21(a). Section 52.21(a) provides the BCMR mailing address for submitting an application for correction of a Coast

Guard record on DD Form 149 (Application for Correction of Military or Naval Record). The BCMR has already updated the mailing address on the DD Form 149 and the BCMR’s website to reflect the change in address.

This rule is issued under the authority of 5 U.S.C. 552; 14 U.S.C. 501 and 503; and Department of Homeland Security Delegation Nos. 0160.1 and 0170.1.

##### II. Regulatory History

The Coast Guard did not publish a notice of proposed rulemaking for this rule. Under Title 5 of the United States Code (U.S.C.), Section 553(b)(A), this final rule is exempt from notice and public comment rulemaking requirements because the change involves rules of agency organization, procedure, or practice. In addition, under 5 U.S.C. 553(b)(B), an agency may waive the notice and comment requirements if it finds, for good cause, that notice and comment is impracticable, unnecessary, or contrary to the public interest. The Coast Guard finds that notice and comment is unnecessary under 5 U.S.C. 553(b)(B) because the mailing address change is an agency procedural correction that will have no substantive effect on the public. For the same reasons, the Coast Guard finds that good cause exists under 5 U.S.C. 553(d) for making this final rule effective immediately upon publication.

##### III. Regulatory Analyses

The Coast Guard developed this rule after considering numerous statutes and executive orders related to rulemaking. Below are summarized analyses based on these statutes or executive orders.

###### A. Regulatory Planning and Review

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs) directs agencies to reduce regulation and control regulatory costs and provides that “for every one new regulation issued, at least two prior regulations be identified for elimination, and that the

cost of planned regulations be prudently managed and controlled through a budgeting process.”

The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it. Because this rule is not a significant regulatory action, this rule is exempt from the requirements of Executive Order 13771. See the OMB Memorandum titled “Guidance Implementing Executive Order 13771, titled ‘Reducing Regulation and Controlling Regulatory Costs’” (April 5, 2017). This rule involves non-substantive changes and internal agency practices and procedures; it will not impose any additional costs on the public. The benefit of the non-substantive change that updates a mailing address is increased clarity and accuracy of regulations for the public.

###### B. Small Entities

Under the Regulatory Flexibility Act, 5 U.S.C. 601–612, the Coast Guard has considered whether this rule would have a significant economic impact on a substantial number of small entities. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

This rule is not preceded by a notice of proposed rulemaking. Therefore, it is exempt from the requirements of the Regulatory Flexibility Act (5 U.S.C. 601–612). The Regulatory Flexibility Act does not apply when notice and comment rulemaking is not required. This rule consists of a technical amendment to a mailing address and does not have any substantive effect on the regulated industry or small businesses.

###### C. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, the Coast Guard offers to assist small entities in understanding this rule so that they can better evaluate its effects on them and participate in the rulemaking. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

###### D. Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520.

### E. Federalism

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

### F. Unfunded Mandates Reform Act

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

### G. Taking of Private Property

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

### H. Civil Justice Reform

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

### I. Protection of Children

The Coast Guard has analyzed this rule under Executive Order 13045 (Protection of Children from Environmental Health Risks and Safety Risks). This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that might disproportionately affect children.

### J. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), because it 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.

### K. Energy Effects

The Coast Guard has analyzed this rule under Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use). It is not a “significant energy action” under that order because it is not a “significant regulatory action” under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

### L. Technical Standards

The National Technology Transfer and Advancement Act, codified as a note to 15 U.S.C. 272, 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 standards bodies.

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

### M. Environment

The Coast Guard has analyzed this rule under Department of Homeland Security Instruction Manual 023–01–001–01, Rev. 1, and U.S. Coast Guard Environmental Planning Policy (COMDTINST 5090.1), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and concluded that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. A final Record of Environmental Consideration supporting this determination is available in the docket where indicated in the **ADDRESSES** section of this preamble. This final rule involves a non-substantive technical amendment that updates a mailing address in existing Coast Guard regulations. Therefore, this rule is categorically excluded under paragraphs A3 and L54 in Appendix A, Table 1, of DHS Instruction Manual 023–01–001–01, Rev. 1. Paragraphs A3 and L54 pertain to regulations which are editorial or procedural.

### List of Subjects in 33 CFR Part 52

Administrative practice and procedure, Archives and records, Military personnel.

For the reason stated in the preamble, the Coast Guard amends 33 CFR part 52 as follows:

### PART 52—BOARD FOR CORRECTION OF MILITARY RECORDS OF THE COAST GUARD

- 1. Revise the authority citation for part 52 to read as follows:

**Authority:** 10 U.S.C. 1552; 14 U.S.C. 501, 633; Department of Homeland Security Delegations No. 0160.1(II)(B)(1), 0170.1(II)(23).

#### § 52.21 [Amended]

- 2. In § 52.21(a), remove the text, “Mailstop 485, 245 Murray Lane, Washington, DC 20528” and add, in its place, the text “2707 Martin Luther King Jr. Avenue SE, Stop 0485, Washington, DC 20528–0485”.

Dated: December 10, 2019.

**M.W. Mumbach,**

*Chief, Office of Regulations and Administrative Law, U.S. Coast Guard.*

[FR Doc. 2019–26996 Filed 12–13–19; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

#### 33 CFR Part 165

[Docket Number USCG–2019–0904]

RIN 1625–AA00

#### Safety Zone; Isabel Holmes Bridge, Wilmington, NC

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing two temporary safety zones on the navigable waters of the Cape Fear River at the Isabel Holmes Bridge in Wilmington, North Carolina. These temporary safety zones are intended to restrict vessel traffic on the Cape Fear River from December 15, 2019, through February 15, 2020, while work crews repair the bridge and replace power cables crossing under the river. This rule prohibits vessels or persons from being in the safety zones unless specifically authorized by the Captain of the Port (COTP) North Carolina or a designated representative.

**DATES:** This rule is effective without actual notice from December 16, 2019 through February 15, 2020. For the

purposes of enforcement, actual notice will be used from December 15, 2019, through December 16, 2019.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG–2019–0904 in the “SEARCH” box and click “SEARCH.” Click on Open Docket Folder on the line associated with this rule.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, contact Petty Officer Matthew Tyson, Waterways Management Division, U.S. Coast Guard Sector North Carolina, Wilmington, NC; telephone: (910) 772–2221, email: [Matthew.I.Tyson@uscg.mil](mailto:Matthew.I.Tyson@uscg.mil).

**SUPPLEMENTARY INFORMATION:**

**I. Table of Abbreviations**

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

**II. Background Information and Regulatory History**

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the North Carolina Department of Transportation (NCDOT) did not notify the Coast Guard of the details of the bridge maintenance project until November 28, 2019. Immediate action is needed to protect persons and vessels from the hazards associated with this project. It is impracticable and contrary to the public interest to publish an NPRM because a final rule needs to be in place by December 15, 2019, to protect against hazards to the work crew and the public during the project.

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

immediate action is needed to protect persons and vessels from the hazards associated with this bridge maintenance project, which begins on December 15, 2019.

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

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously, 33 U.S.C. 1231). The COTP North Carolina has determined that potential hazards associated with the bridge maintenance project, scheduled from December 15, 2019, through February 15, 2020, is a safety concern for workers and mariners on the Cape Fear River at the Isabel Holmes Bridge in Wilmington, North Carolina. This rule is necessary to protect safety of life from the potential hazards associated with the project.

**IV. Discussion of the Rule**

This rule establishes two safety zones on a portion of the Cape Fear River from December 15, 2019, through February 15, 2020, to be enforced while NCDOT conducts a bridge maintenance project. The project will be in two parts: The repair of the Isabel Holmes Bridge, and replacement of the power cables crossing under the river. The bridge repair portion will impact, but not close, the navigable channel. The cable replacement portion will require the navigable channel to be closed. NCDOT will begin staging equipment around the bridge on December 15, 2019.

The first of the two safety zones will extend 100 feet from equipment while it is within the navigable channel during the entire maintenance period. The normal horizontal clearance of the channel beneath the bridge is 200 feet. As a result, smaller vessels will be able to transit under the bridge during this work phase. Maintenance equipment will be able to be relocated outside of the navigable channel for larger vessels during this stage of the project if at least a 48-hour notice is given. This advance notice shall be given to the bridge tender at (910) 251–5774 or via VHF–FM marine channel 13 (165.65 MHz).

The second safety zone will be enforced, within 300 feet of the bridge, located at approximate position, 34°15′06″ N, 077°57′03″ W (NAD 1983) during the cable replacement portion of the project. This cable replacement may last from 6 a.m. to 6 p.m. on four separate days, finishing on February 15, 2020. The public will be notified at least 48 hours in advance of each complete closure via broadcast notice to mariners.

The duration of these zones is intended to protect persons, vessels, and the marine environment on the navigable waters of the Cape Fear River

during the bridge maintenance project. No vessel or person will be permitted to enter either safety zone unless specifically authorized by the Captain of the Port North Carolina or a designated representative.

**V. Regulatory Analyses**

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

*A. Regulatory Planning and Review*

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

This regulatory action determination is based on the size, location, and duration of the safety zones. The ability of vessels to enter or transit a portion of the Cape Fear River near the Isabel Holmes Bridge will be impacted while two safety zones are in place during a bridge maintenance project lasting two months, from December 25, 2019, through February 15, 2020. The project will be in two parts: The repair of the Isabel Holmes Bridge, and replacement of the power cables crossing under the river. The bridge repair portion will impact, but not close, the navigable channel. Smaller vessels will be able to transit under the bridge during the repair work. Larger vessels will be allowed to transit the channel during the repair work provided that they provide a 48-hour notice requesting that equipment be relocated from the channel. The Coast Guard will issue a Local Notice to Mariners and transmit a Broadcast Notice to Mariners via VHF–FM marine channel 16 regarding the safety zone. The cable replacement portion will require the navigable channel to be closed. Specific enforcement dates and times for complete channel closures will be broadcast at least 48 hours in advance. However, this portion of the Cape Fear River is a low traffic area during this time of the year.

### B. Impact on Small Entities

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

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

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

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

### C. Collection of Information

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

### D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of

power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

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

### E. Unfunded Mandates Reform Act

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

### F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves two safety zones lasting two months. The first will prohibit entry within 100 feet of work equipment at the Isabel Holmes Bridge on the Cape Fear River, and the second lasting 12 hours on four separate days that will prohibit entry within 300 feet of the bridge while new power cables are placed under the navigable channel. The rule is categorically excluded from further review under paragraph L60a of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is

available in the docket where indicated under **ADDRESSES**.

### G. Protest Activities

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

### List of Subjects in 33 CFR Part 165

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

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

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

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

**Authority:** 46 U.S.C. 70034, 70051; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

- 2. Add § 165.T05–0904 to read as follows:

#### § 165.T05–0904 Safety Zone; Isabel Holmes Bridge, Wilmington, NC.

(a) *Location.* The following areas are safety zones:

(1) *Safety Zone 1.* All navigable waters of the Cape Fear River within 100 feet of work equipment at the Isabel Holmes Bridge in Wilmington, NC;

(2) *Safety Zone 2.* All navigable waters of the Cape Fear River within a 300 foot radius of the Isabel Holmes Bridge in Wilmington, NC, centered at approximate position 34°15′06″ N, 077°57′03″ W (NAD 1983).

(b) *Definitions.* As used in this section—

*Captain of the Port* means the Commander, Sector North Carolina.

*Designated representative* means a Coast Guard Patrol Commander, including a Coast Guard commissioned, warrant, or petty officer designated by the Captain of the Port North Carolina (COTP) for the enforcement of the safety zone.

*Work crews* means persons and vessels involved in the bridge maintenance project.

(c) *Regulations.* (1) The general regulations governing safety zones in § 165.23 apply to the areas described in paragraph (a) of this section.

(2) With the exception of work crews, entry into or remaining in either safety

zone is prohibited unless authorized by the COTP North Carolina or the COTP North Carolina's designated representative. All other vessels must depart the zone(s) immediately upon activation.

(3) Larger vessels may request maintenance equipment be relocated outside of the navigable channel if at least a 48-hour notice is given. This advance notice shall be given to the bridge tender at (910) 251-5774 or via VHF-FM marine channel 13 (165.65 MHz).

(4) The Captain of the Port, North Carolina can be reached through the Coast Guard Sector North Carolina Command Duty Officer, Wilmington, North Carolina at telephone number 910-343-3882.

(5) The Coast Guard and designated security vessels enforcing the safety zone can be contacted on VHF-FM marine band radio channel 13 (165.65 MHz) and channel 16 (156.8 MHz).

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

(e) *Enforcement periods.* This section will be enforced for:

(1) Safety Zone 1 from December 15, 2019 through February 15, 2020; and

(2) Safety Zone 2 from 6 a.m. through 6 p.m. on days when power cables are being placed under the navigable channel.

(f) *Public notification.* The Coast Guard will notify the public of the active enforcement times at least 48 hours in advance by transmitting Broadcast Notice to Mariners via VHF-FM marine channel 16.

Dated: December 11, 2019.

**Bion B. Stewart,**

*Captain, U.S. Coast Guard, Captain of the Port North Carolina.*

[FR Doc. 2019-27063 Filed 12-13-19; 8:45 am]

BILLING CODE 9110-04-P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

#### 44 CFR Part 64

[Docket ID FEMA-2019-0003; Internal Agency Docket No. FEMA-8609]

#### Suspension of Community Eligibility

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Final rule.

**SUMMARY:** This rule identifies communities where the sale of flood

insurance has been authorized under the National Flood Insurance Program (NFIP) that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date. Also, information identifying the current participation status of a community can be obtained from FEMA's Community Status Book (CSB). The CSB is available at <https://www.fema.gov/national-flood-insurance-program-community-status-book>.

**DATES:** The effective date of each community's scheduled suspension is the third date ("Susp.") listed in the third column of the following tables.

**FOR FURTHER INFORMATION CONTACT:** If you want to determine whether a particular community was suspended on the suspension date or for further information, contact Adrienne L. Sheldon, PE, CFM, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 400 C Street SW, Washington, DC 20472, (202) 212-3966.

**SUPPLEMENTARY INFORMATION:** The NFIP enables property owners to purchase Federal flood insurance that is not otherwise generally available from private insurers. In return, communities agree to adopt and administer local floodplain management measures aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits the sale of NFIP flood insurance unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59.

Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. We recognize that some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual

suspension date. These communities will not be suspended and will continue to be eligible for the sale of NFIP flood insurance. A notice withdrawing the suspension of such communities will be published in the **Federal Register**.

In addition, FEMA publishes a Flood Insurance Rate Map (FIRM) that identifies the Special Flood Hazard Areas (SFHAs) in these communities. The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year on FEMA's initial FIRM for the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment procedures under 5 U.S.C. 553(b), are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

*National Environmental Policy Act.* FEMA has determined that the community suspension(s) included in this rule is a non-discretionary action and therefore the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) does not apply.

*Regulatory Flexibility Act.* The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, Section 1315, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the

communities unless remedial action takes place.

*Regulatory Classification.* This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

*Executive Order 13132, Federalism.* This rule involves no policies that have federalism implications under Executive Order 13132.

*Executive Order 12988, Civil Justice Reform.* This rule meets the applicable standards of Executive Order 12988.

*Paperwork Reduction Act.* This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

**List of Subjects in 44 CFR Part 64**

Flood insurance, Floodplains.  
Accordingly, 44 CFR part 64 is amended as follows:

**PART 64—[AMENDED]**

■ 1. The authority citation for Part 64 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp.; p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp.; p. 376.

**§ 64.6 [Amended]**

■ 2. The tables published under the authority of § 64.6 are amended as follows:

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
<b>Region V</b>				
Minnesota: Halstad, City of, Norman County	270324	February 5, 1975, Emerg; June 15, 1979, Reg; December 20, 2019, Susp.	Dec. 20, 2019.	Dec. 20, 2019.
<b>Region VI</b>				
Texas:				
Aransas County, Unincorporated Areas	485452	June 19, 1970, Emerg; August 6, 1971, Reg; December 20, 2019, Susp.	.....do* .....	Do.
Austin, City of, Hays, Travis and Williamson Counties.	480624	May 9, 1975, Emerg; September 2, 1981, Reg; December 20, 2019, Susp.	.....do .....	Do.
Leroy, City of, McLennan County .....	481314	N/A, Emerg; January 30, 1980, Reg; December 20, 2019, Susp.	.....do .....	Do.
Mount Calm, City of, Hill County .....	480863	March 16, 2010, Emerg; June 2, 2011, Reg; December 20, 2019, Susp.	.....do .....	Do.
Taylor, City of, Williamson County .....	480670	November 7, 1974, Emerg; March 1, 1982, Reg; December 20, 2019, Susp.	.....do .....	Do.
Weir, City of, Williamson County .....	481674	N/A, Emerg; April 19, 1996, Reg; December 20, 2019, Susp.	.....do .....	Do.
West, City of, McLennan County .....	480931	N/A, Emerg; June 4, 2015, Reg; December 20, 2019, Susp.	.....do .....	Do.
<b>Region VII</b>				
Iowa:				
Atkins, City of, Benton County .....	190548	N/A, Emerg; June 18, 2010, Reg; December 20, 2019, Susp.	.....do .....	Do.
Beaman, City of, Grundy County .....	190400	July 27, 2005, Emerg; October 19, 2005, Reg; December 20, 2019, Susp.	.....do .....	Do.
Belle Plaine, City of, Benton County .....	190015	May 9, 1975, Emerg; August 1, 1986, Reg; December 20, 2019, Susp.	.....do .....	Do.
Benton County, Unincorporated Areas	190845	N/A, Emerg; September 10, 2008, Reg; December 20, 2019, Susp.	.....do .....	Do.
Blairstown, City of, Benton County .....	190320	October 30, 2007, Emerg; June 3, 2008, Reg; December 20, 2019, Susp.	.....do .....	Do.
Conrad, City of, Grundy County .....	190401	N/A, Emerg; March 30, 2009, Reg; December 20, 2019, Susp.	.....do .....	Do.
Dike, City of, Grundy County .....	190402	August 17, 1976, Emerg; August 19, 1986, Reg; December 20, 2019, Susp.	.....do .....	Do.
Ellsworth, City of, Hamilton County .....	190136	December 29, 1975, Emerg; August 1, 1987, Reg; December 20, 2019, Susp.	.....do .....	Do.
Garrison, City of, Benton County .....	190321	December 12, 2007, Emerg; June 3, 2008, Reg; December 20, 2019, Susp.	.....do .....	Do.
Grundy Center, City of, Grundy County	190403	August 15, 2005, Emerg; October 19, 2005, Reg; December 20, 2019, Susp.	.....do .....	Do.
Grundy County, Unincorporated Areas	190870	N/A, Emerg; April 21, 2006, Reg; December 20, 2019, Susp.	.....do .....	Do.
Holland, City of, Grundy County .....	190404	November 7, 1979, Emerg; July 17, 1986, Reg; December 20, 2019, Susp.	.....do .....	Do.
Jewell, City of, Hamilton County .....	190600	September 18, 1996, Emerg; March 1, 2001, Reg; December 20, 2019, Susp.	.....do .....	Do.
Kamrar, City of, Hamilton County .....	190406	N/A, Emerg; December 6, 2005, Reg; December 20, 2019, Susp.	.....do .....	Do.
Morrison, City of, Grundy County .....	190953	N/A, Emerg; October 31, 2005, Reg; December 20, 2019, Susp.	.....do .....	Do.
Newhall, City of, Benton County .....	190626	N/A, Emerg; August 4, 2011, Reg; December 20, 2019, Susp.	.....do .....	Do.
Norway, City of, Benton County .....	190632	January 21, 1994, Emerg; March 1, 1997, Reg; December 20, 2019, Susp.	.....do .....	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Reinbeck, City of, Grundy County .....	190646	N/A, Emerg; January 29, 2008, Reg; December 20, 2019, Susp.	.....do .....	Do.
Shellsburg, City of, Benton County .....	190319	September 2, 1993, Emerg; September 3, 1997, Reg; December 20, 2019, Susp.	.....do .....	Do.
Urbana, City of, Benton County .....	190672	N/A, Emerg; September 12, 2011, Reg; December 20, 2019, Susp.	.....do .....	Do.
Vinton, City of, Benton County .....	190016	July 18, 1974, Emerg; March 2, 1981, Reg; December 20, 2019, Susp.	.....do .....	Do.
Webster City, City of, Hamilton County	190137	August 23, 1974, Emerg; August 1, 1978, Reg; December 20, 2019, Susp.	.....do .....	Do.
Wellsburg, City of, Grundy County .....	190680	N/A, Emerg; April 21, 2006, Reg; December 20, 2019, Susp.	.....do .....	Do.
<b>Region VIII</b>				
Colorado:				
Arvada, City of, Adams and Jefferson Counties.	085072	April 30, 1971, Emerg; June 23, 1972, Reg; December 20, 2019, Susp.	.....do .....	Do.
Clear Creek County, Unincorporated Areas.	080034	November 27, 1973, Emerg; March 11, 1980, Reg; December 20, 2019, Susp.	.....do .....	Do.
Georgetown, Town of, Clear Creek County.	080035	April 9, 1974, Emerg; June 5, 1989, Reg; December 20, 2019, Susp.	.....do .....	Do.
Golden, City of, Jefferson County .....	080090	June 19, 1975, Emerg; May 15, 1985, Reg; December 20, 2019, Susp.	.....do .....	Do.
Idaho Springs, City of, Clear Creek County.	080036	December 4, 1973, Emerg; November 15, 1978, Reg; December 20, 2019, Susp.	.....do .....	Do.
Jefferson County, Unincorporated Areas.	080087	July 5, 1973, Emerg; August 5, 1986, Reg; December 20, 2019, Susp.	.....do .....	Do.
<b>Region IX</b>				
California:				
Carlsbad, City of, San Diego County ....	060285	July 2, 1975, Emerg; June 14, 1977, Reg; December 20, 2019, Susp.	.....do .....	Do.
Chula Vista, City of, San Diego County	065021	January 29, 1971, Emerg; August 15, 1983, Reg; December 20, 2019, Susp.	.....do .....	Do.
Coronado, City of, San Diego County ...	060287	February 22, 1974, Emerg; June 1, 1982, Reg; December 20, 2019, Susp.	.....do .....	Do.
Del Mar, City of, San Diego County .....	060288	May 19, 1975, Emerg; August 15, 1983, Reg; December 20, 2019, Susp.	.....do .....	Do.
Encinitas, City of, San Diego County ....	060726	October 22, 1987, Emerg; July 15, 1988, Reg; December 20, 2019, Susp.	.....do .....	Do.
National City, City of, San Diego County.	060293	January 28, 1972, Emerg; February 15, 1979, Reg; December 20, 2019, Susp.	.....do .....	Do.
Oceanside, City of, San Diego County	060294	June 30, 1975, Emerg; September 5, 1984, Reg; December 20, 2019, Susp.	.....do .....	Do.

\*.....do =Ditto.  
Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: December 10, 2019.

**Eric Letvin,**  
Deputy Assistant Administrator for Mitigation, Federal Insurance and Mitigation Administration—FEMA Resilience, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2019-26956 Filed 12-13-19; 8:45 am]

BILLING CODE 9110-12-P

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 648**

[RTID 0648-XX030]

**Fisheries of the Northeastern United States; Summer Flounder Fishery; Quota Transfer From NC to VA**

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

**ACTION:** Notice; quota transfer.

**SUMMARY:** NMFS announces that the State of North Carolina is transferring a portion of its 2019 commercial summer

flounder quota to the Commonwealth of Virginia. This quota adjustment is necessary to comply with the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan quota transfer provisions. This announcement informs the public of the revised 2019 commercial quotas for North Carolina and Virginia.

**DATES:** Effective December 13, 2019, through December 31, 2019.

**FOR FURTHER INFORMATION CONTACT:** Laura Hansen, Fishery Management Specialist, (978) 281-9225.

**SUPPLEMENTARY INFORMATION:** Regulations governing the summer flounder fishery are found in 50 CFR 648.100 through 648.110. These regulations require annual specification of a commercial quota that is

apportioned among the coastal states from Maine through North Carolina. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.102 and final 2019 allocations were published on May 17, 2019 (84 FR 22392).

The final rule implementing Amendment 5 to the Summer Flounder Fishery Management Plan (FMP), as published in the **Federal Register** on December 17, 1993 (58 FR 65936), provided a mechanism for transferring summer flounder commercial quota from one state to another. Two or more states, under mutual agreement and with the concurrence of the NMFS Greater Atlantic Regional Administrator, can transfer or combine summer

flounder commercial quota under § 648.102(c)(2). The Regional Administrator is required to consider three criteria in the evaluation of requests for quota transfers or combinations: The transfer or combinations would not preclude the overall annual quota from being fully harvested; the transfer addresses an unforeseen variation or contingency in the fishery; and, the transfer is consistent with the objectives of the FMP and the Magnuson-Stevens Act. The Regional Administrator has determined these three criteria have been met for the transfer approved in this notice.

North Carolina is transferring 7,500 lb (3,402 kg) of summer flounder

commercial quota to Virginia. This transfer was requested to repay landings made by a North Carolina-permitted vessel in Virginia under a safe harbor agreement. Based on the revised Summer Flounder, Scup, and Black Sea Bass Specifications, the summer flounder quotas for 2019 are now: North Carolina, 2,879,055 lb (1,305,917 kg); and, Virginia, 2,405,916 lb (1,091,305 kg).

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

Dated: December 10, 2019.

**Jennifer M. Wallace,**

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

[FR Doc. 2019-26970 Filed 12-13-19; 8:45 am]

**BILLING CODE 3510-22-P**

# Proposed Rules

Federal Register

Vol. 84, No. 241

Monday, December 16, 2019

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## FEDERAL HOUSING FINANCE AGENCY

### 12 CFR Part 1238

RIN 2590-AB05

### Proposed Amendments to the Stress Test Rule

**AGENCY:** Federal Housing Finance Agency.

**ACTION:** Notice of proposed rulemaking with request for comment.

**SUMMARY:** The Federal Housing Finance Agency (FHFA) is requesting comment on a proposed rule that would amend its stress testing rule, consistent with section 401 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA). Specifically, the proposed rule would revise the minimum threshold for the regulated entities to conduct stress tests from \$10 billion to \$250 billion, remove the requirements for Federal Home Loan Banks (Banks) subject to stress testing, and remove the adverse scenario from the list of required scenarios. These amendments align FHFA's rule with rules adopted by other financial institution regulators that implement the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) stress testing requirements, as amended by EGRRCPA. The proposed rule also makes certain conforming and technical changes.

**DATES:** Comments on the proposed amendments must be received on or before January 15, 2020.

**ADDRESSES:** You may submit your comments, identified by regulatory identification number (RIN) 2590-AB05, by any of the following methods:

- *Agency Website:* [www.fhfa.gov/open-for-comment-or-input](http://www.fhfa.gov/open-for-comment-or-input).
- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by email to FHFA at [RegComments@fhfa.gov](mailto:RegComments@fhfa.gov) to ensure

timely receipt by the agency. Please include "RIN 2590-AB05" in the subject line of the message.

- *Hand Delivered/Courier:* The hand delivery address is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590-AB05, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW, Washington, DC 20219. Deliver the package to the Seventh Street entrance Guard's Desk, First Floor, on business days between 9 a.m. and 5 p.m.

- *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Alfred M. Pollard, General Counsel, Attention: Comments/RIN 2590-AB05, Federal Housing Finance Agency, Eighth Floor, 400 Seventh Street SW, Washington, DC 20219. Please note that all mail sent to FHFA via U.S. Mail is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks.

See **SUPPLEMENTARY INFORMATION** for additional information on submission and posting of comments.

**FOR FURTHER INFORMATION CONTACT:** Naa Awaa Tagoe, Senior Associate Director, Office of Financial Analysis, Modeling and Simulations, (202) 649-3140, [naaawaa.tagoe@fhfa.gov](mailto:naaawaa.tagoe@fhfa.gov); Karen Heidel, Assistant General Counsel, Office of General Counsel, (202) 649-3073, [karen.heidel@fhfa.gov](mailto:karen.heidel@fhfa.gov); or Mark D. Laponsky, Deputy General Counsel, Office of General Counsel, (202) 649-3054, [mark.laponsky@fhfa.gov](mailto:mark.laponsky@fhfa.gov). The telephone number for the Telecommunications Device for the Deaf is (800) 877-8339.

#### SUPPLEMENTARY INFORMATION:

#### I. Comments

FHFA invites comment on all aspects of the proposed amendments and will take all comments into consideration before adopting amendments through a final rule. Copies of all comments received will be posted without change on the FHFA website at <http://www.fhfa.gov>, and will include any personal information you provide, such as your name, address, email address, and telephone number. In addition, copies of all comments received will be available for examination by the public through the electronic rulemaking docket for this proposed rule also located on the FHFA website.

#### II. Background

Section 401 of the EGRRCPA, (Pub. L. 115-174, section 401) amended the Dodd-Frank Act requirements to implement stress testing. Prior to the passage of the EGRRCPA,<sup>1</sup> section 165(i) of the Dodd-Frank Act<sup>2</sup> required each financial company with total consolidated assets of more than \$10 billion to conduct annual stress tests. In addition, section 165 required FHFA to issue regulations for regulated entities to conduct their stress tests, which were required to include at least three different stress testing scenarios: "baseline," "adverse," and "severely adverse."<sup>3</sup> In September 2013, FHFA published in the **Federal Register** a final rule implementing the Dodd-Frank Act stress testing requirements. FHFA's regulation, located at 12 CFR part 1238, requires each regulated entity to conduct an annual stress test based on scenarios provided by FHFA and consistent with FHFA prescribed methodologies and practices. The regulation also requires that the agency issue to the regulated entities stress test scenarios that are generally consistent with and comparable to those developed by the FRB not later than 30 days after the FRB publishes its scenarios.<sup>4</sup>

Section 401 of EGRRCPA amended certain aspects of the stress testing requirements applicable to financial companies in section 165(i) of the Dodd-Frank Act.<sup>5</sup> Specifically, after 18 months, section 401 of EGRRCPA raises the minimum asset threshold for application of the stress testing requirement from \$10 billion to \$250 billion in total consolidated assets, revises the requirement for financial companies to conduct stress tests "annually," and instead requires them to conduct stress tests "periodically", and no longer requires the stress test to include an "adverse" scenario, thus reducing the number of required stress test scenarios from three to two.

#### III. Analysis of Proposed Rule

The purpose of this proposed rule is to revise FHFA's stress testing rules applicable to its regulated entities,

<sup>1</sup> Public Law 115-174, 132 Stat. 1296 (2018).

<sup>2</sup> Public Law 111-203, 124 Stat. 1376 (2010), codified at 12 U.S.C. 5365.

<sup>3</sup> 12 U.S.C. 5365(i)(2)(C).

<sup>4</sup> 12 CFR 1238.3(b).

<sup>5</sup> Public Law 115-174, 132 Stat. 1296-1368 (2018).

consistent with amendments made by section 401 of EGRRCPA. The proposed rule would also make additional technical changes to the stress testing rule. In sum, the proposed rule would discontinue the Dodd-Frank Act stress testing of the Banks and reduce the number of scenarios mandated for Enterprise Dodd-Frank Act stress testing.

#### A. Minimum Asset Threshold

As described above, section 401 of EGRRCPA amended section 165 of the Dodd-Frank Act by raising the minimum threshold for financial companies required to conduct stress tests from \$10 billion to \$250 billion. As there are no Banks with total consolidated assets of over \$250 billion, the Banks will no longer be subject to the stress testing requirements of this rule. Though each of the Banks has total consolidated assets of less than \$250 billion, the rule expressly maintains the Director's discretion to require any regulated entity with assets below the \$250 billion threshold to conduct the stress test. As the total consolidated assets for each Enterprise exceed the \$250 billion threshold, the Enterprises remain subject to stress testing under this rule.

#### B. Frequency of Stress Testing

Section 401 of EGRRCPA also revised the requirement under section 165 of the Dodd-Frank Act for financial companies to conduct stress tests, changing the required frequency from "annual" to "periodic." The term "periodic" is not defined in EGRRCPA. Because of the Enterprises' total consolidated asset amounts, their function in the mortgage market, size of their retained portfolios, and their share of the mortgage securitization market, FHFA proposes to require the Enterprises to conduct stress tests on an annual basis. This is consistent with FHFA's regulatory mission to ensure each of the regulated entities "operates in a safe and sound manner."<sup>6</sup>

#### C. Removal of the "Adverse" Scenario

As discussed above, section 401 of EGRRCPA amended section 165(i) of the Dodd-Frank Act to no longer require the Board to include an "adverse" stress-testing scenario, reducing the number of stress test scenarios from three to two. The "baseline" scenario is a set of conditions that affect the U.S. economy or the financial condition of the regulated entities, and that reflect the consensus views of the economic and financial outlook, and the "severely

adverse" scenario is a more severe set of conditions and the most stringent of the former three scenarios. Although the "adverse" scenario has provided some additional value in limited circumstances, the "baseline" and "severely adverse" scenarios largely cover the full range of expected and stressful conditions. Therefore FHFA does not consider it necessary, for its supervisory purposes, to require the additional burden of analyzing an "adverse" scenario.

#### VI. Coordination With the FRB and the Federal Insurance Office

In accordance with section 165(i)(2)(C), FHFA has coordinated with both the FRB and the Federal Insurance Office (FIO). On November 29, 2018, the FRB published a proposed rule which revised "the minimum threshold for state member banks to conduct stress tests from \$10 billion to \$250 billion," and revised "the frequency with which state member banks with assets greater than \$250 billion would be required to conduct stress tests," in addition to removing the adverse scenario from the list of required scenarios.<sup>7</sup> The FDIC adopted its final rule;<sup>8</sup> and the OCC its final rule.<sup>9</sup> Although FHFA's amended proposed rule would not be identical to those of the FRB, the FDIC, and the OCC, it is consistent and comparable with them. FHFA consulted with the FRB and FIO before proposing these amendments.

#### V. Paperwork Reduction Act

The proposed rule does not contain any collections of information pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*). Therefore, FHFA has not submitted any information to the Office of Management and Budget for review.

#### VI. Regulatory Flexibility Act

The proposed rule applies only to the regulated entities, which do not come within the meaning of small entities as defined in the Regulatory Flexibility Act (see 5 U.S.C. 601(6)). Therefore, in accordance with section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 605(b)), the General Counsel of FHFA certifies that this proposed rule, if promulgated as a final rule, will not have a significant economic impact on a substantial number of small entities.

#### List of Subjects in 12 CFR Part 1238

Administrative practice and procedure, Capital, Federal Home Loan

<sup>7</sup> 83 FR 61408 (Nov. 29, 2018).

<sup>8</sup> 84 FR 56929 (Oct. 24, 2019).

<sup>9</sup> 84 FR 54472 (Oct. 10, 2019).

Banks, Government-sponsored enterprises, Regulated entities, Reporting and recordkeeping requirements, Stress test.

#### Authority and Issuance

For the reasons stated in the SUPPLEMENTARY INFORMATION section, and under the authority of 12 U.S.C. 5365(i), FHFA proposes to amend part 1238 of Title 12 of the Code of Federal Regulations to read as follows:

#### PART 1238—STRESS TESTING OF REGULATED ENTITIES

■ 1. The authority citation for part 1238 continues to read as follows:

**Authority:** 12 U.S.C. 1426; 4513; 4526; 4612; 5365(i).

■ 2. Amend § 1238.1 to read as follows:

##### § 1238.1 Authority and Purpose.

(a) *Authority.* This part is issued by the Federal Housing Finance Agency (FHFA) under section 165(i) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Public Law 111–203, 124 Stat. 1376, 1423–32 (2010), 12 U.S.C. 5365(i), as amended by section 401 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (EGRRCPA), Public Law 115–174, 132 Stat. 1296 (2018), 12 U.S.C. 5365(i); and the Safety and Soundness Act (12 U.S.C. 4513, 4526, 4612).

(b) *Purpose.* (1) This part implements section 165(i)(2) of the Dodd-Frank Act, as amended by section 401 of the EGRRCPA, which requires all large financial companies that have total consolidated assets of more than \$250 billion, and are regulated by a primary federal financial regulatory agency, to conduct periodic stress tests.

(2) This part establishes requirements that apply to each Enterprise's performance of periodic stress tests. The purpose of the periodic stress test is to provide the Enterprises, FHFA, and the FRB with additional, forward-looking information that will help them to assess capital adequacy at the Enterprises under various scenarios; to review the Enterprises' stress test results; and to increase public disclosure of the Enterprises' capital condition by requiring broad dissemination of the stress test scenarios and results.

■ 3. Amend § 1238.2 to read as follows:

##### § 1238.2 Definitions.

For purposes of this part, the following definitions apply:

*Planning horizon* means the period of time over which the stress projections

<sup>6</sup> 12 U.S.C. 4513(a)(1)(B).

must extend. The planning horizon cannot be less than nine quarters.

*Scenarios* are sets of economic and financial conditions used in the Enterprises' stress tests, including baseline and severely adverse.

*Stress test* is a process to assess the potential impact on an Enterprise of economic and financial conditions ("scenarios") on the consolidated earnings, losses, and capital of the Enterprise over a set planning horizon, taking into account the current condition of the Enterprise and the Enterprise's risks, exposures, strategies, and activities.

■ 4. Amend § 1238.3 to read as follows:

**§ 1238.3 Annual stress test.**

(a) *In general.* Each Enterprise:

(1) Shall complete an annual stress test of itself based on its data as of December 31 of the preceding calendar year;

(2) The stress test shall be conducted in accordance with this section and the methodologies and practices described in § 1238.4 and in a supplemental guidance or order.

(b) *Scenarios provided by FHFA.* In conducting its annual stress tests under this section, each Enterprise must use scenarios provided by FHFA, which shall be generally consistent with and comparable to those established by the FRB, that reflect a minimum of two sets of economic and financial conditions, including a baseline and severely adverse scenario. Not later than 30 days after the FRB publishes its scenarios, FHFA will issue to the Enterprises a description of the baseline and severely adverse scenarios that each Enterprise shall use to conduct its annual stress tests under this part.

■ 5. Amend § 1238.4 to read as follows:

**§ 1238.4 Methodologies and practices.**

(a) *Potential impact.* Except as noted in this subpart, in conducting a stress test under § 1238.3, each Enterprise shall calculate how each of the following is affected during each quarter of the stress test planning horizon, for each scenario:

(1) Potential losses, pre-provision net revenues, and future pro forma capital positions over the planning horizon; and

(2) Capital levels and capital ratios, including regulatory capital and net worth, and any capital ratios, specified by FHFA.

(b) *Planning horizon.* Each Enterprise must use a planning horizon of at least nine quarters over which the impact of specified scenarios would be assessed.

(c) *Additional analytical techniques.* If FHFA determines that the stress test

methodologies and practices of an Enterprise are deficient, FHFA may determine that additional or alternative analytical techniques and exercises are appropriate for an Enterprise to use in identifying, measuring, and monitoring risks to the financial soundness of the Enterprise, and require an Enterprise to implement such techniques and exercises in order to fulfill the requirements of this part. In addition, FHFA will issue guidance annually to describe the baseline and severely adverse scenarios, and methodologies to be used in conducting the annual stress test.

(d) *Controls and oversight of the stress testing processes.* (1) The appropriate senior management of each Enterprise must ensure that the Enterprise establishes and maintains a system of controls, oversight, and documentation, including policies and procedures, designed to ensure that the stress testing processes used by the Enterprise are effective in meeting the requirements of this part. These policies and procedures must, at a minimum, describe the Enterprise's testing practices and methodologies, validation and use of stress test results, and processes for updating the Enterprise's stress testing practices consistent with relevant supervisory guidance;

(2) The board of directors, or a designated committee thereof, shall review and approve the policies and procedures established to comply with this part as frequently as economic conditions or the condition of the Enterprise warrants, but at least annually; and

(3) Senior management of the Enterprise and each member of the board of directors shall receive a summary of the stress test results.

■ 6. Amend § 1238.5 to read as follows:

**§ 1238.5 Required report to FHFA and FRB of stress test results and related information.**

(a) *Report required for stress tests.* On or before May 20 of each year, the Enterprises must report the results of the stress tests required under § 1238.3 to FHFA, and to the FRB, in accordance with paragraph (b) of this section;

(b) *Content of the report for annual stress test.* Each Enterprise must file a report in the manner and form established by FHFA.

(c) *Confidential treatment of information submitted.* Reports submitted to FHFA under this part are FHFA property and records (as defined in 12 CFR part 1202 of this chapter). The reports are and include non-public information contained in or related to examination, operating, or condition

reports prepared by, on behalf of, or for the use of, FHFA in connection with the performance of the agency's responsibilities regulating or supervising the Enterprises. Disclosure of any reports submitted to FHFA or the information contained in any such report is prohibited unless authorized by this part, legal obligation, or otherwise by the Director of FHFA.

■ 7. Amend § 1238.6 to read as follows:

**§ 1238.6 Post-assessment actions by the Enterprises.**

Each Enterprise shall take the results of the stress test conducted under § 1238.3 into account in making changes, as appropriate, to the Enterprise's capital structure (including the level and composition of capital); its exposures, concentrations, and risk positions; any plans for recovery and resolution; and to improve overall risk management. If an Enterprise is under FHFA conservatorship, any post-assessment actions shall require prior FHFA approval.

■ 8. Amend § 1238.7 to read as follows:

**§ 1238.7 Publication of results by regulated entities.**

(a) *Public disclosure of results required for stress tests of the Enterprises.* The Enterprises must disclose publicly a summary of the stress test results for the severely adverse scenario not earlier than August 1 and not later than August 15 of each year. The summary may be published on the Enterprise's website or in any other form that is reasonably accessible to the public.

(b) *Information to be disclosed in the summary.* The information disclosed by each Enterprise shall, at minimum, include—

(1) A description of the types of risks being included in the stress test;

(2) A high-level description of the scenario provided by FHFA, including key variables (such as GDP, unemployment rate, housing prices, and foreclosure rate, etc.);

(3) A general description of the methodologies employed to estimate losses, pre-provision net revenue, and changes in capital positions over the planning horizon;

(4) A general description of the use of the required stress test as one element in an Enterprise's overall capital planning and capital assessment. If an Enterprise is under conservatorship, this description shall be coordinated with FHFA;

(5) Aggregate losses, pre-provision net revenue, net income, net worth, pro forma capital levels and capital ratios (including regulatory and any other

capital ratios specified by FHFA) over the planning horizon, under the scenario; and

(6) Such other data fields, in such form (e.g., aggregated), as the Director may require.

Dated: December 10, 2019.

**Mark A. Calabria,**

Director, Federal Housing Finance Agency.

[FR Doc. 2019-26950 Filed 12-13-19; 8:45 am]

**BILLING CODE 8070-01-P**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### 12 CFR Parts 303 and 308

RIN 3064-AF19

#### Incorporation of Existing Statement of Policy Regarding Requests for Participation in the Affairs of an Insured Depository Institution by Convicted Individuals

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Deposit Insurance Corporation (“FDIC”) proposes to revise the existing regulations requiring persons convicted of certain criminal offenses to obtain prior written consent before participating in the conduct of the affairs of any depository institution to incorporate the FDIC’s existing Statement of Policy, and to amend the regulations setting forth the FDIC’s procedures and standards applicable to an application to obtain the FDIC’s prior written consent. Following the issuance of final regulations, the FDIC’s existing Statement of Policy would be rescinded. The proposed incorporation of the Statement of Policy into the FDIC’s regulations would provide for greater transparency as to its application, provide greater certainty as to the FDIC’s application process and help both insured depository institutions and affected individuals to understand its impact and to potentially seek relief from its provisions.

**DATES:** Comments must be received on or before February 14, 2020.

**ADDRESSES:** You may submit comments, identified by RIN 3064-AF19, by any of the following methods:

- **Agency Website:** <https://www.fdic.gov/regulations/laws/federal/propose.html>. Follow instructions for submitting comments on the Agency website.

- **Email:** [Comments@fdic.gov](mailto:Comments@fdic.gov). Include RIN 3064-AF19 on the subject line of the message.

- **Mail:** Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

- **Hand Delivery:** Comments may be hand delivered to the guard station at the rear of the 550 17th Street, Building (located on F Street) on business days between 7:00 a.m. and 5:00 p.m.

**Public Inspection:** All comments received will be posted without change to <https://www.fdic.gov/regulations/laws/federal/propose.html>, including any personal information provided. Paper copies of public comments may be ordered from the FDIC Public Information Center, 3501 North Fairfax Drive, Room E-1002, Arlington, VA 22226 by telephone at (877) 275-3342 or (703) 562-2200.

**FOR FURTHER INFORMATION CONTACT:** Brian Zeller, Review Examiner (319) 395-7394 x4125, or Larisa Collado, Section Chief (202) 898-8509, in the Division of Risk Management Supervision; or Michael Condon, Counsel, (202) 898-6536, John Dorsey, Acting Supervisory Counsel, (202) 898-3807, or Andrea Winkler, Acting Assistant General Counsel, (202) 898-3727 in the Legal Division.

#### SUPPLEMENTARY INFORMATION:

##### I. Policy Objectives

The policy objective of the proposed rule is to clarify the FDIC’s application of section 19 of the FDI Act (section 19), clarify the application process for insured depository institutions and individuals who seek relief from the provisions of section 19, and seek public comment on additional proposals that could expand the scope of relief available for minor offenses. The FDIC has issued a Statement of Policy for Section 19 of the Federal Deposit Insurance Act (SOP), which provides the public with guidance relating to section 19 and the FDIC’s application thereof. The current version of the SOP, with some modifications over time, has been a published resource for the public for over twenty years; however, some uncertainty may exist because the terms and procedures outlined in the SOP have not been adopted as regulations by the FDIC. To remove potential ambiguities about the FDIC’s application of section 19 or the application process, the proposed rule will incorporate the current content of the SOP into its rules and procedures, thereby further clarifying its existing practices enforcing section 19. Additionally, the FDIC seeks comment from members of the public, including but not limited to, insured depository institutions, other financial institutions

and companies, individual depositors and consumers, employees and prospective employees of insured depository institutions or other financial services institutions that have applied for or been granted relief from the provisions of section 19, and civil rights organizations, consumer groups, trade associations, and other members of the financial services industry regarding the scope of section 19, possible amendments to the relief process, the scope of the *de minimis* offense exemption, and the treatment of expunged criminal records.

##### II. Background

The FDIC seeks to incorporate its SOP, which is issued pursuant to section 19 of the Federal Deposit Insurance Act,<sup>1</sup> into its existing Procedures and Rules of Practice. Section 19 prohibits, without the prior written consent of the FDIC, any person from participating in banking who has been convicted of a crime of dishonesty or breach of trust or money laundering, or who has entered a pretrial diversion or similar program in connection with the prosecution for such an offense. Further, the law forbids an insured institution from permitting such a person to engage in any conduct or to continue any relationship prohibited by section 19. It also imposes a ten-year ban against the FDIC’s consent for a person convicted of certain crimes enumerated in Title 18 of the United States Code, absent a motion by the FDIC and approval by the sentencing court.

The FDIC issued originally, after notice and comment, the current SOP in December 1998<sup>2</sup> to provide the public with guidance relating to section 19 and the FDIC’s application thereof. The 1998 SOP, among other things, instituted a set of criteria to provide for blanket approval of certain low-risk crimes, and for persons convicted of such *de minimis* crimes to forgo filing an application.

A clarification to the SOP was issued in 2007, based on the 2006 amendment to Section 19 of the FDI Act by section 710 of the Financial Services Regulatory Relief Act of 2006,<sup>3</sup> which modified section 19 to include coverage of institution-affiliated parties (IAPs) participating in the affairs of bank holding companies, or savings and loan holding companies, and gave supervisory authority over such entities to the Board of Governors of the Federal Reserve System (Federal Reserve Board)

<sup>1</sup> 12 U.S.C. 1829.

<sup>2</sup> 63 FR 66177 (Dec. 1, 1998).

<sup>3</sup> Public Law 109-351, 120 Stat. 1966.

and the Office of Thrift Supervision (OTS), respectively.<sup>4</sup> The FDIC, in 2011, further clarified the SOP as to: (i) The applicability of section 19 to IAPs of bank and savings and loan holding companies; (ii) the meaning of the term “complete expungement;” and (iii) the factors for considering which convictions are considered *de minimis*.<sup>5</sup> In December of 2012, the FDIC modified the *de minimis* exception to filing by changing the amount of the maximum potential fine to qualify for *de minimis* treatment from \$1,000 to \$2,500. The modification also changed the limit on the amount of jail time needed to qualify for the *de minimis* exception from no jail time served to a maximum number of three days spent in jail.<sup>6</sup>

The current version of the SOP was last revised by the Board of Directors in August of 2018,<sup>7</sup> after notice and comment. The 2018 revisions made a number of substantive changes in addition to some grammatical and format changes. The FDIC provided that institutions it supervised could make conditional offers of employment to individuals provided they were not hired until the institution had determined that they were not barred by section 19. The FDIC clarified when section 19 applied to certain persons who are not employees, officers, directors or shareholders of an insured depository institution. The FDIC also deleted language referencing the change that expanded section 19’s application to bank and savings and loan holding companies and simply noted that if a person also seeks to participate in the affairs of a bank or savings and loan holding company, they may be required to comply with any requirements of the Federal Reserve Board under 12 U.S.C. 1829(d) and (e).

In regard to considering applications, the FDIC included language addressing when an application will be considered by the FDIC, which states that the FDIC will not consider an application unless all of the sentencing requirements associated with the conviction, or the conditions imposed by a pretrial

diversion or similar program, are completed, and the court’s decision must be considered final under the procedures of the applicable jurisdiction.

The FDIC also added additional language to address questions regarding complete expungements and made clear that, if the expungement is intended to be complete under the law of the jurisdiction that issues the expungement, and the jurisdiction intends that no governmental body or court can use the prior conviction or program entry for any subsequent purpose, then the fact that the records have not been timely destroyed, or that there exist copies of the records that are not covered by the order sealing or destroying them, will not prevent the expungement from being considered complete for the purposes of section 19.

The FDIC also added language that treats certain convictions that have been set aside or reversed after the sentencing requirements have been completed in the same manner as pretrial diversion or similar programs are treated, unless the reason that the conviction was set aside or reversed is based on a finding on the merits that the conviction was wrongful. In addressing pretrial diversions or similar programs, the FDIC clarified how such programs would be identified by stating that whether a program constitutes a pretrial diversion or similar program is determined by relevant Federal, state or local law, and if that program is not so designated under applicable law, then the determination will be made by the FDIC on a case-by-case basis.

The FDIC also expanded the application of provisions for *de minimis* offenses where an application would not be required and it would be deemed approved. The general provisions for the application of *de minimis* were changed in two ways. The definition of jail time was clarified and the previous *de minimis* category for bad or insufficient fund checks was expanded and set out as a separate basis for applying the *de minimis* exception to filing. The FDIC created new exceptions to the filing requirement. First, a person with a covered conviction or program entry where the acts leading to the conviction or program entry occurred when the person was 21 or younger who also meets the general *de minimis* exception to filing and who has completed all sentencing or program requirements, will qualify for this *de minimis* exception to filing if at least 30 months have passed prior to the date an application would otherwise be required. Second, an exception to filing would apply when the conviction or

program entry is based on a small dollar theft of goods, services, and/or currency (or other monetary instrument) and the aggregate value of the goods, services and/or currency was \$500 or less at the time of the conviction or program entry. Additionally, the individual must have only one conviction or program entry under section 19, and five years must have passed since the conviction or program entry.

The provision related to bad or insufficient funds checks was also expanded to apply to all such convictions or program entries provided that there was no other program entry for an offense covered by section 19, the total amount of the checks did not exceed \$1,000 and that no insured depository institution or credit union was a payee on any of the bad or insufficient funds checks. Lastly, the use of a fake or altered identification to purchase alcohol or to enter a premises where age appropriate identification was required would not require an application provided there was no other conviction or program entry for an offense covered by section 19.

The FDIC also clarified that no conviction for a violation of certain Title 18 provisions, as set out in 12 U.S.C. 1829(a)(2), can qualify under any of the *de minimis* exceptions to filing that are set out in the SOP and that drug convictions or program entries which currently require an application can fall within the *de minimis* exceptions to filing that are set out in the SOP.

The FDIC provided additional information directing individual applicants to file their application with the FDIC Regional Office covering the state where the person lives and also adjusted the language in the evaluations section of the SOP to more closely mirror the language in 12 CFR 308.157 as well as stated that, under the provision that allows the FDIC to consider other appropriate factors, the FDIC may contact the primary Federal and/or state regulator to aid in the evaluation of an application.

Lastly, the FDIC added clarifying language related to bank-sponsored applications that makes clear that changes in an individual’s duties at the insured institution which filed a previously approved section 19 application on that individual’s behalf will require a new application. There is also a clarification that a new application will be required if an individual, covered by a previously approved bank-sponsored application, desires to participate in the affairs of another insured depository institution.

<sup>4</sup> The FDIC amended the SOP by including a footnote which noted the authority of the Federal Reserve Board and the OTS with regard to bank and savings and loan holding companies under section 19. 72 FR 73823 (Dec. 8, 2007) with correction issued at 73 FR 5270 (Oct. 13, 2008). In May of 2011, the FDIC subsequently eliminated the footnote added in December of 2007 and incorporated the change directly into the text of the SOP. It also noted the coming transfer of authority under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 12 U.S.C. 5301 *et seq.*, of savings and loan holding company jurisdiction to the Federal Reserve Board.

<sup>5</sup> 76 FR 28031 (May 13, 2011).

<sup>6</sup> 77 FR 74847 (Dec. 18, 2012).

<sup>7</sup> 83 FR 38143 (Aug. 3, 2018).

### III. The Proposal

The FDIC has determined that the current provisions of the SOP should be incorporated into its rules and procedures in order to provide for greater transparency as to its application, provide greater certainty as to the FDIC's application process and to aid both insured depository institutions and individuals who may be affected by section 19 of the FDI Act to understand its impact and potentially seek relief from its provisions. The FDIC will also rescind those sections of 12 CFR 308, subpart M, which would be duplicative of the changes needed to Part 303, subpart L, and will revise the remaining sections to insure conformity for any request for a hearing when an application under section 19 has been denied.

Currently, 12 CFR part 303, subpart L provides only very basic information as to the need to file an application with the FDIC in order to obtain the written permission of the FDIC required by section 19 so that the person may be employed by, or own or control, or participate in the affairs of an insured depository institution. Further, while some additional details about the filing process were set out in 12 CFR part 308, subpart M, the information was still not as complete as it could have been, and some parts of Part 308, subpart M were actually duplicative of what was in Part 303, subpart L. The better approach would be to describe the complete application process in Part 303, subpart L and amend Part 308, subpart M to address the procedures and rules that could be followed if an application is denied and a hearing is sought.

Therefore, consistent with the foregoing, the FDIC is proposing to rescind subpart L of 12 CFR part 303, and replace and rename it with a new subpart and to revise and amend, as well as rename, subpart M of Part 308. While much of the SOP has been incorporated into the proposed revised subpart L of part 303, some adjustments to the language have been made to add clarification, correct grammar and style consistent with a regulation and, occasionally, reformatted to fit the regulatory scheme.

#### A. Revised Provisions of 12 CFR Part 303, Subpart L

##### 1. § 303.220 What is section 19 of the FDI Act?

This section combines portions of the scope section in the existing 12 CFR 303.220 and the introduction part of the SOP. Paragraph (a) is the scope provisions from the existing § 303.220. Paragraph (b) sets out the application of

section 19 to insured depository institutions including the conditional offers of employment that FDIC supervised institutions may make as is in the existing SOP. Paragraph (c) comes from the SOP and addresses the need for an application.

##### 2. § 303.221 Who is covered by section 19?

This section identifies who is covered by section 19 and comes mainly from the existing SOP. Paragraph (a) defines institution affiliated parties and others who may fall within the scope of section 19. Paragraph (b) defines the term "person" for the purposes of section 19 as an individual not a legal entity. Paragraph (c) addresses when a person is covered under 12 U.S.C. 1829(a) and must file an application with the FDIC even if the person is also covered under 12 U.S.C. 1829(d) and (e), which would require an application approved by the Board of Governors of the Federal Reserve System for an individual at the bank or saving and loan holding company. Paragraph (d) defines when "ownership" or "control" results in the application of section 19 to an individual or individuals who may be deemed in control of, or be deemed to be an owner of, an insured depository institution.

##### 3. § 303.222 What offenses are covered under section 19?

This section comes mainly from the SOP and addresses what is a criminal offense under section 19. Paragraph (a) defines when a criminal offense constitutes a crime of dishonesty or breach of trust. Paragraph (b) requires that, to determine if the criminal offense is one of dishonesty, breach of trust, or money laundering, the FDIC will look to the statutory elements of the criminal offense or to court decisions in the relevant jurisdiction that have found the criminal offense to be one of dishonesty, breach of trust or money laundering. Paragraph (c) requires an application for all drug offenses, except for simple possession, unless the criminal offense meets the criteria in § 303.227 for not filing an application.

##### 4. § 303.223 What constitutes a conviction under section 19?

This section comes mainly from the SOP. Paragraph (a) addresses that there must have been a conviction and that section 19 does not apply to arrests, pending cases not brought to trial, or any conviction reversed on appeal unless the person has entered a pretrial diversion or similar program as set out in § 303.224. Paragraph (b) addresses what constitutes a complete expungement for the purposes of section 19. Paragraph (c) excludes youthful

offender adjudgments for minors from the scope of section 19.

##### 5. § 303.224 What constitutes a pretrial diversion or similar program (a program entry) under section 19?

This section comes mainly from the SOP. Paragraph (a) defines what constitutes a pretrial diversion or similar program and excludes program entries that occurred prior to November 29, 1990. Paragraph (b) states that expungements of program entry records will be treated the same as expungements of convictions.

##### 6. § 303.225 What are the types of applications that can be filed?

This section is a combination of the existing § 303.221, § 308.158 and the SOP. Paragraph (a) establishes the institution filing requirement. Paragraph (b) establishes the procedure to apply when an insured depository institution will not file an application for an individual.

##### 7. § 303.226 When is an application to be filed?

This section comes mainly from the SOP. This section states when an application is to be filed excepting from its requirement those covered offenses which are considered *de minimis* under subpart L. An application will not be considered by the FDIC until all sentencing requirements associated with a conviction have been met or all requirements of the program entry have been completed.

##### 8. § 303.227 When is an application not required for a covered conviction or program entry?

This section comes mainly from the SOP. Paragraph (a) establishes the general criteria for *de minimis* convictions or program entries for which, if the criteria are met, the person is deemed automatically approved and no application will be required. Paragraph (b) establishes certain other specific exceptions to the filing requirement which if met will be deemed automatically approved. Paragraph (b)(1) shortens the five-year waiting period under the general criteria to 30 months when all the elements of the offense occurred before the person is age 21 or younger and the person meets the criteria established by that exception to filing. Paragraph (b)(2) establishes the criteria, which if met, provides that certain convictions or program entries for bad or insufficient funds checks will not require an application. Paragraph (b)(3) establishes the criteria, which if met, provides that certain small dollar simple theft convictions or program entries of \$500 or less will not require an application. Excluded from this exception to filing are convictions or program entries for burglary, forgery,

identity theft, and fraud. Paragraph (b)(5) establishes the criteria which, if met, provides that the use of a fake or false identification by a person under the legal age to purchase alcohol or used to enter premises where alcohol is served but where age appropriate identification is required to enter the premises will not require an application. Paragraph (c) requires that, for any case where the person is able to avail themselves of the *de minimis* exception to filing, they must disclose the convictions or program entries to the insured depository institution and must qualify for a fidelity bond to the same extent as others in a similar position. Paragraph (d) states that any conviction or program entry for criminal offenses under Title 18 set out in 12 U.S.C. 1829(a)(2) cannot qualify for *de minimis* exception to filing an application.

9. § 303.228 How to file an application.

This section comes from the SOP. This section provides the requirement that an insured depository institution is to file an application on behalf of an individual under section 19 to participate in its affairs unless the FDIC grants the individual a waiver for good cause shown to file on their own behalf. Insured depository institutions should file with the FDIC's Regional Office where the institution's home office is located and any waiver and application on behalf of an individual should be filed with the FDIC's Regional Office where the person lives.

10. § 303.229 How an application is evaluated.

This section comes from a combination of § 308.157 and the SOP. Paragraph (a) sets out the ultimate determination the FDIC will make as to the level of risk the applicant poses to an insured depository institution and whether it will consent to allow the person to participate in an insured depository institution's affairs. In evaluating the risk posed by the person's participation the FDIC has established nine factors that it will look at, including other factors that might be relevant to a particular application. Paragraph (b) states that the question of whether a person was guilty of the offense for which the person was convicted, or had a program entry for, is not an issue for Part 303, subpart L or for part 308, subpart M. Paragraph (c) states that it will apply the factors and determination used in paragraph (a) when evaluating an application which is made to terminate the ten-year ban in 12 U.S.C. 1829(a)(2). Paragraph (d) provides that the person must be bonded the same as others in that position and the person must disclose

the covered conviction or program entry to any insured depository institution in which they intend to participate.

Paragraph (e) provides that for bank-sponsored applications the approval is to work a specific job at a specific bank and that the bank may be required to seek permission from the FDIC before there is a significant change in a person's duties and/or responsibilities and the Regional Director may request a new application. Approval to work at a specific insured depository institution is limited to that institution and a new application is required to work at another insured depository institution.

11. § 303.230 What will the FDIC do if the application is denied?

This section is a combination of the current §§ 303.223, 308.157 and 308.159. Paragraph (a) provides that the FDIC will provide a written denial which will summarize or cite the relevant factors from the proposed § 303.229. Paragraph (b) provides that the applicant can file a written request for a hearing pursuant to Part 308, subpart M within 60 days of the denial.

12. § 303.231 Waiting time for a subsequent application if an application is denied.

This section comes mainly from § 308.158 and was clarified so that an applicant will need to wait one year from the date of the denial or decision of the FDIC Board, or its designee.

#### *B. Revised Provisions of 12 CFR Part 308, Subpart M*

1. § 308.156 Scope.

This section has been revised to reflect its application to denials that are issued pursuant to 12 CFR part 303, subpart L.

2. § 308.157 Relevant considerations.

This section will be rescinded.

3. § 308.158 Filing Papers and effective date.

This section will be rescinded.

4. § 308.159 Denial of Application.

This section has been revised to reflect the outcome of the application process in Part 303, subpart L and to clarify the procedure by which a hearing may be requested. It will be renumbered as § 308.157.

5. § 308.160 Hearings.

This section will remain as it currently exists but will be renumbered as § 308.158.

After renumbering, §§ 308.159 and 309.160 will be reserved.

#### **IV. Expected Effects**

The FDIC expects the proposed rule to have relatively small effects on the public and insured institutions. The FDIC currently insures 5,312 depository

institutions which could be affected by the proposed rule.<sup>8</sup> Additionally, as discussed previously, the proposed rule would apply to certain persons covered by the provisions of section 19 who are or wish to become employees, officers, directors or shareholders of an insured depository institution. In the period from 2014 through 2018, the FDIC received 21 bank-sponsored section 19 applications, an average of four per year. Additionally, the FDIC received 500 individual section 19 applications during the same period, an average 100 per year.<sup>9</sup> Therefore, the FDIC estimates that the proposed rule would affect at least four FDIC-insured depository institutions, and 100 individuals per year.

As described previously, the proposed rule incorporates the current content of the SOP into the FDIC's regulations; therefore, it poses no substantive changes for potential applicants, either insured institutions or individuals. Additionally, although codifying the current content of the SOP into the FDIC's regulations could change enforcement of that content, in practice it is unlikely to pose any substantive effect on covered entities and individuals. The FDIC considers individuals who have been convicted of a crime of dishonesty, breach of trust, or money laundering, who participate in the affairs of an insured depository institution without the prior written consent of the FDIC, to be violations of section 19, and will continue to do so if the proposed rule is adopted in its current form. Therefore, the proposed rule is unlikely to pose any substantive change in the FDIC's enforcement of section 19. As such, removing the existing regulation 12 CFR part 303, subpart L and establishing a new subpart L, which incorporates the FDIC's existing SOP, as well as renaming, removing, and amending certain provisions of 12 CFR part 308, subpart M is unlikely to have any substantive effects on the current section 19 application process or the FDIC's enforcement of section 19.

To the extent that the current content of the FDIC's SOP conveys any ambiguity as to the FDIC's application of section 19 or the application process, the proposed rule would benefit covered entities and individuals by further clarifying this topic and process. However, the FDIC believes any such effects are likely to be relatively small because the FDIC has received bank-sponsored section 19 applications from less than 0.08 percent of FDIC-insured

<sup>8</sup> FDIC Call Report Data, June 30, 2019.

<sup>9</sup> Application Tracking System.

institutions, per year, on average,<sup>10</sup> or section 19 applications from individuals who represent less than 0.004 percent of people employed in the credit intermediation sector of the U.S. economy.<sup>11</sup>

The FDIC invites comments on all aspects of this analysis. In particular, would the proposed rule have any costs or benefits that the FDIC has not identified?

## V. Alternatives

The FDIC considered one alternative to the proposed rule but believes that the proposed amendments represent the most appropriate option for covered entities and individuals. The FDIC considered the status quo alternative of retaining the existing section 19 SOP and regulations.<sup>12</sup> However, the FDIC believes that the proposed rule further clarifies the FDIC's application of section 19 of the FDI Act and the application process for insured depository institutions and individuals who seek relief from its provisions, while posing no substantive costs, relative to the status quo alternative.

The FDIC invites comments on its consideration of alternatives. In particular, are there other alternatives that the FDIC should consider?

## VI. Request for Comments

(1) The FDIC seeks comment on all aspects of its approach to section 19 and more specifically in the questions that follow.

(2) The FDIC has received previous inquiries and comments from the public regarding section 19's scope that catches a number of minor offenses in perpetuity. In response to these concerns, the FDIC has established *de minimis* criteria, which have been expanded in 2007, 2011, 2012, and 2018. The FDIC continues to process low-risk cases that, in our experience, present a high likelihood of approval. For this reason, the FDIC seeks comments regarding the *de minimis* criteria for offenses that represent low-risk to the Deposit Insurance Fund while maintaining a balanced approach of reducing regulatory burden to the industry and individuals while maintaining the integrity of section 19.

<sup>10</sup> (4/5312) \* 100 = 0.075 percent.

<sup>11</sup> According to the Bureau of Labor Statistics (BLS) 2,631,500 people were employed in the Credit Intermediation & Related Activities (NAICS 522000) sector in the second quarter of 2019. (100/2631500) \* 100 = 0.0038 percent. See Bureau of Labor Statistics, Current Employment Statistics, Credit Intermediation and Related Activities: NAICS 522, June 2019, Extracted on November 20, 2019 (8:20:49 p.m.).

<sup>12</sup> 12 CFR part 303, subpart L and 12 CFR part 308, subpart M.

(3) One of the specific *de minimis* categories involves the use of a fake identification for a person under the age of 21 in an attempt to purchase alcohol. The FDIC seeks comments on whether the *de minimis* criteria should be expanded and what if any additional situations involving low risk convictions should be covered by this category.

(4) The FDIC seeks comment on whether the five-year post-conviction cooling off period should be modified for certain offenses, and whether additional timeframes should be considered for various offenses.

(5) The FDIC has received previous inquiries and comments from the public related to expungements of convictions. Expungements have been a source of confusion for the industry and individual applicants. The FDIC has attempted to address these concerns by clarifying the term "complete expungement" for section 19 purposes and has made changes to the SOP in 2011 and 2018. However, despite these changes, expungements continue to be a source of confusion. For this reason, the FDIC seeks comments regarding the applicability of section 19 to expungements.

Written comments must be received by the FDIC no later than February 14, 2020.

## VII. Regulatory Analysis and Procedure

### A. The Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act ("PRA"),<sup>13</sup> the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget ("OMB") control number. The proposed rule will not create any new or revise any existing information collections pursuant to the PRA. Therefore, no information collection request will be submitted to the OMB for review.

### B. The Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") generally requires an agency, in connection with a proposed rule, to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a rule on small entities.<sup>14</sup> 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 Small Business Administration ("SBA") has

defined "small entities" to include banking organizations with total assets of less than or equal to \$600 million that are independently owned and operated or owned by a holding company with less than or equal to \$600 million in total assets.<sup>15</sup> 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, if adopted, this proposed rule will not have a significant economic impact on a substantial number of FDIC-supervised small entities.

The FDIC insures 5,312 depository institutions, of which 3,947 are defined as small banking organizations according to the RFA.<sup>16</sup> In the period from 2014 through 2018, the FDIC received 15 bank-sponsored section 19 applications from small, FDIC-insured institutions, an average of three per year. Additionally, the FDIC received 500 section 19 applications from individuals during the same period, an average 100 per year.<sup>17</sup> To determine the maximum number of small, FDIC-supervised institutions who could be affected by the proposed rule this analysis assumes that each applicant is seeking employment at a different bank, and that each bank is a small, FDIC-insured institution. Based on these assumptions it follows that annual section 19 applications can affect at most 103 (2.6 percent) small, FDIC-insured institutions on average, annually.<sup>18</sup> However, in the FDIC's experience, section 19 applications from individuals are compelled by the applicant's intent to seek employment at FDIC-insured institutions that are generally not small. Therefore, the FDIC believes that the number of small, FDIC-insured institutions affected by the proposed rule is likely to be smaller

<sup>15</sup> 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 (July 18, 2019), 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 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.

<sup>16</sup> FDIC Call Report, June 30, 2019.

<sup>17</sup> Application Tracking System.

<sup>18</sup> (103/3947) \* 100 = 2.61 percent.

<sup>13</sup> 44 U.S.C. 3501 *et seq.*

<sup>14</sup> 5 U.S.C. 601 *et seq.*

than 103. The FDIC estimates that the proposed rule would affect at least three, but no more than 103 small, FDIC-insured institutions, per year.

As described previously, the proposed rule incorporates the current content of the SOP into the FDIC's regulations; therefore, it poses no substantive changes for potential applicants. Additionally, although codifying the current content of the SOP into the FDIC's regulations could change enforcement of that content, in practice it is unlikely to pose any substantive effect on covered entities and individuals. The FDIC considers individuals who have been convicted of a crime of dishonesty, breach of trust, or money laundering, who participate in the affairs of an insured depository institution without the prior written consent of the FDIC, to be violations of section 19, and will continue to do so if the proposed rule is adopted in its current form. Therefore, the proposed rule is unlikely to pose any substantive change in the FDIC's enforcement of section 19. As such, removing the existing regulation at 12 CFR part 303, subpart L and establishing a new subpart L which incorporates the FDIC's existing SOP, as well as renaming, removing, and amending certain provisions of 12 CFR part 308, subpart M is unlikely to have any substantive effects on the current section 19 application process or the FDIC's enforcement of section 19 for small, FDIC-insured institutions.

To the extent that the current content of the SOP conveys any ambiguity as to the FDIC's application of section 19 or the application process, the proposed rule would benefit covered entities by further clarifying this topic and process. However, the FDIC believes any such effects are likely to be relatively small because section 19 applications received by the FDIC represent at most 2.6 percent of small, FDIC-insured institutions, per year, on average.

Based on the information above, the FDIC certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities.

The FDIC invites comments on all aspects of the supporting information provided in this section, and in particular, whether the proposed rule would have any significant effects on small entities that the FDIC has not identified.

### C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act<sup>19</sup> requires each Federal

banking agency to use plain language in all of its proposed and final rules published after January 1, 2000. As a Federal banking agency subject to the provisions of this section, the FDIC has sought to present the proposed rule in a simple and straightforward manner. The FDIC invites comments on whether the proposal is clearly stated and effectively organized, and how the FDIC might make the proposal easier to understand. For example:

- Has the FDIC organized the material to suit your needs? If not, how could it present the rule more clearly?
- Have we clearly stated the requirements of the rule? If not, how could the rule be more clearly stated?
- Does the rule contain technical jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would make the regulation easier to understand?
- What else could we do to make the regulation easier to understand?

### D. Riegle Community Development and Regulatory Improvement Act of 1994

The Riegle Community Development and Regulatory Improvement Act of 1994 ("RCDRIA") 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. In addition, new regulations and amendments to regulations that impose additional reporting, disclosure, 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.<sup>20</sup> The FDIC invites comments that further will inform its consideration of RCDRIA.

### List of Subjects

#### 12 CFR Part 303

Administrative practice and procedure, section 19 of the FDI Act

(consent to service of persons convicted of certain criminal offenses).

#### 12 CFR Part 308

Rules of practice and procedure, procedures and standards applicable to an application pursuant to section 19.

For the reasons stated in the preamble and under the authority of 12 U.S.C. 1819 (Seventh and Tenth), the Federal Deposit Insurance Corporation proposes to amend parts 303 and 308 of title 12 of the Code of Federal Regulations as follows:

### PART 303—FILING PROCEDURES

- 1. The authority citation for Part 303 continues to read as follows:

**Authority:** 12 U.S.C. 378, 1464, 1813, 1815, 1817, 1818, 1819(a) (Seventh and Tenth), 1820, 1823, 1828, 1831a, 1831e, 1831o, 1831p–1, 1831w, 1835a, 1843(l), 3104, 3105, 3108, 3207, 5414, 5415 and 15 U.S.C. 1601–1607.

- 2. Revise Part 303, Subpart L as follows:

#### Subpart L—Section 19 of the FDI Act (Consent to Service of Persons Convicted of, or Who Have Program Entries for, Certain Criminal Offenses)

Sec.

- 303.220 What is section 19 of the FDI Act?
- 303.221 Who is covered by section 19?
- 303.222 What offenses are covered under section 19?
- 303.223 What constitutes a conviction under section 19?
- 303.224 What constitutes a pretrial diversion or similar program (program entry) under section 19?
- 303.225 What are the types of applications that can be filed?
- 303.226 When must an application to be filed?
- 303.227 When is an application not required for a covered offense or program entry (*de minimis* offenses)?
- 303.228 How to file an application.
- 303.229 How an application is evaluated.
- 303.230 What will the FDIC do if the application is denied?
- 303.231 Waiting time for a subsequent application if an application is denied.

#### Subpart L—Section 19 of the FDI Act (Consent to Service of Persons Convicted of, or Who Have Program Entries for, Certain Criminal Offenses)

##### § 303.220 What is section 19 of the FDI Act?

(a) This subpart covers applications under section 19 of the Federal Deposit Insurance Act, 12 U.S.C. 1829 (FDI Act). Under section 19, any person who has been convicted of any criminal offense involving dishonesty, breach of trust, or money laundering, or has agreed to enter into a pretrial diversion or similar program (program entry) in connection

<sup>19</sup> 12 U.S.C. 4809.

<sup>20</sup> 12 U.S.C. 4802.

with a prosecution for such offense, may not become, or continue as, an institution-affiliated party of an insured depository institution; own or control, directly or indirectly, any insured depository institution; or otherwise participate, directly or indirectly, in the conduct of the affairs of any insured depository institution without the prior written consent of the FDIC.

(b) In addition, the law bars an insured depository institution from permitting such a person to engage in any conduct or to continue any relationship prohibited by section 19. Insured depository institutions should therefore make a reasonable inquiry regarding an applicant's history to insure that a person who has a conviction or program entry covered by the provisions of section 19 is not hired or permitted to participate in its affairs without the written consent of the FDIC issued under this subpart. FDIC supervised insured depository institutions may extend a conditional offer of employment contingent on the completion of a background check satisfactory to the institution and to determine if the applicant is barred under section 19 but the job applicant may not work for, be employed by or otherwise participate in the affairs of the insured depository institution until the insured depository institution has determined that the applicant is not barred under section 19.

(c) If there is a conviction or program entry covered by the bar of section 19, an application under this subpart must be filed seeking the FDIC's consent to become, or to continue as, an institution-affiliated party, to own or control, directly or indirectly, an insured depository institution or to otherwise participate, directly or indirectly, in the affairs of the insured depository institution. The application must be filed, and consented to, prior to serving in any of the foregoing capacities unless such application is not required under the subsequent provisions of this subpart. The purpose of an application is to provide the applicant an opportunity to demonstrate that, notwithstanding the bar, a person is fit to participate in the conduct of the affairs of an insured depository institution without posing a risk to its safety and soundness or impairing public confidence in that institution. The burden is upon the applicant to establish that the application warrants approval.

#### **§ 303.221 Who is covered by section 19?**

(a) Section 19 covers institution-affiliated parties, as defined by 12 U.S.C. 1813(u), and others who are

participants in the conduct of the affairs of an insured depository institution. Therefore, all employees of an insured depository institution that falls within the scope of section 19, including de facto employees, as determined by the FDIC based upon generally applicable standards of employment law, will also be subject to section 19. Whether other persons who are not institution-affiliated parties are covered depends upon their degree of influence or control over the management or affairs of an insured depository institution. In the context of the FDIC's application of section 19, coverage would apply to an insured depository institution's holding company's directors and officers to the extent that they have the power to define and direct the management or affairs of an insured depository institution. Similarly, directors and officers of affiliates, subsidiaries or joint ventures of an insured depository institution or its holding company will be covered if they participate in the affairs of the insured depository institution or are in a position to influence or control the management or affairs of the insured institution. Typically, an independent contractor does not have a relationship with the insured depository institution other than the activity for which the institution has contracted. An independent contractor who influences or controls the management or affairs of the insured depository institution would be covered by section 19.

(b) The term "person," for purposes of section 19, means an individual, and does not include a corporation, firm or other business entity.

(c) Individuals who file an application with the FDIC under the provisions of section 19 who also seek to participate in the affairs of a bank or savings and loan holding company may have to comply with any filing requirements of the Board of Governors of the Federal Reserve System under 12 U.S.C. 1829(d) and (e).

(d) Section 19 specifically prohibits a person subject to its provisions from owning or controlling an insured depository institution. The terms "control" and "ownership" under section 19, shall have the meaning given to the term "control" in the Change in Bank Control Act (12 U.S.C. 1817(j)(8)(B)). A person will be deemed to exercise "control" if that person has the power to vote 25 percent or more of the voting shares of an insured depository institution (or 10 percent of the voting shares if no other person has more shares) or the ability to direct the management or policies of the institution. Under the same standards, a

person will be deemed to "own" an insured depository institution if that person owns 25 percent or more of the institution's voting stock, or 10 percent of the voting shares if no other person owns more. These standards would also apply to an individual acting in concert with others so as to have such ownership or control. Absent the FDIC's consent, persons subject to the prohibitions of section 19 will be required to divest their control or ownership of shares above the foregoing limits.

#### **§ 303.222 What offenses are covered under section 19?**

(a) The conviction or program entry must be for a criminal offense involving dishonesty, breach of trust or money laundering. "Dishonesty" means directly or indirectly to cheat or defraud; to cheat or defraud for monetary gain or its equivalent; or wrongfully to take property belonging to another in violation of any criminal statute. Dishonesty includes acts involving want of integrity, lack of probity, or a disposition to distort, cheat, or act deceitfully or fraudulently, and includes offenses that Federal, state or local laws define as dishonest. "Breach of trust" means a wrongful act, use, misappropriation or omission with respect to any property or fund that has been committed to a person in a fiduciary or official capacity, or the misuse of one's official or fiduciary position to engage in a wrongful act, use, misappropriation or omission.

(b) Whether a crime involves dishonesty, breach of trust or money laundering will be determined from the statutory elements of the offense itself or from court determinations that the statutory provisions of the offense involve dishonesty, breach of trust or money laundering.

(c) All convictions or program entries for offenses concerning the illegal manufacture, sale, distribution of, or trafficking in controlled substances shall require an application unless no application is required under this subpart. Convictions or program entries for criminal offenses involving the simple possession of a controlled substance are not covered under section 19.

#### **§ 303.223 What constitutes a conviction under section 19?**

(a) *Convictions requiring an application.* There must be a conviction of record. Section 19 does not cover arrests, pending cases not brought to trial, acquittals, or any conviction that has been reversed on appeal unless the person has entered a pretrial diversion

program, or similar program, as set out § 303.224. A conviction with regard to which an appeal is pending requires an application. A conviction for which a pardon has been granted will require an application. Convictions that are set aside or reversed after the applicant has completed sentencing will be treated consistent with pretrial diversions or similar programs unless the court records reflect that the underlying conviction was set aside based on a finding on the merits that such conviction was wrongful. A conviction that has been completely expunged is not considered a conviction of record and will not require an application.

(b) *Complete expungements.* If an order of expungement has been issued in regard to a conviction and it is intended by the language in the order itself, or in the legislative provisions under which the order was issued, to be a complete expungement, then the jurisdiction, either in the order or the underlying legislative provisions, forbids the conviction or program entry to be used for any subsequent purpose including, but not limited to, an evaluation of a person's fitness or character. The failure to destroy or seal the records will not prevent the expungement from being considered complete for the purposes of section 19 in such a case.

(c) *Youthful offenders.* An adjudication by a court against a person as a "youthful offender" under any youth offender law applicable to minors as defined by state law, or any adjudgment as a "juvenile delinquent" by any court having jurisdiction over minors as defined by state law does not require an application. Such an adjudication does not constitute a matter covered under section 19 and is not a conviction or program entry for determining the applicability of section 303.227.

**§ 303.224 What constitutes a pretrial diversion or similar program (program entry) under section 19?**

(a) A program entry is characterized by a suspension or eventual dismissal or reversal of charges or criminal prosecution often upon agreement, whether formal or informal, by the accused to treatment, rehabilitation, restitution, or other noncriminal or non-punitive alternatives. Whether a program constitutes a pretrial diversion or similar program is determined by relevant Federal, state or local law, and, if not so designated under applicable law then the determination of whether it is a pretrial diversion or similar program will be made by the FDIC on a case-by-case basis. Program entries

prior to November 29, 1990, are not covered by section 19.

(b) Expungements of pretrial diversion or similar program entries will be treated the same as those for convictions.

**§ 303.225 What are the types of applications that can be filed?**

(a) *Institution filing requirement (bank-sponsored applications).* Applications are required to be filed by the insured depository institution which intends for a person covered by the provisions of section 19 to participate in its affairs. Bank-sponsored applications are reviewed, as required by this subpart, by the appropriate FDIC Regional Office as required by this subpart and may be approved or denied by the Regional Office pursuant to delegated authority. A denial of an application must be with the certification of the General Counsel or designee that the denial is consistent with purposes of section 19.

(b) *Waiver applications.* If an insured depository institution does not file an application regarding an individual, the individual may file a request for a waiver of the institution filing requirement. Such a waiver application shall be filed with the appropriate Regional Office and shall set forth substantial good cause why the application should be granted. The Director of the Division of Risk Management Supervision, or designee, may grant or deny applications requesting waivers of the institution filing requirement. The authority delegated under this section shall be exercised only upon the concurrent certification of the General Counsel, or designee, that the action to be taken is not inconsistent with section 19 of the FDI Act.

**§ 303.226 When must an application to be filed?**

Except for situations in which no application is required under this subpart, an application must be filed when there is present a conviction by a court of competent jurisdiction for a covered offense by any adult or minor treated as an adult, or when such person has entered a pretrial diversion or similar program regarding that offense. Before an application is considered by the FDIC, all of the sentencing requirements associated with a conviction, or conditions imposed by the pretrial diversion or similar program, including but not limited to, imprisonment, fines, condition of rehabilitation, and probation requirements, must be completed, and the case must be considered final by the

procedures of the applicable jurisdiction. The FDIC's application forms as well as additional information concerning section 19 can be accessed at the FDIC's regional offices or on the FDIC website at: <https://www.fdic.gov/regulations/laws/forms/section19.html>.

**§ 303.227 When is an application not required for a covered offense or program entry (*de minimis* offenses)?**

(a) *In General.* Approval is automatically granted and an application will not be required where the covered offense is considered *de minimis*, by meeting all of the following criteria:

(1) There is only one conviction or program entry of record for a covered offense;

(2) The offense was punishable by imprisonment for a term of one year or less and/or a fine of \$2,500 or less, and the individual served three (3) days or less of jail time. The FDIC considers jail time to include any significant restraint on an individual's freedom of movement which includes, as part of the restriction, confinement to a specific facility or building on a continuous basis where the person may leave temporarily only to perform specific functions or during specified times periods or both. The definition is not intended to include those on probation or parole who may be restricted to a particular jurisdiction, or who must report occasionally to an individual or to a specified location;

(3) The conviction or program was entered at least five years prior to the date an application would otherwise be required; and

(4) The offense did not involve an insured depository institution or insured credit union.

(b) *Other types of offenses for which the *de minimis* exception applies and no application is required.*

(1) *Age of person at time of covered offense.* If the actions that resulted in a covered conviction or program entry of record all occurred when the individual was 21 years of age or younger, then a subsequent conviction or program entry that otherwise meets the general *de minimis* criteria in (a) above, will be considered *de minimis* if the conviction or program entry was entered at least 30 months prior to the date an application would otherwise be required and all sentencing or program requirements have been met.

(2) *Convictions or program entries for insufficient funds checks.* Convictions or program entries of record based on the writing of "bad" or insufficient funds check(s) shall be considered *de minimis* offenses under this provision

and will not be considered as involving an insured depository institution if the following applies:

(i) There is no other conviction or program entry subject to section 19, and the aggregate total face value of all "bad" or insufficient funds check(s) cited across all the conviction(s) or program entry(ies) for bad or insufficient funds checks is \$1,000 or less; and

(ii) No insured depository institution or insured credit union was a payee on any of the "bad" or insufficient funds checks that were the basis of the conviction(s) or program entry(ies).

(3) *Convictions or program entries for small-dollar, simple theft.* A conviction or program entry based on a simple theft of goods, services and/or currency (or other monetary instrument) where the aggregate value of the currency, goods and/or services taken was \$500 or less at the time of conviction or program entry, where the person has no other conviction or program entry under section 19, where it has been five years since the conviction or program entry (30 months in the case of a person 21 or younger as described above) and which does not involve an insured depository financial institution or insured credit union is considered *de minimis*. Simple theft excludes burglary, forgery, robbery, identity theft, and fraud.

(4) *Convictions or program entries for the use of a fake, false or altered identification card.* The use of a fake, false or altered identification card by a person under the legal age for the purpose of obtaining or purchasing alcohol, or used for the purpose of entering a premise where alcohol is served but for which age appropriate identification is required, provided that there is no other conviction or program entry for a covered offense, will be considered *de minimis*.

(c) *Fidelity bond coverage and disclosure to institutions.* Any person who meets the criteria under this section shall be covered by a fidelity bond to the same extent as others in similar positions, and shall disclose the presence of the conviction or program entry to all insured depository institutions in the affairs of which he or she intends to participate.

(d) *Non-qualifying convictions or program entries.* No conviction or program entry for a violation of the Title 18 sections set out in 12 U.S.C. 1829(a)(2) can qualify under any of the *de minimis* exceptions to filing set out in this section.

### **§ 303.228 How to file an application.**

Forms and instructions should be obtained from, and the application filed with, the appropriate FDIC Regional Director. The application must be filed by an insured depository institution on behalf of a person (bank-sponsored) unless the FDIC grants a waiver of that requirement (individual waiver). Such waivers will be considered on a case-by-case basis where substantial good cause for granting a waiver is shown. A person seeking an individual waiver may request the waiver when filing an application on their own behalf. The appropriate Regional Office for a bank-sponsored application is the office covering the state where the insured depository institution's bank's home office is located. The appropriate Regional Office for an individual filing for a waiver of the institution filing requirement is the office covering the state where the person resides. States covered by each FDIC Regional Office can be located on the FDIC's home page in the contacts section.

### **§ 303.229 How an application is evaluated.**

(a) The ultimate determination in assessing an application are whether the person has demonstrated his or her fitness to participate in the conduct of the affairs of an insured depository institution, and whether the affiliation, ownership, control or participation by the person in the conduct of the affairs of the institution may constitute a threat to the safety and soundness of the institution or the interests of its depositors or threaten to impair public confidence in the institution. In determining the degree of risk, the FDIC will consider:

(1) Whether the conviction or program entry into a pretrial or similar program is for a criminal offense involving dishonesty, breach of trust or money laundering and the specific nature and circumstances of the offense;

(2) Whether the participation directly or indirectly by the person in any manner in the conduct of the affairs of the insured depository institution constitutes a threat to the safety and soundness of the institution or the interests of its depositors or threatens to impair public confidence in the institution;

(3) Evidence of rehabilitation including the person's reputation since the conviction or program entry, employment history, age at the time of conviction or program entry, and the time that has elapsed since the conviction or program entry;

(4) The position to be held or the level of participation by the person at an insured depository institution;

(5) The amount of influence and control the person will be able to exercise over the operation, management or affairs of an insured depository institution;

(6) The ability of management of the insured depository institution to supervise and control the person's activities;

(7) The level of ownership or control the person will have at an insured depository institution;

(8) The applicability of the insured depository institution's fidelity bond coverage to the person; and

(9) Any additional factors in the specific case that appear relevant to the application or the applicant including, but not limited to, the opinion or position of the primary Federal and/or state regulator.

(b) The question of whether a person, who was convicted of a crime or who agreed to a program entry, was guilty of that crime shall not be at issue in a proceeding under this subpart or under 12 CFR part 308, subpart M.

(c) The foregoing factors will also be applied by the FDIC to determine whether the interests of justice are served in seeking an exception in the appropriate court when an application is made to terminate the ten-year ban prior to its expiration date under 12 U.S.C. 1829(a)(2) for certain Federal offenses.

(d) All approvals and orders will be subject to the condition that the person shall be covered by a fidelity bond to the same extent as others in similar positions. In cases in which a waiver of the institution filing requirement has been granted to an individual, approval of the application will also be conditioned upon that person disclosing the presence of the conviction(s) or program entry(ies) to all insured depository institutions in the affairs of which he or she wishes to participate.

(e) When deemed appropriate, bank-sponsored applications are to allow the person to work in a specific job at a specific bank and may also be subject to the condition that the prior consent of the FDIC will be required for any proposed significant changes in the person's duties and/or responsibilities. In the case of sponsored bank applications such proposed changes may, in the discretion of the Regional Director, require a new application.

(f) In situations in which an approval has been granted for a person to participate in the affairs of a particular insured depository institution and who subsequently seeks to participate at another insured depository institution, another application must be submitted and approved by the FDIC prior to the

person participating in the affairs of the other insured depository institution.

**§ 303.230 What will the FDIC do if the application is denied?**

(a) The FDIC will inform the applicant in writing that the application has been denied and summarize or cite the relevant considerations specified in § 303.229 of this subpart.

(b) The denial will also notify the applicant that a written request for a hearing under 12 CFR part 308, subpart M may be filed with the Executive Secretary within 60 days after the denial. The request for a hearing must include the relief desired, the grounds supporting the request for relief, and any supporting evidence.

**§ 303.231 Waiting time for a subsequent application if an application is denied.**

An application pursuant to section 19 may be made in writing at any time more than one year after the issuance of a decision denying an application pursuant to section 19. If the original denial is subject to a request for a hearing, then the subsequent application may be filed at any time more than one year after the Board of Directors, or its designee's, decision denying the application. The prohibition against participating in the affairs of a depository institution under section 19 shall continue until the individual has been granted consent in writing to participate in the affairs of a depository institution by the Board of Directors or its designee.

**PART 308 RULES OF PRACTICE AND PROCEDURE**

■ 1. The authority citation for Part 308 continues to read as follows:

**Authority:** 5 U.S.C. 504, 554–557; 12 U.S.C. 93(b), 164, 505, 1464, 1467(d), 1467a, 1468, 1815(e), 1817, 1818, 1819, 1820, 1828, 1829, 1829(b), 1831i, 1831m(g)(4), 1831o, 1831p–1, 1832(c), 1884(b), 1972, 3102, 3108(a), 3349, 3909, 4717, 5412(b)(2)(C), 5414(b)(3); 15 U.S.C. 78(h) and (i), 78o(c)(4), 78o–4(c), 78o–5, 78q–1, 78s, 78u, 78u–2, 78u–3, 78w, 6801(b), 6805(b)(1); 28 U.S.C. 2461 note; 31 U.S.C. 330, 5321; 42 U.S.C. 4012a; Pub. L. 104–134, sec. 31001(s), 110 Stat. 1321; Pub. L. 109–351, 120 Stat. 1966; Pub. L. 111–203, 124 Stat. 1376; Pub. L. 114–74, sec. 701, 129 Stat. 584.

■ 2. Revise Part 308, Subpart M as follows:

**Subpart M—Procedures Applicable to the Request for and Conduct of, a Hearing After a Denial of an Application Under Section 19 of the FDIA**

Sec.

308.156 Scope

308.157 Denial of applications.

308.158 Hearings.

308.159 [Reserved]

308.160 [Reserved]

**Subpart M—Procedures Applicable to the Request for and Conduct of, a Hearing After a Denial of an Application Under Section 19 of the FDIA**

**§ 308.156 Scope.**

The rules and procedures set forth in this subpart shall apply to an application filed pursuant to section 19 of the FDIA (12 U.S.C. 1829) and 12 CFR part 303, subpart L, by an insured depository institution and/or an individual, who has been convicted of any criminal offense involving dishonesty or a breach of trust or money laundering or who has agreed to enter into a pretrial diversion or similar program in connection with the prosecution of such offense, to seek the prior written consent of the FDIC to become or continue as an institution-affiliated party with respect to an insured depository institution; to own or control directly or indirectly an insured depository institution; or to participate directly or indirectly in any manner in the conduct of the affairs of an insured depository institution after such application has been denied under part 12 CFR part 303, subpart L.

**§ 308.157 Denial of applications.**

If an application is denied pursuant to 12 CFR part 303, subpart L, then the applicant may request a hearing under this subpart M. The applicant will have 60 days after the date of the denial to file a written request with the Executive Secretary. In the request the applicant shall state the relief desired, the grounds supporting the request for relief and provide any supporting evidence that the applicant believes is responsive to the grounds for the denial.

**§ 308.158 Hearings.**

(a) *Hearing dates.* The Executive Secretary shall order a hearing to be commenced within 60 days after receipt of a request for hearing on an application filed pursuant to § 308.159. Upon the request of the applicant or FDIC enforcement counsel, the presiding officer or the Executive Secretary may order a later hearing date.

(b) *Burden of proof.* The ultimate burden of proof shall be upon the person proposing to become or continue as an institution-affiliated party with respect to an insured depository institution; to own or control directly or indirectly an insured depository institution; or to participate directly or indirectly in any manner in the conduct of the affairs of an insured depository institution. The burden of going forward

with a *prima facie* case shall be upon the FDIC.

(c) *Hearing procedure.* (1) The hearing shall be held in Washington, DC, or at another designated place, before a presiding officer designated by the Executive Secretary.

(2) The provisions of §§ 308.6 through 308.12, 308.16, and 308.21 of the Uniform Rules and §§ 308.101 through 308.102 and 308.104 through 308.106 of subpart B of the Local Rules shall apply to hearings held pursuant to this subpart.

(3) The applicant may appear at the hearing and shall have the right to introduce relevant and material documents and oral argument. Members of the FDIC enforcement staff may attend the hearing and participate as a party.

(4) There shall be no discovery in proceedings under this subpart.

(5) At the discretion of the presiding officer, witnesses may be presented within specified time limits, provided that a list of witnesses is furnished to the presiding officer and to all other parties prior to the hearing. Witnesses shall be sworn, unless otherwise directed by the presiding officer. The presiding officer may ask questions of any witness. Each party shall have the opportunity to cross-examine any witness presented by an opposing party. The transcript of the proceedings shall be furnished, upon request and payment of the cost thereof, to the applicant afforded the hearing.

(6) In the course of or in connection with any hearing under this paragraph, the presiding officer shall have the power to administer oaths and affirmations, to take or cause to be taken depositions of unavailable witnesses, and to issue, revoke, quash, or modify subpoenas and subpoenas *duces tecum*. Where the presentation of witnesses is permitted, the presiding officer may require the attendance of witnesses from any state, territory, or other place subject to the jurisdiction of the United States at any location where the proceeding is being conducted. Witness fees shall be paid in accordance with § 308.14 of the Uniform Rules.

(7) Upon the request of the applicant afforded the hearing, or FDIC enforcement staff, the record shall remain open for five business days following the hearing for the parties to make additional submissions to the record.

(8) The presiding officer shall make recommendations to the Board of Directors, where possible, within 20 days after the last day for the parties to submit additions to the record.

(9) The presiding officer shall forward his or her recommendation to the Executive Secretary who shall promptly certify the entire record, including the recommendation to the Board of Directors or its designee. The Executive Secretary's certification shall close the record.

(d) *Written submissions in lieu of hearing.* The applicant or the bank may in writing waive a hearing and elect to have the matter determined on the basis of written submissions.

(e) *Failure to request or appear at hearing.* Failure to request a hearing shall constitute a waiver of the opportunity for a hearing. Failure to appear at a hearing in person or through an authorized representative shall constitute a waiver of a hearing. If a hearing is waived, the person shall remain barred under section 19.

(f) *Decision by Board of Directors or its designee.* Within 60 days following the Executive Secretary's certification of the record to the Board of Directors or its designee, the Board of Directors or its designee shall notify the affected person whether the person shall remain barred under section 19. The notification shall state the basis for any decision of the Board of Directors or its designee that is adverse to the applicant.

**§ 308.159 [Reserved]**

**§ 308.160 [Reserved]**

Federal Deposit Insurance Corporation.

By order of the Board of Directors,

Dated at Washington, DC, on November 19, 2019.

**Anmarie H. Boyd,**

*Assistant Executive Secretary.*

[FR Doc. 2019-26351 Filed 12-13-19; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

**[Docket No. FAA-2019-1024; Product Identifier 2019-CE-002-AD]**

**RIN 2120-AA64**

#### **Airworthiness Directives; Gulfstream Aerospace Corporation Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for certain Gulfstream Aerospace Corporation (Gulfstream) Model GVI

airplanes. This proposed AD was prompted by a report that the primary flight control actuation system (PFCAS) linear variable displacement transducer (LVDT) mechanical disconnect monitor may not trigger the disconnect of the affected control surfaces as required in the event of a control surface failure. This proposed AD would require updating the software of each PFCAS remote electronics unit (REU), which includes an improvement to the LVDT. The FAA is proposing this AD to address the unsafe condition on these products.

**DATES:** The FAA must receive comments on this proposed AD by January 30, 2020.

**ADDRESSES:** You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to <https://www.regulations.gov>. Follow the instructions for submitting comments.
- *Fax:* 202-493-2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Gulfstream Aerospace Corporation, Technical Publications Dept., P.O. Box 2206, Savannah, GA 31402-2206; telephone: (800) 810-4853; fax: (912) 965-3520; email: [pubs@gulfstream.com](mailto:pubs@gulfstream.com); internet: <https://www.gulfstream.com/customer-support>. You may view this service information at the FAA, Policy and Innovation Division, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329-4148.

#### **Examining the AD Docket**

You may examine the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA-2019-1024; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Myles Jalalian, Aerospace Engineer, Atlanta ACO Branch, FAA, 1701

Columbia Avenue, College Park, Georgia 30337; phone: (404) 474-5572; fax: (404) 474-5606; email: [myles.jalalian@faa.gov](mailto:myles.jalalian@faa.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **Comments Invited**

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA-2019-1024; Product Identifier 2019-CE-002-AD" at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM because of those comments.

The FAA will post all comments received, without change, to <https://www.regulations.gov>, including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact received about this NPRM.

##### **Discussion**

The FAA received a report from Gulfstream that the PFCAS LVDT mechanical disconnect monitor may not trigger the disconnect of the affected control surfaces as required in the event of a control surface failure. The Model GVI flight control computer actuator LVDT disconnect monitor should disable the control surface for ailerons, elevators, and rudder in the event that one of those control surfaces fails. Gulfstream developed an REU software update that provides improvements to the LVDT of the PFCAS, which addresses the LVDT disconnect monitor problem. This condition, if not addressed, could lead to spoiler hard-over or loss of structural integrity due to excessive surface deflection and result in loss of control of the airplane.

##### **Related Service Information Under 14 CFR Part 51**

The FAA reviewed Gulfstream G650 Customer Bulletin Number 201, dated September 28, 2017, and Gulfstream G650ER Customer Bulletin Number 201, dated September 28, 2017; which specify incorporating Gulfstream G650 Aircraft Service Change 069, dated September 28, 2017, or Gulfstream G650ER Aircraft Service Change 069, dated September 28, 2017. This service information differs because each document applies to a different airplane designation.

The FAA also reviewed Gulfstream G650 Aircraft Service Change 069, dated

September 28, 2017, and Gulfstream G650ER Aircraft Service Change 069, dated September 28, 2017, which provide and reference procedures for preparing the REU for a software update.

The FAA reviewed Parker Service Bulletin 469000–27–003, Revision 1, dated October 11, 2017, which contains procedures for updating the software of the REU from Label 34 to Label 35. This update includes improved LVDT disconnect and oscillatory monitoring, force fight mitigation, troubleshooting,

and rectification of other reported problems.

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

**FAA’s Determination**

The FAA is proposing this AD because it evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

**Proposed D Requirements**

This proposed AD would require accomplishing the actions specified in the service information described previously.

**Costs of Compliance**

The FAA estimates that this proposed AD would affect 161 airplanes of U.S. registry.

The FAA estimates the following costs to comply with this proposed AD:

**ESTIMATED COSTS**

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Update REU software .....	386 work-hours × \$85 per hour = \$32,810.	None .....	\$32,810	\$5,282,410

According to the manufacturer, some of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected individuals. The FAA does not control warranty coverage for affected individuals. As a result, the FAA has included all costs in this cost estimate.

**Authority for This Rulemaking**

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

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

This proposed AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to small airplanes,

gliders, balloons, airships, domestic business jet transport airplanes, and associated appliances to the Director of the Policy and Innovation Division.

**Regulatory Findings**

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD 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.

For the reasons discussed above, I certify this proposed regulation:

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Will not affect intrastate aviation in Alaska, and
- (3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

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

**PART 39—AIRWORTHINESS DIRECTIVES**

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

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

**§ 39.13 [Amended]**

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

**Gulfstream Aerospace Corporation:** Docket No. FAA–2019–1024; Product Identifier 2019–CE–002–AD.

**(a) Comments Due Date**

The FAA must receive comments by January 30, 2020.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to Gulfstream Aerospace Corporation Model GVI airplanes, certificated in any category, serial numbers 6001 through 6111, 6113 through 6133, and 6135 through 6274.

Note 1 to paragraph (c) of this AD: Model GVI airplanes are also referred to by the marketing designations G650 and G650ER.

**(d) Subject**

Joint Aircraft System Component (JASC)/ Air Transport Association (ATA) of America Code 27, Flight Controls.

**(e) Unsafe Condition**

This AD was prompted by a report that the primary flight control actuation system (PFCAS) linear variable displacement transducer (LVDT) mechanical disconnect monitor may not trigger the disconnect of the affected control surfaces as required in the event of a control surface failure. This condition, if not addressed, could lead to spoiler hard-over or loss of structural integrity due to excessive surface deflection and result in loss of control of the airplane.

**(f) Compliance**

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

**(g) Software Upgrade**

Within the next 24 months after the effective date of this AD, update the software for each PFCAS remote electronics unit (REU) from Label 34 to Label 35 by following the Accomplishment Instructions in Gulfstream G650 Customer Bulletin Number 201, dated September 28, 2017, or Gulfstream G650ER Customer Bulletin Number 201, dated September 28, 2017; the Modification Instructions, sections A through C, in Gulfstream G650 Aircraft Service Change No. 069, dated September 28, 2017, or Gulfstream G650ER Aircraft Service Change No. 069, dated September 28, 2017; and the Accomplishment Instructions in Parker Service Bulletin 469000-27-003, Revision 1, dated October 11, 2017; except you are not required to submit information to the manufacturer.

**(h) Alternative Methods of Compliance (AMOCs)**

(1) The Manager, Atlanta ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (i)(1) of this AD.

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

(3) For service information that contains steps that are labeled as Required for Compliance (RC), the provisions of paragraphs (h)(3)(i) and (ii) of this AD apply.

(i) The steps labeled as RC, including substeps under an RC step and any figures identified in an RC step, must be done to comply with the AD. An AMOC is required for any deviations to RC steps, including substeps and identified figures.

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

**(i) Related Information**

(1) For more information about this AD, contact Myles Jalalian, Aerospace Engineer, Atlanta ACO Branch, FAA, 1701 Columbia Avenue, College Park, Georgia 30337; phone: (404) 474-5572; fax: (404) 474-5606; email: [myles.jalalian@faa.gov](mailto:myles.jalalian@faa.gov).

(2) For service information identified in this AD, contact Gulfstream Aerospace Corporation, Technical Publications Dept., P.O. Box 2206, Savannah, GA 31402-2206; telephone: (800) 810-4853; fax: (912) 965-3520; email: [pubs@gulfstream.com](mailto:pubs@gulfstream.com); internet: <https://www.gulfstream.com/customer-support>. You may obtain Parker-Hannifin service information using the contact information for Gulfstream Aerospace Corporation. You may view this referenced

service information at the FAA, Policy and Innovation Division, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329-4148.

Issued on December 2, 2019.

**Patrick R. Mullen,**

*Aircraft Certification Service, Manager, Small Airplane Standards Branch, AIR-690.*

[FR Doc. 2019-26850 Filed 12-13-19; 8:45 am]

**BILLING CODE 4910-13-P**

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 39**

**[Docket No. FAA-2019-0982; Product Identifier 2019-NM-170-AD]**

**RIN 2120-AA64**

**Airworthiness Directives; Airbus SAS Airplanes**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for certain Airbus SAS Model A319-115 airplanes; Model A320-214, -216, -232, -251N, and -271N airplanes; and Model A321-211, -231, -251N, -251NX, -253N, -271N, -271NX, and -272N airplanes. This proposed AD was prompted by reports of incomplete installations of the over wing panel lug attachments in the production assembly line. This proposed AD would require a one-time detailed inspection of certain attaching points on the left-hand and right-hand wings for the correct installation of certain hardware, and, depending on findings, accomplishment of applicable corrective actions, as specified in a European Union Aviation Safety Agency (EASA) AD, which will be incorporated by reference. The FAA is proposing this AD to address the unsafe condition on these products.

**DATES:** The FAA must receive comments on this proposed AD by January 30, 2020.

**ADDRESSES:** You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to <https://www.regulations.gov>. Follow the instructions for submitting comments.

- *Fax:* 202-493-2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For the material identified in this proposed AD that will be incorporated by reference (IBR), contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 1000; email [ADs@easa.europa.eu](mailto:ADs@easa.europa.eu); internet [www.easa.europa.eu](http://www.easa.europa.eu). You may find this IBR material on the EASA website at <https://ad.easa.europa.eu>. You may view this IBR material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195. It is also available in the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA-2019-0982.

**Examining the AD Docket**

You may examine the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA-2019-0982; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Sanjay Ralhan, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206-231-3223.

**SUPPLEMENTARY INFORMATION:****Comments Invited**

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA-2019-0982; Product Identifier 2019-NM-170-AD" at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM based on those comments.

The FAA will post all comments, without change, to <https://www.regulations.gov>, including any personal information you provide. The FAA will also post a report

summarizing each substantive verbal contact the agency receives about this NPRM.

**Discussion**

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2019-0233, dated September 18, 2019; corrected September 19, 2019 (“EASA AD 2019-0233”) (also referred to as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for certain Airbus SAS Model A319-115 airplanes; Model A320-214, -216, -232, -251N, and -271N airplanes; and Model A321-211, -231, -251N, -251NX, -253N, -271N, -271NX, and -272N airplanes.

This proposed AD was prompted by reports of incomplete installations of the over wing panel lug attachments in the production assembly line. The FAA is proposing this AD to address this condition, which, if not detected and corrected, could reduce the structural integrity of the wing. See the MCAI for additional background information.

**Related IBR Material Under 1 CFR Part 51**

EASA AD 2019-0233 describes procedures for a one-time detailed inspection of certain attaching points on the left-hand and right-hand wings for the correct installation of certain hardware (bolt, nut, washer, and cotter pin), and, depending on findings, accomplishment of applicable corrective actions. Corrective actions include installing missing hardware, doing a detailed inspection of the attaching

point and attaching straps for distortion or missing parts, and repair. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the ADDRESSES section.

**FAA’s Determination and Requirements of This Proposed AD**

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to the FAA’s bilateral agreement with the State of Design Authority, the FAA has been notified of the unsafe condition described in the MCAI referenced above. The FAA is proposing this AD because the FAA evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

**Proposed AD Requirements**

This proposed AD would require accomplishing the actions specified in EASA AD 2019-0233 described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD. This proposed AD also would require sending the inspection results to Airbus.

**Explanation of Required Compliance Information**

In the FAA’s ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with

Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2019-0233 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2019-0233 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to “all required actions and compliance times,” compliance with this AD requirement is not limited to the section titled “Required Action(s) and Compliance Time(s)” in the EASA AD. Service information specified in EASA AD 2019-0233 that is required for compliance with EASA AD 2019-0233 will be available on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA-2019-0982 after the FAA final rule is published.

**Costs of Compliance**

The FAA estimates that this proposed AD affects 110 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

**ESTIMATED COSTS FOR REQUIRED ACTIONS \***

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
2 work-hours × \$85 per hour = \$170 .....	\$0	\$170	\$18,700

\* Table does not include estimated costs for reporting.

The FAA estimates that it would take about 1 work-hour per product to comply with the proposed reporting requirement in this proposed AD. The average labor rate is \$85 per hour. Based

on these figures, the FAA estimates the cost of reporting the inspection results on U.S. operators to be \$9,350, or \$85 per product.

The FAA estimates the following costs to do any necessary on-condition

actions that would be required based on the results of any required actions. The FAA has no way of determining the number of aircraft that might need these on-condition actions:

**ESTIMATED COSTS OF ON-CONDITION ACTIONS**

Labor cost	Parts cost	Cost per product
Up to 20 work-hours × \$85 per hour = \$1,700 .....	Up to \$77,850 .....	Up to \$79,550.

**Paperwork Reduction Act**

A federal agency may not conduct or sponsor, and a person is not required to

respond to, nor shall a person be subject to penalty for failure to comply with a collection of information subject to the

requirements of the Paperwork Reduction Act unless that collection of information displays a current valid

OMB control number. The control number for the collection of information required by this NPRM is 2120–0056. The paperwork cost associated with this NPRM has been detailed in the Costs of Compliance section of this document and includes time for reviewing instructions, as well as completing and reviewing the collection of information. Therefore, all reporting associated with this NPRM is mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177–1524.

#### Authority for This Rulemaking

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

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

This proposed AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes and associated appliances to the Director of the System Oversight Division.

#### Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD 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.

For the reasons discussed above, I certify this proposed regulation:

- (1) Is not a "significant regulatory action" under Executive Order 12866,
- (2) Will not affect intrastate aviation in Alaska, and
- (3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

#### List of Subjects in 14 CFR Part 39

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

#### The Proposed Amendment

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

#### PART 39—AIRWORTHINESS DIRECTIVES

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

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

#### § 39.13 [Amended]

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

**Airbus SAS:** Docket No. FAA–2019–0982; Product Identifier 2019–NM–170–AD.

#### (a) Comments Due Date

The FAA must receive comments by January 30, 2020.

#### (b) Affected ADs

None.

#### (c) Applicability

This AD applies to the Airbus SAS airplanes specified in paragraphs (c)(1) through (3) of this AD, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2019–0233, dated September 18, 2019; corrected September 19, 2019 ("EASA AD 2019–0233").

- (1) Model A319–115 airplanes.
- (2) Model A320–214, –216, –232, –251N, and –271N airplanes.
- (3) Model A321–211, –231, –251N, –251NX, –253N, –271N, –271NX, and –272N airplanes.

#### (d) Subject

Air Transport Association (ATA) of America Code 57, Wings.

#### (e) Reason

This AD was prompted by reports of incomplete installations of the over wing panel lug attachments in the production assembly line. The FAA is issuing this AD to address this condition, which, if not detected and corrected, could reduce the structural integrity of the wing.

#### (f) Compliance

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

#### (g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2019–0233.

#### (h) Exceptions to EASA AD 2019–0233

(1) For purposes of determining compliance with the requirements of this AD: Where EASA AD 2019–0233 refers to its effective date, this AD requires using the effective date of this AD.

(2) The "Remarks" section of EASA AD 2019–0233 does not apply to this AD.

(3) Where any service information referenced in EASA AD 2019–0233 specifies reporting, this AD requires reporting all inspection results at the applicable time specified in paragraph (h)(3)(i) or (ii) of this AD. If operators have reported findings as part of obtaining any corrective actions approved by Airbus SAS's EASA Design Organization Approval (DOA), operators are not required to report those findings as specified in this paragraph.

(i) If the inspection was done on or after the effective date of this AD: Submit the report within 30 days after the inspection.

(ii) If the inspection was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

#### (i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Section, Transport Standards Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Section, send it to the attention of the person identified in paragraph (j)(2) of this AD. Information may be emailed to: [9-ANM-116-AMOC-REQUESTS@faa.gov](mailto:9-ANM-116-AMOC-REQUESTS@faa.gov). Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Section, Transport Standards Branch, FAA; or EASA; or Airbus SAS's EASA DOA. If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* For any service information referenced in EASA AD 2019–0233 that contains RC procedures and tests: Except as required by paragraph (i)(2) of this AD, RC procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are

recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(4) *Paperwork Reduction Act Burden Statement*: A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120-0056. Public reporting for this collection of information is estimated to be approximately 1 hour per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Information Collection Clearance Officer, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177-1524.

#### (j) Related Information

(1) For information about EASA AD 2019-0233, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 6017; email [ADs@easa.europa.eu](mailto:ADs@easa.europa.eu); internet [www.easa.europa.eu](http://www.easa.europa.eu). You may find this EASA AD on the EASA website at <https://ad.easa.europa.eu>. You may view this material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195. This material may be found in the AD docket on the internet at <http://www.regulations.gov> by searching for and locating Docket No. FAA-2019-0982.

(2) For more information about this AD, contact Sanjay Ralhan, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206-231-3223.

Issued in Des Moines, Washington, on December 5, 2019.

**Michael Kaszycki,**

*Acting Director, System Oversight Division, Aircraft Certification Service.*

[FR Doc. 2019-26700 Filed 12-13-19; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA-2019-0977; Product Identifier 2019-NM-166-AD]

RIN 2120-AA64

#### Airworthiness Directives; Airbus SAS Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for all Airbus SAS Model A319-131, -132, and -133 airplanes, Model A320-231, -232, and -233 airplanes, and Model A321-131, -231, and -232 airplanes. This proposed AD was prompted by a report of rupture of a hydraulic reservoir air pressurization hose on an in-service airplane, leading to air leakage that was undetectable during normal operation, and found during subsequent zonal inspection. This proposed AD would require modifying the airplane by replacing the affected bleed air hoses with a modification of hydraulic pressurization lines, as specified in a European Union Aviation Safety Agency (EASA) AD, which will be incorporated by reference. The FAA is proposing this AD to address the unsafe condition on these products.

**DATES:** The FAA must receive comments on this proposed AD by January 30, 2020.

**ADDRESSES:** You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to <https://www.regulations.gov>. Follow the instructions for submitting comments.

- *Fax:* 202-493-2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For the material identified in this proposed AD that will be incorporated by reference (IBR), contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 1000; email [ADs@easa.europa.eu](mailto:ADs@easa.europa.eu); internet [www.easa.europa.eu](http://www.easa.europa.eu). You may find this IBR material on the EASA website at <https://ad.easa.europa.eu>.

You may view this IBR material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195. It is also available in the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA-2019-0977.

#### Examining the AD Docket

You may examine the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA-2019-0977; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Sanjay Ralhan, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206-231-3223.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA-2019-0977; Product Identifier 2019-NM-166-AD" at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM based on those comments.

The FAA will post all comments, without change, to <https://www.regulations.gov>, including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact the agency receives about this NPRM.

##### Discussion

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2019-0232, dated September 16, 2019 ("EASA AD 2019-0232") (also referred to as the Mandatory Continuing Airworthiness Information, or "the MCAI"), to correct an unsafe condition for all Airbus SAS Model A319-131,

–132, and –133 airplanes, Model A320–231, –232, and –233 airplanes, and Model A321–131, –231, and –232 airplanes.

This proposed AD was prompted by a report of rupture of a hydraulic reservoir air pressurization hose on an in-service airplane, leading to air leakage that was undetectable during normal operation, and found during subsequent zonal inspection. The FAA is proposing this AD to address this condition, which, if not detected and corrected, could lead to exposure of the wing structure to high temperatures (possibly above 200 degrees Celsius (392 degrees Fahrenheit)), possibly resulting in reduced structural integrity of the airplane. See the MCAI for additional background information.

**Related IBR Material Under 1 CFR Part 51**

EASA AD 2019–0232 describes procedures for modifying the airplane by replacing the affected bleed air hoses with a modification kit that includes improved bleed air hoses. This material is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the ADDRESSES section.

**FAA’s Determination and Requirements of This Proposed AD**

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to the FAA’s bilateral agreement with the State of Design Authority, the FAA has been notified of the unsafe condition described in the MCAI referenced above. The FAA is proposing this AD because the FAA evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

**Proposed AD Requirements**

This proposed AD would require accomplishing the actions specified in EASA AD 2019–0232 described previously, as incorporated by reference, except for any differences identified as exceptions in the regulatory text of this AD.

**Explanation of Required Compliance Information**

In the FAA’s ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since

coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2019–0232 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2019–0232 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to “all required actions and compliance times,” compliance with this AD requirement is not limited to the section titled “Required Action(s) and Compliance Time(s)” in the EASA AD. Service information specified in EASA AD 2019–0232 that is required for compliance with EASA AD 2019–0232 will be available on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA–2019–0977 after the FAA final rule is published.

**Costs of Compliance**

The FAA estimates that this proposed AD affects 802 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

**ESTIMATED COSTS FOR REQUIRED ACTIONS**

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
6 work-hours × \$85 per hour = \$510 .....	\$4,300	\$4,810	\$3,857,620

**Authority for This Rulemaking**

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

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

develop on products identified in this rulemaking action.

This proposed AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes and associated appliances to the Director of the System Oversight Division.

**Regulatory Findings**

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD 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.

For the reasons discussed above, I certify this proposed regulation:

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Will not affect intrastate aviation in Alaska, and
- (3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**List of Subjects in 14 CFR Part 39**

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

## The Proposed Amendment

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

### PART 39—AIRWORTHINESS DIRECTIVES

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

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

#### § 39.13 [Amended]

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

**Airbus SAS:** Docket No. FAA–2019–0977; Product Identifier 2019–NM–166–AD.

#### (a) Comments Due Date

The FAA must receive comments by January 30, 2020.

#### (b) Affected ADs

None.

#### (c) Applicability

This AD applies to all Airbus SAS airplanes specified in paragraphs (c)(1) through (3) of this AD, certificated in any category.

(1) Model A319–131, –132, and –133 airplanes.

(2) Model A320–231, –232, and –233 airplanes.

(3) Model A321–131, –231, and –232 airplanes.

#### (d) Subject

Air Transport Association (ATA) of America Code 29, Hydraulic power.

#### (e) Reason

This AD was prompted by a report of rupture of a hydraulic reservoir air pressurization hose on an in-service airplane, leading to air leakage that was undetectable during normal operation, and found during subsequent zonal inspection. The FAA is issuing this AD to address this condition, which, if not detected and corrected, could lead to exposure of the wing structure to high temperatures (possibly above 200 degrees Celsius (392 degrees Fahrenheit)), possibly resulting in reduced structural integrity of the airplane.

#### (f) Compliance

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

#### (g) Requirements

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2019–0232, dated September 16, 2019 (“EASA AD 2019–0232”).

#### (h) Exceptions to EASA AD 2019–0232

(1) For purposes of determining compliance with the requirements of this AD:

Where EASA AD 2019–0232 refers to its effective date, this AD requires using the effective date of this AD.

(2) The “Remarks” section of EASA AD 2019–0232 does not apply to this AD.

#### (i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Section, Transport Standards Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Section, send it to the attention of the person identified in paragraph (j)(2) of this AD. Information may be emailed to: [9-ANM-116-AMOC-REQUESTS@faa.gov](mailto:9-ANM-116-AMOC-REQUESTS@faa.gov). Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Section, Transport Standards Branch, FAA; or EASA; or Airbus SAS’s EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* For any service information referenced in EASA AD 2019–0232 that contains RC procedures and tests: Except as required by paragraph (i)(2) of this AD, RC procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator’s maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

#### (j) Related Information

(1) For information about EASA AD 2019–0232, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 6017; email [ADS@easa.europa.eu](mailto:ADS@easa.europa.eu); internet [www.easa.europa.eu](http://www.easa.europa.eu). You may find this EASA AD on the EASA website at <https://ad.easa.europa.eu>. You may view this material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA–2019–0977.

(2) For more information about this AD, contact Sanjay Ralhan, Aerospace Engineer,

International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3223.

Issued in Des Moines, Washington, on November 27, 2019.

**Michael Kaszycki,**

*Acting Director, System Oversight Division, Aircraft Certification Service.*

[FR Doc. 2019–26674 Filed 12–13–19; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. FAA–2019–0876; Product Identifier 2019–NM–070–AD]

RIN 2120–AA64

#### Airworthiness Directives; Bombardier, Inc., Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for certain Bombardier, Inc., Model BD–700–1A10 and BD–700–1A11 airplanes. This proposed AD was prompted by a report that cracking was discovered in a channel within a structural support member for the rudder quadrant, rudder feel unit assembly, and environmental control system due to fatigue. This proposed AD would require repetitive inspections of the rudder quadrant box assembly for any cracking, and modification of the rudder quadrant box assembly. The FAA is proposing this AD to address the unsafe condition on these products.

**DATES:** The FAA must receive comments on this proposed AD by January 30, 2020.

**ADDRESSES:** You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to <https://www.regulations.gov>. Follow the instructions for submitting comments.

- *Fax:* 202–493–2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact Bombardier, Inc.,

400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514-855-5000; fax 514-855-7401; email [thd.crj@aero.bombardier.com](mailto:thd.crj@aero.bombardier.com); internet <https://www.bombardier.com>. You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195.

#### Examining the AD Docket

You may examine the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA-2019-0876; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

#### FOR FURTHER INFORMATION CONTACT:

Andrea Jimenez, Aerospace Engineer, Airframe and Mechanical Systems Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516-228-7330; fax 516-794-5531; email [9-avs-nyaco-cos@faa.gov](mailto:9-avs-nyaco-cos@faa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include “Docket No. FAA-2019-0876; Product Identifier 2019-NM-070-AD” at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM because of those comments.

The FAA will post all comments received, without change, to <https://www.regulations.gov>, including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact received about this NPRM.

##### Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian

Airworthiness Directive CF-2019-11, dated March 22, 2019 (referred to after this as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for certain Bombardier, Inc., Model BD-700-1A10 and BD-700-1A11 airplanes. You may examine the MCAI in the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA-2019-0876.

This proposed AD was prompted by a report that cracking was discovered in a channel within a structural support member for the rudder quadrant, rudder feel unit assembly, and environmental control system due to fatigue. The FAA is proposing this AD to address cracking in the rudder quadrant support structure, which can lead to progressive deterioration in the performance of the systems it supports, and could eventually lead to uncommanded rudder movement and bleed air leakage. See the MCAI for additional background information.

#### Related Service Information Under 1 CFR Part 51

Bombardier has issued the following service information.

- Bombardier Service Bulletin 700-53-054, dated October 1, 2018.
- Bombardier Service Bulletin 700-53-5013, dated October 1, 2018.
- Bombardier Service Bulletin 700-53-6012, dated October 1, 2018.
- Bombardier Service Bulletin 700-1A11-53-029, dated October 1, 2018.

This service information describes procedures for repetitive detailed visual inspections of the rudder quadrant box assembly for any cracking. These documents are distinct since they apply to different airplane models.

Bombardier also issued the following service information:

- Bombardier Service Bulletin 700-53-052, dated October 1, 2018.
- Bombardier Service Bulletin 700-53-6010, dated October 1, 2018.
- Bombardier Service Bulletin 700-1A11-53-027, dated October 1, 2018.
- Bombardier Service Bulletin 700-53-5011, dated October 1, 2018.

This service information describes procedures for modification of the rudder quadrant box assembly. The modification includes surface and bolt-hole eddy current inspections for cracking of the left-hand (LH) channel; a detailed visual inspection for cracking

of the forward and aft half ribs and bottom and top skins; replacement of the rudder quadrant box half ribs, air systems support fitting, and LH channel; and installation of new rudder quadrant box back-up fittings. These documents are distinct since they apply to different airplane models.

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

#### FAA's Determination

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to a bilateral agreement with the State of Design Authority, the FAA has been notified of the unsafe condition described in the MCAI and service information referenced above. The FAA is proposing this AD because the agency evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop on other products of the same type design.

#### Proposed Requirements of This NPRM

This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under “Differences Between this Proposed AD and the MCAI or Service Information.”

#### Differences Between This Proposed AD and the MCAI or Service Information

Canadian Airworthiness Directive CF-2019-11, dated March 22, 2019, states that if any cracking is found during the repetitive detailed visual inspections of the rudder quadrant box assembly, the repair can be done within 100 flight cycles after the inspection. However, this AD requires that, for the LH channel, if the length of the crack exceeds the upper limit, the repair must be done before further flight. In addition, if the length of the crack for the LH channel is within the upper limit, the repair must be done within 50 flight cycles. These differences have been coordinated with TCCA.

#### Costs of Compliance

The FAA estimates that this proposed AD affects 123 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Labor cost	Parts cost	Cost per product	Cost on U.S. operators
2 work-hours × \$85 per hour = \$170 per inspection cycle.	\$0 .....	\$170 per inspection cycle	\$20,910 per inspection cycle

The FAA estimates the following costs to do any necessary on-condition action that would be required based on

the results of any required actions. The FAA has no way of determining the

number of aircraft that might need this on-condition action:

ESTIMATED COSTS OF ON-CONDITION ACTION

Labor cost	Parts cost	Cost per product
46 work-hours × \$85 per hour = \$3,910 .....	\$355	\$4,265

**Authority for This Rulemaking**

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

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

This proposed AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes and associated appliances to the Director of the System Oversight Division.

**Regulatory Findings**

The FAA has determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD 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.

For the reasons discussed above, I certify this proposed regulation:

1. Is not a “significant regulatory action” under Executive Order 12866;
2. Will not affect intrastate aviation in Alaska; and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

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

**PART 39—AIRWORTHINESS DIRECTIVES**

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

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

**§ 39.13 [Amended]**

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

**Bombardier, Inc.:** Docket No. FAA–2019–0876; Product Identifier 2019–NM–070–AD.

**(a) Comments Due Date**

The FAA must receive comments by January 30, 2020.

**(b) Affected ADs**

None.

**(c) Applicability**

This AD applies to Bombardier, Inc., Model BD–700–1A10 and BD–700–1A11 airplanes, certificated in any category, serial numbers 9001 through 9844 inclusive, and 9998.

**(d) Subject**

Air Transport Association (ATA) of America Code 53, Fuselage.

**(e) Reason**

This AD was prompted by a report that cracking was discovered in a channel within a structural support member for the rudder quadrant, rudder feel unit assembly, and environmental control system due to fatigue. The FAA is issuing this AD to address cracking in the rudder quadrant support structure, which can lead to progressive deterioration in the performance of the systems it supports, and could eventually lead to uncommanded rudder movement and bleed air leakage.

**(f) Compliance**

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

**(g) Initial and Repetitive Inspections**

For airplanes that have accumulated fewer than 2,900 total flight cycles as of the effective date of this AD, and that have not been modified as specified in paragraph (i) of this AD: At the applicable time specified in paragraph (g)(1) or (2) of this AD, do a detailed visual inspection for cracking of the rudder quadrant box assembly, in accordance with paragraph 2.B. of the Accomplishment Instructions of the applicable service bulletin specified in figure 1 to paragraph (g) of this AD. Repeat the inspection thereafter at intervals not to exceed 1,000 flight cycles.

(1) For airplanes that have accumulated fewer than 2,000 total flight cycles as of the effective date of this AD: Inspect within 1,000 flight cycles after the effective date of this AD.

(2) For airplanes that have accumulated 2,000 total flight cycles or more, but fewer than 2,900 total flight cycles, as of the effective date of this AD: Inspect within 100

flight cycles after the effective date of this AD.

**Figure 1 to paragraph (g) – Inspection Service Information**

Airplane Model	Service Information
BD-700-1A10 airplanes having serial numbers 9002 through 9312 inclusive, 9314 through 9380 inclusive, and 9384 through 9429 inclusive	Bombardier Service Bulletin 700-53-054, dated October 1, 2018
BD-700-1A10 airplanes having serial numbers 9313, 9381, and 9432 through 9844 inclusive	Bombardier Service Bulletin 700-53-6012, dated October 1, 2018
BD-700-1A11 airplanes having serial numbers 9127 through 9383 inclusive, 9389 through 9400 inclusive, 9404 through 9431 inclusive, and 9998	Bombardier Service Bulletin 700-1A11-53-029, dated October 1, 2018
BD-700-1A11 airplanes having serial numbers 9386, 9401, and 9445 through 9840 inclusive	Bombardier Service Bulletin 700-53-5013, dated October 1, 2018

**(h) Corrective Actions for Inspection Findings**

If any cracking is found during the inspection specified in paragraph (g) of this AD, do the actions specified in paragraph (i) of this AD at the applicable time specified in paragraphs (h)(1) through (4) of this AD.

(1) If any crack of 1.20 inch (30.48 mm) or longer is found on the forward (FWD) upper half rib: Do the actions within 100 flight cycles after discovery of the crack.

(2) If any crack of 0.40 inch (10.16 mm) or longer is found on the AFT lower half rib, do the actions within 100 flight cycles after discovery of the crack.

(3) If any crack is found on the left-hand (LH) channel that has grown from the air system's support fitting aft fastener hole to the adjacent air systems support fitting fastener hole (which is 0.625 inch (15.88 mm) from hole edge to hole edge) or longer, do the actions before further flight.

(4) If any crack is found on the LH channel that is less than 0.625 inch (15.88 mm) from

hole edge to hole edge (which is the distance from the air system's support fitting aft fastener hole to the adjacent air system's support fitting fastener hole), do the actions within 50 flight cycles after discovery of the crack.

**(i) Modification of the Rudder Quadrant Box Assembly**

At the applicable time specified in paragraph (i)(1) or (2) of this AD, except as required by paragraph (h) of this AD: Modify the rudder quadrant box assembly. The modification includes surface and bolt-hole eddy current inspections for cracking of the left-hand channel; a detailed visual inspection for cracking of the forward and aft half ribs and bottom and top skins; applicable corrective actions; replacement of the rudder quadrant box half ribs, air systems support fitting, and LH channel; and installation of new rudder quadrant box back-up fittings. Do the modification and associated actions in accordance with

paragraph 2.B., 2.C., and 2.D., of the Accomplishment Instructions of the applicable service bulletin specified in figure 2 to paragraph (i) of this AD; except, where the applicable service bulletin specifies to contact Bombardier for appropriate action, corrective actions must be done before further flight in accordance with the procedures specified in paragraph (l)(2) of this AD.

(1) For airplanes that have accumulated 2,900 total flight cycles or fewer as of the effective date of this AD, do the required actions before the accumulation of 3,000 total flight cycles, or within 60 months after the effective date of this AD, whichever occurs first.

(2) For airplanes that have accumulated more than 2,900 total flight cycles as of the effective date of this AD, do the required actions within 100 flight cycles or 12 months, whichever occurs first, after the effective date of this AD.

**Figure 2 to paragraph (i) – Modification Service Information**

Airplane Model	Service Information
BD-700-1A10 airplanes having serial numbers 9002 through 9312 inclusive, 9314 through 9380 inclusive, and 9384 through 9429 inclusive	Bombardier Service Bulletin 700-53-052, dated October 1, 2018
BD-700-1A10 airplanes having serial numbers 9313, 9381, and 9432 through 9844 inclusive	Bombardier Service Bulletin 700-53-6010, dated October 1, 2018.
BD-700-1A11 airplanes having serial numbers 9127 through 9383 inclusive, 9389 through 9400 inclusive, 9404 through 9431 inclusive, and 9998	Bombardier Service Bulletin 700-1A11-53-027, dated October 1, 2018
BD-700-1A11 airplanes having serial numbers 9386, 9401, and 9445 through 9840 inclusive	Bombardier Service Bulletin 700-53-5011, dated October 1, 2018

**(j) Alternative Modification**

Airplanes that have been modified as specified by any modification identified in paragraph (j)(1) through (4) of this AD (which are not required by this AD), meet the requirements specified in paragraph (i) of this AD.

(1) Bombardier Repair Modification R700T400669, Revision C, dated January 19, 2018, or Bombardier Repair Modification R700T400669, Revision G, dated May 30, 2018.

(2) Bombardier In-Service Modification IS700-53-0024, Revision A, dated July 24, 2018.

(3) Bombardier Service Request for Product Support Action (SRPSA) 000220372.

(4) Bombardier Service Request for Product Support Action (SRPSA) 000271526.

**(k) Terminating Action for Repetitive Inspections**

Accomplishing the actions in paragraph (i) or (j) of this AD terminates all of the requirements in paragraph (g) of this AD.

**(l) Other FAA AD Provisions**

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs)*: The Manager, New York ACO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to ATTN: Program Manager, Continuing Operational Safety, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516-228-7300; fax 516-794-5531. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local

flight standards district office/certificate holding district office.

(2) *Contacting the Manufacturer*: For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, New York ACO Branch, FAA; or Transport Canada Civil Aviation (TCCA); or Canada's TCCA Design Approval Organization (DAO). If approved by the DAO, the approval must include the DAO-authorized signature.

**(m) Related Information**

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) Canadian Airworthiness Directive CF-2019-11, dated March 22, 2019, for related information. This MCAI may be found in the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA-2019-0876.

(2) For more information about this AD, contact Andrea Jimenez, Aerospace Engineer, Airframe and Mechanical Systems Section, FAA, New York ACO Branch, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone 516-228-7330; fax 516-794-5531; email [9-avs-nyaco-cos@faa.gov](mailto:9-avs-nyaco-cos@faa.gov).

(3) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514-855-5000; fax 514-855-7401; email [thd.crj@aero.bombardier.com](mailto:thd.crj@aero.bombardier.com); internet <https://www.bombardier.com>. You may view this service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195.

Issued in Des Moines, Washington, on November 21, 2019.

**Dorr Anderson,**

*Acting Director, System Oversight Division, Aircraft Certification Service.*

[FR Doc. 2019-25719 Filed 12-13-19; 8:45 am]

**BILLING CODE 4910-13-P**

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 39**

[Docket No. FAA-2019-0832; Product Identifier 2019-NE-28-AD]

**RIN 2120-AA64**

**Airworthiness Directives; International Aero Engines AG Turbofan Engines**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for International Aero Engines AG (IAE) V2500-A1, V2522-A5, V2524-A5, V2525-D5, V2527-A5, V2527E-A5, V2527M-A5, V2528-D5, V2530-A5, V2531-E5, and V2533-A5 turbofan engine models with a certain diffuser case assembly installed. This proposed AD was prompted by a report of a manufacturing quality escape that could impact the life of the diffuser case assembly. This proposed AD would require removal of the affected diffuser case assembly from service and replacement with a part eligible for installation. The FAA is proposing this

AD to address the unsafe condition on these products.

**DATES:** The FAA must receive comments on this proposed AD by January 30, 2020.

**ADDRESSES:** You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to <https://www.regulations.gov>. Follow the instructions for submitting comments.
- *Fax:* 202-493-2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this NPRM, contact International Aero Engines AG, 400 Main Street, East Hartford, CT 06118; phone: 800-565-0140; email: [help24@pw.utc.com](mailto:help24@pw.utc.com); internet: <http://fleetcare.pw.utc.com>. You may view this service information at the FAA, Engine and Propeller Standards Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781-238-7759.

**Examining the AD Docket**

You may examine the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA-2019-0832; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be

available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Nicholas Paine, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA, 01803; phone: 781-238-7116; fax: 781-238-7199; email: [nicholas.j.paine@faa.gov](mailto:nicholas.j.paine@faa.gov).

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include “Docket No. FAA-2019-0832; Product Identifier 2019-NE-28-AD” at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM because of those comments.

The FAA will post all comments received, without change, to <https://www.regulations.gov>, including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact received about this NPRM.

**Discussion**

The FAA received a report of a manufacturing quality escape that identified certain diffuser case assemblies which did not meet material specification. According to an IAE investigation, the production defects in the affected diffuser case assemblies could impact the part design life and, therefore, the diffuser case assemblies require replacement. This condition, if not addressed, could result in the uncontained release of the diffuser case assembly, damage to the engine, and damage to the airplane.

**Related Service Information**

The FAA reviewed IAE Non-Modification Service Bulletin (NMSB) V2500-ENG-72-0707, dated July 1, 2019. The NMSB describes procedures for replacing the affected diffuser case assemblies.

**FAA’s Determination**

The FAA is proposing this AD because it evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

**Differences Between This Proposed AD and the Service Information**

IAE NMSB V2500-ENG-72-0707, dated July 1, 2019, identifies IAE V2522-A5, V2524-A5, V2527-A5, V2527E-A5, V2527M-A5, V2530-A5, and V2533-A5 turbofan engine models as applicable to replacement of the affected diffuser case assemblies. This proposed FAA AD additionally identifies V2500-A1, V2525-D5, V2528-D5, and V2531-E5 turbofan engine models to the applicability due to operators having the ability to install the affected diffuser case assemblies on any of the turbofan engine models.

**Proposed AD Requirements**

This proposed AD would require removal of the affected diffuser case assembly from service and its replacement with a part eligible for installation.

**Costs of Compliance**

The FAA estimates that this proposed AD affects two engines installed on airplanes of U.S. registry.

The FAA estimates the following costs to comply with this proposed AD:

**ESTIMATED COSTS**

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Replace the diffuser case assembly .....	70 work-hours × \$85 per hour = \$5,950 .....	\$250,000	\$255,950	\$511,900

According to the manufacturer, some of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected individuals. The FAA does not control warranty coverage for affected individuals. As a result, the FAA has included all costs in our cost estimate.

**Authority for This Rulemaking**

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

The FAA is issuing this rulemaking under the authority described in

Subtitle VII, Part A, Subpart III, Section 44701: “General requirements.” Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or

develop on products identified in this rulemaking action.

This AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to engines, propellers, and associated appliances to the Manager, Engine and Propeller Standards Branch, Policy and Innovation Division.

### Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD 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.

For the reasons discussed above, I certify this proposed regulation:

- (1) Is not a "significant regulatory action" under Executive Order 12866,
- (2) Will not affect intrastate aviation in Alaska, and
- (3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

### List of Subjects in 14 CFR Part 39

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

### The Proposed Amendment

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

### PART 39—AIRWORTHINESS DIRECTIVES

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

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

#### § 39.13 [Amended]

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

**International Aero Engines AG:** Docket No. FAA-2019-0832; Product Identifier 2019-NE-28-AD.

#### (a) Comments Due Date

The FAA must receive comments by January 30, 2020.

#### (b) Affected ADs

None.

#### (c) Applicability

This AD applies to International Aero Engines AG (IAE) V2500-A1, V2522-A5, V2524-A5, V2525-D5, V2527-A5, V2527E-A5, V2527M-A5, V2528-D5, V2530-A5, V2531-E5, and V2533-A5 turbofan engine models with diffuser case assembly, serial number PGGUBB8267, PGGUBB8271, PGGUA95825, PGGUA95827, or PGGUBB8264, installed.

#### (d) Subject

Joint Aircraft System Component (JASC) Code 7230, Turbine Engine Compressor Section.

#### (e) Unsafe Condition

This AD was prompted by a report of a manufacturing quality escape that could impact the life of the diffuser case assembly. The FAA is issuing this AD to prevent failure of the diffuser case assembly. The unsafe condition, if not addressed, could result in the uncontained release of the diffuser case assembly, damage to the engine, and damage to the airplane.

#### (f) Compliance

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

#### (g) Required Action

At the next engine shop visit after the effective date of the AD or before accumulating 10,000 cycles since new, whichever occurs first, remove the affected diffuser case assembly from service and replace with a part eligible for installation.

Note to paragraph (g): IAE Non-Modification Service Bulletin (NMSB) V2500-ENG-72-0707, dated July 1, 2019, contains guidance for replacing the diffuser case assembly.

#### (h) Definition

For the purpose of this AD, an "engine shop visit" is the induction of an engine into the shop for maintenance involving the separation of pairs of major mating engine flanges, except that the separation of engine flanges solely for the purposes of transportation without subsequent engine maintenance does not constitute an engine shop visit.

#### (i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, ECO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (j)(1) of this AD. You may email your request to: [ANE-AD-AMOC@faa.gov](mailto:ANE-AD-AMOC@faa.gov).

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager

of the local flight standards district office/certificate holding district office.

#### (j) Related Information

(1) For more information about this AD, contact Nicholas Paine, Aerospace Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: 781-238-7116; fax: 781-238-7199; email: [nicholas.j.paine@faa.gov](mailto:nicholas.j.paine@faa.gov).

(2) For service information identified in this AD, contact International Aero Engines AG, 400 Main Street, East Hartford, CT 06118; phone: 800-565-0140; email: [help24@pw.utc.com](mailto:help24@pw.utc.com); internet: <http://fleetcare.pw.utc.com>. You may view this referenced service information at the FAA, Engine and Propeller Standards Branch, 1200 District Avenue, Burlington, MA 01803. For information on the availability of this material at the FAA, call 781-238-7759.

Issued in Burlington, Massachusetts, on December 6, 2019.

**Robert J. Ganley,**

*Manager, Engine & Propeller Standards Branch, Aircraft Certification Service.*

[FR Doc. 2019-26871 Filed 12-13-19; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

**[Docket No. FAA-2019-0978; Product Identifier 2019-NM-163-AD]**

**RIN 2120-AA64**

### Airworthiness Directives; Airbus SAS Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to supersede Airworthiness Directive (AD) 2017-05-12, which applies to certain Airbus SAS Model A318-112 airplanes, Model A319-111, -112, -115, -132, and -133 airplanes, Model A320-214, -232, and -233 airplanes, and Model A321-211, -212, -213, -231, and -232 airplanes. AD 2017-05-12 requires a one-time eddy current conductivity measurement of certain cabin, cargo compartment, and frame structural parts to determine if aluminum alloy with inadequate heat treatment was used, and replacement if necessary. Since AD 2017-05-12 was issued, it was determined that aluminum alloy with inadequate heat treatment had been used for additional structural parts. This proposed AD would retain the requirements of AD 2017-05-12, and for certain airplanes, would require additional work, as specified in a

European Union Aviation Safety Agency (EASA) AD, which will be incorporated by reference. The FAA is proposing this AD to address the unsafe condition on these products.

**DATES:** The FAA must receive comments on this proposed AD by January 30, 2020.

**ADDRESSES:** You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to <https://www.regulations.gov>. Follow the instructions for submitting comments.

- *Fax:* 202-493-2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For the material identified in this proposed AD that will be incorporated by reference (IBR), contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 1000; email [ADs@easa.europa.eu](mailto:ADs@easa.europa.eu); internet [www.easa.europa.eu](http://www.easa.europa.eu). You may find this IBR material on the EASA website at <https://ad.easa.europa.eu>. You may view this IBR material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195. It is also available in the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA-2019-0978.

#### Examining the AD Docket

You may examine the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA-2019-0978; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this NPRM, the regulatory evaluation, any comments received, and other information. The street address for Docket Operations is listed above. Comments will be available in the AD docket shortly after receipt.

**FOR FURTHER INFORMATION CONTACT:** Sanjay Ralhan, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South

216th St., Des Moines, WA 98198; telephone and fax 206-231-3223.

#### SUPPLEMENTARY INFORMATION:

##### Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include “Docket No. FAA-2019-0978; Product Identifier 2019-NM-163-AD” at the beginning of your comments. The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this NPRM. The FAA will consider all comments received by the closing date and may amend this NPRM based on those comments.

The FAA will post all comments received, without change, to <https://www.regulations.gov>, including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact received about this NPRM.

##### Discussion

The FAA issued AD 2017-05-12, Amendment 39-18823 (82 FR 13382, March 13, 2017) (“AD 2017-05-12”), which applied to certain Airbus SAS Model A318-112 airplanes, Model A319-111, -112, -115, -132, and -133 airplanes, Model A320-214, -232, and -233 airplanes, and Model A321-211, -212, -213, -231, and -232 airplanes. AD 2017-05-12 requires a one-time eddy current conductivity measurement of certain cabin, cargo compartment, and frame structural parts to determine if aluminum alloy with inadequate heat treatment was used, and replacement if necessary. The FAA issued AD 2017-05-12 to address structural parts made of aluminum alloy with inadequate heat treatment, which could result in reduced structural integrity of the airplane.

##### Actions Since AD 2017-05-12 Was Issued

Since AD 2017-05-12 was issued, it was determined that aluminum alloy with inadequate heat treatment had been used for additional structural parts.

The EASA, which is the Technical Agent for the Member States of the European Union, has issued EASA AD 2019-0196, dated August 14, 2019 (“EASA AD 2019-0196”) (also referred to as the Mandatory Continuing Airworthiness Information, or “the MCAI”), to correct an unsafe condition for certain Airbus SAS Model A318-112 airplanes, Model A319-111, -112, -115, -132, and -133 airplanes, Model A320-

214, -216, -232, and -233 airplanes, and Model A321-211, -212, -213, -231, and -232 airplanes. EASA AD 2019-0196 supersedes EASA AD 2015-0129, dated November 3, 2015 (which corresponds to FAA AD 2017-05-12).

This proposed AD was prompted by a determination that aluminum alloy with inadequate heat treatment was used for additional structural parts not addressed in AD 2017-05-12. The FAA is proposing this AD to address structural parts made of aluminum alloy with inadequate heat treatment, which could result in reduced structural integrity of the airplane. See the MCAI for additional background information.

##### Model A320-216 Airplanes

The Airbus SAS Model A320-216 was U.S. type certificated on December 19, 2016. Before that date, any EASA ADs that affected Model A320-216 airplanes were included in the U.S. type certificate as part of the Required Airworthiness Actions List (RAAL). One or more Model A320-216 airplanes have subsequently been placed on the U.S. Register, and will now be included in FAA AD actions. For Model A320-216 airplanes, the requirements that correspond to AD 2017-05-12 were mandated by the MCAI via the RAAL. Although that RAAL requirement is still in effect, for continuity and clarity Model A320-216 airplanes are identified in paragraph (c) of this AD; the MCAI that is specified in paragraph (g) in this proposed AD includes restated requirements, which would therefore apply to those airplanes.

##### Explanation of Retained Requirements

Although this proposed AD does not explicitly restate the requirements of AD 2017-05-12, this proposed AD would retain all of the requirements of AD 2017-05-12. Those requirements are referenced in EASA AD 2019-0196, which, in turn, is referenced in paragraph (g) of this proposed AD.

##### Related IBR Material Under 1 CFR Part 51

EASA AD 2019-0196 describes procedures for a one-time eddy current conductivity measurement of certain cabin, cargo compartment, and frame structural parts to determine if aluminum alloy with inadequate heat treatment was used, and replacement if necessary. EASA AD 2019-0196 also describes, for certain airplanes, additional work (a one-time eddy current conductivity measurement of certain other structural parts, and replacement if necessary).

This material is reasonably available because the interested parties have

access to it through their normal course of business or by the means identified in the ADDRESSES section.

**FAA’s Determination and Requirements of This Proposed AD**

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to a bilateral agreement with the State of Design Authority, the FAA has been notified of the unsafe condition described in the MCAI referenced above. The FAA is proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

**Proposed AD Requirements**

This proposed AD would require accomplishing the actions specified in EASA AD 2019–0196 described previously, as incorporated by

reference, except for any differences identified as exceptions in the regulatory text of this AD.

**Explanation of Required Compliance Information**

In the FAA’s ongoing efforts to improve the efficiency of the AD process, the FAA initially worked with Airbus and EASA to develop a process to use certain EASA ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has since coordinated with other manufacturers and civil aviation authorities (CAAs) to use this process. As a result, EASA AD 2019–0196 will be incorporated by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2019–0196 in its entirety, through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD.

Using common terms that are the same as the heading of a particular section in the EASA AD does not mean that operators need comply only with that section. For example, where the AD requirement refers to “all required actions and compliance times,” compliance with this AD requirement is not limited to the section titled “Required Action(s) and Compliance Time(s)” in the EASA AD. Service information specified in EASA AD 2019–0196 that is required for compliance with EASA AD 2019–0196 will be available on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA–2019–0978 after the FAA final rule is published.

**Costs of Compliance**

The FAA estimates that this proposed AD affects 63 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

**ESTIMATED COSTS FOR REQUIRED ACTIONS**

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Retained actions from AD 2017-05-12 ..	6 work-hours × \$85 per hour = \$510 .....	\$0	\$510 .....	\$32,130.
New proposed actions .....	Up to 7 work-hours × \$85 per hour = \$595.	\$0	Up to \$595 .....	Up to \$37,485.

The FAA has received no definitive data that would enable the agency to provide cost estimates for the on-condition actions specified in this proposed AD.

According to the manufacturer, some or all of the costs of this proposed AD may be covered under warranty, thereby reducing the cost impact on affected individuals. The FAA does not control warranty coverage for affected individuals. As a result, the FAA has included all known costs in our cost estimate.

**Authority for This Rulemaking**

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

The FAA is issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701: “General requirements.” Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds

necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

This proposed AD is issued in accordance with authority delegated by the Executive Director, Aircraft Certification Service, as authorized by FAA Order 8000.51C. In accordance with that order, issuance of ADs is normally a function of the Compliance and Airworthiness Division, but during this transition period, the Executive Director has delegated the authority to issue ADs applicable to transport category airplanes and associated appliances to the Director of the System Oversight Division.

**Regulatory Findings**

The FAA has determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD 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.

For the reasons discussed above, I certify this proposed regulation:  
 (1) Is not a “significant regulatory action” under Executive Order 12866,  
 (2) Will not affect intrastate aviation in Alaska, and  
 (3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**List of Subjects in 14 CFR Part 39**

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

**The Proposed Amendment**

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

**PART 39—AIRWORTHINESS DIRECTIVES**

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

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

**§ 39.13 [Amended]**

■ 2. The FAA amends § 39.13 by removing Airworthiness Directive (AD)

2017–05–12, Amendment 39–18823 (82 FR 13382, March 13, 2017) and adding the following new AD:

**Airbus SAS:** Docket No. FAA–2019–0978; Product Identifier 2019–NM–163–AD.

**(a) Comments Due Date**

The FAA must receive comments by January 30, 2020.

**(b) Affected ADs**

This AD replaces AD 2017–05–12, Amendment 39–18823 (82 FR 13382, March 13, 2017) (“AD 2017–05–12”).

**(c) Applicability**

This AD applies to the Airbus SAS airplanes identified in paragraphs (c)(1) through (4) of this AD, certificated in any category, as identified in European Union Aviation Safety Agency (EASA) AD 2019–0196, dated August 14, 2019 (“EASA AD 2019–0196”).

- (1) Model A318–112 airplanes.
- (2) Model A319–111, –112, –115, –132, and –133 airplanes.
- (3) Model A320–214, –216, –232, and –233 airplanes.
- (4) Model A321–211, –212, –213, –231, and –232 airplanes.

**(d) Subject**

Air Transport Association (ATA) of America Code 53, Fuselage.

**(e) Reason**

This AD was prompted by a determination that aluminum alloy with inadequate heat treatment was used for certain structural parts, including additional structural parts not addressed in AD 2017–05–12. The FAA is issuing this AD to address structural parts made of aluminum alloy with inadequate heat treatment, which could result in reduced structural integrity of the airplane.

**(f) Compliance**

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

**(g) Requirements**

Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2019–0196.

**(h) Exceptions to EASA AD 2019–0196**

(1) For purposes of determining compliance with the requirements of this AD: Where EASA AD 2019–0196 refers to its effective date, this AD requires using the effective date of this AD.

(2) The “Remarks” section of EASA AD 2019–0196 does not apply to this AD.

**(i) Other FAA AD Provisions**

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Section, Transport Standards Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal

inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Section, send it to the attention of the person identified in paragraph (j)(2) of this AD. Information may be emailed to: 9-ANM-116-AMOC-REQUESTS@faa.gov.

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

(ii) AMOCs approved previously for AD 2017–05–12 are approved as AMOCs for the corresponding provisions of EASA AD 2019–0196 that are required by paragraph (g) of this AD.

(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain instructions from a manufacturer, the instructions must be accomplished using a method approved by the Manager, International Section, Transport Standards Branch, FAA; or EASA; or Airbus SAS’s EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.

(3) *Required for Compliance (RC):* For any service information referenced in EASA AD 2019–0196 that contains RC procedures and tests: Except as required by paragraph (i)(2) of this AD, RC procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator’s maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

**(j) Related Information**

(1) For information about EASA AD 2019–0196, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 89990 6017; email [ADS@easa.europa.eu](mailto:ADS@easa.europa.eu); internet [www.easa.europa.eu](http://www.easa.europa.eu). You may find this EASA AD on the EASA website at <https://ad.easa.europa.eu>. You may view this material at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. This material may be found in the AD docket on the internet at <https://www.regulations.gov> by searching for and locating Docket No. FAA–2019–0978.

(2) For more information about this AD, contact Sanjay Ralhan, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3223.

Issued in Des Moines, Washington, on November 27, 2019.

**Michael Kaszycki,**

*Acting Director, System Oversight Division, Aircraft Certification Service.*

[FR Doc. 2019–26673 Filed 12–13–19; 8:45 am]

**BILLING CODE 4910–13–P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 71**

[Docket No. FAA–2019–0902; Airspace Docket No. 19–ACE–14]

**RIN 2120–AA66**

**Proposed Amendment of Class E Airspace; Pratt, KS**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to amend the Class E airspace extending upward from 700 feet above the surface at Pratt Regional Airport, Pratt, KS. The FAA is proposing this action as the result of an airspace review caused by the decommissioning of the Pratt non-directional beacon (NDB), which provided navigation information for the instrument procedures at this airport. Additionally, the geographic coordinates of the Pratt Regional Airport, would also be updated to coincide with the FAA’s aeronautical database. Airspace redesign is necessary for the safety and management of instrument flight rules (IFR) operations at this airport.

**DATES:** Comments must be received on or before January 30, 2020.

**ADDRESSES:** Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590; telephone (202) 366–9826, or (800) 647–5527. You must identify FAA Docket No. FAA–2019–0902; Airspace Docket No. 19–ACE–14, at the beginning of your comments. You may also submit comments through the internet at <https://www.regulations.gov>. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays.

FAA Order 7400.11D, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at [https://www.faa.gov/air\\_traffic/publications/](https://www.faa.gov/air_traffic/publications/). For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For

information on the availability of FAA Order 7400.11D at NARA, email [fedreg.legal@nara.gov](mailto:fedreg.legal@nara.gov) or go to <https://www.archives.gov/federal-register/cfr/ibr-locations.html>.

**FOR FURTHER INFORMATION CONTACT:**

Rebecca Shelby, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222-5857.

**SUPPLEMENTARY INFORMATION:**

**Authority for This Rulemaking**

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend the Class E airspace extending upward from 700 feet above the surface at Pratt Regional Airport, Pratt, KS, to support IFR operations at this airport.

**Comments Invited**

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA-2019-0902; Airspace Docket No. 19-ACE-14." The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed

in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

**Availability of NPRMs**

An electronic copy of this document may be downloaded through the internet at <https://www.regulations.gov>. Recently published rulemaking documents can also be accessed through the FAA's web page at [https://www.faa.gov/air\\_traffic/publications/airspace\\_amendments/](https://www.faa.gov/air_traffic/publications/airspace_amendments/).

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

**Availability and Summary of Documents for Incorporation by Reference**

This document proposes to amend FAA Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective September 15, 2019. FAA Order 7400.11D is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11D lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

**The Proposal**

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 by amending the Class E airspace extending upward from 700 feet above the surface to within a 6.5-mile radius of the Pratt Regional Airport, Pratt, KS; and removing the Pratt NDB from the airspace legal description.

This action is necessary due to an airspace review caused by the decommissioning of the Pratt NDB, which provided navigation information for the instrument procedures at this airport.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.11D, dated August 8, 2019, and effective September 15, 2019, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be

published subsequently in the Order. FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

**Regulatory Notices and Analyses**

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**Environmental Review**

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, "Environmental Impacts: Policies and Procedures" prior to any FAA final regulatory action.

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

**PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS**

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959-1963 Comp., p. 389.

**§ 71.1 [Amended]**

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective September 15, 2019, is amended as follows:

Paragraph 6005 Class E Airspace Areas  
Extending Upward From 700 Feet or More  
Above the Surface of the Earth.

\* \* \* \* \*

#### ACE KS E5 Pratt, KS [Amended]

Pratt Regional Airport, KS  
(Lat. 37°42'09" N, long. 98°44'49" W)

That airspace extending upward from 700 feet above the surface within a 6.5-mile radius of Pratt Regional Airport.

Issued in Fort Worth, Texas, on December 5, 2019.

**Steve Szukala,**

Acting Manager, Operations Support Group,  
ATO Central Service Center.

[FR Doc. 2019-26855 Filed 12-13-19; 8:45 am]

BILLING CODE 4910-13-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA-2019-0341; Airspace  
Docket No. 18-ANM-4]

RIN 2120-AA66

#### Proposed Amendment of Class E Airspace; Gunnison, CO

**AGENCY:** Federal Aviation  
Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking  
(NPRM).

**SUMMARY:** This action proposes to amend the Class E airspace designated as a surface area, at Gunnison-Crested Butte Regional Airport, Gunnison, CO. The proposal would increase the circular radius of the Class E surface area and add an extension to the west of the airport. Also, this action proposes to amend the Class E airspace by adding an airspace area designated as an extension to a Class D or Class E surface area, to the southwest of the airport. Additionally, this action proposes to amend the Class E airspace extending upward from 700 feet above the surface by significantly reducing the area around the airport, except to the west and southwest of the airport. Furthermore, this action proposes to amend the Class E airspace extending upward from 1,200 feet above the surface by removing this area. This area is wholly contained within the Denver Class E6 en route airspace area and duplication is not necessary. Lastly, this action proposes several administrative changes to the airspace legal descriptions for the airport. These changes are necessary to accommodate airspace redesign for the safety and management of Instrument Flight Rules (IFR) operations at the airport.

**DATES:** Comments must be received on or before January 30, 2020.

**ADDRESSES:** Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12-140, Washington, DC 20590; telephone: 1-800-647-5527, or (202) 366-9826. You must identify FAA Docket No. FAA-2019-0341; Airspace Docket No. 18-ANM-4, at the beginning of your comments. You may also submit comments through the internet at <https://www.regulations.gov>.

FAA Order 7400.11D, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at [https://www.faa.gov/air\\_traffic/publications/](https://www.faa.gov/air_traffic/publications/). For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267-8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11D at NARA, email [fedreg.legal@nara.gov](mailto:fedreg.legal@nara.gov) or go to <https://www.archives.gov/federal-register/cfr/ibr-locations.html>.

**FOR FURTHER INFORMATION CONTACT:** Matthew Van Der Wal, Federal Aviation Administration, Western Service Center, Operations Support Group, 2200 S. 216th Street, Des Moines, WA 98198; telephone (206) 231-3695.

#### SUPPLEMENTARY INFORMATION:

##### Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend Class E airspace at Gunnison-Crested Butte Regional Airport, Gunnison, CO, to ensure safety and management of Instrument Flight Rules (IFR) operations at the airport.

##### Comments Invited

Interested parties are invited to participate in this proposed rulemaking

by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Persons wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA-2019-0341; Airspace Docket No. 18-ANM-4". The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

##### Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at <https://www.regulations.gov>. Recently published rulemaking documents can also be accessed through the FAA's web page at [https://www.faa.gov/air\\_traffic/publications/airspace\\_amendments/](https://www.faa.gov/air_traffic/publications/airspace_amendments/).

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined during normal business hours at the Northwest Mountain Regional Office of the Federal Aviation Administration, Air Traffic Organization, Western Service Center, Operations Support Group, 2200 S 216th Street, Des Moines, WA 98198.

##### Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective September 15, 2019. FAA Order 7400.11D is publicly available as listed

in the ADDRESSES section of this document. FAA Order 7400.11D lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

**The Proposal**

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) Part 71 by amending Class E airspace at the Gunnison-Crested Butte Regional Airport, Gunnison, CO. The action proposes to amend the Class E airspace designated as a surface area by increasing the circular radius and adding an extension to the west of the airport. The airspace area would be defined as follows: That airspace extending upward from the surface within a 4.8-mile radius of the airport and within 1 mile each side of the 256° bearing, extending from the 4.8-mile radius to 5.7 miles west of the Gunnison-Crested Butte Regional Airport.

Also, this action proposes to amend the Class E airspace by adding a Class E airspace area designated an extension to Class D and Class E2 surface areas. This airspace area would be defined as follows: That airspace extending upward from the surface within 1.4 miles each side of the 225° bearing, extending from the 4.8-mile radius to 14.1 miles southwest of the Gunnison-Crested Butte Regional Airport.

Additionally, this action proposes a significant modification to the Class E airspace extending upward from 700 feet above the surface. The action would remove most of the area extending upward from 700 feet above the surface, from the northwest of the airport clockwise to the south of the airport. A small area would remain east of the airport and two larger areas would remain to the southwest and west of the airport. This airspace area would be defined as follows: That airspace extending upward from 700 feet above the surface, extending from the 4.8-mile radius to a 7-mile radius along the 052° bearing clockwise to the 107° bearing, and within 2.5 miles each side of the 254° bearing, extending from the 4.8-mile radius to 9.6 miles west of the airport, and within 8.1 miles north and 3.9 miles south of the 225° bearing, extending from 7.1 miles to 23.1 miles southwest of the Gunnison-Crested Butte Regional Airport.

Furthermore, this action proposes to remove the Class E airspace extending upward from 1,200 feet above the surface. This airspace area is wholly contained within the Denver Class E6 en route airspace area and duplication is not necessary.

Lastly, the action proposes administrative corrections to the airspace’s legal descriptions. The geographic coordinates need to be updated to (lat. 38°32’04” N, long. 106°55’54” W) to match the FAA’s aeronautical database. The Class E surface airspace should be full time; the following two sentences do not accurately represent the time of use for this airspace area and need to be removed: “This Class E airspace area is effective during specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.”

Class E airspace designations are published in paragraphs 6002, 6004 and 6005 of FAA Order 7400.11D, dated August 8, 2019, and effective September 15, 2019, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designations listed in this document will be published subsequently in the Order. FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

**Regulatory Notices and Analyses**

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current, is non-controversial and unlikely to result in adverse or negative comments. It, therefore: (1) Is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**Environmental Review**

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, “Environmental Impacts: Policies and Procedures” prior to any FAA final regulatory action.

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

**PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS**

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(f), 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

**§ 71.1 [Amended]**

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective September 15, 2019, is amended as follows:

*Paragraph 6002 Class E Airspace Areas Designated as a Surface Area.*

\* \* \* \* \*

**ANM CO E2 Gunnison, CO [Amended]**

Gunnison-Crested Butte Regional Airport, CO (Lat. 38°32’04” N, long. 106°55’54” W)

That airspace extending upward from the surface within a 4.8-mile radius of the airport, and within 1 mile each side of the 256° bearing, extending from the 4.8-mile radius to 5.7 miles west of the Gunnison-Crested Butte Regional Airport.

*Paragraph 6004 Class E Airspace Areas Designated as an Extension to a Class D or Class E Surface Area.*

\* \* \* \* \*

**ANM CO E4 Gunnison, CO [New]**

Gunnison-Crested Butte Regional Airport, CO (Lat. 38°32’04” N, long. 106°55’54” W)

That airspace extending upward from the surface within 1.4 miles each side of the 225° bearing, extending from the 4.8-mile radius to 14.1 miles southwest of the Gunnison-Crested Butte Regional Airport.

*Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.*

\* \* \* \* \*

**ANM CO E5 Gunnison, CO [Amended]**

Gunnison-Crested Butte Regional Airport, CO (Lat. 38°32’04” N, long. 106°55’54” W)

That airspace extending upward from 700 feet above the surface extending from the 4.8-mile radius to a 7-mile radius along the 052° bearing clockwise to the 107° bearing, and within 2.5 each side of the 254° bearing, extending from the 4.8-mile radius to 9.6 miles west of the airport, and within 8.1 miles north and 3.9 miles south of the 225° bearing, extending from 7.1 miles to 23.1 miles southwest of the Gunnison-Crested Butte Regional Airport.

Issued in Seattle, Washington, on December 6, 2019.

**Byron Chew,**

*Group Manager, Operations Support Group, Western Service Center.*

[FR Doc. 2019-26848 Filed 12-13-19; 8:45 am]

**BILLING CODE 4910-13-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA-2019-0932; Airspace Docket No. 19-ASO-24]

RIN 2120-AA66

#### **Proposed Removal of Class E Airspace, and Proposed Amendment of Class D and Class E Airspace; Jacksonville, FL**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to remove Class E airspace area designated as an extension to a Class D surface area for Cecil Airport (previously Cecil Field), Jacksonville, FL, as the Cecil very high frequency omnidirectional range (VOR) has been decommissioned, and the VOR approach cancelled. This action would also amend Class D and E airspace by updating the following airport names: Jacksonville NAS (Towers Field) (previously Jacksonville NAS); Herlong Recreational Airport (formerly Herlong Airport); and, Jacksonville Executive Airport at Craig (previously Craig Municipal Airport). Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations in the area. Also, this action would update the geographic coordinates of Cecil Airport, Jacksonville NAS (Towers Field), Jacksonville International Airport, Mayport NAS, and Whitehouse NOLF. This action also would make an editorial change replacing Airport/Facility Directory with the term Chart Supplement in the legal descriptions of associated Class D airspace.

**DATES:** Comments must be received on or before January 30, 2020.

**ADDRESSES:** Send comments on this proposal to: The U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12-140, Washington, DC 20590-0001; Telephone: (800) 647-5527, or (202) 366-9826. You must identify the Docket No. FAA-2019-0932; Airspace Docket

No. 19-ASO-24, at the beginning of your comments. You may also submit comments through the internet at <https://www.regulations.gov>.

FAA Order 7400.11D, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at <https://www.faa.gov/air-traffic/publications/>. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267-8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11D at NARA, email [fedreg.legal@nara.gov](mailto:fedreg.legal@nara.gov) or go to <https://www.archives.gov/federal-register/cfr/ibr-locations.html>.

**FOR FURTHER INFORMATION CONTACT:** John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; telephone (404) 305-6364.

#### **SUPPLEMENTARY INFORMATION:**

##### **Authority for This Rulemaking**

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would remove Class E airspace at Cecil Airport, and amend Class D and E airspace in the Jacksonville, FL area to support IFR operations in the area. FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

##### **Comments Invited**

Interested persons are invited to comment on this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic,

environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (Docket No. FAA-2019-0932 and Airspace Docket No. 19-ASO-24) and be submitted in triplicate to DOT Docket Operations (see **ADDRESSES** section for the address and phone number.) You may also submit comments through the internet at <http://www.regulations.gov>.

Persons wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: "Comments to FAA Docket No. FAA-2019-0932; Airspace Docket No. 19-ASO-24." The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this document may be changed in light of the comments received. All comments submitted will be available for examination in the public docket both before and after the comment closing date. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

##### **Availability of NPRMs**

An electronic copy of this document may be downloaded through the internet at <https://www.regulations.gov>. Recently published rulemaking documents can also be accessed through the FAA's web page at [https://www.faa.gov/air-traffic/publications/airspace\\_amendments/](https://www.faa.gov/air-traffic/publications/airspace_amendments/).

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined between 8:00 a.m. and 4:30 p.m., Monday through Friday, except federal holidays at the office of the Eastern Service Center, Federal Aviation Administration, Room 350, 1701 Columbia Avenue, College Park, GA 30337.

##### **Availability and Summary of Documents for Incorporation by Reference**

This document proposes to amend FAA Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective

September 15, 2019. FAA Order 7400.11D is publicly available as listed in the ADDRESSES section of this document. FAA Order 7400.11D lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

**The Proposal**

The FAA proposes an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 to remove Class E surface airspace designated as an extension to a Class D surface area at Cecil Airport due to the decommissioning of the Cecil VOR. The FAA also proposed to amend Class D airspace and Class E airspace extending upward from 700 feet or more above the surface by recognizing the name changes of Jacksonville NAS (Towers Field), (previously Jacksonville NAS), and Herlong Recreational Airport, (previously Herlong Airport), and Jacksonville Executive Airport at Craig, (previously Craig Municipal Airport), Jacksonville, FL. Also, the geographic coordinates of these airports would be adjusted to coincide with the FAA’s aeronautical database. In addition, the FAA proposes to replace the outdated term Airport/Facility Directory with the term Chart Supplement in the associated Class D airspace legal descriptions for these airports.

Class D airspace designations, Class E airspace areas designated as an extension to a Class D or E surface area, and Class E airspace areas extending upward from 700 feet or more above the surface are published in Paragraphs 5000, 6004, and 6005, respectively of FAA Order 7400.11D, dated August 8, 2019, and effective September 15, 2019, which is incorporated by reference in 14 CFR 71.1. The Class D and E airspace designations listed in this document will be published subsequently in the Order.

**Regulatory Notices and Analyses**

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a “significant regulatory action,” under Executive Order 12866; (2) is not a “significant rule,” under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact

on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**Environmental Review**

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, “Environmental Impacts: Policies and Procedures” prior to any FAA final regulatory action.

**Lists of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

**PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS**

- 1. The authority citation for part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

**§ 71.1 [Amended]**

- 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective September 15, 2019, is amended as follows:

*Paragraph 5000 Class D Airspace.*

\* \* \* \* \*

**ASO FL D Jacksonville Cecil Airport, FL [New]**

Cecil Airport, FL

(Lat. 30°13’07” N, long. 81°52’38” W)

Jacksonville NAS (Towers Field), FL

(Lat. 30°14’01” N, long. 81°40’34” W)

Whitehouse NOLF, FL

(Lat. 30°20’58” N, long. 81°52’01” W)

Herlong Recreational Airport, FL

(Lat. 30°16’40” N, long. 81°48’21” W)

That airspace extending upward from the surface to and including 2,600 feet MSL, within a 4.3-mile radius of Cecil Airport; excluding that airspace within the Jacksonville NAS Class D airspace area, excluding that airspace north of a line from lat. 30°17’11” N, long. 81°54’22” W to lat. 30°16’58” N, long. 81°50’19” W, which abuts the Whitehouse NOLF Class D airspace, and excluding that airspace within a 1.8-mile radius of Herlong Recreational Airport. This Class D airspace area is effective during the specific days and times established in advance by a Notice to Airmen. The effective days and times will thereafter be continuously published in the Chart Supplement.

**ASO FL D Jacksonville Whitehouse NOLF, FL [Amended]**

Whitehouse NOLF, FL

(Lat. 30°20’58” N, long. 81°52’01” W)

Cecil Airport, FL

(Lat. 30°13’08” N, long. 81°52’38” W)

Herlong Recreational Airport, FL

(Lat. 30°16’40” N, long. 81°48’21” W)

That airspace extending upward from the surface to and including 2,600 feet MSL, within a 4.3-mile radius of Whitehouse NOLF, excluding that airspace within a 1.8-mile radius of Herlong Recreational Airport and that airspace south of a line from lat. 30°17’11” N, long. 81°54’22” W to lat. 30°16’58” N, long. 81°50’19” W, which abuts the Jacksonville Cecil Airport Class D airspace. This Class D airspace area is effective during the specific days and times established in advance by a Notice to Airmen. The effective days and times will thereafter be continuously published in the Chart Supplement.

**ASO FL D Jacksonville Executive Airport at Craig, FL [New]**

Jacksonville Executive Airport at Craig, FL

(Lat. 30°20’11” N, long. 81°30’52” W)

Mayport NAS, FL

(Lat. 30°23’29” N, long. 81°25’28” W)

That airspace extending upward from the surface to and including 2,500 feet MSL within a 4.2-mile radius of Jacksonville Executive Airport at Craig; excluding the portion northeast of a line connecting the 2 points of intersection with a 4.2-mile radius circle centered on Mayport NAS, FL. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Chart Supplement.

**ASO FL D Jacksonville Cecil Field, FL [Removed]**

**ASO FL D Jacksonville Craig Municipal Airport, FL [Removed]**

*Paragraph 6004 Class E Airspace*

*Designated as an Extension to Class D or E Surface Area.*

\* \* \* \* \*

**ASO FL E4 Jacksonville Cecil Field, FL [Removed]**

*Paragraph 6005 Class E Airspace Areas*

*Extending Upward From 700 Feet or More Above the Surface of the Earth.*

\* \* \* \* \*

**ASO FL E5 Jacksonville, FL [Amended]**

Jacksonville International Airport, FL

(Lat. 30°29’39” N, long. 81°41’16” W)

Jacksonville NAS (Towers Field), FL

(Lat. 30°14’01” N, long. 81°40’34” W)

Cecil Airport, FL

(Lat. 30°13’08” N, long. 81°52’38” W)

Jax Executive Airport at Craig, FL

(Lat. 30°20’11” N, long. 81°30’52” W)

Mayport NAS, FL

(Lat. 30°23’29” N, long. 81°25’28” W)

Whitehouse NOLF, FL

(Lat. 30°20’58” N, long. 81°52’01” W)

That airspace extending upward from 700 feet above the surface within a 10-mile radius of Jacksonville International Airport and

within the 7-mile radii of Jacksonville NAS (Towers Field), Cecil Airport, Jacksonville Executive Airport at Craig, Mayport NAS and Whitehouse NOLF.

Issued in College Park, Georgia, on December 5, 2019.

**Ryan Almasy,**

*Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.*

[FR Doc. 2019-26858 Filed 12-13-19; 8:45 am]

BILLING CODE 4910-13-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Docket No. FAA-2019-0921; Airspace Docket No. 19-ANE-7]

RIN 2120-AA66

#### Proposed Amendment of Class D and Class E Airspace, Nashua, NH

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** This action proposes to amend Class D airspace, Class E airspace designated as an extension to a Class D surface area, and Class E airspace extending upward from 700 feet above the surface at Boire Field, Nashua, NH, to accommodate airspace reconfiguration due to the decommissioning of CHERN non-directional beacon, and cancellation of the associated approaches. Controlled airspace is necessary for the safety and management of instrument flight rules (IFR) operations at this airport. This action also would update the geographic coordinates of this airport, as well as Manchester Very High Frequency Omnidirectional Range Tactical Air Navigation (VORTAC). In addition, this action would recognize the name change of Pepperell Airport, MA, (formerly Sports Center Airport). This action also would replace the outdated term Airport/Facility Directory with the term Chart Supplement in the legal descriptions of associated Class D and E airspace of Boire Field.

**DATES:** Comments must be received on or before January 30, 2020.

**ADDRESSES:** Send comments on this proposal to: The U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12-140, Washington, DC 20590-0001; Telephone: (800) 647-5527, or (202) 366-9826. You must identify the Docket No. FAA-2019-0921; Airspace Docket

No. 19-ANE-7, at the beginning of your comments. You may also submit comments through the internet at <https://www.regulations.gov>.

FAA Order 7400.11D, Airspace Designations and Reporting Points, and subsequent amendments can be viewed on line at [https://www.faa.gov/air\\_traffic/publications/](https://www.faa.gov/air_traffic/publications/). For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267-8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11D at NARA, email [fedreg.legal@nara.gov](mailto:fedreg.legal@nara.gov), or go to <https://www.archives.gov/federal-register/cfr/ibr-locations.html>.

**FOR FURTHER INFORMATION CONTACT:** John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Avenue, College Park, GA 30337; telephone (404) 305-6364.

#### SUPPLEMENTARY INFORMATION:

##### Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend Class D and E airspace at Boire Field, Nashua, NH, to support IFR operations in the area.

##### Comments Invited

Interested persons are invited to comment on this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (Docket No. FAA-

2019-0921 and Airspace Docket No. 19-ANE-7) and be submitted in triplicate to DOT Docket Operations (see **ADDRESSES** section for the address and phone number.) You may also submit comments through the internet at <https://www.regulations.gov>.

Persons wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: "Comments to FAA Docket No. FAA-2019-0921; Airspace Docket No. 19-ANE-7." The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this document may be changed in light of the comments received. All comments submitted will be available for examination in the public docket both before and after the comment closing date. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

##### Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at <https://www.regulations.gov>. Recently published rulemaking documents can also be accessed through the FAA's web page at [https://www.faa.gov/air\\_traffic/publications/airspace\\_amendments/](https://www.faa.gov/air_traffic/publications/airspace_amendments/).

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays. An informal docket may also be examined between 8:00 a.m. and 4:30 p.m., Monday through Friday, except federal holidays, at the office of the Eastern Service Center, Federal Aviation Administration, Room 350, 1701 Columbia Avenue, College Park, GA 30337.

##### Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective September 15, 2019. FAA Order 7400.11D is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11D lists

Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

### The Proposal

The FAA proposes an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 to amend Class D, Class E airspace designated as an extension to a Class D surface area, and Class E airspace extending upward from 700 feet or more above the surface at Boire Field, Nashua, NH, by eliminating the northwest extension of the airport due to the cancellation of the NDB approach. The FAA also proposes to update the geographic coordinates of Boire Field and Manchester VORTAC to coincide with the FAA's aeronautical database. In addition, this action would recognize the name change of Pepperell Airport (formerly Sports Center Airport). Also, an editorial change would be made replacing the outdated term Airport/Facility Directory with the term Chart Supplement in the associated Class D and E airspace legal descriptions for Boire Field.

Class D and Class E airspace designations are published in Paragraphs 5000, 6004, and 6005, respectively of FAA Order 7400.11D, dated August 8, 2019, and effective September 15, 2019, which is incorporated by reference in 14 CFR 71.1. The Class D and E airspace designations listed in this document will be published subsequently in the Order. FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

### Regulatory Notices and Analyses

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

### Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, paragraph 5–6.5(a), "Environmental Impacts: Policies and Procedures" prior to any FAA final regulatory action.

### Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

### The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

### PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

- 1. The authority citation for part 71 continues to read as follows:

**Authority:** 49 U.S.C. 106(f), 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

#### § 71.1 [Amended]

- 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective September 15, 2019, is amended as follows:

*Paragraph 5000 Class D Airspace.*

\* \* \* \* \*

#### ANE NH D Nashua, NH [Amended]

Boire Field, NH

(Lat. 42°46'57" N, long. 71°30'51" W)

Pepperell Airport, MA

(Lat. 42°41'46" N, long. 71°33'00" W)

That airspace extending upward from the surface to and including 2,700 feet MSL within a 5-mile radius of Boire Field; excluding that airspace within a 2-mile radius of Pepperell Airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Chart Supplement.

*Paragraph 6004 Class E Airspace Designated as an Extension to Class D or E Surface Area.*

\* \* \* \* \*

#### ANE NH E4 Nashua, NH [Amended]

Boire Field, NH

(Lat. 42°46'57" N, long. 71°30'51" W)

Manchester VORTAC

(Lat. 42°52'07" N, long. 71°22'10" W)

That airspace extending upward from the surface within 1.1 miles on each side of the Manchester VORTAC 231° radial extending from the 5-mile radius to 8.4 miles northeast of Boire Field. This Class E airspace area is

effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Chart Supplement.

*Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.*

\* \* \* \* \*

#### ANE NH E5 Nashua, NH [Amended]

Boire Field, NH

(Lat. 42°46'57" N, long. 71°30'51" W)

That airspace extending upward from 700 feet above the surface within a 7.9-mile radius of Boire Field.

Issued in College Park, Georgia, on December 5, 2019.

**Matt Cathcart,**

*Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.*

[FR Doc. 2019–26856 Filed 12–13–19; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

#### 49 CFR Chapter III

[Docket No. FMCSA–2019–0151]

### National Association of the Deaf Petition for Rulemaking; Hearing Requirement for Commercial Motor Vehicle Drivers

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Petition for rulemaking; request for public comments.

**SUMMARY:** FMCSA requests public comments on the National Association of the Deaf's (NAD) petition for rulemaking to rescind the requirement for interstate drivers of commercial motor vehicles (CMVs) to be able to hear. NAD also requests that FMCSA amend the requirement that interstate drivers be able to speak, and the rule prohibiting the use of interpreters during the administration of the commercial driver's license (CDL) skills test. NAD believes the origins of the hearing requirement dates to a time of misguided stereotypes about the abilities and inabilities of deaf and hard of hearing individuals and the rules should now be changed.

**DATES:** Comments must be submitted by February 14, 2020.

**ADDRESSES:** You may submit comments identified by Docket Number FMCSA–2019–0151 using any of the following methods:

• *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments.

• *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.

• *Hand Delivery or Courier:* 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.

• *Fax:* (202) 493-2251.

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

**FOR FURTHER INFORMATION CONTACT:** Ms. Christine A. Hydock, Chief, Medical Programs Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, by telephone at (202) 366-4001, or by email at [fmcsamedical@dot.gov](mailto:fmcsamedical@dot.gov). If you have questions on viewing or submitting material to the docket, contact Docket Services, telephone (202) 366-9826.

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Submitting Comments**

If you submit a comment, please include the docket number for this document (Docket No. FMCSA-2019-0151), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online 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 telephone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to <http://www.regulations.gov>, put the docket number, FMCSA-2019-0151, in the keyword box, and click “Search.” When the new screen appears, click on the “Comment Now!” button and type your comment into the text box on 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 and may change this proposed rule based on your comments. FMCSA may issue a final rule at any time after the close of the comment period.

##### *Confidential Business Information*

Confidential Business Information (CBI) is commercial or financial information that is customarily not made available to the general public by the submitter. Under the Freedom of Information Act (5 U.S.C. 552), CBI is eligible for protection from public disclosure. If you have CBI that is relevant or responsive to this document, it is important that you clearly designate the submitted comments as CBI. Accordingly, please mark each page of your submission as “confidential” or “CBI.” Submissions designated as CBI and meeting the definition noted above will not be placed in the public docket of this document. Submissions containing CBI should be sent to Brian Dahlin, Chief, Regulatory Evaluation Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590-0001. Any commentary that FMCSA receives that is not specifically designated as CBI will be placed in the public docket for this document.

##### **B. Viewing Comments and Documents**

To view comments, as well as any documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>. Insert the docket number, FMCSA-2019-0151 in the keyword box, and click “Search.” Next, click the “Open Docket Folder” button and choose the document to review. If you do not have access to the internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

##### **C. 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](http://www.regulations.gov), as described in the system of records notice (DOT/ALL-

14 FDMS), which can be reviewed at [www.transportation.gov/privacy](http://www.transportation.gov/privacy).

## **I. Background**

### *A. The Hearing Standard and the Granting of Exemptions*

The current hearing standard under 49 CFR 391.41(b)(11) was adopted in 1970, with a revision in 1971 to allow drivers to be qualified under this standard while wearing a hearing aid, 35 FR 6458, 6463 (April 22, 1970) and 36 FR 12857 (July 3, 1971).<sup>1</sup>

On May 25, 2012, FMCSA published a notice requesting public comment on the application from NAD for an exemption from the regulatory requirement in 49 CFR 391.41(b)(11) on behalf of 45 deaf drivers (77 FR 31423). The Agency received 570 comments in response to that notice, and 40 of the 45 applicants were granted exemptions (78 FR 7479). Since that time, FMCSA has granted more than 450 hearing exemptions to individuals who do not meet the hearing standard. In doing so, FMCSA has published numerous **Federal Register** notices announcing receipt of hearing exemption applications and requesting public comment, prior to granting the individual exemptions. *See, e.g.*, 84 FR 5544 (February 21 2019); 84 FR 21392 (May 14, 2019).

### *B. Speaking Requirement for Interstate Drivers*

Currently, § 391.11(b)(2) requires that interstate CMV drivers read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records.

The requirement to speak was adopted on December 23, 1936 by the Interstate Commerce Commission (ICC), the Federal agency responsible for motor carrier safety prior to the establishment of the U.S. Department of Transportation. (1 M.C.C. 1, at 18-19).

On May 27, 1939, the ICC made certain changes and additions to the Motor Carrier Safety Regulations, including elimination of the exceptions granted by the original rules for those drivers unable to read and speak English. As stated in that notice, “The intent of the Commission to require such ability of all drivers in this service has been unmistakable since 1937, and the intervening period of more than two years is regarded as sufficient to justify the removal of the exception.” (14

<sup>1</sup> A hearing requirement has been included in the physical qualifications for commercial drivers since 1940. *Cf.* 4 FR 2294, 2295 (June 7, 1939).

M.C.C. 669, at 675). The requirements have remained essentially unchanged since the 1930s.

#### *C. Prohibition Against Interpreters During the CDL Skills Test*

On May 9, 2011 (76 FR 26854), FMCSA published a final rule amending the CDL knowledge and skills testing standards. The final rule included prohibitions against the use of interpreters during the administration of the CDL knowledge and skills tests. Section 383.133(b)(3) provides that the CDL knowledge tests may be administered in written form, verbally, or in automated format and can be administered in a foreign language, provided that no interpreter is used in administering the test. Section 383.133(c)(5) prohibits interpreters during the administration of skills tests. Paragraph (c)(5) also states that applicants must be able to understand and respond to verbal commands and instructions in English by a skills test examiner. Neither the applicant nor the examiner may communicate in a language other than English during the skills test.

#### *D. NAD Petition To Change the Rules*

NAD petitioned FMCSA to change its safety regulations so that deaf and hard of hearing individuals would be allowed to operate CMVs in interstate commerce. Although FMCSA has granted exemptions from § 391.41(b)(11) concerning physical qualifications for deaf and hard of hearing individuals as noted above, NAD believes the rule should be changed to eliminate the regulatory barrier to these individuals operating CMVs in interstate commerce. NAD also contends that both the hearing requirement for physical qualification to operate a commercial vehicle and the speaking requirement are violations of the Rehabilitation Act of 1973.<sup>2</sup> A copy of the petition is included in the docket referenced at the beginning of this document.

In granting the exemptions discussed above, the Agency did not provide relief from the requirement that drivers be able to communicate in English and the prohibition against interpreters during the CDL knowledge and skills tests. However, the Agency has provided clarifications on how these requirements should be applied in the context of deaf or hard of hearing individuals.

On December 29, 2017 (82 FR 61809), FMCSA published a notice announcing its response to certain substantive comments submitted to one of the

notices regarding the granting of exemptions from the hearing requirement for multiple drivers. The Agency explained that the restriction under 49 CFR 383.133(c)(5) does not mean that a skills test cannot be accomplished with a deaf or hard of hearing individual. The 2017 notice stated:

Generally, FMCSA has addressed this issue in formal guidance, which is found at Question 7 to 49 CFR 391.11(b)(2) (published on October 1, 2014 at 79 FR 59139). The guidance is premised on the position that the term “speak,” as used with the associated rule, should not be construed so narrowly as to find a deaf driver who does not use oral communication in violation of that regulation. Similarly, the term “verbal” in 49 CFR 383.133 should not be construed so narrowly when examiners are administering skills tests to applicants with a hearing exemption, and should be applied to permit communication in forms other than verbal. If the actual skills tests are administered without the aid of an interpreter, the State is in compliance with 49 CFR 383.133(c)(5). Additionally, as noted above, there are no prohibitions against the use of an interpreter prior to the skills test generally or in between the three segments of the test. Use of a skills test examiner who is capable of communicating via American Sign Language is also an option.

## **II. Requests for Public Comments**

After the publication of the December 29, 2017, notice, several motor carriers and CDL training providers shared with FMCSA their concerns about safety when it comes to behind-the-wheel training of deaf or hard of hearing individuals. Behind-the-wheel training requires communication between the instructor and the student while the vehicle is in motion under a variety of conditions. This includes operating on public roads in traffic, and at highway speeds. Given that deaf and hard of hearing individuals rely on sign language, written messages or other visual indicators, training providers have expressed concerns about safety when the students take their eyes off the road to focus on communication with the instructor.

Motor carriers also raised concerns about work-place safety with such individuals. Safety concerns include identifying effective alternatives to audible alerts and warnings for hazardous conditions, such as trucks backing around loading docks and driven around terminals.

The FMCSA requests public comments on NAD’s petition for rulemaking, with a focus on five areas of concern:

#### *Safety During CDL Training*

FMCSA’s hearing requirement is applicable to individuals who operate CMVs (as defined in 49 CFR 390.5) in interstate commerce, regardless of whether they are required to have a CDL. There are also some regulatory exemptions from the physical qualification requirements. See, generally, 49 CFR 390.3(f) and 391.2. Therefore, some individuals seeking CDL training have not been, and would not be, subject to the hearing standard. This includes, for example, individuals that drive or plan to drive for Federal, State or local government agencies that do not impose the same physical qualification requirements on their employees, etc. What actions have CDL training providers, including governmental entities providing such training, taken to address the needs of CDL applicants seeking employment opportunities in transportation sectors that are exempt from FMCSA’s physical qualifications standards and to what extent would these practices be helpful to training providers preparing drivers to operate in sectors subject to FMCSA’s physical qualifications standards? How do CDL training providers ensure safe operations during behind-the-wheel training of deaf and hard of hearing individuals on public roads?

#### *CDL Skills Test Administration*

With the granting of hearing exemptions as discussed above, some State Driver Licensing Agencies (SDLAs) have raised concerns about challenges administering the CDL skills test to deaf and hard of hearing individuals. The SDLAs expressed concern that the prohibition against interpreters during the skills test precludes the administration of the tests if the CDL examiner is not capable of communicating with sign language.

In addition, SDLAs have expressed concerns about safety of operations when the CDL examiner must communicate with the applicant while the vehicle is in operation on a public road.

FMCSA requests information from the SDLAs concerning challenges their examiners have experienced administering the CDL skills test under such circumstances and what accommodations, if any, have been made to complete the skills test while complying with the prohibition against the use of interpreters. The Agency also requests comment on steps taken to address or minimize the time applicants must take their eyes off the road to receive instruction or feedback from the CDL examiner.

<sup>2</sup> 29 U.S.C. 701, *et seq.*

## Workplace Safety

FMCSA has statutory direction to ensure that operation of a CMV does not have a deleterious effect on the health of CMV operators. To consider the impact of a change in the hearing requirement on driver health, the Agency requests comments from motor carriers about their concerns about ensuring the safety of deaf and hard of hearing individuals at facilities where trucks are loaded and unloaded, and terminals at which trucks may be operated with workers walking around. Under such scenarios, deaf or hard of hearing individuals would not be able to hear audible alarms or signals of workplace hazards. The Agency requests information about safety precautions that are being taken to accommodate such individuals and the experiences of these employers with workplace incidents and injuries.

### *Safety Impacts if FMCSA Grants NAD's Petition*

In consideration of the areas highlighted above, the Agency request comments on whether the Agency should grant NAD's petition for rulemaking, in whole or in part, and initiate a notice-and-comment rulemaking proceeding. The Agency seeks information on whether a regulatory change would significantly increase the number of individuals seeking training and employment as interstate CMV drivers. Also, would CDL training providers and motor carriers face additional challenges if the population of deaf and hard of hearing individuals seeking entry into the industry increased significantly?

### *Granting of Hearing Exemptions*

As noted above, the Agency has granted more than 450 hearing exemptions since 2012. The exemptions cover a range of circumstances necessitating relief from the hearing standard, from individuals with CDLs in need of an exemption to allow them to operate in interstate commerce, to individuals seeking a CDL to begin a career in the interstate motor carrier industry. The exemptions also cover individuals interested in operating CMVs for which a CDL is not required. If FMCSA denies the NAD petition for rulemaking, should the Agency continue granting exemptions, or consider limiting the exemptions to certain categories such as individuals intending to operate CMVs for which a CDL is not required, or individuals who already hold a CDL?

Issued under authority delegated in 49 CFR 1.87 on: December 10, 2019.

**Jim Mullen,**

*Acting Administrator.*

[FR Doc. 2019-26942 Filed 12-13-19; 8:45 am]

**BILLING CODE 4910-EX-P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 600

[Docket No. 191209-0103]

RIN 0648-B182

#### Clarification of Magnuson-Stevens Fishery Conservation and Management Act Regulation Regarding Monitor National Marine Sanctuary; Proposed Rulemaking

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS is proposing to clarify its regulation which interprets other regulations to prohibit all fishing in the Monitor National Marine Sanctuary (Sanctuary). This is inconsistent with the applicable Sanctuary regulation that prohibits some, but not all, fishing activity in the Sanctuary. This proposed rule would revise regulations by removing the fishing prohibition text and cross-referencing the Sanctuary regulations instead.

**DATES:** Comments must be received by January 15, 2020.

**ADDRESSES:** You may submit comments, identified by NOAA-NMFS-2019-0114, by the following method:

*Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking portal: <http://www.regulations.gov>.

*Instructions:* All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

NMFS will accept anonymous comments.

**FOR FURTHER INFORMATION CONTACT:** Chris Wright, Fishery Policy Analyst, 301-427-8504, or via email [chris.wright@noaa.gov](mailto:chris.wright@noaa.gov).

## SUPPLEMENTARY INFORMATION:

### Background

The Sanctuary was designated as the nation's first national marine sanctuary in 1975. The site protects the wreck of the famed Civil War ironclad U.S.S. Monitor. The U.S.S. Monitor is located approximately 15 miles southeast of Cape Hatteras, North Carolina. The Sanctuary currently surrounds the shipwreck and consists of a vertical column of water one mile (1.61 km) in diameter (0.78 square miles (2.02 square km) in size) extending from the seabed to the surface, the center of which is at 35°00'23" north latitude and 75°24'32" west longitude (15 CFR 922.60). The U.S.S. Monitor is in water depths of 240 feet (22.3 m).

Fishing in Federal waters off North Carolina is economically and socially vital to the state's residents, visitors, and coastal communities. Commercial and recreational fishing provides an important source of employment, income, recreation, and food, and is a significant driver for local tourism.

The United States claims sovereign rights and exclusive fishery management authority over fish within the U.S. Exclusive Economic Zone (EEZ), an area extending 200 nautical miles (370.4 km) from the seaward boundary of coastal states and U.S. territories (16 U.S.C. 1811(a)). Within the EEZ, Federal fishery management is conducted under the authority of the Magnuson Stevens Fishery Conservation and Management Act (MSA) (16 U.S.C. 1801 *et seq.*). NMFS, acting under authority delegated from the Secretary of Commerce, is responsible for managing fisheries pursuant to the MSA. To assist in fishery management, the MSA established eight regional fishery management councils that develop and submit fishery management plans to NMFS (16 U.S.C. 1852(a)) for specific geographic areas. NMFS is responsible for developing fishery management plans for Atlantic highly migratory species (16 U.S.C. 1852(a)(3)).

This action affects regulations codified in the General Provisions for Domestic Fisheries (50 CFR part 600, subpart H). The proposed action would alleviate the potential for confusion regarding the fishing restrictions applicable to the Monitor National Marine Sanctuary or other sanctuaries. NMFS is taking this action pursuant to MSA § 305(d), which gives the Agency general authority to carry out fishery management plans adopted under the MSA.

### Current Regulations Affecting Fishing

A Sanctuary regulation (15 CFR 922.61) includes specific restrictions applicable to fishing. Provisions that limit fishing and activities associated with fishing are: Anchoring in any manner, stopping, remaining, or drifting without power at any time; diving of any type, whether by an individual or by a submersible; lowering below the surface of the water any grappling, suction, conveyor, dredging or wrecking device; and trawling.

In reviewing its regulations, NMFS noted that 50 CFR 600.705(f) cross-references the Sanctuary regulation, but includes broader language that prohibits “all fishing activity” in the Sanctuary.

The marine sanctuary regulations under 15 CFR part 924 were changed to 15 CFR part 922, on December 27, 1995 (60 FR 66875). The broader prohibition on all fishing at 50 CFR 600.705(f) appears to be inadvertent and the result of consolidation of regulations for specific fisheries into the General Provisions for Domestic Fisheries.

### Proposed Action

This proposed action will remove text at 50 CFR 600.705(f), which states that all fishing in the Sanctuary is prohibited by Sanctuary regulations. This text is unnecessary and inconsistent with the Sanctuary’s regulations and policies, which prohibit some, but not all, fishing activity in the Sanctuary. In 50 CFR 600.705(f), NMFS will retain an updated cross-reference to the Office of National Marine Sanctuaries’ regulations at 15 CFR part 922.

### Classification

The NMFS Assistant Administrator has determined that the proposed rule is consistent with the MSA and other applicable laws, subject to further consideration after public comment.

This proposed action has been determined to be not significant for the purposes of Executive Order 12866.

This rule is expected to be an Executive Order 13771 deregulatory action.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. A description of the factual basis for this determination follows.

This proposed rule removes an unnecessary fishery regulation that inadvertently included an overly broad interpretation of a Sanctuary regulation. The existing Sanctuary regulation will

continue to prohibit stopping, remaining, or drifting without power in the Sanctuary, which significantly curtails most fishing activity in the Sanctuary. The proposed action could result in a slight increase in fishing activity in the Sanctuary, to the extent that NMFS’s regulation had discouraged such activity.

This rule would remove an unnecessary regulation that applies to vessels (businesses) in the commercial harvesting and for-hire fishing industries. The SBA has established size criteria for all major industry sectors in the U.S., including fish harvesters. On December 29, 2015, NMFS issued a final rule establishing a small business size standard of \$11 million in annual gross receipts for all businesses primarily engaged in the commercial fishing industry (NAICS 11411) for Regulatory Flexibility Act (RFA) compliance purposes only (80 FR 81194). The \$11 million standard became effective on July 1, 2016, and is to be used in place of the SBA’s current standards of \$20.5 million, \$5.5 million, and \$7.5 million for the finfish (NAICS 114111), shellfish (NAICS 114112), and other marine fishing (NAICS 114119) sectors of the U.S. commercial fishing industry in all NMFS rules subject to the RFA after July 1, 2016 (80 FR 81194, December 29, 2015).

On July 18, 2019, the SBA issued an interim final rule (84 FR 34261) effective August 19, 2019, that adjusted the monetary-based industry size standards (*i.e.*, receipts- and assets-based) for inflation for many industries. For fisheries for-hire businesses, the rule changes the small business size standard from \$7.5 million in annual gross receipts to \$8 million (See 84 FR at 34273) (adjusting NAICS 487990 (Scenic and Sightseeing Transportation, Other)).

Commercial fishing vessels whose owners possess valid commercial permit(s) for the South Atlantic EEZ (*e.g.*, Tunas General category, Atlantic Tunas Longline, Atlantic Tunas Harpoon, Dolphin/Wahoo, and Atlantic Swordfish General Commercial) and harvest eligible species with hook and line or longline gear off the coast of North Carolina may be affected by this rule. As of May 7, 2019, 2633 vessels with valid commercial permits for the South Atlantic EEZ reported landings using hook and line or longline gear with 233 hailing from North Carolina. Of these, 82 of the 233 vessels landed in North Carolina in 2018. These 82 entities could be directly affected by this action.

The for-hire fleet is comprised of charter vessels, which charge a fee on a

vessel basis, and headboats, which charge a fee on an individual angler (head) basis. The harvest of various species in the EEZ by for-hire vessels requires a charter vessel/headboat permit (*e.g.*, Atlantic Highly Migratory Species Charter/Headboat, Atlantic Charter/Headboat for Dolphin Wahoo, South Atlantic Charter/Headboat for Pelagic Fish, and South Atlantic Charter/Headboat for Snapper/Grouper). The registration address for the Federal permit does not restrict operation to Federal waters off that state. As of September 19, 2019, there were 4904 vessels with valid or renewable for-hire permits. Of the 4904 vessels, 497 vessels were registered in North Carolina, with several entities owning multiple vessels. Based on the registered permit address, 439 for-hire businesses eligible to fish in the EEZ off North Carolina could be directly affected by the proposed action.

The Sanctuary is relatively small, covering approximately one mile (1.61 km) in diameter (0.78 square miles in size; 2.02 square km). Limited data is available to determine how much harvesting activity is currently occurring or may occur in the Sanctuary if NMFS clarifies its regulation as proposed. As such, it is not possible to quantitatively determine the potential effects of this proposed rule. Considerable uncertainty exists regarding those potential effects. However, it is highly likely the economic benefits would be neutral to a slight increase. Vessels that might have been discouraged from fishing by NMFS’s regulation may seek to fish in the Sanctuary, consistent with the Sanctuary regulations, if NMFS’s rule is clarified as proposed. However, given the presence of similar or better fishing grounds closer to shore which are not subject to the Sanctuary’s restrictions, vessels may not seek to fish in the Sanctuary.

NMFS assumes that the 82 commercial fishing vessels and 439 for-hire businesses, described above, are small entities and has determined that possible impacts of this proposed rule on those entities will not be significant.

Because this rule, if implemented, is not expected to have a significant adverse economic effect on the profits of a substantial number of small entities, an initial regulatory flexibility analysis is not required and none has been prepared.

### List of Subjects in 50 CFR Part 600

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: December 9, 2019.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator, National Marine Fisheries Service.*

For the reasons stated in the preamble, 50 CFR part 600 is proposed to be amended as follows:

**PART 600—MAGNUSON-STEVENS ACT PROVISIONS**

■ 1. The authority citation for part 600 continues to read as follows:

**Authority:** 5 U.S.C. 561 and 16 U.S.C. 1801 *et seq.*

■ 2. In § 600.705, revise paragraph (f) to read as follows:

**§ 600.705 Relation to other laws.**

\* \* \* \* \*

(f) *Marine sanctuaries.* Regulations governing fishing activities inside the boundaries of national marine sanctuaries are set forth in 15 CFR part 922.

\* \* \* \* \*

[FR Doc. 2019-27052 Filed 12-13-19; 8:45 am]

**BILLING CODE 3510-22-P**

# Notices

Federal Register

Vol. 84, No. 241

Monday, December 16, 2019

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## AGENCY FOR INTERNATIONAL DEVELOPMENT

### Agency Information Collection Activity; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Title II Vegetable Oil Packaging Survey

**AGENCY:** Office of Food for Peace (FFP), United States Agency for International Development (USAID) .

**ACTION:** Availability of survey.

**SUMMARY:** The U.S. Agency for International Development (USAID) is issuing a survey on Food for Peace (FFP) Title II vegetable oil packaging to collect information on the quality and condition of vegetable oil packaging and what problems or challenges should be prioritized and addressed. Data collected from the survey will be compiled and shared with survey participants and be used to make improvements to Title II vegetable oil.

**DATES:** Comments are due by February 14, 2020.

**ADDRESSES:** Interested persons are invited to submit comments regarding the proposed information collection to Angela Roberts, USAID, Bureau for Democracy, Conflict & Humanitarian Assistance, Office of Food for Peace at [angroberts@usaid.gov](mailto:angroberts@usaid.gov).

**FOR FURTHER INFORMATION CONTACT:** Angela Roberts, 703-775-6140, [angroberts@usaid.gov](mailto:angroberts@usaid.gov).

**Greg Olson,**

*Food for Peace Program Operations Division Chief.*

[FR Doc. 2019-27026 Filed 12-13-19; 8:45 am]

**BILLING CODE 6116-01-P**

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

[Order No. 2089]

#### Reorganization of Foreign-Trade Zone 213 Under Alternative Site Framework; Fort Myers, Florida

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

*Whereas*, the Foreign-Trade Zones (FTZ) Act provides for “. . . the establishment . . . of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,” and authorizes the Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

*Whereas*, the Board adopted the alternative site framework (ASF) (15 CFR Sec. 400.2(c)) as an option for the establishment or reorganization of zones;

*Whereas*, the Lee County Port Authority, grantee of Foreign-Trade Zone 213, submitted an application to the Board (FTZ Docket B-46-2019, docketed July 25, 2019) for authority to reorganize under the ASF with a service area of Charlotte, Collier and Lee Counties, Florida, in and adjacent to the Fort Myers, Florida U.S. Customs and Border Protection port of entry, and FTZ 213's existing Sites 1 through 7 would be categorized as magnet sites;

*Whereas*, notice inviting public comment was given in the **Federal Register** (84 FR 37237-37238, July 31, 2019) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

*Whereas*, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied;

*Now, therefore*, the Board hereby orders:

The application to reorganize FTZ 213 under the ASF is approved, subject to the FTZ Act and the Board's regulations, including Section 400.13, to the Board's standard 2,000-acre activation limit for the zone, and to an ASF sunset provision for magnet sites that would terminate authority for Sites 2 through

7 if not activated within five years from the month of approval.

Dated: December 9, 2019.

**Jeffrey I. Kessler,**

*Assistant Secretary for Enforcement and Compliance, Alternate Chairman, Foreign-Trade Zones Board.*

[FR Doc. 2019-27034 Filed 12-13-19; 8:45 am]

**BILLING CODE 3510-DS-P**

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

[Order No. 2090]

#### Approval of Subzone Status ProAmpac Holdings, Inc.; Westfield, Massachusetts

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a-81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

*Whereas*, the Foreign-Trade Zones (FTZ) Act provides for “. . . the establishment . . . of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,” and authorizes the Foreign-Trade Zones Board to grant to qualified corporations the privilege of establishing foreign-trade zones in or adjacent to U.S. Customs and Border Protection ports of entry;

*Whereas*, the Board's regulations (15 CFR part 400) provide for the establishment of subzones for specific uses;

*Whereas*, the Holyoke Economic Development and Industrial Corporation, grantee of Foreign-Trade Zone 201, has made application to the Board for the establishment of a subzone at the facilities of ProAmpac Holdings, Inc., located in Westfield, Massachusetts (FTZ Docket B-51-2019, docketed August 13, 2019);

*Whereas*, notice inviting public comment has been given in the **Federal Register** (84 FR 41956-41957, August 16, 2019) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

*Whereas*, the Board adopts the findings and recommendations of the examiner's memorandum, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied;

*Now, therefore*, the Board hereby approves subzone status at the facility of

ProAmpac Holdings, Inc., located in Westfield, Massachusetts (Subzone 201D), as described in the application and **Federal Register** notice, subject to the FTZ Act and the Board's regulations, including Section 400.13.

Dated: December 9, 2019.

**Jeffrey I. Kessler,**

*Assistant Secretary for Enforcement and Compliance, Alternate Chairman, Foreign-Trade Zones Board.*

[FR Doc. 2019-27040 Filed 12-13-19; 8:45 am]

BILLING CODE 3510-DS-P

## DEPARTMENT OF COMMERCE

### International Trade Administration

#### Announcement of Trade Mission to the Caribbean Region in Conjunction With the Trade Americas—Business Opportunities in the Caribbean Region Conference

**AGENCY:** International Trade Administration, Department of Commerce.

**ACTION:** Notice.

**SUMMARY:** The United States Department of Commerce, International Trade Administration (ITA) is announcing the following upcoming trade mission that will be recruited, organized, and implemented by ITA:

Trade Mission to the Caribbean Region in conjunction with the Trade Americas—Business Opportunities in the Caribbean Region Conference—May 31–June 5, 2020

A summary of the mission is found below. Application information and more detailed mission information, including the commercial setting and sector information, can be found at the trade mission website: <http://export.gov/trademissions>.

Recruitment for the mission will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (<http://export.gov/trademissions>) and other internet websites, press releases to general and trade media, direct mail, broadcast fax, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows.

**FOR FURTHER INFORMATION CONTACT:** Gemal Brangman, Trade Promotion Programs, Industry and Analysis, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington DC 20230; telephone (202) 482-3773.

#### The Following Conditions for Participation Will Be Used for Each Mission

Applicants must submit a completed and signed mission application and supplemental application materials, including adequate information on their products and/or services, primary market objectives, and goals for participation. If the Department of Commerce receives an incomplete application, the Department may either: Reject the application, request additional information/clarification, or take the lack of information into account when evaluating the application. If the requisite minimum number of participants is not selected for the mission by the recruitment deadline, the mission may be cancelled.

Each applicant must also certify that the products and services it seeks to export through the mission are either produced in the United States, or, if not, are marketed under the name of a U.S. firm and have at least fifty-one percent U.S. content by value. In the case of a trade association or organization, the applicant must certify that, for each firm or service provider to be represented by the association/organization, the products and/or services the represented firm or service provider seeks to export are either produced in the United States or, if not, marketed under the name of a U.S. firm and have at least 51% U.S. content by value.

A trade association/organization applicant must certify to the above for all of the companies it seeks to represent on the mission.

In addition, each applicant must:

- Certify that the export of the products and services that it wishes to market through the mission would be in compliance with U.S. export controls and regulations;
- Certify that it has identified any matter pending before any bureau or office in the Department of Commerce;
- Certify that it has identified any pending litigation (including any administrative proceedings) to which it is a party that involves the Department of Commerce; and
- Sign and submit an agreement that it and its affiliates (1) have not and will not engage in the bribery of foreign officials in connection with a company's/participant's involvement in this mission, and (2) maintain and enforce a policy that prohibits the bribery of foreign officials.

In the case of a trade association/organization, the applicant must certify that each firm or service provider to be represented by the association/organization can make the above certifications.

#### The Following Selection Criteria Will Be Used for the Mission

Targeted mission participants are U.S. firms, services providers, and trade associations/organizations providing or promoting U.S. products and services, that have an interest in entering or expanding their business in the mission's destination countries. The following criteria will be evaluated in selecting participants:

- Suitability of the applicant's (or in the case of a trade association/organization, represented firms' or service providers') products or services to these markets;
- The applicant's (or in the case of a trade association/organization, represented firms' or service providers') potential for business in the markets, including likelihood of exports resulting from the mission; and
- Consistency of the applicant's (or in the case of a trade association/organization, represented firms' or service providers') goals and objectives with the stated scope of the mission.

Balance of company size and location may also be considered during the review process. Referrals from a political party or partisan political group or any information, including on the application, containing references to political contributions or other partisan political activities will be excluded from the application and will not be considered during the selection process. The sender will be notified of these exclusions.

#### Trade Mission Participation Fees

If and when an applicant is selected to participate on a particular mission, a payment to the Department of Commerce in the amount of the designated participation fee below is required. Upon notification of acceptance to participate, each applicant selected has 5 business days to submit payment or the acceptance may be revoked.

Participants selected for a trade mission will be expected to pay for the cost of personal expenses, including, but not limited to, international travel, lodging, meals, transportation, communication, and incidentals, unless otherwise noted. Participants will, however, be able to take advantage of U.S. Government rates for hotel rooms. In the event that a mission is cancelled, no personal expenses paid in anticipation of a mission will be reimbursed. However, participation fees for a cancelled mission will be reimbursed to the extent they have not already been expended in anticipation of the mission.

If a visa is required to travel on a particular mission, applying for and obtaining such a visa will be the responsibility of the mission participant. Government fees and processing expenses to obtain such a visa are not included in the participation fee. However, the Department of Commerce will provide instructions to each participant on the procedures required to obtain business visas. Trade Mission members participate in trade missions and undertake mission-related travel at their own risk. The nature of the security situation in a given foreign market at a given time cannot be guaranteed. The U.S. Government does not make any representations or guarantees as to the safety or security of participants. The U.S. Department of State issues U.S. Government international travel alerts and warnings for U.S. citizens available at <https://travel.state.gov/content/passports/en/alertswarnings.html>. Any question regarding insurance coverage must be resolved by the participant and its insurer of choice.

**Definition of Small and Medium Sized Enterprise**

For purposes of assessing participation fees, an applicant is a small or medium-sized enterprise (SME) if it qualifies under the Small Business Administration’s (SBA) size standards (<https://www.sba.gov/document/>

*support--table-size-standards*), which vary by North American Industry Classification System (NAICS) Code. The SBA Size Standards Tool [<https://www.sba.gov/size-standards/>] can help you determine the qualifications that apply to your company.

*Mission List:* (additional information about the mission can be found at <http://export.gov/trademissions>).

**Trade Mission to the Caribbean Region in Conjunction With the Trade Americas—Business Opportunities in the Caribbean Region Conference, Dates: May 31–June 5, 2020**

*Summary*

The U.S. Department of Commerce, International Trade Administration, in partnership with the U.S. Department of State, is organizing a trade mission to the Caribbean region that will include participation in the *Trade Americas—Business Opportunities in the Caribbean Region Conference* in Bridgetown, Barbados on May 31–June 1, 2020.

The conference will focus on region-specific sessions, market access, fair trade, disaster preparedness and recovery, logistics, and trade financing resources as well as prearranged one-one-one consultations with US&FCS Commercial Officers and/or Department of State Economic/Commercial Officers with expertise in markets throughout the region. The mission is open to U.S. companies from a cross-section of

industries with growth potential in the Caribbean region, but is focused on U.S. companies in best prospects sectors such as automotive parts and services, construction equipment/road building machinery/building products/ infrastructure projects, medical equipment and devices/ pharmaceuticals, ICT, energy equipment and services, safety and security equipment, hotel and restaurant equipment, franchising, manufacturing equipment, yachting industry/maritime services/sailing equipment, marine ports, aviation/airports, waste management, and water treatment and supply. All selected trade mission participants will attend the conference in Barbados and will have business-to-business meetings in up to two markets in the region, selecting from: Barbados/ Eastern Caribbean, Dominican Republic, Guyana, Haiti, Jamaica, Suriname, The Bahamas, and Trinidad and Tobago.

The combination of participation in the *Trade Americas—Business Opportunities in the Caribbean Region Conference* and business-to-business matchmaking appointments in the Caribbean region markets, will provide participants with access to substantive information about and strategies for entering or expanding their business across the Caribbean region. The United States holds a dominant supplier position in the Caribbean region.

**PROPOSED TIMETABLE**

Saturday, May 30, 2020 .....	Travel Day/Arrival in Barbados. <i>Optional Local Tour/Activities.</i>
Sunday, May 31, 2020 .....	Barbados. Afternoon: Registration, Briefing and U.S. Embassy Officer Consultations. Evening: Networking Reception.
Monday, June 1, 2020 .....	Barbados. Morning: Registration and Trade Americas—U.S.-Caribbean Business Conference. Afternoon: U.S. Embassy Officer Consultations. Evening: Networking Reception.
<b>Optional</b>	
Tuesday, June 2, 2020 .....	Barbados/Eastern Caribbean Region Business-to-Business Meetings or Travel day.
June 3–5, 2020 .....	Travel day or Business-to-Business Meetings in: Option (A) Dominican Republic. Option (B) Guyana. Option (C) Haiti. Option (D) Jamaica. Option (E) Suriname. Option (F) The Bahamas. Option (H) Trinidad & Tobago.

**Participation Requirements**

All parties interested in participating in the U.S. Department of Commerce Trade Mission to the Caribbean Region must complete and submit an application package for consideration by the Department of Commerce. All applicants will be evaluated on their ability to meet certain conditions and best satisfy the selection criteria as outlined below.

A minimum of 20 and a maximum of 30 companies will be selected to

participate in the mission on a first-come first-serve basis. During the registration process, applicants will be able to select what countries for which they would like to receive a brief market assessment. Once they receive their brief market assessment report, they will be able to select up to two markets to which they would like to travel for their business to business meetings.

All selected participants will attend the conference in Barbados and will

have business-to-business meetings in up to two markets in the region.

The number of companies that may be selected for each country are as follows: 20 Companies for Barbados/Eastern Caribbean; 30 companies for the Dominican Republic; 5 companies for Guyana; 5 companies for Haiti; 5 companies for Jamaica; 5 companies for Suriname; 5 companies for The Bahamas; and 5 companies for Trinidad and Tobago.

The Trade Mission is open to U.S. companies already doing business in the region that are seeking to expand their market share and to those U.S. companies new to the region.

### Fees and Expenses

After a company has been selected to participate on the mission, a payment to the Department of Commerce in the form of a participation fee is required.

For business-to-business meetings in one market, the participation fee will be \$2,300 for a small or medium-sized enterprise (SME)\* and \$3,500 for a large firm.

For business-to-business meetings in two markets, the participation fee will be \$3,300 for a small or medium-sized enterprise (SME) \* and \$4,500 for a large firm.

The mission participation fee includes a brief market assessment for the countries that were selected in the registration process, market briefings, networking receptions, lunch and coffee breaks during the conference, interpretation and transportation associated with the business-to-business meetings in the region, and U.S. Embassy officer consultations.

The Trade Americas—Business Opportunities in the Caribbean Region Conference registration fee is \$650 for one participant from each firm.

There will be a \$300 fee for each additional firm representative (large firm or SME) that wishes to participate in business-to-business meetings.

### Timeframe for Recruitment and Application

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar on [www.export.gov](http://www.export.gov), the Trade Americas web page at <http://export.gov/tradeamericas/index.asp>, and other internet websites, press releases to the general and trade media, direct mail and broadcast fax, notices by industry trade associations and other multiplier groups and announcements at industry meetings, symposia, conferences, and trade shows.

Recruitment for the mission will begin immediately and conclude no later than Friday, April 17, 2020. The U.S. Department of Commerce will review applications and make selection decisions on a rolling basis until the maximum of 30 participants are selected. After April 17, 2020, companies will be considered only if space and scheduling constraints permit.

### Contacts

U.S. Trade Americas Team Contact Information:

Delia Valdivia, Senior International Trade Specialist, U.S. Commercial Service—Los Angeles (West), CA, [delia.valdivia@trade.gov](mailto:delia.valdivia@trade.gov), Tel: 310–597–8218

Diego Gattesco, Director, U.S. Commercial Service—Wheeling, WV, [Diego.Gattesco@trade.gov](mailto:Diego.Gattesco@trade.gov), Tel: 304–243–5493

Caribbean Region Contact Information:

Bryan Larson, Regional Senior Commercial Officer, U.S. Commercial Service—U.S. Embassy Santo Domingo, Dominican Republic, [Bryan.Larson@trade.gov](mailto:Bryan.Larson@trade.gov)

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**BILLING CODE 3510-DR-P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A–570–092]

### Mattresses From the People's Republic of China: Antidumping Duty Order

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** Based on the affirmative final determination by the Department of Commerce (Commerce) and the International Trade Commission (ITC), Commerce is issuing the antidumping duty (AD) order on mattresses from the People's Republic of China (China).

**DATES:** Applicable December 16, 2019.

**FOR FURTHER INFORMATION CONTACT:** Stephen Bailey or Jonathan Hill, 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) 482–0193 and (202) 482–3518, respectively.

### SUPPLEMENTARY INFORMATION:

#### Background

In accordance with sections 735(d) and 777(i) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.210(c), on October 23, 2019,

Commerce published its affirmative final determination of sales at less-than-fair-value (LTFV) of mattresses from China.<sup>1</sup> On December 9, 2019, the ITC notified Commerce of its final affirmative determination that an industry in the United States is materially injured by reason of LTFV imports of mattresses from China, within the meaning of section 735(b)(1)(A)(i) of the Act.<sup>2</sup>

### Scope of the Order

The product covered by this order is mattresses from China. For a complete description of the scope of the orders, see the Appendix to this notice.

### Order

In accordance with section 735(d) of the Act, the ITC notified Commerce of its final determination that an industry in the United States is materially injured within the meaning of section 735(b)(1)(A)(i) of the Act by reason of imports of mattresses from China that are sold in the United States at LTFV.<sup>3</sup> The ITC also made a determination that critical circumstances do not exist with respect to imports of mattresses from China subject to Commerce's critical circumstances finding.<sup>4</sup> Therefore, in accordance with section 735(c)(2) of the Act, we are issuing this order. Because the ITC determined that imports of mattresses from China are materially injuring a U.S. industry, unliquidated entries of such merchandise from China entered, or withdrawn from warehouse, for consumption are subject to the assessment of antidumping duties.

As a result of the ITC's final determination, in accordance with section 736(a)(1) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to assess, upon further instruction by Commerce, antidumping duties equal to the amount by which the normal value of the merchandise exceeds the export price, or constructed export price, of the subject merchandise for all relevant entries of mattresses from China. Antidumping duties will be assessed on unliquidated entries of mattresses from China entered, or withdrawn from warehouse, for consumption on or after June 4, 2019,

<sup>1</sup> See *Mattresses from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Affirmative Determination of Critical Circumstances, in Part*, 84 FR 56761 (October 23, 2019) (*Final Determination*).

<sup>2</sup> See ITC Notification Letter regarding ITC Investigation No. 731–TA–1424 (December 9, 2019) (ITC Notification).

<sup>3</sup> *Id.*

<sup>4</sup> See *Mattresses From China*, 84 FR 67958 (December 12, 2019) (*ITC Mattress Final*) and *Mattresses From China Investigation No. 731–TA–1424 (FINAL)*, Publication 5000, December 2019.

the date of publication of the *Preliminary Determination*, but antidumping duties will not be assessed on entries of subject merchandise after the expiration of the provisional measures period and before publication in the **Federal Register** of the ITC's final injury determination, as further described below.<sup>5</sup>

**Continuation of Suspension of Liquidation**

Except as noted in the "Provisional Measures" section of this notice below, in accordance with section 735(c)(1)(B) of the Act, Commerce intends to instruct CBP to continue to suspend liquidation on all relevant entries of mattresses from China. These instructions suspending liquidation will remain in effect until further notice.

Commerce also intends to instruct CBP to require cash deposits equal to the estimated weighted-average dumping margins indicated in the table below. Given that the provisional measures period has expired, as explained below, effective on the date of publication in the **Federal Register** of the notice of the ITC's final affirmative injury determination, CBP will require, at the same time as importers would normally deposit estimated duties on subject merchandise, a cash deposit equal to the estimated weighted-average

dumping margins listed in the table below.<sup>6</sup> The China-wide entity rate applies to all exporter-producer combinations not specifically listed.

**Provisional Measures**

Section 733(d) of the Act states that suspension of liquidation pursuant to an affirmative preliminary determination may not remain in effect for more than four months, except where exporters representing a significant proportion of exports of the subject merchandise request that Commerce extend the four-month period to no more than six months. At the request of exporters that account for a significant proportion of mattresses from China, Commerce extended the four-month period to six months in this proceeding.<sup>7</sup> In the underlying investigation, Commerce published the *Preliminary Determination* on June 4, 2019. Hence, the extended provisional measures period, beginning on the date of publication of the *Preliminary Determination*, ended on November 30, 2019.

Therefore, in accordance with section 733(d) of the Act and our practice, Commerce intends to instruct CBP to terminate the suspension of liquidation and to liquidate, without regard to antidumping duties, unliquidated entries of mattresses from China,

entered, or withdrawn from warehouse, for consumption after November 30, 2019, the final day on which the provisional measures were in effect, through the day preceding the date of publication of the ITC's final affirmative injury determination in the **Federal Register**.<sup>8</sup> Suspension of liquidation and the collection of cash deposits will resume on the date of publication of the ITC's final determination in the **Federal Register**.

**Critical Circumstances**

With regard to the ITC's negative critical circumstances determination on imports of mattresses from China, Commerce intends to instruct CBP to lift suspension and to refund any cash deposits made to secure the payment of estimated antidumping duties with respect to entries of subject merchandise entered, or withdrawn from warehouse, for consumption on or after March 6, 2019 (*i.e.*, 90 days prior to the date of publication of the *Preliminary Determination*), but before June 4, 2019, (*i.e.*, the date of publication of the *Preliminary Determination*).

**Estimated Weighted-Average Dumping Margins**

The estimated weighted-average dumping margin percentages are as follows:

Exporter	Producer	Estimated weighted-average dumping margin (percent)
Healthcare Co., Ltd .....	Healthcare Co., Ltd .....	57.03
Zinus Inc./Zinus Xiamen Inc./Zinus Zhangzhou Inc <sup>9</sup> .....	Zinus Inc./Zinus Xiamen Inc./Zinus Zhangzhou Inc .....	192.04
Dockter China Limited .....	Dongguan Beijianing Household Products Co., Ltd (a.k.a. Better Zs, Ltd.) .....	162.76
Dockter China Limited .....	Healthcare Co., Ltd .....	162.76
Dockter China Limited .....	Huizhou Lemeijia Household Products Co., Ltd. (a.k.a. Better Zs, Ltd.) .....	162.76
Foshan Chiland Furniture Co., Ltd .....	Foshan Chiland Furniture Co., Ltd .....	162.76
Foshan City Jinxingma Furniture Manufacture Co., Ltd .....	Foshan City Jinxingma Furniture Manufacture Co., Ltd .....	162.76
Foshan City Kewei Furniture Co., Ltd .....	Foshan City Kewei Furniture Co., Ltd .....	162.76
Foshan City Shunde Haozuan Furniture Co., Ltd .....	Foshan City Shunde Haozuan Furniture Co., Ltd .....	162.76
Foshan EON Technology Industry Co., Ltd .....	Foshan EON Technology Industry Co., Ltd .....	162.76
Foshan Mengruo Household Furniture Co., Ltd .....	Foshan Mengruo Household Furniture Co., Ltd .....	162.76
Foshan Qisheng Sponge Co., Ltd .....	Foshan Qisheng Sponge Co., Ltd .....	162.76
Foshan Ruixin Non Woven Co., Ltd .....	Foshan Ruixin Non Woven Co., Ltd .....	162.76
Foshan Sulong Furniture Co. Ltd .....	Foshan Sulong Furniture Co. Ltd .....	162.76
Foshan Ziranbao Furniture Co., Ltd .....	Foshan Ziranbao Furniture Co., Ltd .....	162.76
Guangdong Diglant Furniture Industrial Co., Ltd .....	Guangdong Diglant Furniture Industrial Co., Ltd .....	162.76
Healthcare Sleep Products Limited .....	Healthcare Co., Ltd .....	162.76
Hong Kong Gesin Technology Limited .....	Inno Sports Co., Ltd .....	162.76
Inno Sports Co., Ltd .....	Inno Sports Co., Ltd .....	162.76
Jiangsu Wellcare Household Articles Co., Ltd .....	Jiangsu Wellcare Household Articles Co., Ltd .....	162.76
Jiashan Nova Co., Ltd .....	Jiashan Nova Co., Ltd .....	162.76

<sup>5</sup> See *Mattresses From the People's Republic of China: Preliminary Determination of Sales at Less-Than-Fair-Value, Postponement of Final Determination and Affirmative Preliminary Determination of Critical Circumstances*, 84 FR 25732 (June 4, 2019) (*Preliminary Determination*).

<sup>6</sup> See section 736(a)(3) of the Act.

<sup>7</sup> *Preliminary Determination*, 84 FR at 25735.

<sup>8</sup> See *ITC Mattress Final*.

<sup>9</sup> See Memorandum, "Antidumping Duty Investigation of Mattresses from the People's

Republic of China: Final Determination of Affiliation/Single Entity Treatment of Zinus Xiamen Inc., Zinus Zhangzhou Inc., and Zinus Inc.," dated October 17, 2019.

Exporter	Producer	Estimated weighted-average dumping margin (percent)
Jiaying Taien Springs Co., Ltd .....	Jiaying Taien Springs Co., Ltd .....	162.76
Jiaying Visco Foam Co., Ltd .....	Jiaying Visco Foam Co., Ltd .....	162.76
Jinlongheng Furniture Co., Ltd .....	Jinlongheng Furniture Co., Ltd .....	162.76
Luen Tai Group (China) Limited .....	Shenzhen L&T Industrial Co., Ltd .....	162.76
Luen Tai Global Limited .....	Shenzhen L&T Industrial Co., Ltd .....	162.76
Man Wah Furniture Manufacturing (Hui Zhou) Co., Ltd., Man Wah.	Man Wah Household Industry (Huizhou) Co., Ltd .....	162.76
(MACAO Commercial Offshore), Ltd. and Man Wah (USA), Inc		
Ningbo Megafeat Bedding Co., Ltd .....	Ningbo Megafeat Bedding Co., Ltd .....	162.76
Ningbo Shuibishen Home Textile Technology Co., Ltd .....	Ningbo Shuibishen Home Textile Technology Co., Ltd .....	162.76
Nisco Co., Ltd .....	Healthcare Co., Ltd .....	162.76
Quanzhou Hengang Imp. & Exp. Co., Ltd .....	Quanzhou Hengang Industries Co., Ltd .....	162.76
Shanghai Glory Home Furnishings Co., Ltd .....	Shanghai Glory Home Furnishings Co., Ltd .....	162.76
Sinomax Macao Commercial Offshore Limited .....	Dongguan Sinohome Limited .....	162.76
Sinomax Macao Commercial Offshore Limited .....	Sinomax (Zhejiang) Polyurethane Technology Ltd .....	162.76
Wings Developing Co., Limited .....	Quanzhou Hengang Industries Co., Ltd .....	162.76
Xianghe Kaneman Furniture Co., Ltd .....	Xianghe Kaneman Furniture Co., Ltd .....	162.76
Xilinmen Furniture Co., Ltd .....	Xilinmen Furniture Co., Ltd .....	162.76
Zhejiang Glory Home Furnishings Co., Ltd .....	Zhejiang Glory Home Furnishings Co., Ltd .....	162.76
China-wide entity .....		1,731.75

### Notifications to Interested Parties

This notice constitutes the antidumping duty order with respect to mattresses from China pursuant to sections 736(a) of the Act. Interested parties can find a list of orders currently in effect at <http://enforcement.trade.gov/stats/iastats1.html>.

This order is published in accordance with section 736(a) of the Act and 19 CFR 351.211(b).

Dated: December 12, 2019.

#### Christian Marsh,

Deputy Assistant Secretary for Enforcement and Compliance.

### Appendix

#### Scope of the Order

The products covered by this order are all types of youth and adult mattresses. The term “mattress” denotes an assembly of materials that at a minimum includes a “core,” which provides the main support system of the mattress, and may consist of innersprings, foam, other resilient filling, or a combination of these materials. Mattresses may also contain (1) “upholstery,” the material between the core and the top panel of the ticking on a single-sided mattress, or between the core and the top and bottom panel of the ticking on a double-sided mattress; and/or (2) “ticking,” the outermost layer of fabric or other material (e.g., vinyl) that encloses the core and any upholstery, also known as a cover.

The scope of this order is restricted to only “adult mattresses” and “youth mattresses.” “Adult mattresses” have a width exceeding 35 inches, a length exceeding 72 inches, and a depth exceeding 3 inches on a nominal basis. Such mattresses are frequently described as “twin,” “extra-long twin,” “full,” “queen,” “king,” or “California king” mattresses. “Youth mattresses” have a width

exceeding 27 inches, a length exceeding 51 inches, and a depth exceeding 1 inch (crib mattresses have a depth of 6 inches or less from edge to edge) on a nominal basis. Such mattresses are typically described as “crib,” “toddler,” or “youth” mattresses. All adult and youth mattresses are included regardless of actual size description.

The scope encompasses all types of “innerspring mattresses,” “non-innerspring mattresses,” and “hybrid mattresses.” “Innerspring mattresses” contain innersprings, a series of metal springs joined together in sizes that correspond to the dimensions of mattresses. Mattresses that contain innersprings are referred to as “innerspring mattresses” or “hybrid mattresses.” “Hybrid mattresses” contain two or more support systems as the core, such as layers of both memory foam and innerspring units.

“Non-innerspring mattresses” are those that do not contain any innerspring units. They are generally produced from foams (e.g., polyurethane, memory (viscoelastic), latex foam, gel-infused viscoelastic (gel foam), thermobonded polyester, polyethylene) or other resilient filling.

Mattresses covered by the scope of this order may be imported independently, as part of furniture or furniture mechanisms (e.g., convertible sofa bed mattresses, sofa bed mattresses imported with sofa bed mechanisms, corner group mattresses, day-bed mattresses, roll-away bed mattresses, high risers, trundle bed mattresses, crib mattresses), or as part of a set in combination with a “mattress foundation.” “Mattress foundations” are any base or support for a mattress. Mattress foundations are commonly referred to as “foundations,” “boxsprings,” “platforms,” and/or “bases.” Bases can be static, foldable, or adjustable. Only the mattress is covered by the scope if imported as part of furniture, with furniture mechanisms, or as part of a set in combination with a mattress foundation.

Excluded from the scope of this order are “futon” mattresses. A “futon” is a bi-fold frame made of wood, metal, or plastic material, or any combination thereof, that functions as both seating furniture (such as a couch, love seat, or sofa) and a bed. A “futon mattress” is a tufted mattress, where the top covering is secured to the bottom with thread that goes completely through the mattress from the top through to the bottom, and it does not contain innersprings or foam. A futon mattress is both the bed and seating surface for the futon.

Also excluded from the scope are airbeds (including inflatable mattresses) and waterbeds, which consist of air- or liquid-filled bladders as the core or main support system of the mattress.

Also excluded is certain multifunctional furniture that is convertible from seating to sleeping, regardless of filler material or components, where that filler material or components are integrated into the design and construction of, and inseparable from, the furniture framing. Such furniture may, and without limitation, be commonly referred to as “convertible sofas,” “sofa beds,” “sofa chaise sleepers,” “futons,” “ottoman sleepers” or a like description.

Further, also excluded from the scope of this order are any products covered by the existing antidumping duty order on uncovered innerspring units. See *Uncovered Innerspring Units from the People’s Republic of China: Notice of Antidumping Duty Order*, 74 FR 7661 (February 19, 2009).

Additionally, also excluded from the scope of this order are “mattress toppers.” A “mattress topper” is a removable bedding accessory that supplements a mattress by providing an additional layer that is placed on top of a mattress. Excluded mattress toppers have a height of four inches or less.

The products subject to this order are currently properly classifiable under Harmonized Tariff Schedule for the United States (HTSUS) subheadings: 9404.21.0010,

9404.21.0013, 9404.29.1005, 9404.29.1013, 9404.29.9085, and 9404.29.9087. Products subject to this order may also enter under HTSUS subheadings: 9404.21.0095, 9404.29.1095, 9404.29.9095, 9401.40.0000, and 9401.90.5081. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to this investigation is dispositive.

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BILLING CODE 3510-DS-P

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-549-817]

#### Certain Hot-Rolled Carbon Steel Flat Products From Thailand: Preliminary Determination of No Shipments; 2017-2018

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (Commerce) preliminarily determines that there were no shipments of subject merchandise during the period of review (POR) November 1, 2017 through October 31, 2018. We invite interested parties to comment on these preliminary results.

**DATES:** Applicable December 16, 2019.

**FOR FURTHER INFORMATION CONTACT:** Chelsey Simonovich, 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) 482-1979.

#### SUPPLEMENTARY INFORMATION:

##### Background

On November 1, 2018, Commerce published in the **Federal Register** a notice of opportunity to request an administrative review of the order on certain hot-rolled carbon steel flat products (hot-rolled steel) from Thailand for the POR.<sup>1</sup> On November 30, 2018, Commerce received a request for administrative review covering imports of hot-rolled steel from Thailand, which was filed in proper form by Steel Dynamics and SSAB Enterprises (collectively, the petitioners).<sup>2</sup> Commerce published the

<sup>1</sup> See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 83 FR 54912 (November 1, 2018).

<sup>2</sup> See Petitioners' Letter, "Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Request for Administrative Review," dated November 30, 2018.

notice of initiation of this administrative review on February 6, 2019, covering the two companies for which we received a request for review.<sup>3</sup>

On February 27, 2019, Commerce received a notification of no shipments from Sahaviriya Steel Industries Public Co., Ltd. (Sahaviriya) and G Steel Public Company Ltd. (G Steel).<sup>4</sup> On March 5, 2019, Commerce published a memorandum informing interested parties that we had made an inquiry to U.S. Customs and Border Protection (CBP) with regard to entries of subject merchandise for the purposes of potential respondent selection. The results indicated that there were no shipments of subject merchandise from Thailand as country of origin or country of export by G Steel or Sahaviriya into the United States during the POR.<sup>5</sup> On March 20, 2019, Commerce made inquiries to CBP informing CBP that Commerce's records indicated no shipments from G Steel and Sahaviriya and requested that any CBP import officers aware of entries inform Commerce within ten days.<sup>6</sup> We received no notifications from CBP.

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.<sup>7</sup> On September 10, 2019, Commerce further extended the time limit for completion of the preliminary results of the review to no later than December 10, 2019.<sup>8</sup> This preliminary

<sup>3</sup> See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 FR 2160 (February 6, 2019).

<sup>4</sup> See Sahaviriya and G Steel's Letter, "Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Notice of No Shipments for Sahaviriya Steel Industries and G Steel Public Company (11//01/17-10/31/18)," dated February 27, 2019.

<sup>5</sup> See Memorandum, "Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Placement on the Record of Results of Inquiry to U.S. Customs and Border Protection for 2017-2018 Period of Review," dated March 5, 2019 (CBP Memo).

<sup>6</sup> See CBP Message 9079310, "No shipments inquiry for certain hot-rolled carbon steel flat products from Thailand produced and/or exported by G Steel Public Company Ltd. (A-549-817)," and CBP Message 9079311, "No shipments inquiry for certain hot-rolled carbon steel flat products from Thailand produced and/or exported by Sahaviriya Steel Industries Public Co., Ltd. (A-549-817)," both dated March 20, 2019 (CBP Message 9079311 and CBP Message 9079311, respectively).

<sup>7</sup> See Memorandum, "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.

<sup>8</sup> See Memorandum, "Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review," dated September 10, 2019.

determination is made in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

#### Scope of the Order

The product covered by the order is hot-rolled steel from Thailand. For a complete description of the scope of the order, see the appendix to this notice.

#### Preliminary Determination of No Shipments

Based on record evidence, we preliminarily determine that G Steel and Sahaviriya had no shipments of subject merchandise during the POR. With respect to G Steel and Sahaviriya, CBP stated that it did not find any shipments of subject merchandise from these two companies during the POR.<sup>9</sup>

Consistent with our practice, we find that it is not appropriate to rescind the review with respect to G Steel and Sahaviriya, but rather to complete the review and issue appropriate instructions to CBP based on the final results of this review.<sup>10</sup>

#### Public Comment

Interested parties may submit case briefs to Commerce no later than 30 days after the date of publication of this notice.<sup>11</sup> 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.<sup>12</sup> Pursuant to 19 CFR 351.309(c)(2) and (d)(2), 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.

All submissions to Commerce must be filed electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS) and must also be served on interested parties.<sup>13</sup> ACCESS is available to registered users at <http://access.trade.gov> and is available to all parties in the Central Records Unit, Room B8024 of the main Commerce building. An electronically filed document must be received successfully

<sup>9</sup> See CBP Memo; see also CBP Message 9079310; and CBP Message 9079311.

<sup>10</sup> See, e.g., *Magnesium Metal from the Russian Federation: Preliminary Results of Antidumping Duty Administrative Review*, 75 FR 26922, 26923 (May 13, 2010), unchanged in *Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review*, 75 FR 56989 (September 17, 2010).

<sup>11</sup> See 19 CFR 351.309(c)(1)(ii).

<sup>12</sup> See 19 CFR 351.309(d).

<sup>13</sup> See 19 CFR 351.303(f).

in its entirety by 5:00 p.m. Eastern Time on the date that the document is due.

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 Commerce's electronic records system, ACCESS. An electronically filed request must be received successfully in its entirety by 5:00 p.m. Eastern Time within 30 days of the date of publication of this notice.<sup>14</sup> Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues parties intend to discuss. 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 date and time to be determined.<sup>15</sup> Parties should confirm the date, time, and location of the hearing two days before the scheduled date.

Commerce intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any case or rebuttal briefs, no later than 120 days after the date of publication of this notice, unless extended.<sup>16</sup>

#### Assessment Rates

If we continue to find in the final results that G Steel and Sahaviriya had no shipments of subject merchandise, for entries of subject merchandise during the POR produced by G Steel and Sahaviriya for which these companies did not know that the merchandise was destined for the United States, we will instruct CBP to liquidate these entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.<sup>17</sup>

We intend to issue instructions to CBP 15 days after the date of publication of the final results of this review.

#### Cash Deposit Requirements

The following deposit requirements will be effective for all shipments of the 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 rates for G Steel and Sahaviriya will remain unchanged from the rate assigned to them in the most recently completed review of those companies; (2) for merchandise exported by manufacturers or exporters not covered in this 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; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation, but the manufacturer is, then the cash deposit rate will be the rate established for the most recently completed segment for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 4.44 percent, the all-others rate established in the less-than-fair-value investigation.<sup>18</sup> 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 review period. Failure to comply with this requirement may result in the presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double 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 351.221(b)(4).

Dated: December 10, 2019.

**Jeffrey I. Kessler,**

*Assistant Secretary for Enforcement and Compliance.*

#### Appendix

##### SCOPE OF THE ORDER

For purposes of the *Order*, the products covered are certain hot-rolled carbon steel flat products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non-metallic substances, in coils (whether or not in successively superimposed layers), regardless of

thickness, and in straight lengths of a thickness of less than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate (*i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm, but not exceeding 1250 mm, and of a thickness of not less than 4.0 mm, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of the order.

Specifically included within the scope of the order are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (IF)) steels, high strength low alloy (HSLA) steels, and the substrate for motor lamination steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium or niobium (also commonly referred to as columbium), or both, added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum.

Steel products to be included in the scope of the order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTS), are products in which: (i) Iron predominates, by weight, over each of the other contained elements; (ii) the carbon content is 2 percent or less, by weight; and (iii) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

1.80 percent of manganese,  
or 2.25 percent of silicon,  
or 1.00 percent of copper,  
or 0.50 percent of aluminum,  
or 1.25 percent of chromium,  
or 0.30 percent of cobalt,  
or 0.40 percent of lead,  
or 1.25 percent of nickel,  
or 0.30 percent of tungsten,  
or 0.10 percent of molybdenum,  
or 0.10 percent of niobium,  
or 0.15 percent of vanadium,  
or 0.15 percent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of the order unless otherwise excluded. The following products, by way of example, are outside or specifically excluded from the scope of the order:

- Alloy hot-rolled steel products in which at least one of the chemical elements exceeds those listed above (including, *e.g.*, ASTM specifications A543, A387, A514, A517, A506).
- Society of Automotive Engineers (SAE)/ American Iron and Steel Institute (AISI) grades of series 2300 and higher.
- Ball bearings steels, as defined in the HTS.
- Tool steels, as defined in the HTS.
- Silico-manganese (as defined in the HTS) or silicon electrical steel with a silicon level exceeding 2.25 percent.
- ASTM specifications A710 and A736.
- USS Abrasion-resistant steels (USS AR 400, USS AR 500).
- All products (proprietary or otherwise) based on an alloy ASTM specification

<sup>14</sup> See 19 CFR 351.310(c).

<sup>15</sup> See 19 CFR 351.310(d).

<sup>16</sup> See section 751(a)(3)(A) of the Act; and 19 CFR 351.213(h).

<sup>17</sup> For a full discussion of this clarification, see *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

<sup>18</sup> See *Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot Rolled Carbon Steel Flat Products from Thailand*, 66 FR 49623 (September 28, 2001).

(sample specifications: ASTM A506, A507).

—Non-rectangular shapes, not in coils, which are the result of having been processed by cutting or stamping and which have assumed the character of articles or products classified outside chapter 72 of the HTS.

The merchandise subject to the order is classified in the HTS at subheadings: 7208.10.15.00, 7208.10.30.00, 7208.10.60.00, 7208.25.30.00, 7208.25.60.00, 7208.26.00.30, 7208.26.00.60, 7208.27.00.30, 7208.27.00.60, 7208.36.00.30, 7208.36.00.60, 7208.37.00.30, 7208.37.00.60, 7208.38.00.15, 7208.38.00.30, 7208.38.00.90, 7208.39.00.15, 7208.39.00.30, 7208.39.00.90, 7208.40.60.30, 7208.40.60.60, 7208.53.00.00, 7208.54.00.00, 7208.90.00.00, 7211.14.00.90, 7211.19.15.00, 7211.19.20.00, 7211.19.30.00, 7211.19.45.00, 7211.19.60.00, 7211.19.75.30, 7211.19.75.60, and 7211.19.75.90. Certain hot-rolled flat-rolled carbon steel flat products covered by the order, including: Vacuum degassed fully stabilized; high strength low alloy; and the substrate for motor lamination steel may also enter under the following tariff numbers: 7225.11.00.00, 7225.19.00.00, 7225.30.30.50, 7225.30.70.00, 7225.40.70.00, 7225.99.00.90, 7226.11.10.00, 7226.11.90.30, 7226.11.90.60, 7226.19.10.00, 7226.19.90.00, 7226.91.50.00, 7226.91.70.00, 7226.91.80.00, and 7226.99.01.80. Subject merchandise may also enter under 7210.70.30.00, 7210.90.90.00, 7211.14.00.30, 7212.40.10.00, 7212.40.50.00, and 7212.50.00.00. Although the HTS subheadings are provided for convenience and U.S. Customs purposes, the written description of the merchandise under the order is dispositive.

[FR Doc. 2019-27030 Filed 12-13-19; 8:45 am]

BILLING CODE 3510-DS-P

## DEPARTMENT OF COMMERCE

### International Trade Administration

[C-570-094]

#### Refillable Stainless Steel Kegs From the People's Republic of China: Countervailing Duty Order

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** Based on affirmative final determinations by the Department of Commerce (Commerce) and the International Trade Commission (ITC), Commerce is issuing a countervailing duty order on refillable stainless steel kegs from the People's Republic of China (China).

**DATES:** Applicable December 16, 2019.

**FOR FURTHER INFORMATION CONTACT:** Theodore Pearson or Nicholas Czajkowski, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration,

U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-2631 or (202) 482-1395, respectively.

#### SUPPLEMENTARY INFORMATION:

##### Background

In accordance with sections 705(a), 735(d), and 777(i)(1) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.210(c), on October 24, 2019, Commerce published its affirmative final determination in the countervailing duty investigation of refillable stainless steel kegs from China,<sup>1</sup> including its affirmative determination of critical circumstances. On December 9, 2019, the ITC notified Commerce of its final determination pursuant to section 705(b)(1)(B) of the Act that an industry in the United States is materially retarded by reason of subsidized imports of refillable stainless steel kegs from China, and its determination that critical circumstances do not exist with respect to imports of subject merchandise from China.<sup>2</sup>

##### Scope of the Order

The merchandise covered by this order are refillable stainless steel kegs from China. For a complete description of the scope of the order, see the appendix to this notice.

##### Countervailing Duty Order

As stated above, on December 9, 2019, in accordance with sections 705(b)(1)(B) and 735(d) of the Act, the ITC notified Commerce of its final determination in this investigation, in which it found that the establishment of an industry in the United States is materially retarded by reason of subsidized imports of refillable stainless steel kegs from China, and that critical circumstances do not exist with respect to imports of subject merchandise from China that are subject to Commerce's affirmative critical circumstances findings. Therefore, in accordance with section 705(c)(2) of the Act, Commerce is issuing this countervailing duty order.

Because the ITC's final determination is that the establishment of an industry in the United States is materially retarded by subsidized imports of refillable stainless steel kegs from China, and is not accompanied by a finding that injury would have resulted

<sup>1</sup> See *Refillable Stainless Steel Kegs from China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, in Part*, 84 FR 57005 (October 24, 2019).

<sup>2</sup> See Notification Letter from the ITC dated December 9, 2019 (ITC Letter).

but for the imposition of suspension of liquidation of entries since Commerce's *Preliminary Determination*,<sup>3</sup> section 706(b)(2) of the Act is applicable. Accordingly, Commerce will instruct U.S. Customs and Border Protection (CBP) to terminate the suspension of liquidation, and to liquidate without regard to countervailing duties, unliquidated entries of refillable stainless steel kegs from China entered, or withdrawn from warehouse, for consumption prior to the publication of the ITC's final determination, and to release any bond or other security posted and to refund any cash deposit of estimated countervailing duties made prior to the publication of the ITC's final determination.

##### Suspension of Liquidation

In accordance with section 706 of the Act, Commerce will instruct CBP to reinstate the suspension of liquidation of all appropriate entries of refillable stainless steel kegs from China, as described in the appendix to this notice, effective on the date of publication in the **Federal Register** of the ITC's final determination, and to collect cash deposits of estimated countervailing duties for each entry of subject merchandise equal to the rates noted below. The all-others rate applies to all producers or exporters not specifically listed.

##### Critical Circumstances

With regard to the ITC's negative critical circumstances determination on imports of refillable stainless steel kegs from China, we will instruct CBP to lift suspension and to refund any cash deposits made to secure the payment of estimated countervailing duties with respect to entries of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after January 5, 2019 (*i.e.*, 90 days prior to the date of the publication of the *Preliminary Determination*), but before April 5, 2019 (*i.e.*, the date of publication of the *Preliminary Determination*).

##### Estimated Subsidy Rates

The estimated subsidy rates are as follows:

<sup>3</sup> See *Refillable Stainless Steel Kegs from China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination With Final Antidumping Duty Determination*, 84 FR 13634 (April 5, 2019) (*Preliminary Determination*).

Producer/exporter	Net subsidy rate (percent)
Equipmentines (Dalian) E-Commerce Co., Ltd .....	145.23
Jinan HaoLu Machinery Equipment Co., Ltd .....	145.23
NDL Keg Qingdao Inc .....	145.23
Ningbo Direct Import & Export Co., Ltd .....	145.23
Ningbo Hefeng Container Manufacture Co., Ltd .....	145.23
Ningbo Hefeng Kitchen Utensils Manufacture Co., Ltd .....	145.23
Ningbo HGM Food Machinery Co., Ltd .....	145.23
Ningbo Jiangbei Bei Fu Industry and Trade Co., Ltd .....	145.23
Ningbo Master International Trade Co., Ltd .....	16.21
Ningbo Sanfino Import & Export Co., Ltd .....	145.23
Ningbo Shimaotong International Co., Ltd .....	145.23
Ningbo Sunburst International Trading Co., Ltd .....	145.23
Orient Equipment (Taizhou) Co., Ltd .....	145.23
Penglai JinFu Stainless Steel Products .....	145.23
Qingdao Henka Precision Technology Co., Ltd .....	145.23
Shandong Tiantai Beer Equipment .....	145.23
Sino Dragon Trading International .....	145.23
Wenzhou Deli Machinery Equipment Co .....	145.23
Wuxi Taihu Lamps and Lanterns Co., Ltd .....	145.23
Yantai Trano New Material Co., Ltd .....	145.23
All Others .....	16.21

**Provisional Measures**

Section 703(d) of the Act states that the suspension of liquidation pursuant to an affirmative preliminary determination may not remain in effect for more than four months. Commerce published the *Preliminary Determination* on April 5, 2019. Therefore, the four-month period beginning on the date of the publication of the *Preliminary Determination* ended on August 1, 2019. In accordance with section 703(d) of the Act, Commerce instructed CBP to terminate the suspension of liquidation and to liquidate, without regard to countervailing duties, unliquidated entries of refillable stainless steel kegs from China entered, or withdrawn from warehouse, for consumption after August 1, 2019, the date the provisional measures expired. Suspension of liquidation will resume on the date of publication in the **Federal Register** of the ITC’s determination that the establishment of an industry was materially retarded by reason of subsidized imports.

**Notification to Interested Parties**

This notice constitutes the countervailing duty order with respect to refillable stainless steel kegs from China pursuant to section 706(a) of the Act. Interested parties can find a list of countervailing duty orders currently in effect at <http://enforcement.trade.gov/stats/iastats1.html>.

This order is issued and published in accordance with section 706(a) of the Act and 19 CFR 351.211(b).

Dated: December 11, 2019.

**Jeffrey I. Kessler,**

*Assistant Secretary for Enforcement and Compliance.*

**Appendix**

**Scope of the Order**

The merchandise covered by the order are kegs, vessels, or containers with bodies that are approximately cylindrical in shape, made from stainless steel (*i.e.*, steel containing at least 10.5 percent chromium by weight and less than 1.2 percent carbon by weight, with or without other elements), and that are compatible with a “D Sankey” extractor (refillable stainless steel kegs) with a nominal liquid volume capacity of 10 liters or more, regardless of the type of finish, gauge, thickness, or grade of stainless steel, and whether or not covered by or encased in other materials. Refillable stainless steel kegs may be imported assembled or unassembled, with or without all components (including spears, couplers or taps, necks, collars, and valves), and be filled or unfilled.

“Unassembled” or “unfinished” refillable stainless steel kegs include drawn stainless steel cylinders that have been welded to form the body of the keg and attached to an upper (top) chime and/or lower (bottom) chime. Unassembled refillable stainless steel kegs may or may not be welded to a neck, may or may not have a valve assembly attached, and may be otherwise complete except for testing, certification, and/or marking.

Subject merchandise also includes refillable stainless steel kegs that have been further processed in a third country, including but not limited to, attachment of necks, collars, spears or valves, heat treatment, pickling, passivation, painting, testing, certification or any other processing that would not otherwise remove the merchandise from the scope of the order if performed in the country of manufacture of the in-scope refillable stainless steel keg.

Specifically excluded are the following:

(1) Vessels or containers that are not approximately cylindrical in nature (*e.g.*, box, “hopper” or “cone” shaped vessels);

(2) stainless steel kegs, vessels, or containers that have either a “ball lock” valve system or a “pin lock” valve system (commonly known as “Cornelius,” “corny” or “ball lock” kegs);

(3) necks, spears, couplers or taps, collars, and valves that are not imported with the subject merchandise; and

(4) stainless steel kegs that are filled with beer, wine, or other liquid and that are designated by the Commissioner of Customs as Instruments of International Traffic within the meaning of section 332(a) of the *Tariff Act of 1930*, as amended.

The merchandise covered by the order are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 7310.10.0010, 7310.10.0050, 7310.29.0025, and 7310.29.0050.

These HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope of the order is dispositive.

[FR Doc. 2019–27129 Filed 12–13–19; 8:45 am]

**BILLING CODE 3510–DS–P**

**DEPARTMENT OF COMMERCE**

**International Trade Administration**

**North American Free Trade Agreement (NAFTA), Article 1904 Binational Panel Review: Notice of NAFTA Panel Decision**

**AGENCY:** United States Section, NAFTA Secretariat, International Trade Administration, Department of Commerce.

**ACTION:** Notice of NAFTA Panel Decision in the matter of the Review of the Final Determination of Antidumping Duties imposed on imports of ammonium sulphate from the United

States of America. (Secretariat File Number: MEX–USA–2015–1904–01).

**SUMMARY:** On November 29, 2019, a NAFTA Binational Panel issued its Decision in the matter of the Review of the Final Determination of Antidumping Duties imposed on imports of ammonium sulphate from the United States of America (Final Determination). The Binational Panel remanded the Final Determination by Mexico's Investigating Authority, Secretaria de Economía (Economía), and ordered Economía to issue a redetermination within 90 days.

**FOR FURTHER INFORMATION CONTACT:** Paul E. Morris, United States Secretary, NAFTA Secretariat, Room 2061, 1401 Constitution Avenue NW, Washington, DC 20230, (202) 482–5438.

**SUPPLEMENTARY INFORMATION:** Chapter 19 of Article 1904 of NAFTA provides a dispute settlement mechanism involving trade remedy determinations issued by the Government of the United States, the Government of Canada, and the Government of Mexico. Following a Request for Panel Review, a Binational Panel is composed to provide judicial review of the trade remedy determination being challenged and then issue a binding Panel Decision. The NAFTA Binational Panel Decision is available publicly at <https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Decisions-and-Reports>. There are established *NAFTA Rules of Procedure for Article 1904 Binational Panel Reviews* and the NAFTA Panel Decision has been notified in accordance with Rule 70. For the complete Rules, please see <https://www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/Rules-of-Procedure/Article-1904>.

Dated: December 6, 2019.

**Paul E. Morris,**

*U.S. Secretary, NAFTA Secretariat.*

[FR Doc. 2019–26966 Filed 12–13–19; 8:45 am]

**BILLING CODE 3510–GT–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

#### Proposed Information Collection; Comment Request; Request for Duty-Free Entry of Scientific Instrument or Apparatus

**AGENCY:** International Trade Administration.

**ACTION:** Notice.

**SUMMARY:** The Department of Commerce, as part of its continuing effort to reduce paperwork and

respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on this information collection, as required by the Paperwork Reduction Act of 1995.

**DATES:** Written comments must be submitted on or before February 14, 2020.

**ADDRESSES:** Direct all written comments to Towanda Carey, ITA Paperwork Clearance Officer, Department of Commerce, OCFDO, 14th and Constitution Avenue NW, Washington, DC 20230 (or via the internet at [PRACOMMENTS@DOC.GOV](mailto:PRACOMMENTS@DOC.GOV)). Comments will generally be posted without change. Please do not include information of a confidential nature, such as sensitive personal information or proprietary information. All Personally Identifiable Information (for example, name and address) voluntarily submitted may be publicly accessible.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the information collection instrument and instructions should be directed to Dianne Hanshaw, Enforcement and Compliance (E&C), phone number 202–482–1661, or via the internet at [Dianne.Hanshaw@trade.gov](mailto:Dianne.Hanshaw@trade.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Abstract

The Departments of Commerce and Homeland Security (“DHS”) are required to determine whether nonprofit institutions established for scientific or educational purposes are entitled to duty-free entry for scientific instruments the institutions import under the Florence Agreement. Form ITA–338P enables: (1) DHS to determine whether the statutory eligibility requirements for the institution and the instrument are fulfilled, and (2) Commerce to make a comparison and finding as to the scientific equivalency of comparable instruments being manufactured in the United States. Without the collection of the information, DHS and Commerce would not have the necessary information to carry out the responsibilities of determining eligibility for duty-free entry assigned by law.

##### II. Method of Collection

A copy of Form ITA–338P is provided on and downloadable from a website at <http://enforcement.trade.gov/sips/sipsform/ita-338p.pdf> or the potential applicant may request a copy from the Department. The applicant completes the form and then forwards it via mail to DHS.

Upon acceptance by DHS as a valid application, the application is transmitted to Commerce for further processing.

#### III. Data

*OMB Control Number:* 0625–0037.

*Form Number(s):* ITA–338P.

*Type of Review:* Regular submission.

*Affected Public:* State or local government; Federal agencies; not for-profit institutions.

*Estimated Number of Respondents:* 65.

*Estimated Time per Response:* 2 hours.

*Estimated Total Annual Burden Hours:* 130.

*Estimated Total Annual Cost to Public:* \$2,138.

#### IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

**Sheleen Dumas,**

*Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.*

[FR Doc. 2019–27000 Filed 12–13–19; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A–588–874]

#### Certain Hot-Rolled Steel Flat Products From Japan: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2017–2018

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (Commerce) preliminarily determines

that Nippon Steel Corporation (NSC) and Tokyo Steel Manufacturing Co., Ltd. (Tokyo Steel), producers and exporters of hot-rolled steel flat products (hot-rolled steel) from Japan, did not sell subject merchandise in the United States at prices below normal value during the period of review (POR) October 1, 2017 through September 30, 2018. In addition, Commerce preliminarily determines that Honda Trading Canada, Inc. (Honda) had no shipments during the POR. We invite interested parties to comment on these preliminary results.

**DATES:** Applicable December 16, 2019.

**FOR FURTHER INFORMATION CONTACT:** Myrna Lobo or Jack Zhao, AD/CVD Operations, Office VII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-2371 or (202) 482-1396, respectively.

**SUPPLEMENTARY INFORMATION:**

**Background**

Commerce is conducting an administrative review of the antidumping duty order on hot-rolled steel from Japan in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (the Act).<sup>1</sup> Commerce initiated this administrative review on December 11, 2018 covering 25 producers and/or exporters.<sup>2</sup> We selected NSC and Tokyo Steel as mandatory respondents.<sup>3</sup> On January 28, 2019, 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.<sup>4</sup> On July 29, 2019, we extended the deadline for the preliminary results of this review until November 8, 2019.<sup>5</sup>

<sup>1</sup> See *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom: Amended Final Affirmative Antidumping Determinations for Australia, the Republic of Korea, and the Republic of Turkey and Antidumping Duty Orders*, 81 FR 67962 (October 3, 2016) (*Order*).

<sup>2</sup> See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 FR 63615 (December 11, 2018).

<sup>3</sup> See Memorandum, "Respondent Selection for the 2017-2018 Antidumping Duty Administrative Review of Certain Hot-Rolled Steel Flat Products from Japan," dated March 11, 2019.

<sup>4</sup> See Memorandum, "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.

<sup>5</sup> See Memorandum, "Certain Hot-Rolled Steel Flat Products from Japan: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review—2017-2018," dated July 29, 2019.

On October 22, 2019, we extended the deadline for the preliminary results of this review until December 10, 2019.<sup>6</sup> For a detailed description of the events that followed the initiation of this review, see the Preliminary Decision Memorandum.<sup>7</sup>

**Scope of the Order**

The merchandise covered by the order is hot-rolled steel from Japan. For a complete description of the scope of the order, see the Preliminary Decision Memorandum.<sup>8</sup>

**Methodology**

Commerce is conducting this administrative review in accordance with section 751(a) of the Act. Constructed export price and export price were 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 conclusions, see the Preliminary Decision Memorandum. A list of topics discussed in the Preliminary Decision Memorandum is attached as an appendix 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 to ACCESS is available to registered users at <http://access.trade.gov> and is available to all parties in the Central Records Unit, Room B8024 of the main Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly on the internet at <http://enforcement.trade.gov/frn/index.html>. A list of the topics discussed in the Preliminary Decision Memorandum is attached as an appendix to this notice. The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

**Preliminary Determination of No Shipments**

Among the companies under review, Honda properly filed a statement

<sup>6</sup> See Memorandum, "Certain Hot-Rolled Steel Flat Products from Japan: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review—2017-2018," dated October 22, 2019.

<sup>7</sup> See Memorandum, "Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review: Certain Hot-Rolled Steel Flat Products from Japan; 2017-2018," dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

<sup>8</sup> *Id.*

reporting that it had made no shipments of subject merchandise to the United States during the POR. Commerce issued an instruction to the U.S. Customs and Border Protection (CBP) asking for any entry activity regarding Honda, and is awaiting CBP's response.<sup>9</sup> Based on the certification submitted by Honda and our analysis of CBP information on the record, we preliminarily determine that Honda had no shipments during the POR.<sup>10</sup> Consistent with its practice, Commerce finds that it is not appropriate to preliminarily rescind the review with respect to Honda, but rather to complete the review and issue appropriate instructions to CBP based on the final results of this review.

**Rate for Non-Examined Companies**

The statute and Commerce's regulations do not address the establishment of a rate to be applied to companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. 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, for guidance when calculating the rate for companies which were not selected for individual examination in an administrative review. 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 review, we have preliminarily calculated weighted-average dumping margins for NSC and Tokyo Steel that are zero. Accordingly, we have preliminarily assigned to the companies not individually examined a margin of 0.00 percent.

**Preliminary Results**

We preliminarily determine the following weighted-average dumping margins for the period October 1, 2017 through September 30, 2018:

<sup>9</sup> See No Shipment Inquiry to CBP, dated December 9, 2019.

<sup>10</sup> See Honda's Letter, "Administrative Review of Certain Hot-Rolled Steel Flat Products from Japan: Honda Trading Canada, Inc.'s No Shipment Certification," dated December 20, 2018.

Exporter/producer	Weighted-average dumping margin (percent)
Nippon Steel Corporation/Nippon Steel Nisshin Co., Ltd./Nippon Steel Trading Corporation <sup>11</sup>	0.00
Tokyo Steel Manufacturing Co., Ltd	0.00
Hanwa Co., Ltd	0.00
Higuchi Manufacturing America, LLC	0.00
Higuchi Seisakusho Co., Ltd	0.00
Hitachi Metals, Ltd	0.00
JFE Steel Corporation/JFE Shoji Trade Corporation <sup>12</sup>	0.00
JFE Shoji Trade America	0.00
JFE Shoji Trade Corporation	0.00
Kanematsu Corporation	0.00
Kobe Steel, Ltd	0.00
Metal One Corporation	0.00
Mitsui & Co., Ltd	0.00
Miyama Industry Co., Ltd	0.00
Nakagawa Special Steel Inc	0.00
Nippon Steel & Sumikin Logistics Co., Ltd	0.00
Okaya & Co. Ltd	0.00
Panasonic Corporation	0.00
Saint-Gobain K.K	0.00
Shinsho Corporation	0.00
Sumitomo Corporation	0.00
Suzukaku Corporation	0.00
Toyota Tsusho Corporation Nagoya	0.00

**Assessment Rates**

Upon completion of the administrative review, Commerce shall determine, and CBP shall assess, antidumping duties on all appropriate entries. For any individually examined respondent whose weighted-average dumping margin is not zero or *de minimis* (i.e., less than 0.5 percent) in the final results of this review and the respondent reported reliable entered values, we will calculate importer-specific *ad valorem* assessment rates for the merchandise based on the ratio of the total amount of dumping calculated for the examined sales made during the POR to each importer and the total entered value of those same sales, in accordance with 19 CFR 351.212(b)(1). If the respondent has not reported

reliable entered values, we will calculate a per-unit assessment rate for each importer by dividing the total amount of dumping calculated for the examined sales made to that importer by the total sales quantity associated with those transactions. Where an importer-specific *ad valorem* 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 19 CFR 351.106(c)(2). If a respondent’s weighted-average dumping margin is zero or *de minimis* in the final results of review, we will instruct CBP not to assess duties on any of its entries in accordance with the *Final Modification for Reviews*, i.e., “{w}here the weighted-average margin of dumping for the exporter is determined to be zero or *de minimis*, no antidumping duties will be assessed.” <sup>13</sup>

For entries of subject merchandise during the POR produced by NSC and Tokyo Steel for which the producer did not know its merchandise was destined for the United States, or for any respondent for which we have a final determination of no shipments, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company (or

companies) involved in the transaction.<sup>14</sup>

We intend to issue liquidation instructions to CBP 15 days after publication of the final results of this review.

**Cash Deposit Requirements**

The following deposit requirements will be effective upon publication of the notice of final results of this administrative review for all shipments of the subject merchandise 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 each specific company listed above will be that established in the final results of this review, except if the rate is less than 0.50 percent, and therefore *de minimis* within the meaning of 19 CFR 351.106(c)(1), in which case the cash deposit rate will be zero; (2) for previously investigated companies not participating in this review, the cash deposit will continue to be the company-specific rate published for the most recently completed segment of this proceeding in which the company participated; (3) if the exporter is not a firm covered in this review, or the underlying investigation, but the manufacturer is, then the cash deposit rate will be the rate established for the most recent segment for the manufacturer of the merchandise; and (4) the cash deposit rate for all other

<sup>11</sup> In a recently completed changed circumstances review, we found that NSC, Nippon Steel Nisshin Co., Ltd. (Nippon Nisshin), and Nippon Steel Trading Corporation (NSTC) are affiliated companies that should be treated as a single entity and as the successor-in-interest to Nippon Steel & Sumitomo Metal Corporation (NSSMC), Nisshin Steel Co., Ltd. (Nisshin Steel), and Nippon Steel & Sumikin Bussan Corporation (NSSBC), respectively. See *Certain Hot-Rolled Steel Flat Products from Japan: Notice of Final Results of Antidumping Duty Changed Circumstances Review*, 84 FR 46713 (September 5, 2019). In the absence of record information indicating that Commerce should reevaluate this determination, we are treating these companies as a single entity for purposes of this administrative review.

<sup>12</sup> We collapsed JFE Shoji Trade Corporation with JFE Steel Corporation in the underlying investigation. See *Certain Hot-Rolled Steel Flat Products from Japan: Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination*, 81 FR 15222 (March 22, 2016), and accompanying Preliminary Decision Memorandum at 8–9.

<sup>13</sup> See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification*, 77 FR 8101, 8102 (February 14, 2012) (*Final Modification for Reviews*).

<sup>14</sup> See *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

manufacturers or exporters will continue to be 5.58 percent, the all-others rate established in the less-than-fair-value investigation.<sup>15</sup> These deposit requirements, when imposed, shall remain in effect until further notice.

### Disclosure and Public Comment

We intend to disclose the calculations performed for these preliminary results of review to interested parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs no later than 30 days after the date of publication of this notice. Rebuttal briefs, the content of which is limited to issues raised in the case briefs, may be filed no later than five days after the date for filing case briefs.<sup>16</sup> 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.<sup>17</sup> Case and rebuttal briefs should be filed using ACCESS<sup>18</sup> and must be served on interested parties.<sup>19</sup> Executive summaries should be limited to five pages total, including footnotes.

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 Commerce's electronic records system, ACCESS. An electronically filed request must be received successfully in its entirety by 5:00 p.m. Eastern Time within 30 days of the date of publication of this notice.<sup>20</sup> Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues parties intend to discuss. 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 date and time to be determined.<sup>21</sup> Parties should confirm the date, time, and location of the hearing two days before the scheduled date.

Commerce intends to issue the final results of this administrative review, including the results of its analysis of

the issues raised in any case or rebuttal briefs, no later than 120 days after the date of publication of this notice, unless extended.<sup>22</sup>

### 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 POR. 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

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 10, 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. Use of Facts Available and Adverse Facts Available
- VI. Rates for Non-Examined Companies
- VII. Discussion of the Methodology
- VIII. Currency Conversion
- IX. Recommendation

[FR Doc. 2019-27043 Filed 12-13-19; 8:45 am]

**BILLING CODE 3510-DS-P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-428-846, A-570-093]

#### Refillable Stainless Steel Kegs From the Federal Republic of Germany and the People's Republic of China: Antidumping Duty Orders

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** Based on affirmative final determinations by the Department of Commerce (Commerce) and the International Trade Commission (ITC), Commerce is issuing antidumping duty orders on refillable stainless steel kegs from the Federal Republic of Germany

(Germany) and the People's Republic of China (China).

**DATES:** Applicable December 16, 2019.

**FOR FURTHER INFORMATION CONTACT:** Michael A. Romani (Germany) and Thomas Schauer (China), AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-0189 and (202) 482-0410, respectively.

### SUPPLEMENTARY INFORMATION:

#### Background

In accordance with sections 735(a), 735(d), and 777(i)(1) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.210(c), on October 24, 2019, Commerce published its affirmative final determinations in the less-than-fair-value (LTFV) investigations of refillable stainless steel kegs from Germany and China, including its affirmative determination of critical circumstances with respect to certain imports of subject merchandise from China.<sup>1</sup> On December 9, 2019, the ITC notified Commerce of its final determinations pursuant to section 735(b)(1)(A) of the Act that an industry in the United States is materially retarded by reason of the LTFV imports of refillable stainless steel kegs from Germany and China, and its determination that critical circumstances do not exist with respect to imports of subject merchandise from China.<sup>2</sup>

#### Scope of the Orders

The merchandise covered by these orders are refillable stainless steel kegs. For a complete description of the scope of the orders, *see* the appendix to this notice.

#### Antidumping Duty Orders

As stated above, on December 9, 2019, in accordance with sections 735(b)(1)(B) and 735(d) of the Act, the ITC notified Commerce of its final determinations in these investigations, in which it found that the establishment of an industry in the United States is materially retarded within the meaning of section 735(b)(1)(B) by reason of imports of

<sup>1</sup> *See Refillable Stainless Steel Kegs from Germany: Final Affirmative Determination of Sales at Less Than Fair Value*, 84 FR 57008 (October 24, 2019); and *Refillable Stainless Steel Kegs from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 84 FR 57010 (October 24, 2019) (*China Final Determination*).

<sup>2</sup> *See* Notification Letter from the ITC dated December 9, 2019.

<sup>15</sup> *See Order*.

<sup>16</sup> *See* 19 CFR 351.309(d).

<sup>17</sup> *See* 19 CFR 351.309(c)(2) and (d)(2).

<sup>18</sup> *See generally* 19 CFR 351.303.

<sup>19</sup> *See* 19 CFR 351.303(f).

<sup>20</sup> *See* 19 CFR 351.310(c).

<sup>21</sup> *See* 19 CFR 351.310(d).

<sup>22</sup> *See* section 751(a)(3)(A) of the Act; and 19 CFR 351.213(h).

refillable stainless steel kegs from Germany and China, and further found that critical circumstances do not exist with respect to imports of subject merchandise from China that are subject to Commerce's affirmative critical circumstances finding. Therefore, in accordance with section 735(c)(2) of the Act, Commerce is issuing these antidumping duty orders.

Because the ITC determined that the establishment of an industry in the United States is materially retarded by imports of refillable stainless steel kegs from Germany and China that are sold at LTFV, and is not accompanied by a finding that injury would have resulted but for the imposition of suspension of liquidation of entries since Commerce's *Preliminary Determination*, section 736(b)(2) of the Act is applicable. Accordingly, Commerce will instruct U.S. Customs and Border Protection (CBP) to assess, upon further instruction from Commerce, antidumping duties equal to the amount by which the normal value of the refillable stainless steel kegs from Germany or China exceed the export price (or constructed export price) of the merchandise for entries of refillable stainless steel kegs from Germany or China which are entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's final affirmative determination, under section 735(b) of the Act.

#### Suspension of Liquidation

With respect to Germany, in accordance with section 735(c)(1)(B) of the Act, Commerce will instruct CBP to continue to suspend liquidation of all appropriate entries of refillable stainless steel kegs from Germany as described in the appendix to this notice which are entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's notice of final determination in the **Federal Register**. We will also instruct CBP to require, at the same time as importers would normally deposit estimated customs duties on this merchandise, cash deposits for the subject merchandise equal to the estimated weighted-average antidumping margins listed below, adjusted for the subsidy offset, as appropriate. The all-others rate applies to all producers or exporters not specifically listed.

With respect to China, in accordance with section 735(c)(1)(B) of the Act, Commerce will instruct CBP to continue to suspend liquidation of all entries of refillable stainless steel kegs from China, as described in the appendix to this notice, with the exception of entries

of subject merchandise that were produced by Ningbo Major Draft Beer Equipment Co., Ltd., and exported by Ningbo Master International Trade Co., Ltd. Because we determined the weighted-average dumping margin for such entries to be zero, we are excluding entries of subject merchandise that were produced by Ningbo Major Draft Beer Equipment Co., Ltd., and exported by Ningbo Master International Trade Co., Ltd., from the antidumping duty order. On the basis of the negative *Final Determination*<sup>3</sup> for this producer/exporter combination, we ordered CBP to discontinue the suspension of liquidation and to refund all cash deposits collected for this producer/exporter combination. Such exclusion will not be applicable to merchandise exported to the United States by any other producer/exporter combinations or by third-country exporters that sourced from the excluded producer/exporter combination(s). Moreover, consistent with the decision of the Court of International Trade in *Changzhou Hurd Flooring*, we will not exclude from the antidumping duty order the separate-rate-eligible non-selected respondents.<sup>4</sup> The China-wide entity rate applies to all exporter-producer combinations not specifically listed below.

In accordance with section 736(b)(2) of the Act, Commerce will also direct CBP to release any bond or other security, and refund any cash deposit made, to secure the payment of antidumping duties with respect to entries of the merchandise entered, or withdrawn from warehouse, for consumption before the date of publication of the ITC's final affirmative determination under section 735(b) of the Act. Further, Commerce will instruct CBP to terminate the suspension of liquidation of, and to liquidate without regard to antidumping duties, entries of refillable stainless steel kegs from Germany and China which are entered, or withdrawn from warehouse, for consumption prior to the date of publication of the ITC's affirmative determinations under section 735(b) of the Act.

#### Provisional Measures and Critical Circumstances

Section 733(d) of the Act states that suspension of liquidation pursuant to an affirmative preliminary determination may not remain in effect for more than

<sup>3</sup> See *China Final Determination*.

<sup>4</sup> See *Changzhou Hurd Flooring Co. v. United States*, 324 F. Supp. 3d 1317 (CIT 2018) (*Changzhou Hurd Flooring*).

four months, except where exporters representing a significant proportion of exports of the subject merchandise request Commerce to extend that four-month period to no more than six months. At the request of exporters that account for a significant proportion of refillable stainless steel kegs from Germany and China, Commerce extended the four-month period to six months.<sup>5</sup> In the underlying investigations, Commerce published the preliminary determinations on June 4, 2019. Therefore, the extended period, beginning on the date of publication of the *Preliminary Determination*, ended on November 30, 2019. Furthermore, section 737(b) of the Act states that definitive duties are to begin on the date of publication of the ITC's final injury determination.

Because the ITC determined, in accordance with Section 733(d) of the Act, that the establishment of an industry in the United States is materially retarded within the meaning of section 735(b)(1)(B) of the Act by reason of imports of refillable stainless steel kegs from Germany and China sold at LTFV, and further found that critical circumstances do not exist with respect to imports of subject merchandise from China pursuant to section 735(c)(3) of the Act, provisional measures are inapplicable. Accordingly, Commerce will instruct CBP to terminate any retroactive suspension of liquidation, release any bond or other security, and refund any cash deposit required to secure the payment of antidumping duties with respect to entries of refillable stainless steel kegs entered, or withdrawn from warehouse, for consumption before the date of publication of the ITC's final affirmative determination under section 735(b) of the Act.

#### Estimated Weighted-Average Dumping Margins

The weighted-average antidumping duty margin percentages and cash deposit rates are as follows:

##### Germany

<sup>5</sup> See *Refillable Stainless Steel Kegs from the Federal Republic of Germany: Preliminary Affirmative Determination of Sales at Less Than Fair Value, and Postponement of Final Determination*, 84 FR 25736, 25737 (June 4, 2019); and *Refillable Stainless Steel Kegs from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, in Part, Postponement of Final Determination, and Extension of Provisional Measures*, 84 FR 25745, 25747 (June 4, 2019).

Exporter/producer	Estimated weighted-average dumping margin (percent)
Blefa GmbH .....	7.47
All Others .....	7.47

## China

Exporter	Producer	Estimated weighted-average dumping margin (percent <i>ad valorem</i> )	Cash deposit rate (adjusted for subsidy offsets) (percent <i>ad valorem</i> )
Ningbo Master International Trade Co., Ltd .....	Ningbo Major Draft Beer Equipment Co., Ltd .....	<sup>6</sup> 0.00	N/A
Guangzhou Jingye Machinery Co., Ltd .....	Guangzhou Jingye Machinery Co., Ltd .....	<sup>7</sup> 0.00	0.0
Guangzhou Ulix Industrial & Trading Co., Ltd .....	Guangzhou Jingye Machinery Co., Ltd .....	<sup>8</sup> 0.00	0.0
China-Wide Entity .....	.....	77.13	63.60

## Notification to Interested Parties

This notice constitutes the antidumping duty order with respect to refillable stainless steel kegs from Germany and China pursuant to section 736(a) of the Act. Interested parties can find a list of antidumping duty orders currently in effect at <http://enforcement.trade.gov/stats/iastats1.html>.

This order is issued and published in accordance with section 736(a) of the Act and 19 CFR 351.211(b).

Dated: December 11, 2019.

**Jeffrey I. Kessler,**

*Assistant Secretary for Enforcement and Compliance.*

## Appendix

### Scope of the Orders

The merchandise covered by the orders are kegs, vessels, or containers with bodies that are approximately cylindrical in shape, made from stainless steel (*i.e.*, steel containing at least 10.5 percent chromium by weight and less than 1.2 percent carbon by weight, with or without other elements), and that are compatible with a “D Sankey” extractor (refillable stainless steel kegs) with a nominal liquid volume capacity of 10 liters or more, regardless of the type of finish, gauge, thickness, or grade of stainless steel, and whether or not covered by or encased in other materials. Refillable stainless steel kegs may be imported assembled or unassembled, with or without all components (including spears, couplers or taps, necks, collars, and valves), and be filled or unfilled.

“Unassembled” or “unfinished” refillable stainless steel kegs include drawn stainless

<sup>6</sup> Entries of subject merchandise that were produced by Ningbo Major Draft Beer Equipment Co., Ltd., and exported by Ningbo Master International Trade Co., Ltd. are excluded from the antidumping duty order.

<sup>7</sup> This producer/exporter combination is based on the rate calculated for Ningbo Master International Trade Co., Ltd.

<sup>8</sup> *Id.*

steel cylinders that have been welded to form the body of the keg and attached to an upper (top) chime and/or lower (bottom) chime. Unassembled refillable stainless steel kegs may or may not be welded to a neck, may or may not have a valve assembly attached, and may be otherwise complete except for testing, certification, and/or marking.

Subject merchandise also includes refillable stainless steel kegs that have been further processed in a third country, including but not limited to, attachment of necks, collars, spears or valves, heat treatment, pickling, passivation, painting, testing, certification or any other processing that would not otherwise remove the merchandise from the scope of the orders if performed in the country of manufacture of the in-scope refillable stainless steel keg.

Specifically excluded are the following:

- (1) Vessels or containers that are not approximately cylindrical in nature (*e.g.*, box, “hopper” or “cone” shaped vessels);
- (2) stainless steel kegs, vessels, or containers that have either a “ball lock” valve system or a “pin lock” valve system (commonly known as “Cornelius,” “corny” or “ball lock” kegs);
- (3) necks, spears, couplers or taps, collars, and valves that are not imported with the subject merchandise; and
- (4) stainless steel kegs that are filled with beer, wine, or other liquid and that are designated by the Commissioner of Customs as Instruments of International Traffic within the meaning of section 332(a) of the *Tariff Act of 1930*, as amended.

The merchandise covered by the orders are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 7310.10.0010, 7310.10.0050, 7310.29.0025, and 7310.29.0050.

These HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope of the orders is dispositive.

[FR Doc. 2019–27128 Filed 12–13–19; 8:45 am]

**BILLING CODE 3510-DS-P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A–580–883]

### Certain Hot-Rolled Steel Flat Products From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2017–2018

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The Department of Commerce (Commerce) preliminarily determines that sales of certain hot-rolled steel flat products (hot-rolled steel) from the Republic of Korea (Korea) were made at less than normal value during the period of review (POR) October 1, 2017 through September 30, 2018. We invite interested parties to comment on these preliminary results.

**DATES:** Applicable December 16, 2019.

**FOR FURTHER INFORMATION CONTACT:** Genevieve Coen, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3251.

### SUPPLEMENTARY INFORMATION:

#### Background

On December 11, 2018, Commerce initiated the administrative review of the antidumping duty order on hot-rolled steel from Korea in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act).<sup>1</sup> This

<sup>1</sup> See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 FR 63615 (December 11, 2018).

review covers one mandatory respondent, Hyundai Steel Company (Hyundai). The remaining companies, POSCO and POSCO Daewoo Corporation (collectively, POSCO), were not selected for individual examination and remain subject to this administrative review.<sup>2</sup> 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, resulting in a revised deadline for these preliminary results.<sup>3</sup> Additionally, Commerce exercised its discretion to extend the deadline for the preliminary results until December 10, 2019.<sup>4</sup>

**Scope of the Order**<sup>5</sup>

The products covered by this Order are certain hot-rolled steel products. For a full description of the scope, see the Preliminary Decision Memorandum.<sup>6</sup>

<sup>2</sup> Commerce previously determined that these companies are affiliated and should be treated as a single entity. In the absence of information indicating that we should reevaluate this finding, we are treating POSCO and POSCO Daewoo Corporation as a single entity. See *Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 81 FR 15228 (March 22, 2016), and accompanying Preliminary Decision Memorandum (PDM) at 6–8, unchanged in *Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 81 FR 53419 (August 12, 2016); see also *Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2016–2017*, 83 FR 56821 (November 14, 2018), and accompanying PDM at 8–9, unchanged in *Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2016–2017*, 84 FR 32720 (July 9, 2019), and accompanying IDM at 1.

<sup>3</sup> See Memorandum, “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.

<sup>4</sup> See Memorandum, “Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review, 2017–2018,” dated July 18, 2019; see also Memorandum, “Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Second Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review, 2017–2018,” dated October 16, 2019.

<sup>5</sup> See *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom: Amended Final Affirmative Antidumping Determinations for Australia, the Republic of Korea, and the Republic of Turkey and Antidumping Duty Orders*, 81 FR 67962 (October 3, 2016) (Order).

<sup>6</sup> See Memorandum, “Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review: Certain Hot-Rolled Steel Flat Products from the Republic of Korea,” dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

**Preliminary Determination of No Shipments**

On January 11, 2019, POSCO certified it had no reviewable entries, exports, or sales of subject merchandise to the United States during the POR.<sup>7</sup> To confirm POSCO’s no-shipment claims, Commerce issued a no-shipment inquiry to U.S. Customs and Border Protection (CBP) and has received no information that contradicts POSCO’s no shipment claims.<sup>8</sup> Therefore, we preliminarily determine that POSCO did not have any shipments of subject merchandise during the POR. Consistent with Commerce’s practice, we will not rescind the review with respect to these companies, but, rather, will complete the review and issue instructions based on the final results.<sup>9</sup>

**Methodology**

Commerce is conducting this review in accordance with section 751(a) of the Act. For a full description of the methodology underlying these preliminary results, 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 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 and electronic versions of the Preliminary Decision Memorandum are identical in content.

**Rates for Non-Examined Companies**

The statute and Commerce’s regulations do not address the establishment of a rate to be applied to

<sup>7</sup> See POSCO’s Letter, “Certain Hot-Rolled Steel Flat Products from South Korea, Case No. A–580–883: No Shipment Letter,” dated January 11, 2019.

<sup>8</sup> See Memorandum, “Certain Hot-Rolled Steel Flat Products from the Republic of Korea: POSCO’s No Shipments Inquiry Instructions,” dated December 5, 2019.

<sup>9</sup> 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).

companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. 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, for guidance when calculating the rate for companies which were not selected for individual examination in an administrative review. 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 review, we have preliminarily calculated a weighted-average dumping margin for Hyundai that is not zero, *de minimis*, or determined entirely on the basis of facts available. Accordingly, we have preliminarily assigned to the companies not individually examined in this review a margin of 0.94 percent, which is the calculated weighted-average dumping margin for Hyundai.<sup>10</sup>

**Preliminary Results of the Review**

We preliminarily determine that the following weighted-average dumping margin exists for the period October 1, 2017 through September 30, 2018:

Exporter/producer	Weighted-average dumping margin (percent)
Hyundai Steel Company .....	0.94
POSCO/POSCO Daewoo Corporation .....	0.94

**Disclosure and Public Comment**

We intend to disclose the calculations performed for these preliminary results of review to interested parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). Commerce will establish a deadline for interested parties to submit case briefs and rebuttal briefs at a later date.<sup>11</sup> 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.<sup>12</sup> Case and

<sup>10</sup> The non-examined companies subject to this review are: POSCO and POSCO Daewoo Corporation.

<sup>11</sup> See 19 CFR 351.309(c)(1)(ii) and 351.309(d)(1).

<sup>12</sup> See 19 CFR 351.309(c)(2) and (d)(2).

rebuttal briefs should be filed using ACCESS<sup>13</sup> and must be served on interested parties.<sup>14</sup> Executive summaries should be limited to five pages total, including footnotes.

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 Commerce's electronic records system, ACCESS. An electronically filed request must be received successfully in its entirety by 5:00 p.m. Eastern Time within 30 days of the date of publication of this notice.<sup>15</sup> Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues parties intend to discuss. 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 date and time to be determined.<sup>16</sup> Parties should confirm the date, time, and location of the hearing two days before the scheduled date.

Commerce intends to issue the final results of this administrative review, including the results of its analysis of the issues raised in any case or rebuttal briefs, no later than 120 days after the date of publication of this notice, unless extended.<sup>17</sup>

#### Assessment Rates

Upon completion of this administrative review, Commerce shall determine, and CBP shall assess, antidumping duties on all appropriate entries. If Hyundai's weighted-average dumping margin is not zero or *de minimis* (i.e., less than 0.5 percent) in the final results of this review, we will calculate importer-specific *ad valorem* antidumping duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1). We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific assessment rate calculated in the final results of this review is not zero or *de minimis*. If Hyundai's weighted-average dumping margin is

zero or *de minimis*, we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.<sup>18</sup>

In accordance with Commerce's "automatic assessment" practice, for entries of subject merchandise during the POR produced by Hyundai for which it did not know that the merchandise was destined to the United States, we will instruct CBP to liquidate those entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.<sup>19</sup>

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 for all shipments of the 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 Hyundai and POSCO in the final results of review will be equal to the weighted-average dumping margin established in the final results of this administrative review; (2) for merchandise exported by producers or exporters not covered in this 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 in which they were reviewed; (3) if the exporter is not a firm covered in this 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 merchandise; (4) the cash deposit rate for all other producers or exporters will continue to be 6.05 percent, the all-others rate established in the less-than-fair-value investigation. These cash deposit requirements, when imposed, shall remain in effect until further notice.

#### Notification to Importers

This notice also 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 POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

#### Notification to Interested Parties

This administrative review and notice are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 9, 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. Affiliation
- VI. Particular Market Situation
- VII. Discussion of the Methodology
- VIII. Currency Conversion
- IX. Recommendation

[FR Doc. 2019-27027 Filed 12-13-19; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[RTID 0648-XY050]

#### Fisheries of the Exclusive Economic Zone Off Alaska; North Pacific Observer Program Standard Ex-Vessel Prices

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

**ACTION:** Notice.

**SUMMARY:** NMFS publishes standard ex-vessel prices for groundfish and halibut for the calculation of the observer fee under the North Pacific Observer Program (Observer Program). This notice is intended to provide information to vessel owners, processors, registered buyers, and other Observer Program participants about the standard ex-vessel prices that will be

<sup>13</sup> See generally 19 CFR 351.303.

<sup>14</sup> See 19 CFR 351.303(f).

<sup>15</sup> See 19 CFR 351.310(c).

<sup>16</sup> See 19 CFR 351.310(d).

<sup>17</sup> See section 751(a)(3)(A) of the Act; and 19 CFR 351.213(h).

<sup>18</sup> See section 751(a)(2)(C) of the Act.

<sup>19</sup> For a full discussion of this practice, see *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

used to calculate the observer fee for landings of groundfish and halibut made in 2020. NMFS will send invoices to processors and registered buyers subject to the fee by January 15, 2021. Fees are due to NMFS on or before February 15, 2021.

**DATES:** The standard prices are valid on January 1, 2020.

**FOR FURTHER INFORMATION CONTACT:** For general questions about the observer fee and standard ex-vessel prices, contact Alicia M. Miller at (907) 586-7471. For questions about the fee billing process, contact Carl Greene at (907) 586-7003. Additional information about the Observer Program is available on NMFS Alaska Region's website at <https://www.fisheries.noaa.gov/alaska/fisheries-observers/north-pacific-observer-program>.

**SUPPLEMENTARY INFORMATION:**

**Background**

Regulations at 50 CFR part 679, subpart E, governing the Observer Program, require the deployment of NMFS-certified observers (observers) and electronic monitoring (EM) systems to collect information necessary for the conservation and management of the Bering Sea and Aleutian Islands (BSAI) and Gulf of Alaska (GOA) groundfish and halibut fisheries. Fishery managers use information collected by observers to monitor quotas, manage groundfish and prohibited species catch, and document and reduce fishery interactions with protected resources. Scientists use observer-collected information for stock assessments and marine ecosystem research.

The Observer Program includes two observer coverage categories—the partial coverage category and the full coverage category. All groundfish and halibut vessels and processors subject to observer coverage are included in one of these two categories. Defined at 50 CFR 679.51, the partial coverage category includes vessels and processors that are not required to have an observer or electronic monitoring (EM) at all times and the full coverage category includes vessels and processors required to have all of their fishing and processing activity observed. Vessels and processors in the full coverage category arrange and pay for observer services from a permitted observer provider. Observer coverage and EM for the partial coverage category is funded through a system of fees based on the ex-vessel value of groundfish and halibut. Throughout this notice, the term “processor” refers to shoreside processors, stationary floating

processors, and catcher/processors in the partial coverage category.

**Landings Subject to Observer Coverage Fee**

Pursuant to section 313 of the Magnuson-Stevens Act, NMFS is authorized to assess a fee on all landings accruing against a Federal total allowable catch (TAC) for groundfish or a commercial halibut quota made by vessels that are subject to Federal regulations and not included in the full coverage category. A fee is only assessed on landings of groundfish from vessels designated on a Federal Fisheries Permit or from vessels landing individual fishing quota (IFQ) or community development quota (CDQ) halibut or IFQ sablefish. Within the subset of vessels subject to the observer fee, only landings accruing against an IFQ allocation or a Federal TAC for groundfish are included in the fee assessment. A table with additional information about which landings are and are not subject to the observer fee is at § 679.55(c) and is on page 2 of an informational bulletin titled “Observer Fee Collection” on the NMFS Alaska Region website at <https://www.fisheries.noaa.gov/resource/document/observer-fee-collection-north-pacific-groundfish-and-halibut-fisheries-observer>.

**Fee Determination**

A fee equal to 1.25 percent of the ex-vessel value is assessed on the landings of groundfish and halibut subject to the fee. Ex-vessel value is determined by multiplying the standard price for groundfish by the round weight equivalent for each species, gear, and port combination, and the standard price for halibut by the headed and gutted weight equivalent. Standard prices are determined by aggregating prices by species, gear, and area grouping to arrive at an average price per pound for each grouping. NMFS reviews each vessel landing report and determines whether the reported landing is subject to the observer fee and, if so, which groundfish species in the landing are subject to the observer fee. All IFQ or CDQ halibut in a landing subject to the observer fee will be included in the observer fee calculation. For any landed groundfish or halibut subject to the observer fee, NMFS will apply the appropriate standard ex-vessel prices for the species, gear type, and port, and calculate the observer fee associated with the landing.

Processors and registered buyers access the landing-specific, observer fee information through NMFS Web Application (<https://>

[alaskafisheries.noaa.gov/webapps/efish/login](https://alaskafisheries.noaa.gov/webapps/efish/login)) or eLandings (<https://elandings.alaska.gov/>). Observer fee information is either available immediately or within 24 hours after a landing report is submitted electronically. A time lag occurs for some landings because NMFS must process each landing report through the catch accounting system computer programs to determine which groundfish in a landing accrues against a Federal TAC and are subject to the observer fee.

Under the fee system, catcher vessel owners split the fee with the registered buyers or owners of shoreside or stationary floating processors. While the owners of catcher vessels and processors in the partial coverage category are each responsible for paying their portion of the fee, the owners of shoreside or stationary floating processors and registered buyers are responsible for collecting the fees from catcher vessels, and remitting the full fee to NMFS. Owners of catcher/processors in the partial coverage category are responsible for remitting the full fee to NMFS.

NMFS sends invoices to processors and registered buyers by January 15 of each calendar year. The total fee amount is determined by the sum of the fees reported for each landing at that processor or registered buyer in the prior calendar year. Processors and registered buyers must pay the fees to NMFS using NMFS Web Application by February 15 each year. Processors and registered buyers have access to this system through a User ID and password issued by NMFS. Instructions for electronic payment will be provided on the NMFS Alaska Region website at <https://www.fisheries.noaa.gov/alaska/commercial-fishing/observer-fee-collection-and-payment-north-pacific-groundfish-and-halibut> and on the observer fee invoice to be mailed to each processor and registered buyer.

**Standard Prices**

This notice provides the standard ex-vessel prices for groundfish and halibut species subject to the observer fee in 2020. Data sources for ex-vessel prices are:

- For groundfish other than sablefish IFQ and sablefish accruing against the fixed gear sablefish CDQ reserve, the State of Alaska's Commercial Fishery Entry Commission's (CFEC) gross revenue data, which are based on the Commercial Operator Annual Report (COAR) and Alaska Department of Fish and Game (ADF&G) fish tickets; and
- For halibut IFQ, halibut CDQ, sablefish IFQ, and sablefish accruing

against the fixed gear sablefish CDQ reserve, the IFQ Buyer Report that is submitted to NMFS annually by each registered buyer that operates as a shoreside processor and receives and purchases IFQ landings of sablefish and halibut or CDQ landings of halibut under § 679.5(l)(7)(i).

The standard prices in this notice were calculated using the following procedures for protecting confidentiality of data submitted to or collected by NMFS. NMFS does not publish any price information that would permit the identification of an individual or business. For NMFS to publish a standard price for a particular species-gear-port combination, the price data used to calculate the standard price must represent landings from at least four different vessels to at least three different processors in a port or port group. Price data that is confidential because fewer than four vessels or three processors contributed data to a particular species-gear-port combination has been aggregated.

*Groundfish Standard Ex-Vessel Prices*

Table 1 shows the groundfish species standard ex-vessel prices that will be used to calculate the fee for 2020. These prices are based on the CFEC gross revenue data, which are based on landings data from ADF&G fish tickets and information from the COAR. The COAR contains statewide buying and production information, and is considered the most complete routinely collected information to determine the ex-vessel value of groundfish harvested from waters off Alaska.

The standard ex-vessel prices for groundfish were calculated by adding

ex-vessel value from the CFEC gross revenue files for 2016, 2017, and 2018 by species, port, and gear category, and adding the volume (round weight equivalent) from the CFEC gross revenue files for 2016, 2017, and 2018 by species, port, and gear category, and then dividing total ex-vessel value over the three-year period in each category by total volume over the 3-year period in each category. This calculation results in an average ex-vessel price per pound by species, port, and gear category for the 3-year period. Three gear categories were used for the standard ex-vessel prices: (1) Non-trawl gear, including hook-and-line, pot, jig, troll, and others (Non-Trawl); (2) non-pelagic trawl gear (NPT); and (3) pelagic trawl gear (PTR).

CFEC ex-vessel value and volume data are available in the fall of the year following the year the fishing occurred. Thus, it is not possible to base ex-vessel fee liabilities on standard prices that are less than two years old. For the 2020 groundfish standard ex-vessel prices, the most recent ex-vessel value and volume data available is from 2018.

If a particular groundfish species is not listed in Table 1, the standard ex-vessel price for a species group, if it exists in the management area, will be used. If price data for a particular species remained confidential once aggregated to the ALL level, data is aggregated by species group (Flathead Sole; GOA Deep-water Flatfish; GOA Shallow-water Flatfish; GOA Skate, Other; and Other Rockfish). Standard prices for the groundfish species groups are shown in Table 2.

If a port-level price does not meet the confidentiality requirements, the data

are aggregated by port group. Port-group data for Southeast Alaska (SEAK) and the Eastern GOA excluding Southeast Alaska (EGOAxSE) also are presented separately when price data are available. Port-group data is then aggregated by regulatory area in the GOA (Eastern GOA, Central GOA, and Western GOA) and by subarea in the BSAI (BS subarea and AI subarea). If confidentiality requirements are still not met by aggregating prices across ports at these levels, the prices are aggregated at the level of BSAI or GOA, then statewide (AK) and ports outside of Alaska (OTAK), and finally all ports, including those outside of Alaska (ALL).

Standard prices are presented separately for non-pelagic trawl and pelagic trawl when non-confidential data is available. NMFS also calculated prices for a “Pelagic Trawl/Non-pelagic Trawl Combined” (PTR/NPT) category that can be used when combining trawl price data for landings of a species in a particular port or port group will not violate confidentiality requirements. Creating this standard price category allows NMFS to assess a fee on 2020 landings of some of the species with pelagic trawl gear based on a combined trawl gear price for the port or port group.

If no standard ex-vessel price is listed for a species or species group and gear category combination in Table 1, Table 2, or Table 3, no fee will be assessed on that landing. Volume and value data for that species will be added to the standard ex-vessel prices in future years, if that data becomes available and display of a standard ex-vessel price meets confidentiality requirements.

TABLE 1—STANDARD EX-VESSEL PRICES FOR GROUNDFISH SPECIES FOR 2020 OBSERVER COVERAGE FEE

[Based on volume and value from 2016, 2017, and 2018]

Species (species code) <sup>1 2</sup>	Port/area <sup>3 4</sup>	Non-trawl	NPT	PTR	PTR/NPT
Alaska Plaice Flounder (133) .....	GOA .....	---	\$0.10	---	\$0.10
	AK .....	---	0.10	---	0.10
	ALL .....	---	0.10	---	0.10
Arrowtooth Flounder (121) .....	Kodiak .....	---	0.09	\$0.08	---
	CGOA .....	---	0.09	0.08	---
	GOA .....	---	0.09	0.08	---
	AK .....	\$0.12	0.09	0.08	---
	ALL .....	0.12	0.09	0.08	---
Atka Mackerel (193) .....	Kodiak .....	---	0.20	---	0.21
	CGOA .....	---	0.20	---	0.21
	GOA .....	---	0.20	---	0.21
	AK .....	---	0.20	---	0.20
	ALL .....	---	0.20	---	0.20
Black Rockfish (142) .....	AK .....	0.54	0.19	---	0.19
Bocaccio Rockfish (137) .....	SEAK .....	0.53	---	---	---
	EGOA .....	0.53	---	---	---
	CGOA .....	0.74	---	---	---
	GOA .....	0.56	---	---	---
	AK .....	0.56	---	---	---
	ALL .....	0.55	---	---	---

TABLE 1—STANDARD EX-VESSEL PRICES FOR GROUND FISH SPECIES FOR 2020 OBSERVER COVERAGE FEE—Continued  
 [Based on volume and value from 2016, 2017, and 2018]

Species (species code) <sup>1,2</sup>	Port/area <sup>3,4</sup>	Non-trawl	NPT	PTR	PTR/NPT	
Butter Sole (126)	Kodiak	---	0.15	0.15	---	
	CGOA	---	0.15	0.15	---	
	GOA	---	0.15	0.15	---	
	AK	---	0.15	0.15	---	
	ALL	---	0.15	0.15	---	
Canary Rockfish (146)	Craig	0.45	---	---	---	
	Ketchikan	0.49	---	---	---	
	Sitka	0.56	---	---	---	
	SEAK	0.52	---	---	---	
	EGOAxSE	0.36	---	---	---	
	Homer	0.66	---	---	---	
	Seward	0.48	---	---	---	
	CGOA	0.50	---	---	---	
	GOA	0.51	---	---	---	
	AK	0.51	---	---	---	
	ALL	0.51	---	---	---	
	Sitka	0.70	---	---	---	
China Rockfish (149)	SEAK	0.61	---	---	---	
	Cordova	0.27	---	---	---	
	EGOAxSE	0.27	---	---	---	
	Homer	0.68	---	---	---	
	Seward	0.63	---	---	---	
	CGOA	0.68	---	---	---	
	GOA	0.55	---	---	---	
	AK	0.55	---	---	---	
	ALL	0.55	---	---	---	
	Sitka	0.76	---	---	---	
	Copper Rockfish (138)	SEAK	0.66	---	---	---
		EGOA	0.56	---	---	---
Homer		0.62	---	---	---	
Seward		0.42	---	---	---	
CGOA		0.49	---	---	---	
GOA		0.55	---	---	---	
AK		0.55	---	---	---	
ALL		0.55	---	---	---	
GOA		0.50	---	---	---	
AK		0.50	---	---	---	
ALL		0.50	---	---	---	
Darkblotched Rockfish (159)		GOA	0.50	---	---	---
	AK	0.50	---	---	---	
	ALL	0.50	---	---	---	
Dover Sole (124)	Kodiak	---	0.09	---	0.09	
	CGOA	---	0.09	---	0.09	
	GOA	---	0.09	0.10	---	
	AK	---	0.09	0.10	---	
	ALL	---	0.09	0.10	---	
Dusky Rockfish (172)	Juneau	0.54	---	---	---	
	Sitka	0.55	---	---	---	
	SEAK	0.55	---	---	---	
	Whittier	0.41	---	---	---	
	EGOAxSE	0.30	---	---	---	
	Homer	0.59	---	---	---	
	Kodiak	0.41	0.17	0.17	---	
	Seward	0.60	---	---	---	
	CGOA	0.43	0.17	0.17	---	
	GOA	0.44	0.17	0.17	---	
	AK	0.44	0.17	0.17	---	
	ALL	0.44	0.17	0.17	---	
English Sole (128)	Kodiak	---	0.13	---	0.13	
	CGOA	---	0.13	---	0.13	
	GOA	---	0.13	---	0.13	
	AK	---	0.13	---	0.13	
	ALL	---	0.13	---	0.13	
Flathead Sole (122)	Kodiak	---	0.15	0.15	---	
	CGOA	---	0.15	0.15	---	
	GOA	---	0.15	0.15	---	
	AK	---	0.15	0.15	---	
	ALL	---	0.15	0.15	---	
Northern Rockfish (136)	Kodiak	0.21	0.16	0.16	---	
	CGOA	0.22	0.16	0.16	---	
	GOA	0.23	0.16	0.16	---	
	BSAI	0.68	---	---	---	
	AK	0.62	0.16	0.16	---	

TABLE 1—STANDARD EX-VESSEL PRICES FOR GROUND FISH SPECIES FOR 2020 OBSERVER COVERAGE FEE—Continued  
 [Based on volume and value from 2016, 2017, and 2018]

Species (species code) <sup>1,2</sup>	Port/area <sup>3,4</sup>	Non-trawl	NPT	PTR	PTR/NPT	
Octopus (870)	ALL	0.62	0.16	0.16	----	
	Homer	0.76	----	----	----	
	Kodiak	0.49	0.60	----	0.60	
	CGOA	0.51	0.60	----	0.60	
	GOA	0.51	0.59	----	0.59	
	Dutch Harbor	0.30	----	----	----	
	BS	0.54	----	----	----	
	BSAI	0.50	----	----	----	
	AK	0.50	0.59	----	0.59	
	ALL	0.50	0.59	----	0.59	
Pacific Cod (110)	Juneau	0.62	----	----	----	
	Ketchikan	0.36	----	----	----	
	Petersburg	0.19	----	----	----	
	Sitka	0.34	----	----	----	
	SEAK	0.59	----	----	----	
	Cordova	0.41	----	----	----	
	Whittier	0.40	----	----	----	
	EGOAxSE	0.40	----	----	----	
	Homer	0.40	----	----	----	
	Kodiak	0.37	0.34	0.30	----	
	Seward	0.40	----	----	----	
	CGOA	0.37	0.34	0.30	----	
	King Cove	0.30	----	----	----	
	WGOA	0.29	----	----	----	
	GOA	----	0.31	0.25	----	
	Dutch Harbor	0.33	0.31	----	0.31	
	BS	0.33	0.31	----	0.31	
	BSAI	0.34	0.31	0.11	----	
	Stationary Floating Processor	0.33	0.31	----	0.31	
	AK	0.34	0.31	0.25	----	
	ALL	0.34	0.31	0.25	----	
	Pacific Ocean Perch (141)	Kodiak	----	0.19	0.19	----
Seward		0.34	----	----	----	
CGOA		0.34	0.19	0.19	----	
GOA		0.77	0.19	0.19	----	
BSAI		----	----	0.05	0.05	
AK		0.54	0.19	0.19	----	
ALL		0.54	0.19	0.19	----	
ALL		0.06	0.10	0.10	----	
Pollock (270)	Kodiak	0.06	0.10	0.10	----	
	Seward	0.03	----	----	----	
	CGOA	0.06	0.10	0.10	----	
	GOA	0.06	0.10	0.10	----	
	Dutch Harbor	----	0.14	----	0.14	
	BS	----	0.14	0.13	----	
	BSAI	----	0.14	0.13	----	
	Stationary Floating Processor	----	0.13	----	0.12	
	AK	0.06	0.10	0.10	----	
	ALL	0.06	0.10	0.10	----	
Quillback Rockfish (147)	Craig	0.65	----	----	----	
	Juneau	0.44	----	----	----	
	Ketchikan	0.80	----	----	----	
	Petersburg	0.25	----	----	----	
	Sitka	0.82	----	----	----	
	SEAK	0.65	----	----	----	
	Cordova	0.26	----	----	----	
	Whittier	0.39	----	----	----	
	EGOAxSE	0.34	----	----	----	
	Homer	0.49	----	----	----	
	Seward	0.41	----	----	----	
	CGOA	0.42	----	----	----	
	GOA	0.48	----	----	----	
	AK	0.48	----	----	----	
	ALL	0.48	----	----	----	
	Redbanded Rockfish (153)	Juneau	0.34	----	----	----
		Ketchikan	0.33	----	----	----
Petersburg		0.23	----	----	----	
Sitka		0.52	----	----	----	
SEAK		0.39	----	----	----	
EGOAxSE		0.30	----	----	----	
Homer		0.33	----	----	----	

TABLE 1—STANDARD EX-VESSEL PRICES FOR GROUND FISH SPECIES FOR 2020 OBSERVER COVERAGE FEE—Continued  
 [Based on volume and value from 2016, 2017, and 2018]

Species (species code) <sup>1,2</sup>	Port/area <sup>3,4</sup>	Non-trawl	NPT	PTR	PTR/NPT	
Redstripe Rockfish (158)	Kodiak	0.26	---	---	---	
	Seward	0.34	---	---	---	
	CGOA	0.31	---	---	---	
	GOA	0.37	0.23	---	0.23	
	AK	0.37	0.23	---	0.23	
	ALL	0.38	0.23	---	0.23	
	Sitka	0.56	---	---	---	
	SEAK	0.62	---	---	---	
	EGOA	0.53	---	---	---	
	Seward	0.72	---	---	---	
	CGOA	0.54	---	---	---	
Rex Sole (125)	GOA	0.53	---	---	---	
	AK	0.53	---	---	---	
	ALL	0.53	---	---	---	
	Kodiak	---	0.36	0.36	---	
	CGOA	---	0.36	0.36	---	
	GOA	---	0.37	0.45	---	
	AK	---	0.37	0.43	---	
	ALL	---	0.37	0.43	---	
	Kodiak	---	0.17	0.17	---	
	CGOA	---	0.17	0.17	---	
	GOA	---	0.17	0.17	---	
Rock Sole (123)	AK	---	0.17	0.17	---	
	ALL	---	0.17	0.17	---	
	Kodiak	0.44	---	---	---	
	SEAK	0.40	---	---	---	
	EGOA	0.40	---	---	---	
	Seward	0.43	---	---	---	
	CGOA	0.49	---	---	---	
	GOA	0.43	---	---	---	
	AK	0.43	---	---	---	
	ALL	0.43	---	---	---	
	Juneau	0.33	---	---	---	
Rougheye Rockfish (151)	Ketchikan	0.32	---	---	---	
	Petersburg	0.28	---	---	---	
	Sitka	0.52	---	---	---	
	SEAK	0.44	---	---	---	
	Cordova	0.27	---	---	---	
	EGOAxSE	0.27	---	---	---	
	Homer	0.38	---	---	---	
	Kodiak	0.32	0.21	0.22	---	
	Seward	0.40	---	---	---	
	CGOA	0.35	0.21	0.21	---	
	GOA	0.38	0.23	0.21	---	
Sablefish (blackcod) (710)	AK	0.38	0.23	0.21	---	
	ALL	0.38	0.23	0.21	---	
	Kodiak	<sup>5</sup> n/a	2.98	2.82	---	
	CGOA	<sup>5</sup> n/a	2.98	2.82	---	
	GOA	<sup>5</sup> n/a	2.86	2.56	---	
	AK	<sup>5</sup> n/a	2.86	2.41	---	
	ALL	<sup>5</sup> n/a	2.86	2.41	---	
	Juneau	0.33	---	---	---	
	Shortraker Rockfish (152)	Ketchikan	0.32	---	---	---
		Petersburg	0.30	---	---	---
		Sitka	0.50	---	---	---
SEAK		0.41	---	---	---	
EGOAxSE		0.51	---	---	---	
Homer		0.36	---	---	---	
Kodiak		0.35	0.23	0.27	---	
Seward		0.38	---	---	---	
CGOA		0.38	0.23	0.25	---	
GOA		0.40	0.31	0.25	---	
BS		0.32	---	---	---	
Silvergray Rockfish (157)	BSAI	0.32	---	---	---	
	AK	0.40	0.31	0.25	---	
	ALL	0.40	0.31	0.25	---	
	Juneau	0.39	---	---	---	
	Ketchikan	0.58	---	---	---	
	Sitka	0.53	---	---	---	
	SEAK	0.45	---	---	---	

TABLE 1—STANDARD EX-VESSEL PRICES FOR GROUND FISH SPECIES FOR 2020 OBSERVER COVERAGE FEE—Continued  
 [Based on volume and value from 2016, 2017, and 2018]

Species (species code) <sup>1,2</sup>	Port/area <sup>3,4</sup>	Non-trawl	NPT	PTR	PTR/NPT
	EGOAxSE .....	0.40	---	---	---
	Homer .....	0.46	---	---	---
	Seward .....	0.41	---	---	---
	CGOA .....	0.42	---	---	0.13
	GOA .....	0.44	---	---	0.13
	AK .....	0.44	---	---	0.13
	ALL .....	0.44	---	---	0.13
Skate, Alaska (703) .....	CGOA .....	0.35	---	---	---
	GOA .....	0.35	---	---	---
	AK .....	0.35	---	---	---
	ALL .....	0.35	---	---	---
Skate, Big (702) .....	EGOA .....	0.39	---	---	---
	Homer .....	0.39	---	---	---
	Kodiak .....	0.45	0.46	0.45	---
	Seward .....	0.39	---	---	---
	CGOA .....	0.44	0.46	0.45	---
	GOA .....	0.43	0.46	0.45	---
	AK .....	0.43	0.46	0.45	---
	ALL .....	0.43	0.46	0.45	---
Skate, Longnose (701) .....	Petersburg .....	0.40	---	---	---
	SEAK .....	0.40	---	---	---
	EGOAxSE .....	0.32	---	---	---
	Homer .....	0.38	---	---	---
	Kodiak .....	0.45	0.46	0.45	---
	Seward .....	0.39	---	---	---
	CGOA .....	0.43	0.46	0.45	---
	GOA .....	0.41	0.46	0.45	---
	AK .....	0.41	0.46	0.45	---
	ALL .....	0.41	0.46	0.45	---
Skate, Other (700) .....	Juneau .....	0.03	---	---	---
	SEAK .....	0.35	---	---	---
	EGOA .....	0.35	---	---	---
	GOA .....	0.38	---	---	0.43
	AK .....	0.38	0.12	---	0.12
	ALL .....	0.38	0.12	---	0.12
Starry Flounder (129) .....	Kodiak .....	---	0.08	---	0.08
	CGOA .....	---	0.08	---	0.08
	GOA .....	---	0.08	---	0.08
	AK .....	---	0.08	---	0.08
	ALL .....	---	0.08	---	0.08
Thornyhead Rockfish (Idiots) (143) ..	Juneau .....	0.98	---	---	---
	Ketchikan .....	1.19	---	---	---
	Petersburg .....	0.97	---	---	---
	Sitka .....	0.99	---	---	---
	SEAK .....	1.00	---	---	---
	Cordova .....	0.54	---	---	---
	EGOAxSE .....	0.70	---	---	---
	Homer .....	0.73	---	---	---
	Kodiak .....	0.51	0.68	---	0.69
	Seward .....	0.74	---	---	---
	CGOA .....	0.66	0.68	---	0.69
	WGOA .....	0.79	---	---	---
	GOA .....	---	0.69	---	0.70
	Adak .....	0.55	---	---	---
	AI .....	0.57	---	---	---
	BS .....	0.70	---	---	---
	AK .....	0.78	0.69	---	0.70
	Bellingham .....	0.89	---	---	---
	OTAK .....	0.89	---	---	---
	ALL .....	0.78	0.69	---	0.70
Tiger Rockfish (148) .....	Juneau .....	0.43	---	---	---
	Sitka .....	0.52	---	---	---
	SEAK .....	0.50	---	---	---
	EGOAxSE .....	0.38	---	---	---
	Homer .....	0.43	---	---	---
	Seward .....	0.40	---	---	---
	CGOA .....	0.41	---	---	---
	GOA .....	0.44	---	---	---
	AK .....	0.44	---	---	---
	ALL .....	0.44	---	---	---

TABLE 1—STANDARD EX-VESSEL PRICES FOR GROUND FISH SPECIES FOR 2020 OBSERVER COVERAGE FEE—Continued  
 [Based on volume and value from 2016, 2017, and 2018]

Species (species code) <sup>1,2</sup>	Port/area <sup>3,4</sup>	Non-trawl	NPT	PTR	PTR/NPT
Vermilion Rockfish (184)	Sitka	0.95	---	---	---
	SEAK	0.81	---	---	---
	EGOA	0.81	---	---	---
	GOA	0.81	---	---	---
	AK	0.81	---	---	---
Widow Rockfish (156)	ALL	0.81	---	---	---
	CGOA	1.13	---	---	---
	GOA	1.08	---	---	---
Yelloweye Rockfish (145)	AK	1.08	---	---	---
	ALL	1.08	---	---	---
	Craig	1.31	---	---	---
	Juneau	1.30	---	---	---
	Ketchikan	1.87	---	---	---
	Petersburg	1.14	---	---	---
	Sitka	2.02	---	---	---
	SEAK	1.80	---	---	---
	Cordova	0.97	---	---	---
	Whittier	0.98	---	---	---
	EGOAxSE	1.00	---	---	---
	Homer	0.88	---	---	---
	Kodiak	0.33	0.25	---	0.25
	Seward	0.64	---	---	---
	CGOA	0.67	0.25	---	0.25
	WGOA	0.46	---	---	---
	GOA	---	0.25	---	0.25
Yellowtail Rockfish (155)	BS	0.18	---	---	---
	BSAI	0.18	---	---	---
	AK	1.52	0.25	---	0.25
	Bellingham	1.16	---	---	---
	OTAK	1.16	---	---	---
	ALL	1.52	0.25	---	0.25
	Sitka	0.67	---	---	---
	SEAK	0.64	---	---	---
	EGOA	0.64	---	---	---
	Homer	0.69	---	---	---
	Kodiak	0.28	---	---	---
CGOA	0.46	---	---	---	
GOA	0.53	---	---	---	
AK	0.53	---	---	---	
ALL	0.51	---	---	---	

--- = No landings in last 3 years or the data is confidential.

<sup>1</sup> If species is not listed, use price for the species group in Table 2 if it exists in the management area. If no price is available for the species or species group in Table 1, Table 2, or Table 3, no fee will be assessed on that landing. That species will come into standard ex-vessel prices in future years.

<sup>2</sup> For species codes, see Table 2a to 50 CFR part 679.

<sup>3</sup> Regulatory areas are defined at §679.2. (AK = Alaska; ALL = all ports including those outside Alaska; BS = Bering Sea subarea; BSAI = Bering Sea/Aleutian Islands; CGOA = Central Gulf of Alaska; EGOA = Eastern Gulf of Alaska; EGOAxSE = Eastern Gulf of Alaska except Southeast Alaska; GOA = Gulf of Alaska; SEAK = Southeast Alaska; WGOA = Western Gulf of Alaska).

<sup>4</sup> If a price is listed for the species, port, and gear type combination, that price will be applied to the round weight equivalent for groundfish landings. If no price is listed for the port and gear type combination, use port group and gear type, or see Table 2 or Table 3.

<sup>5</sup> n/a = ex-vessel prices for sablefish landed with hook-and-line, pot, or jig gear are listed in Table 3 with the prices for IFQ and CDQ landings.

TABLE 2—STANDARD EX-VESSEL PRICES FOR GROUND FISH SPECIES GROUPS FOR 2020 OBSERVER Coverage Fee [Based on volume and value from 2016, 2017, and 2018]

Species group <sup>1</sup>	Port/area <sup>2,3</sup>	Non-trawl	NPT	PTR	PTR/NPT
Flathead Sole (FSOL)	Kodiak	---	\$0.15	\$0.15	---
	CGOA	---	0.15	0.15	---
	GOA	---	0.15	0.15	---
	AK	---	0.15	0.15	---
	ALL	---	0.15	0.15	---
GOA Deep Water Flatfish (DFL4) <sup>4</sup>	Kodiak	---	0.09	0.09	---
	CGOA	---	0.09	---	0.09
	GOA	---	0.09	0.10	---
GOA Shallow Water Flatfish (SFL1) <sup>5</sup>	Kodiak	---	0.17	0.16	---
	CGOA	---	0.17	0.16	---
	GOA	---	0.17	0.16	---
GOA Skate, Other (USKT)	Juneau	0.03	---	---	---
	SEAK	0.35	---	---	---
	EGOA	0.35	---	---	---

TABLE 2—STANDARD EX-VESSEL PRICES FOR GROUND FISH SPECIES GROUPS FOR 2020 OBSERVER—Continued  
Coverage Fee [Based on volume and value from 2016, 2017, and 2018]

Species group <sup>1</sup>	Port/area <sup>2,3</sup>	Non-trawl	NPT	PTR	PTR/NPT
Other Rockfish (ROCK) <sup>6,7</sup>	Seward	0.42	---	---	---
	CGOA	0.41	---	---	---
	GOA	0.38	---	---	0.43
	Juneau	0.51	---	---	---
	Ketchikan	0.36	---	---	---
	Petersburg	0.35	---	---	---
	Sitka	0.54	---	---	---
	SEAK	0.47	---	---	---
	Cordova	0.74	---	---	---
	Whittier	0.75	---	---	---
	EGOAxSE	0.75	---	---	---
	Homer	0.81	---	---	---
	Kodiak	0.34	0.20	---	0.20
	Seward	0.54	---	---	---
	CGOA	0.58	0.20	---	0.20
	WGOA	0.61	---	---	---
	GOA	---	0.21	---	0.21
	Adak	0.55	---	---	---
	AI	0.57	---	---	---
	Dutch Harbor	0.74	---	---	---
BS	0.67	---	---	---	
AK	---	0.21	---	0.21	

--- = No landings in last 3 years or the data is confidential.

<sup>1</sup> If groundfish species is not listed in Table 1, use price for the species group if it exists in the management area. If no price is available for the species or species group in Table 1, Table 2, or Table 3, no fee will be assessed on that landing. That species will come into standard ex-vessel prices in future years.

<sup>2</sup> Regulatory areas are defined at § 679.2. (AK = Alaska; BS = Bering Sea subarea; BSAI = Bering Sea/Aleutian Islands; CGOA = Central Gulf of Alaska; EGOA = Eastern Gulf of Alaska; EGOAxSE = Eastern Gulf of Alaska except Southeast Alaska; GOA = Gulf of Alaska; SEAK = Southeast Alaska; WGOA = Western Gulf of Alaska).

<sup>3</sup> If a price is listed for the species, port, and gear type combination, that price will be applied to the round weight equivalent for groundfish landings. If no price is listed for the port and gear type combination, use port group and gear type combination.

<sup>4</sup> "Deep-water flatfish" in the GOA means Dover sole, Greenland turbot, Kamchatka flounder, and deepsea sole.

<sup>5</sup> "Shallow-water flatfish" in the GOA means flatfish not including "deep-water flatfish," flathead sole, rex sole, or arrowtooth flounder.

<sup>6</sup> In the GOA:

"Other rockfish" means *Sebastes aurora* (aurora), *S. melanostomus* (blackgill), *S. paucispinis* (bocaccio), *S. goodei* (chilipepper), *S. crameri* (darkblotch), *S. elongatus* (greenstriped), *S. variegatus* (harlequin), *S. wilsoni* (pygmy), *S. babcocki* (redbanded), *S. proriger* (redstripe), *S. zacentrus* (sharpchin), *S. jordani* (shortbelly), *S. brevispinis* (silvergray), *S. diploproa* (splitnose), *S. saxicola* (stripetail), *S. miniatus* (vermillion), *S. reedi* (yellowmouth), *S. entomelas* (widow), and *S. flavidus* (yellowtail). In the Eastern GOA only, other rockfish also includes northern rockfish, *S. polyspinis*.

"Other rockfish" in the Western and Central Regulatory Areas and in the West Yakutat District means other rockfish and demersal shelf rockfish. The "other rockfish" species group in the SEO District only includes other rockfish.

"Demersal shelf rockfish" means *Sebastes pinniger* (canary), *S. nebulosus* (china), *S. caurinus* (copper), *S. maliger* (quillback), *S. helvomaculatus* (rosethorn), *S. nigrocinctus* (tiger), and *S. ruberrimus* (yelloweye).

<sup>7</sup> "Other rockfish" in the BSAI includes all *Sebastes* and *Sebastolobus* species except for dark rockfish, Pacific ocean perch, northern rockfish, blackspotted/rougheye rockfish, and shortraker rockfish.

*Halibut and Sablefish IFQ and CDQ Standard Ex-Vessel Prices*

Table 3 shows the observer fee standard ex-vessel prices for halibut and sablefish. These standard prices are calculated as a single annual average price, by species and port or port group. Volume and ex-vessel value data collected on the 2019 IFQ Buyer Report for landings made from October 1, 2018, through September 30, 2019, were used to calculate the standard ex-vessel prices for the 2020 observer fee for halibut IFQ, halibut CDQ, sablefish IFQ, and sablefish landings that accrue against the fixed gear sablefish CDQ reserve.

TABLE 3—STANDARD EX-VESSEL PRICES FOR HALIBUT IFQ, HALIBUT CDQ, SABLEFISH IFQ, AND SABLEFISH ACCRUING AGAINST THE FIXED GEAR SABLEFISH CDQ RESERVE FOR THE 2020 OBSERVER FEE [Based on 2019 IFQ Buyer Reports]

Species	Port/area <sup>1</sup>	Price <sup>2</sup>
Halibut (200) .....	Craig	\$5.56
	Ketchikan	5.60
	Petersburg	5.54
	Sitka	5.47
	SEAK	5.62
	Cordova	5.72
	EGOAxSE	5.66
	Homer	5.80
	Kodiak	5.07
	Seward	5.61
	CGOA	5.48
	WGOA	4.64
	BS	4.30
	BSAI	4.32
	AK	5.31
	ALL	5.31

TABLE 3—STANDARD EX-VESSEL PRICES FOR HALIBUT IFQ, HALIBUT CDQ, SABLEFISH IFQ, AND SABLEFISH ACCRUING AGAINST THE FIXED GEAR SABLEFISH CDQ RESERVE FOR THE 2020 OBSERVER FEE—Continued [Based on 2019 IFQ Buyer Reports]

Species	Port/area <sup>1</sup>	Price <sup>2</sup>
Sablefish (710) ...	Craig	3.30
	Sitka	3.61
	SEAK	3.55
	Cordova	3.27
	EGOAxSE	3.16
	Homer	2.92
	Kodiak	2.65
	Seward	3.17
	CGOA	2.83
	WGOA	4.32
	BS	1.98
BSAI	2.08	
AK	3.12	

TABLE 3—STANDARD EX-VESSEL PRICES FOR HALIBUT IFQ, HALIBUT CDQ, SABLEFISH IFQ, AND SABLEFISH ACCRUING AGAINST THE FIXED GEAR SABLEFISH CDQ RESERVE FOR THE 2020 OBSERVER FEE—Continued

[Based on 2019 IFQ Buyer Reports]

Species	Port/area <sup>1</sup>	Price <sup>2</sup>
	ALL .....	3.12

<sup>1</sup> Regulatory areas are defined at §679.2. (AK = Alaska; ALL = all ports including those outside Alaska; AI = Aleutian Islands subarea; BS = Bering Sea subarea; CGOA = Central Gulf of Alaska; EGOAxSE = Eastern Gulf of Alaska except Southeast Alaska; SEAK = Southeast Alaska; WGOA = Western Gulf of Alaska).

<sup>2</sup> If a price is listed for the species and port combination, that price will be applied to the round weight equivalent for sablefish landings and the headed and gutted weight equivalent for halibut landings. If no price is listed for the port, use port group.

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

Dated: December 11, 2019.

**Alan D. Risenhoover,**

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

[FR Doc. 2019–27064 Filed 12–13–19; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[RTID 0648–XV148]

#### Fisheries of the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

**ACTION:** Notice of scheduled SEDAR 59 Assessment Webinar III.

**SUMMARY:** The SEDAR 59 assessment of the South Atlantic stock of Greater Amberjack will consist of a series of Data and Assessment webinars.

**DATES:** The SEDAR 59-Assessment Webinar III has been scheduled for January 22, 2020, from 9 a.m. to 12 p.m., Eastern Time.

**ADDRESSES:**

*Meeting address:* The meeting will be held via webinar. The webinar is open to members of the public. Registration is available online at: <https://attendee.gotowebinar.com/register/5706560309522095885>.

*SEDAR address:* South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N Charleston, SC 29405; [www.sedarweb.org](http://www.sedarweb.org).

**FOR FURTHER INFORMATION CONTACT:**

Kathleen Howington, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; phone: (843) 571–4366; email: [Kathleen.Howington@safmc.net](mailto:Kathleen.Howington@safmc.net).

**SUPPLEMENTARY INFORMATION:** The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions, have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, Highly Migratory Species Management Division, and Southeast Fisheries Science Center. Participants include: Data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and non-governmental organizations (NGOs); international experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion at the Assessment webinar III are as follows:

- Finalize discussion about model structure and address the terms of reference.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice

that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

**Special Accommodations**

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the South Atlantic Fishery Management Council office (see **ADDRESSES**) at least 5 business days prior to the meeting.

**Note:** The times and sequence specified in this agenda are subject to change.

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

Dated: December 11, 2019.

**Tracey L. Thompson,**

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

[FR Doc. 2019–27059 Filed 12–13–19; 8:45 am]

**BILLING CODE 3510–22–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[RTID 0648–XV149]

#### Pacific Fishery Management Council; Public Meeting

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

**ACTION:** Notice of public meetings.

**SUMMARY:** The Pacific Fishery Management Council's (Pacific Council) Ad Hoc Sablefish Management and Trawl Allocation Attainment Committee (SaMTAAC) will hold a meeting, which will be open to the public.

**DATES:** The meeting will be held Wednesday, January 22 and Thursday, January 23, 2020, starting at 8 a.m. Pacific Standard Time and will end when business for the day has been completed.

**ADDRESSES:** The meeting will be held at the Holiday Inn Portland Airport, Bridal Veil Room, 8439 NE Columbia Blvd., Portland, OR 97220; telephone: (503) 256–5000.

*Council address:* Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

**FOR FURTHER INFORMATION CONTACT:** Dr. Jim Seger, Pacific Council; telephone: (503) 820–2416.

**SUPPLEMENTARY INFORMATION:** At its meeting, the SaMTAAC will continue to develop alternatives that address

obstacles to achieving the goals and objectives of the groundfish trawl catch share plan related to under-attainment of non-sablefish shorebased trawl allocations. The SaMTAAC's work on alternatives will be presented at the June 2020 Pacific Council meeting.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

#### Special Accommodations

The meetings are physically accessible to people with disabilities.

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt ([kris.kleinschmidt@noaa.gov](mailto:kris.kleinschmidt@noaa.gov); (503) 820-2412) at least 10 days prior to the meeting date.

Dated: December 11, 2019.

#### Tracey L. Thompson,

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

[FR Doc. 2019-27058 Filed 12-13-19; 8:45 am]

**BILLING CODE 3510-22-P**

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## DEPARTMENT OF DEFENSE

### Office of the Secretary

[Transmittal No. 19-48]

#### Arms Sales Notification

**AGENCY:** Defense Security Cooperation Agency, Department of Defense.

**ACTION:** Arms sales notice.

**SUMMARY:** The Department of Defense is publishing the unclassified text of an arms sales notification.

**FOR FURTHER INFORMATION CONTACT:**

Karma Job at [karma.d.job.civ@mail.mil](mailto:karma.d.job.civ@mail.mil) or (703) 697-8976.

**SUPPLEMENTARY INFORMATION:** This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104-164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 19-48 with attached Policy Justification.

Dated: December 9, 2019.

**Aaron T. Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

**BILLING CODE 5001-06-P**



DEFENSE SECURITY COOPERATION AGENCY

201 12<sup>TH</sup> STREET SOUTH, STE 203  
ARLINGTON, VA 22202-5408

JUL 29 2019

The Honorable Nancy Pelosi  
Speaker of the House  
U.S. House of Representatives  
H-209, The Capitol  
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 19-48 concerning the Air Force's proposed Letter(s) of Offer and Acceptance to the Republic of Korea for defense articles and services estimated to cost \$950 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Charles W. Hooper  
Lieutenant General, USA  
Director

Enclosures:

- 1. Transmittal
- 2. Policy Justification

BILLING CODE 5001-06-C

Transmittal No. 19-48

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Republic of Korea

(ii) *Total Estimated Value:*

Major Defense Equipment*	\$ 0 million
Other .....	\$950 million
<b>TOTAL .....</b>	<b>\$950 million</b>

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:* The Republic of Korea has requested to purchase items and services for follow-on support to the RQ-4 Block 30 Remotely Piloted Aircraft (RPA) program.

*Major Defense Equipment (MDE):*  
None

*Non-MDE:* Contractor Logistics Support (CLS); program management; training for pilots maintenance, logistics

and communications personnel; depot and organizational level maintenance; minor modifications and upgrades; spares and repair/return parts; operational flight support; program analysis; publications and technical documentation; U.S. Government and contractor technical and logistics services; and other related elements of logistics and program support.

(iv) *Military Department:* Air Force (KS-D-QFU)

(v) *Prior Related Cases, if any:* KS-D-SAD

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* None

(viii) *Date Report Delivered to Congress:* July 29, 2019

\* As defined in Section 47(6) of the Arms Export Control Act.

#### **POLICY JUSTIFICATION**

*Republic of Korea—Contractor Logistics Support (CLS) for RQ-4 Block 30 Remotely Piloted Aircraft (RPA)*

The Republic of Korea has requested to purchase Contractor Logistics Support (CLS); program management; training for pilots maintenance, logistics and communications personnel; depot and organizational level maintenance; minor modifications and upgrades; spares and repair/return parts; operational flight support; program analysis; publications and technical documentation; U.S. Government and contractor technical and logistics services; and other related elements of logistics and program support. The total estimated program cost is \$950 million.

This proposed sale will support the foreign policy and national security objectives of the United States by meeting the legitimate security and defense needs of one of the closest allies in the INDOPACOM Theater. The Republic of Korea is one of the major political and economic powers in East

Asia and the Western Pacific and a key partner of the United States in ensuring peace and stability in that region. It is vital to U.S. national interests to assist the Republic of Korea in developing and maintaining a strong and ready self-defense capability.

This proposed sale will enable the Republic of Korea to sustain and operate its fleet of RQ-4 Block 30 remotely piloted aircraft and will significantly advance U.S. interests in standardization with the Republic of Korea's Armed Forces. The potential sale will further strengthen the interoperability between the United States and the Republic of Korea and ensures the Alliance has a robust intelligence, surveillance, and reconnaissance (ISR) capability on the Korean peninsula. The ROK will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractor will be Northrop Grumman Corporation located in Palmdale, CA. There are no known offset agreements proposed in conjunction with this potential sale. Any offset agreement will be defined in negotiations between the Purchaser and the prime contractor.

Implementation of the proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to the ROK.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

All defense articles and services in this transmittal have been approved for release and export to the Republic of Korea.

[FR Doc. 2019-27014 Filed 12-13-19; 8:45 am]

**BILLING CODE 5001-06-P**

## **DEPARTMENT OF DEFENSE**

### **Office of the Secretary**

[Transmittal No. 19-50]

#### **Arms Sales Notification**

**AGENCY:** Defense Security Cooperation Agency, Department of Defense.

**ACTION:** Arms sales notice.

**SUMMARY:** The Department of Defense is publishing the unclassified text of an arms sales notification.

**FOR FURTHER INFORMATION CONTACT:** Karma Job at [karma.d.job.civ@mail.mil](mailto:karma.d.job.civ@mail.mil) or (703) 697-8976.

**SUPPLEMENTARY INFORMATION:** This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104-164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 19-50 with attached Policy Justification and Sensitivity of Technology.

Dated: December 10, 2019.

**Aaron T. Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

**BILLING CODE 5001-06-P**



**DEFENSE SECURITY COOPERATION AGENCY**  
201 12<sup>TH</sup> STREET SOUTH, SUITE 101  
ARLINGTON, VA 22202-5408

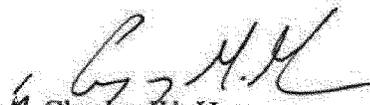
**AUG 20 2019**

The Honorable Nancy Pelosi  
Speaker of the House  
U.S. House of Representatives  
H-209, The Capitol  
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 19-50 concerning the Air Force's proposed Letter(s) of Offer and Acceptance to the Taipei Economic and Cultural Representative Office in the United States (TECRO) for defense articles and services estimated to cost \$8.0 billion. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

  
Charles W. Hooper  
Lieutenant General, USA  
Director

Enclosures:

1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Transmittal No. 19-50

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser*: Taipei Economic and Cultural Representative Office in the United States (TECRO)

(ii) *Total Estimated Value*:

Major Defense Equipment *	\$5.1 billion
Other .....	\$2.9 billion
TOTAL .....	\$8.0 billion

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase*:

*Major Defense Equipment (MDE)*:

Sixty-six (66) F-16C/D Block 70 Aircraft  
 Seventy-five (75) F110 General Electric Engines (includes 9 spares)  
 Seventy-five (75) Link-16 Systems (includes 9 spares)  
 Seventy-five (75) Improved Programmable Display Generators (iPDG) (includes 9 spares)  
 Seventy-five (75) APG-83 Active Electronically Scanned Array (AESA) Radars (includes 9 spares)  
 Seventy-five (75) Modular Mission Computers 7000AH (includes 9 spares)  
 Seventy-five (75) LN-260 Embedded GPS/INS (includes 9 spares)  
 Seventy-five (75) M61 Vulcan 20mm Guns (includes 9 spares)  
 One-hundred thirty-eight (138) LAU-129 Multipurpose Launchers  
 Six (6) FMU-139D/B Fuze for Guided Bombs  
 Six (6) FMU-139D/B Inert Fuze for Guided Bombs  
 Six (6) FMU-152 Fuze for Guided Bombs  
 Six (6) MK-82 Filled Inert Bombs for Guided Bombs  
 Three (3) KMU-572 Joint Direct Attack Munition (JDAM) Tail Kits, GBU-38/54

*Non-MDE*: Also included are seventy-five (75) AN/ALE-47 Countermeasure Dispensers (includes 9 spares); one-hundred twenty (120) ALE-50 towed decoy or equivalent; seventy-five (75) APX-126 Advanced Identification Friend or Foe (includes 9 spares); seventy-five (75) AN/ALQ-211 A(V)4 Airborne Integrated Defensive Electronic Warfare Suite (AIDEWS) or equivalent (includes 9 spares); EW Line Replaceable Unit (LRU) and Standard Electronic Module (SEM) spares; one hundred fifty (150) ARC-238 radios (includes 18 spares); Secure Communications and Cryptographic Appliques including seventy-three (73) KIV-78 cryptographic COMSEC devices, and ten (10) AN/PYQ-10 Simple Key Loaders (SKLs) for COMSEC; three (3)

Joint Mission Planning Systems (JMPS); twenty-seven (27) Joint Helmet Mounted Cueing Systems (JHMCS) II with Night Vision Device (NVD) compatibility or Scorpion Hybrid Optical-based Inertial Tracker (HObIT) helmet mounted cueing system with NVD compatibility; seventy (70) NVDs; six (6) NVD spare image intensifier tubes; Cartridge Actuated Devices/Propellant Actuated Devices (CAD/PAD); cartridges; chaff; flares; three (3) each DSU-38A/B Precision Laser Guidance Sensor (PLGS) for GBU-54 Laser Joint Direct Attack Munition (LJDAM) integration; PGU-28A/B 20mm ammunition; telemetry units for integration and test; bomb components; twenty (20) ground debriefing stations; Electronic Combat International Security Assistance Program (ECISAP) support including EW database and Mission Data File (MDF) development (classified/unclassified); communications equipment; classified/unclassified spares, repair, support equipment, test equipment, software delivery/support, personnel training, training equipment, flight/tactics manuals, publications and technical documentation; bomb racks; Organizational, Intermediate and Depot level tooling; Pilot Life Support Equipment (PLSE); Alternate Mission Equipment (AME); ground training devices (including flight and maintenance simulators); containers; development, integration, test and engineering, technical and logistical support of munitions; aircraft ferry; studies and surveys; construction services; U.S. Government and contractor engineering, technical and logistical support services; and other related elements of logistics, program and sustainment support.

(iv) *Military Department*: Air Force (TW-D-QCA)

(v) *Prior Related Cases, if any*: TW-D-SKA, TW-D-QBZ

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid*: None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold*: See Attached Annex

(viii) *Date Report Delivered to Congress*: August 20, 2019

\* As defined in Section 47(6) of the Arms Export Control Act.

#### POLICY JUSTIFICATION

*Taipei Economic and Cultural Representative Office in the United States (TECRO)—F-16C/D Block 70 Aircraft*

TECRO has requested to purchase sixty-six (66) F-16C/D Block 70 aircraft; seventy-five (75) F110 General Electric

Engines (includes 9 spares); seventy-five (75) Link-16 Systems (includes 9 spares); seventy-five (75) Improved Programmable Display Generators (iPDG) (includes 9 spares); seventy-five (75) APG-83 Active Electronically Scanned Array (AESA) Radars (includes 9 spares); seventy-five (75) Modular Mission Computers 7000AH (includes 9 spares); seventy-five (75) LN-260 Embedded GPS/INS (includes 9 spares); seventy-five (75) M61 Vulcan 20mm Guns (includes 9 spares); one-hundred thirty-eight (138) LAU-129 Multipurpose Launchers; six (6) FMU-139D/B Fuze for Guided Bombs; six (6) FMU-139D/B Inert Fuze for Guided Bombs; six (6) FMU 152 Fuze for Guided Bombs; six (6) MK-82 Filled Inert Bombs for Guided Bombs; and three (3) KMU-572 Joint Direct Attack Munition (JDAM) Tail Kits, GBU-38/54. Also included are seventy-five (75) AN/ALE-47 Countermeasure Dispensers (includes 9 spares); one-hundred twenty (120) ALE-50 towed decoy or equivalent; seventy-five (75) APX-126 Advanced Identification Friend or Foe (includes 9 spares); seventy five (75) AN/ALQ-211 A(V)4 Airborne Integrated Defensive Electronic Warfare Suite (AIDEWS) or equivalent (includes 9 spares); EW Line Replaceable Unit (LRU) and Standard Electronic Module (SEM) spares; one hundred fifty (150) ARC-238 radios (includes 18 spares); Secure Communications and Cryptographic Appliques including seventy-three (73) KIV-78 cryptographic COMSEC devices, and ten (10) AN/PYQ-10 Simple Key Loaders (SKLs) for COMSEC; three (3) Joint Mission Planning Systems (JMPS); twenty-seven (27) Joint Helmet Mounted Cueing Systems (JHMCS) II with Night Vision Device (NVD) compatibility or Scorpion Hybrid Optical-based Inertial Tracker (HObIT) helmet mounted cueing system with NVD compatibility; seventy (70) NVDs; six (6) NVD spare image intensifier tubes; Cartridge Actuated Devices/Propellant Actuated Devices (CAD/PAD); cartridges; chaff; flares; three (3) each DSU-38A/B Precision Laser Guidance Sensor (PLGS) for GBU-54 Laser Joint Direct Attack Munition (LJDAM) integration; PGU-28A/B 20mm ammunition; telemetry units for integration and test; bomb components; twenty (20) ground debriefing stations; Electronic Combat International Security Assistance Program (ECISAP) support including EW database and Mission Data File (MDF) development (classified/unclassified); communications equipment; classified/unclassified spares, repair, support equipment, test equipment, software

delivery/support, personnel training, training equipment, flight/tactics manuals, publications and technical documentation; bomb racks; Organizational, Intermediate and Depot level tooling; Pilot Life Support Equipment (PLSE); Alternate Mission Equipment (AME); ground training devices (including flight and maintenance simulators); containers; development, integration, test and engineering, technical and logistical support of munitions; aircraft ferry; studies and surveys; construction services; U.S. Government and contractor engineering, technical and logistical support services; and other related elements of logistics, program and sustainment support. The total estimated program cost is \$8.0 billion.

This proposed sale is consistent with U.S. law and policy as expressed in Public Law 96-8.

This proposed sale serves U.S. national, economic, and security interests by supporting the recipient's continuing efforts to modernize its armed forces and to maintain a credible defensive capability. The proposed sale will help improve the security of the recipient and assist in maintaining political stability, military balance, and economic progress in the region.

This proposed sale will contribute to the recipient's capability to provide for the defense of its airspace, regional security, and interoperability with the United States. The recipient currently operates the F-16A/B. The recipient will have no difficulty absorbing this aircraft and services into its arms forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principle contractor will be Lockheed Martin, headquartered in Bethesda, MD. There are no known offset agreements proposed. The purchaser typically requests offsets. Any offset agreement would be defined in negotiations between the purchaser and the contractor(s).

Implementation of this proposed sale will require assignment of a small number of U.S. Government representatives (less than 20) and a modest number of contractor representatives to the recipient to manage the fielding and training for the program.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 19-50

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The F-16 Block 70 weapon system is unclassified, except as noted below. The aircraft utilizes the F-16 airframe and features advanced avionics and systems. It contains the General Electric F110-129 engine, AN/APG-83 radar, digital flight control system, embedded internal global navigation system, Joint Helmet Mounted Cueing Systems (JHMCS) II or may include Scorpion Hybrid Optical-based Inertial Tracker (HOBIT) with or without Night Vision Device (NVD) capability, internal and external electronic warfare equipment, Advanced IFF, LINK-16 datalink, operational flight trainer, and software computer programs.

2. Sensitive and/or classified (up to SECRET) elements of the proposed F-16 Block 70 include hardware, accessories, components, and associated software: Link 16 and ESHI Terminals, Multipurpose Launcher (LAU-129), AN/ALQ-21 I A(V)4 AIDEWS EW system or equivalent, Advanced Identification Friend or Foe (AIFF), Cryptographic Appliques (KIV-78), Dual-Band AN/ARC-238 UHF/VHF Radios, Joint Mission Planning System, F-16 Block 70 Simulator, Avionics I-Level Test Station, F110 engine infrared signature, and Advanced Interference Blanker Unit. Additional sensitive areas include operating, tactics manuals, and maintenance technical orders containing performance information, operating and test procedures, and other information related to support operations and repair. The hardware, software, and data identified are classified to protect vulnerabilities, design and performance parameters and other similar critical information.

3. AN/APG-83 is an Active Electronically Scanned Array (AESA) radar upgrade for the F-16. It includes higher processor power, higher transmission power, more sensitive receiver electronics, and Synthetic Aperture Radar (SAR), which creates higher-resolution ground maps from a greater distance than existing mechanically scanned array radars (e.g., APG-68). The upgrade features an increase in detection range of air targets, increases in processing speed and memory, as well as significant improvements in all modes. The highest classification of the radar is SECRET.

4. Link-16 is a command, control, communications, and intelligence (C3I) system incorporating high-capacity, jam-resistant, digital communication links for exchange of near real-time tactical information, including both data and voice, among air, ground, and sea elements.

5. Joint Helmet Mounted Cueing System II (JHMCS II) is a modified HGU-55/P helmet that incorporates a visor-projected Heads-Up Display (HUD) to cue weapons and aircraft sensors to air and ground targets. This system projects visual targeting and aircraft performance information on the back of the helmet's visor, enabling the pilot to monitor this information without interrupting his field of view through the cockpit canopy. This provides improvement for close combat targeting and engagement. Hardware is UNCLASSIFIED; technical data and documents are classified up to SECRET.

6. Joint Mission Planning System (JMPS) is a multi-platform PC based mission planning system. JMPS hardware is UNCLASSIFIED but the software is classified up to SECRET.

7. AN/ALQ-211 A(V)4 Airborne Integrated Defensive Electronic Warfare Suite (AIDEWS) or equivalent provides passive radar warning, wide spectrum Radio Frequency (RF) jamming, and control and management of the entire Electronic Warfare (EW) system. The system is anticipated to be internal to the aircraft although mounted pod variants are used in certain circumstances. The commercially developed system software and hardware is UNCLASSIFIED. The system is classified SECRET when loaded with a U.S. derived EW database.

8. Embedded GPS-INS (EGI) LN-260 is a sensor that combines GPS and inertial sensor inputs to provide accurate location information for navigation and targeting. The EGI LN-260 is UNCLASSIFIED. The GPS cryptovariation keys needed for highest GPS accuracy are classified up to SECRET.

9. AN/APX-126 Advanced Identification Friend or Foe (AIFF) Combined Interrogator Transponder (CIT) is a system capable of transmitting and interrogating Mode V. It is UNCLASSIFIED unless/until Mode IV and/or Mode V operational evaluator parameters are loaded into the equipment. Elements of the IFF system classified up to SECRET include software object code, operating characteristics, parameters, and technical data. Mode IV and Mode V anti-jam performance specifications/data, software source code, algorithms, and tempest plans or reports will not be

offered, released, discussed, or demonstrated.

10. Modular Mission Computer (MMC) 7000AH is the central aircraft computer of the F-16. It serves as the hub for all aircraft subsystems and avionics data transfer. The MMC 7000AH hardware and software are classified SECRET.

11. Improved Programmable Display Generator (iPDG) and color multifunction displays utilize ruggedized commercial liquid crystal display technology that is designed to withstand the harsh environment found in modern fighter cockpits. The display generator is the fifth generation graphics processor for the F-16. Through the use of state-of-the-art microprocessors and graphics engines, it provided orders of magnitude increases in throughput, memory, and graphics capabilities. The hardware and software are UNCLASSIFIED.

12. AN/AVS-9 Night Vision Goggles (NVG) are 3rd generation aviation NVG offering higher resolution, high gain, and photo response to near infrared. Hardware is UNCLASSIFIED, and technical data and documentation to be provided are UNCLASSIFIED.

13. KIV-78 is a crypto applique for IFF. The hardware is UNCLASSIFIED unless loaded with Mode 4 classified elements.

14. AN/ARC-238 radio with HAVE QUICK II is a voice communications radio system and considered UNCLASSIFIED without HAVE QUICK II. HAVE QUICK II employs cryptographic technology that is classified SECRET. Other waveforms may be included as needed. Classified elements include operating characteristics, parameters, technical data, and keying material.

15. LAU-129 Guided Missile Launcher is capable of launching a single AIM-9 (Sidewinder) family of missile or AIM-120 Advanced Medium Range Air-to-Air Missile (AMRAAM). The LAU-129 launcher provides mechanical and electrical interface between missile and aircraft. There are five versions produced strictly for foreign military sales. The only difference between these launchers is the material they are coated with or the

color of the coating. This device is UNCLASSIFIED.

16. Laser JDAM (Joint Direct Attack Munitions) (GBU-54/56) is a Joint Service weapon and has the capability to engage targets moving at up to 70 mph. The LJDAM weapon consists of a DSU-38/40 sensor, a JDAM guidance set installed on either a nonthermal or thermal coated bomb body; and fuze. The DSU-38/40 consists of a laser spot tracker (same size and shape as a DSU-33 proximity fuze), a cable connecting the DSU-38/40 to the basic JDAM guidance set, a cable cover, cable cover tie down straps, modified tail kit door and wiring harness, and associated modified JDAM software that incorporates navigation and guidance flight software to support both LJDAM and standard JDAM missions. FMU-152A/B, FMU-139 (all variants) and dummy fuzes are the standard fuzes to be used with this weapon. The quantities in this notification are for testing and integration effort. The weapons components are UNCLASSIFIED. Technical data and countermeasures/vulnerabilities are SECRET. The overall classification is SECRET.

17. MK-82 inert General Purpose (GP) bomb is a 500 pound, inert, free-fall, unguided, low-drag weapon usually equipped with the mechanical M904 (nose) and M905 (tail) fuzes or the radar-proximity FMU-113 air-burst fuze. The MK-82 is designed for soft, fragment sensitive targets and is not intended for hard targets or penetrations. The explosive filling is usually tritonal, though other compositions have sometimes been used. The overall classification of the weapon and 904/905/FMU-113 fuzes are UNCLASSIFIED.

18. M61 20mm Vulcan Cannon is a six-barreled automatic cannon chambered in 20x120mm with a cyclic rate of fire from 2,500-6,000 shots per minute. This weapon is a hydraulically powered air cooled Gatling gun used to damage/destroy aerial targets, suppress/incapacitate personnel targets and damage or destroy moving and stationary light materiel targets. The M61 and its components are UNCLASSIFIED.

If a technologically advanced adversary were to obtain knowledge of the hardware and software elements, the information could be used to develop countermeasures or equivalent systems, which might reduce system effectiveness or be used in the development of a system with similar or advanced capabilities.

20. A determination has been made that the recipient can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

21. All defense articles and services listed in this transmittal have been authorized for release and export to the recipient.

[FR Doc. 2019-27042 Filed 12-13-19; 8:45 am]

BILLING CODE 5001-06-P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

[Transmittal No. 19-46]

#### Arms Sales Notification

**AGENCY:** Defense Security Cooperation Agency, Department of Defense.

**ACTION:** Arms sales notice.

**SUMMARY:** The Department of Defense is publishing the unclassified text of an arms sales notification.

**FOR FURTHER INFORMATION CONTACT:** Karma Job at [karma.d.job.civ@mail.mil](mailto:karma.d.job.civ@mail.mil) or (703) 697-8976.

**SUPPLEMENTARY INFORMATION:** This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104-164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 19-46 with attached Policy Justification and Sensitivity of Technology.

Dated: December 9, 2019.

**Aaron T. Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

BILLING CODE 5001-06-P



**DEFENSE SECURITY COOPERATION AGENCY**  
201 12<sup>TH</sup> STREET SOUTH, SUITE 101  
ARLINGTON, VA 22202-5408

AUG 27 2019

The Honorable Nancy Pelosi  
Speaker of the House  
U.S. House of Representatives  
H-209, The Capitol  
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 19-46 concerning the Army's proposed Letter(s) of Offer and Acceptance to the Government of Lithuania for defense articles and services estimated to cost \$170.8 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Charles W. Hooper  
Lieutenant General, USA  
Director

Enclosures:

1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

BILLING CODE 5001-06-C

Transmittal No. 19-46

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Government of Lithuania

(ii) *Total Estimated Value:*

Major Defense Equipment \* \$147.0 million

Other ..... \$ 23.8 million

TOTAL ..... \$170.8 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

*Major Defense Equipment (MDE):* Five hundred Joint Light Tactical Vehicles, M1278A1 Heavy Guns Carrier.

*Non-MDE:* Also included are Baseline Integration Kits; Ballistic Kits Armor; Explosive Formed Protection Kit; Shot Detection Boomerang Kits; Shot Detection, Boomerang III; GPS Stand Alone kits; Network Switch—8 port; M153 Common Remote Weapon Stations (CROWS); CROWS Baseline v2 Integration Kit; MK-93 Weapons Mounts; M2 QCB .50 CAL Machine Guns; M230 TAC-FLIR Systems;

Opaque Armor (windows); Basic Issue Item Kits; Winch Kits; Flat Tow Kits; Run-Flat Kits; Spare Tire Kits; Combat Bumper Kits; Duramax Turbo Engine with Allison 6 speed automatic transmission and 4x4 TAK-4i Independent suspension systems; personnel training and training equipment; U.S. Government and contractor engineering, technical and logistics support services; and other related elements of logistical and program support.

(iv) *Military Department: Army (LH-B-UDG)*

(v) *Prior Related Cases, if any: None*

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid: None*

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold: See Attached Annex.*

(viii) *Date Report Delivered to Congress: August 27, 2019*

\* As defined in Section 47(6) of the Arms Export Control Act.

#### **POLICY JUSTIFICATION**

##### *Lithuania—Joint Light Tactical Vehicles and Accessories*

The Government of Lithuania has requested to buy five hundred Joint Light Tactical Vehicles, M1278A1 Heavy Guns Carriers. Also included are Baseline Integration Kits; Ballistic Kits Armor; Explosive Formed Protection Kit; Shot Detection Boomerang Kits; Shot Detection, Boomerang III; GPS Stand Alone kits; Network Switch—8 port; M153 Common Remote Weapon Stations (CROWS); CROWS Baseline v2 Integration Kit; MK-93 Weapons Mounts; M2 QCB .50 CAL Machine Guns; M230 TAC-FLIR Systems; Opaque Armor (windows); Basic Issue Item Kits; Winch Kits; Flat Tow Kits; Run-Flat Kits; Spare Tire Kits; Combat Bumper Kits; Duramax Turbo Engine with Allison 6 speed automatic transmission and 4x4 TAK-4i Independent suspension systems; personnel training and training equipment; U.S. Government and contractor engineering, technical and logistics support services; and other related elements of logistical and program support. The total estimated program cost is \$170.8 million.

This proposed sale will support the foreign policy and national security objectives of the United States by helping to improve the military capability of Lithuania, a NATO ally that is an important force for ensuring political stability and economic progress within Eastern Europe.

The proposed sale of the Joint Light Tactical Vehicle (JLTV) will help improve Lithuania's light tactical vehicle fleet and enhance the capabilities to meet current and future enemy threats. Lithuania will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractor will be Oshkosh Defense LLC of Oshkosh, WI. There are no known offset agreements associated with this proposed sale.

Implementation of this proposed sale will not require the assignment of additional U.S. Government or contractor representatives to Lithuania. However, it is anticipated that engineering and technical support services provided by the U.S. Government and/or the contractor may be required on an interim basis for training and technical assistance.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 19-46

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

##### *(vii) Sensitivity of Technology:*

1. This sale will involve the release of sensitive technology to Lithuania. The Joint Light Tactical Vehicle platform is classified as SECRET. The Joint Light Tactical Vehicle fleet will incorporate Ballistic Armor Kits for protection from Improvised Explosive Devices.

2. Sensitive and/or classified (up to SECRET) elements of the proposed Joint Light Tactical Vehicle include hardware and accessories, components and associated software.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures, which might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

4. A determination has been made that the Government of Lithuania can provide substantially the same degree of protection for this technology as the U.S. Government. This proposed sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

5. All defense articles and services listed in this transmittal have been authorized for release and export to Lithuania.

[FR Doc. 2019-26978 Filed 12-13-19; 8:45 am]

**BILLING CODE 5001-06-P**

## **DEPARTMENT OF DEFENSE**

### **Office of the Secretary**

[Transmittal No. 19-51]

#### **Arms Sales Notification**

**AGENCY:** Defense Security Cooperation Agency, Department of Defense.

**ACTION:** Arms sales notice.

**SUMMARY:** The Department of Defense is publishing the unclassified text of an arms sales notification.

**FOR FURTHER INFORMATION CONTACT:** Karma Job at [karma.d.job.civ@mail.mil](mailto:karma.d.job.civ@mail.mil) or (703) 697-8976.

**SUPPLEMENTARY INFORMATION:** This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104-164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 19-51 with attached Policy Justification and Sensitivity of Technology.

Dated: December 4, 2019.

**Aaron T. Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

**BILLING CODE 5001-06-P**



**DEFENSE SECURITY COOPERATION AGENCY**  
201 12<sup>TH</sup> STREET SOUTH, SUITE 101  
ARLINGTON, VA 22202-5408

**OCT 17 2019**

The Honorable Nancy Pelosi  
Speaker of the House  
U.S. House of Representatives  
H-209, The Capitol  
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 19-51 concerning the Air Force's proposed Letter(s) of Offer and Acceptance to the Republic of Korea for defense articles and services estimated to cost \$253 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

Charles W. Hooper  
Lieutenant General, USA  
Director

**Enclosures:**

- 1. Transmittal
- 2. Policy Justification
- 3. Sensitivity of Technology

**BILLING CODE 5001-06-C**

Transmittal No. 19-51

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser:* Republic of Korea

(ii) *Total Estimated Value:*

Major Defense Equipment \* \$250 million

Other ..... \$ 3 million  
TOTAL ..... \$253 million

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:*

*Major Defense Equipment (MDE):* One hundred twenty (120) AIM-120C-7/C-8 Advanced Medium Range Air-to-Air Missile (AMRAAM)

*Non-MDE:* Also included are containers; weapon support and support equipment; spare and repair parts; U.S. Government and contractor engineering, technical, and logistics support services; and other related elements of logistical and program support.

(iv) *Military Department:* Air Force (KS-D-YDB)

(v) *Prior Related Cases, if any:* None

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Annex Attached

(viii) *Date Report Delivered to Congress:* October 17, 2019

\* As defined in Section 47(6) of the Arms Export Control Act.

#### POLICY JUSTIFICATION

*Republic of Korea—AIM-120C Advanced Medium Range Air-to-Air Missile (AMRAAM)*

The Republic of Korea (ROK) has requested to buy one hundred twenty (120) AIM-120C-7/C-8 Advanced Medium Range Air-to-Air Missiles (AMRAAM). Also included are containers; weapon support and support equipment; spare and repair parts; U.S. Government and contractor engineering, technical, and logistics support services; and other related elements of logistical and program support. The total estimated program cost is \$253 million.

This proposed sale will support the foreign policy and national security objectives of the United States by meeting the legitimate security and defense needs of one of the closest allies in the INDOPACOM Theater. The Republic of Korea is one of the major political and economic powers in East Asia and the Western Pacific and a key partner of the United States in ensuring peace and stability in that region. It is vital to U.S. national interests to assist the Republic of Korea in developing and maintaining a strong and ready self-defense capability.

This proposed sale will improve the ROK capability to meet current and future threats by increasing its stocks of medium range missiles for its F-15K, KF-16, and F-35 fleets for its national defense. The potential sale will further strengthen the interoperability between the United States and the ROK. The ROK will have no difficulty absorbing these additional missiles into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractor will be Raytheon of Waltham, MA. There are no known offset agreements proposed in connection with this potential sale. Any offset agreement will be defined in negotiations between the Purchaser and the prime contractor.

Implementation of the proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to the ROK.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 19-51

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The proposed sale will involve the release of sensitive technology to the Republic of Korea related to the AIM-120C-7/C-8 Advanced Medium Range Air-to-Air Missile (AMRAAM). The AIM-120C-7/C-8 AMRAAM is a supersonic, air launched, aerial intercept, guided missile featuring digital technology and micro-miniature solid-state electronics. Purchase will include AMRAAM Guidance Sections. AMRAAM capabilities include look-down/shoot down, multiple launches against multiple targets, resistance to electronic countermeasures, and interception of high- and low-flying maneuvering targets. The AIM-120C-8 is a form, fit, function refresh of the AIM-120C-7 and is the next generation to be produced. The capabilities of the AIM-120C-7 and C-8 are identical. The AMRAAM All Up Round is classified CONFIDENTIAL, major components and subsystems range from UNCLASSIFIED to CONFIDENTIAL, and technical data and other documentation are classified up to SECRET.

2. If a technologically advanced adversary were to obtain knowledge of

the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

3. A determination has been made that the Republic of Korea can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

4. All defense articles and services listed on this transmittal have been authorized for release and export to the Republic of Korea.

[FR Doc. 2019-26979 Filed 12-13-19; 8:45 am]

BILLING CODE 5001-06-P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

[Transmittal No. 19-47]

#### Arms Sales Notification

**AGENCY:** Defense Security Cooperation Agency, Department of Defense.

**ACTION:** Arms sales notice.

**SUMMARY:** The Department of Defense is publishing the unclassified text of an arms sales notification.

**FOR FURTHER INFORMATION CONTACT:** Karma Job at [karma.d.job.civ@mail.mil](mailto:karma.d.job.civ@mail.mil) or (703) 697-8976.

**SUPPLEMENTARY INFORMATION:** This 36(b)(1) arms sales notification is published to fulfill the requirements of section 155 of Public Law 104-164 dated July 21, 1996. The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 19-47 with attached Policy Justification and Sensitivity of Technology.

Dated: December 9, 2019.

**Aaron T. Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

BILLING CODE 5001-06-P



**DEFENSE SECURITY COOPERATION AGENCY**  
201 12<sup>TH</sup> STREET SOUTH, SUITE 101  
ARLINGTON, VA 22202-5408

SEP 24 2019

The Honorable Nancy Pelosi  
Speaker of the House  
U.S. House of Representatives  
H-209, The Capitol  
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 19-47 concerning the Air Force's proposed Letter(s) of Offer and Acceptance to the Government of Qatar for defense articles and services estimated to cost \$86 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

*Charles W. Hooper*  
Charles W. Hooper  
Lieutenant General, USA  
Director

Enclosures:

1. Transmittal
2. Policy Justification
3. Sensitivity of Technology
4. Regional Balance (Classified document provided under separate cover)

**BILLING CODE 5001-06-C**

Transmittal No. 19-47

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

- (i) *Prospective Purchaser:* Government of Qatar
- (ii) *Total Estimated Value:*

Major Defense Equipment*	\$17 million
Other .....	\$69 million
<b>TOTAL .....</b>	<b>\$86 million</b>

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase:* Qatar requested a possible sale of two (2) AN/

AAQ-24(V)N Large Aircraft Infrared Countermeasures (LAIRCM) systems to protect two (2) Boeing 747-800 Head-of-State aircraft. Each LAIRCM system consists of three (3) Guardian Laser Turret Assemblies (GLTA), one (1) LAIRCM System Processor Replacement (LSPR), five (5) Missile Warning Sensors

(MWS), one (1) Control Indicator Unit Replacement (CIUR), one (1) Smart Card Assembly (SCA), and one (1) High Capacity Card (HCC/User Data Memory (UDM) card.

*Major Defense Equipment (MDE):*

Twelve (12) Guardian Laser Turret Assemblies (GLTA) (6 installed, 6 spares)  
Seven (7) LAIRCM System Processor Replacements (LSPR) (2 installed 5 spares)  
Twenty-three (23) Missile Warning Sensors (MWS) (10 installed, 13 spares)

*Non-MDE:* Also included are LAIRCM CIURs; SCAs; HCCs; UDM cards; initial spares; consumables; repair and return support; support equipment; engineering design; integration; hardware integration; flight test and certifications; selective availability anti-spoofing modules (SAASM); publications and technical documentation; training and training equipment; field service representatives; U.S. Government and contractor engineering, technical, and logistics support; and other related elements of logistics and program support.

(iv) *Military Department:* Air Force (QA-D-BAB)

(v) *Prior Related Cases, if any:* QA-D-QAA and QA-D-QAF

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid:* None  
(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold:* See Attached Annex.

(viii) *Date Report Delivered to Congress:* September 24, 2019

\* As defined in Section 47(6) of the Arms Export Control Act.

**POLICY JUSTIFICATION**

*Qatar—Large Aircraft Infrared Countermeasures (LAIRCM) System for Head-of-State Aircraft*

The Government of Qatar has requested to buy two AN/AAQ-24(V)N Large Aircraft Infrared Countermeasures (LAIRCM) systems to protect two (2) 747-800 Head-of-State aircraft. This proposed sale will include: twelve (12) Guardian Laser Turret Assemblies (GLTA) (6 installed, 6 spares); seven (7) LAIRCM System Processor Replacements (LSPR) (2 installed 5 spares); twenty-three (23) Missile Warning Sensors (MWS) (10 installed, 13 spares); Control Indicator Unit Replacements (CIURs); Smart Card Assemblies (SCAs); High Capacity Cards (HCCs); User Data Memory (UDM) cards; initial spares; consumables; repair and return support; support equipment; engineering design;

integration; hardware integration; flight test and certifications; selective availability anti-spoofing modules (SAASM); publications and technical documentation; training and training equipment; field service representatives; U.S. Government and contractor engineering, technical, and logistics support; and other related elements of logistics and program support. The estimated cost is \$86 million.

This proposed sale will support the foreign policy and national security of the United States by helping to improve the security of a friendly country that continues to be an important force for political and economic progress in the Middle East. Qatar is host to the U.S. Central Command forces and serves as a critical forward-deployed location in the region.

The proposed sale will improve Qatar's capability to deter regional threats. The self-protection suite will facilitate a more robust capability into areas of increased missile threats. Qatar will have no difficulty absorbing this equipment and capability into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The prime contractor will be Northrop Grumman, Rolling Meadows, IL. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale may require the assignment of a U.S. Government and/or contractor representatives to Qatar to provide the field service support as requested.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 19-47

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex

Item No. vii

(vii) *Sensitivity of Technology:*

1. The AN/AAQ-24(V)N LAIRCM is a self-contained, directed energy countermeasures system designed to protect aircraft from infrared-guided surface-to-air missiles. The system features digital technology and micro-miniature solid-state electronics. The system operates in all conditions, detecting incoming missiles and jamming infrared-seeker equipped missiles with aimed bursts of laser energy. The LAIRCM system consists of multiple Missile Warning Sensors, Guardian Laser Turret Assembly (GLTA), LAIRCM System Processor

Replacement (LSPR), Control Indicator Unit Replacement (CIUR), and a classified User Data Memory (UDM) card containing the laser jam codes. The UDM card is loaded into the LSPR prior to flight; when not in use, the UDM card is removed from the LSRP and put in secure storage. The Missile Warning Sensors (MWS) for AN/AAQ-24(V)N are mounted on the aircraft exterior to provide omni-directional protection. The MWS detects the rocket plume of missiles and sends appropriate data signals to the LSPR for processing. The LSPR analyzes the data from each sensor and automatically deploys the appropriate countermeasure via the GLTA. The CIUR displays the incoming threat for the pilot to take appropriate action. The LSPR also contains Built-in-Test (BIT) circuitry. LAIRCM hardware is CLASSIFIED only when a classified UDM card is inserted into the system and it is powered up. LAIRCM system software, including Operational Flight Program and jam codes, are classified SECRET. Technical data and documentation to be provided is UNCLASSIFIED.

2. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

3. A determination has been made that Qatar can provide substantially the same degree of protection for the sensitive technology being released as the U.S. Government. This sale is necessary in furtherance of the U.S. foreign policy and national security objectives outlined in the Policy Justification.

4. All defense articles and services listed in this transmittal are authorized for release and export to the Government of Qatar.

[FR Doc. 2019-26980 Filed 12-13-19; 8:45 am]

BILLING CODE 5001-06-P

**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

[Transmittal No. 19-62]

**Arms Sales Notification**

**AGENCY:** Defense Security Cooperation Agency, Department of Defense.

**ACTION:** Arms sales notice.

**SUMMARY:** The Department of Defense is publishing the unclassified text of an arms sales notification.

**FOR FURTHER INFORMATION CONTACT:**  
Karma Job at [karma.d.job.civ@mail.mil](mailto:karma.d.job.civ@mail.mil)  
or (703) 697-8976.

**SUPPLEMENTARY INFORMATION:** This  
36(b)(1) arms sales notification is  
published to fulfill the requirements of

section 155 of Public Law 104-164  
dated July 21, 1996. The following is a  
copy of a letter to the Speaker of the  
House of Representatives, Transmittal  
19-62 with attached Policy Justification  
and Sensitivity of Technology.

Dated: December 10, 2019.  
**Aaron T. Siegel,**  
*Alternate OSD Federal Register Department  
of Defense.*  
BILLING CODE 5001-06-P



**DEFENSE SECURITY COOPERATION AGENCY**  
201 12<sup>TH</sup> STREET SOUTH, SUITE 101  
ARLINGTON, VA 22202-5408

SEP 24 2019

The Honorable Nancy Pelosi  
Speaker of the House  
U.S. House of Representatives  
H-209, The Capitol  
Washington, DC 20515

Dear Madam Speaker:

Pursuant to the reporting requirements of Section 36(b)(1) of the Arms Export Control Act, as amended, we are forwarding herewith Transmittal No. 19-62 concerning the Army's proposed Letter(s) of Offer and Acceptance to the Government of Thailand for defense articles and services estimated to cost \$400 million. After this letter is delivered to your office, we plan to issue a news release to notify the public of this proposed sale.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles W. Hooper".

Charles W. Hooper  
Lieutenant General, USA  
Director

Enclosures:

1. Transmittal
2. Policy Justification
3. Sensitivity of Technology

Transmittal No. 19-62

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act, as amended

(i) *Prospective Purchaser*: Government of Thailand

(ii) *Total Estimated Value*:

Major Defense Equipment * ..	\$300 million
Other .....	\$100 million
<b>TOTAL .....</b>	<b>\$400 million</b>

(iii) *Description and Quantity or Quantities of Articles or Services under Consideration for Purchase*:

*Major Defense Equipment (MDE)*:

Eight (8) AH-6i Helicopters, Light Attack-Reconnaissance  
Fifty (50) AGM-114R Hellfire  
Two-hundred (200) Advance Precision Kill Weapon System (APKWS) Rockets

*Non-MDE*:

Also included are ten (10) M134 Mini Guns, ten (10) M260 Rocket Launchers, ten (10) M299 Longbow Hellfire Launcher, ten (10) AN/APN-209 Radar Altimeter, eight (8) AN/APR-39(V)(4), four (4) GAU-19/B .50 Cal Machine Gun, five-hundred (500) Hydra 70 Rockets, twenty (20) AN/AVS-6 Night Vision Goggles, eight (8) WESCAM MX-10Di Cameras, ten (10) AN/APX-123 IFF, ten (10) AN/ARC 201E-VHF-FM, ten (10) AN/ARC-231 w/ MX-4027, ten (10) LN-251 Inertial Navigation System/Global Positioning System (EGI), Aircrew Trainer (ACT), Pilot Desktop Trainer (PDT), Virtual Maintenance Trainer (VMT), contractor provided pilot and maintainer training, peculiar ground support equipment, spares, publications, integrated product support, technical assistance, quality assurance team, transportation, and other related elements of logistics and program support.

(iv) *Military Department*: Army (TH-B-WHB)

(v) *Prior Related Cases, if any*: None

(vi) *Sales Commission, Fee, etc., Paid, Offered, or Agreed to be Paid*: None

(vii) *Sensitivity of Technology Contained in the Defense Article or Defense Services Proposed to be Sold*: See Annex Attached

(viii) *Date Report Delivered to Congress*: September 24, 2019

\* As defined in Section 47(6) of the Arms Export Control Act.

#### POLICY JUSTIFICATION

##### Thailand—AH-6i Helicopters

The Government of Thailand has requested to buy eight (8) AH-6i light attack reconnaissance helicopters; fifty (50) AGM-114R Hellfire missiles; and two-hundred (200) Advance Precision

Kill Weapon System (APKWS) Rockets. Also included are ten (10) M134 Mini Guns, ten (10) M260 Rocket Launchers; ten (1) M299 Longbow Hellfire Launcher; ten (10) AN/APN-209 Radar Altimeter; eight (8) AN/APR-39(V)(4) four (4) GAU-19/B .50 Cal Machine Gun; five-hundred (500) Hydra 70 Rockets; twenty (20) AN/AVS-6 Night Vision Goggles; eight (8) WESCAM MX-10Di Cameras; ten (10) AN/APX-123 IFF; ten (10) AN/ARC 201E-VHF-FM; ten (10) AN/ARC-231 w/ MX-4027; ten (10) LN-251 Inertial Navigation System/Global Positioning System (EGI); Aircrew Trainer (ACT); Pilot Desktop Trainer (PDT); Virtual Maintenance Trainer (VMT); contractor provided pilot and maintainer training peculiar ground support equipment; spares; publications; integrated product support; technical assistance; quality assurance team; transportation; and other related elements of logistics and program support. The total estimated program cost is \$400 million.

This proposed sale will support the foreign policy and national security objectives of the United States by helping to improve the security of a Major Non-NATO ally in INDO-PACOM. Thailand is a strategic partner committed to contributing to regional security.

The proposed sale of the AH-6i helicopter will improve the Royal Thai Army's (RTA) light attack capability to strengthen its homeland defense and deter regional threats. These AH-6i helicopters will replace the RTA's aging fleet of seven AH-IF Cobra helicopters. As part of a broader military modernization effort, these AH-6i helicopters will provide light attack reconnaissance for close air support to special operations forces, Stryker infantry soldiers and border guard units. Thailand will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this equipment and support will not alter the basic military balance in the region.

The principal contractor for the AH-6i is Boeing Company, Mesa, Arizona. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of any permanent additional U.S. Government or Contractor representatives to Thailand.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

Transmittal No. 19–62

Notice of Proposed Issuance of Letter of Offer Pursuant to Section 36(b)(1) of the Arms Export Control Act

Annex Item No. vii

(vii) *Sensitivity of Technology*:

1. The AH-6i Light Attack Helicopter is a commercial-off-the-shelf, light attack/reconnaissance helicopter to include AN/APX-123 Identification Friend or Foe (IFF) Mode S Transponder, AN/ARC 201E-VHF /FM Radio, AN/ARC-231 w/ MX-4027 Radio and LN 251 Embedded GPS/INS (EGI). The helicopter will be equipped with the WESCAM MX-10Di Sight/Targeting Sensor to ensure commonality and interoperability with the other aircraft platforms. The airframe itself does not contain sensitive technology.

2. Identification and security classification of sensitive technological information and/or restricted information contained in the equipment, major components, subsystems, software, technical data (Performance, Maintenance, R&M, etc.) documentation, training devices and services to be conveyed with the proposed sale. Also a brief explanation of why information is sensitive:

a. The AN/APX-123, Identification Friend or Foe (IFF) Transponder, is a space diversity transponder and is installed on various military platforms. When installed in conjunction with platform antennas and the RCU (or other appropriate control unit), the transponder provides identification, altitude and surveillance reporting in response to interrogations from airborne, ground-based and/or surface interrogators. The transponder provides operational capabilities for Mark XII Identification IFF capabilities of Modes 1, 2, 2/A, C and 4&5 and Modes S (levels 1, 2, and 3 capable).

b. The LN-251 INS/GPS is a satellite based positioning system coupled to the aircraft inertial navigation system to provide aircraft position and navigation. The INS/GPS has an embedded SAASM and has gyro and accelerometers that have been evaluated as MTCR Category II controlled items, specifically items 9.A.6 and 9.A.8.

c. The WESCAM MX-10Di is a small Multi-Sensor, Multi-Spectral Imaging System with Inertial Measurement Unit (IMU) and Embedded with Global Positioning System (GPS) Standard Positioning Service (SPS). WESCAM MX-10 is embedded with GPS SPS. SPS is a three dimensional position and time determination capability provided to a user equipped with a minimum capability GPS SPS receiver in

accordance with GPS national policy. The LN-200 is a small, lightweight fiber optic IMU comprised of gyro and accelerometers that have been evaluated as MTCR Category II controlled item, specifically item 9.A.6.

d. The M134 Mini Gun has variable rates of fire-up to 4000 rounds per minute-and has seen increasingly widespread deployment over the last several years.

e. The AN/APR-39 (V) (4) Radar Signal Detecting Set is a system that provides warning of a radar directed air defense threat and allow appropriate countermeasures.

f. The 12.7mm (.50 caliber) GAU-19/B Externally Powered Gatling Gun, has variable rates of fire-up to 2000 rounds per minute-and has seen increasingly widespread deployment over the last several years.

g. The M299 Longbow Hellfire Launcher (LBHL) is a digital missile launcher capable of carry and launch of up to four of any combination of AGM-114 missiles. The launcher provides electronic functions required for the missile and launcher to communicate with the platform through MIL-STD-1760 and MIL-STD-1553 interfaces. The production quad-rail configuration was designed for use on the AH-64D Apache Longbow but is also commonly used on a wide variety of other rotary-wing platforms across all services. The M299 launcher has also been successfully re-configured into a dual rail launcher for weight savings and/or use on smaller platforms and also into a single-rail configuration for use on Un-manned Air System (UAS) platforms where the launcher electronics is integrated within the platform airframe.

h. The AGM-114 Hellfire II is a precision strike, Semi-Active Laser (SAL) guided missile and is the principal air-to-ground weapon for the Army AH-64 Apache. It provides the warfighter with an air-to-ground, point target precision strike capability to defeat advanced armor and an array of traditional and non-traditional targets. The Hellfire AGM-114R model is a selectable multipurpose warhead providing effects against a diverse target set.

i. The M260 Rocket Launcher with APKWS capability is a seven tube rocket launcher with a remote fuze setting function. Once the target is located, single or multiple pairs of the Hydra 70 APKWS folding-fin rockets can be launched toward the target when a predetermined time signal is sent to the electronic time fuze.

j. The APKWS is a low cost semi-active laser guidance kit developed by BAE Systems which is added to current

unguided 70 mm rocket motors and warheads similar to and including the Hydra 70 rocket. It is a low collateral damage weapon that can effectively strike both soft and lightly armored targets. APKWS turns a standard unguided 2.75 inch (70 mm) rocket into a precision laser-guided rocket.

k. AN/AVS-6 (Helmet Mounted) Night Vision Goggles. The AN/AVS-6 NVG is a 3rd generation aviation NVG offering higher resolution, high gain, and photo response to near infrared. AN/AVS-6 is a lightweight, binocular, night vision imaging system developed by the US Army specifically for helicopter flying. The system can be mounted to a variety of aviator helmets, including the SPH-4B, HGU-56P, HGU-5/P, HGU-55/G, HGU-26/P and Alpha. A 25mm eye relief eyepieces easily accommodate eyeglasses. Low-profile battery pack improves aviator head mobility and increases battery life. Other features include flip-up/flop-down capability, simple binocular attachment, individual interpupillary adjustment, tilt, vertical and fore-aft adjustments to fit all aviators.

3. If a technologically advanced adversary were to obtain knowledge of the specific hardware and software elements, the information could be used to develop countermeasures that might reduce weapon system effectiveness or be used in the development of a system with similar or advanced capabilities.

4. A determination has been made that Thailand can provide substantially the same degree of protection for the technology being released as the U.S. Government. This sale supports the U.S. foreign policy and national security objectives as outlined in the Policy Justification.

5. All defense articles and services listed in this transmittal have been authorized for release and export to Thailand.

[FR Doc. 2019-27050 Filed 12-13-19; 8:45 am]

BILLING CODE 5001-06-P

## DEPARTMENT OF EDUCATION

### Eligibility Designations and Applications for Waiving Eligibility Requirements; Programs Under Parts A and F of Title III and Programs Under Title V of the Higher Education Act of 1965, as Amended (HEA)

**AGENCY:** Office of Postsecondary Education, Department of Education (Department).

**ACTION:** Notice.

**SUMMARY:** The Department announces the process for designation of eligible

institutions and invites applications for waivers of eligibility requirements for fiscal year (FY) 2020, for the following programs:

1. Programs authorized under title III, part A of the HEA: Strengthening Institutions Program (Part A SIP), Alaska Native and Native Hawaiian-Serving Institutions (Part A ANNH), Predominantly Black Institutions (Part A PBI), Native American-Serving Nontribal Institutions (Part A NASNTI), and Asian American and Native American Pacific Islander-Serving Institutions (Part A AANAPISI).

2. Programs authorized under title III, part F of the HEA: Hispanic-Serving Institutions STEM and Articulation (Part F, HSI STEM and Articulation), Predominantly Black Institutions (Part F PBI), Alaska Native and Native Hawaiian-Serving Institutions (Part F ANNH), Native American-Serving Nontribal Institutions (Part F NASNTI), and Asian American and Native American Pacific Islander-Serving Institutions (Part F AANAPISI).

*Note:* The authority to award new grants under section 371 of the HEA expired at the end of FY 2019. However, we will review applications for eligibility should Congress renew the Department's authority to award new grants under this section.

3. Programs authorized under title V of the HEA: Developing Hispanic-Serving Institutions (HSI) and Promoting Postbaccalaureate Opportunities for Hispanic Americans (PPOHA).

#### **DATES:**

*Applications Available:* December 16, 2019.

*Deadline for Transmittal of Applications:* January 15, 2020.

#### **FOR FURTHER INFORMATION CONTACT:**

Christopher Smith, Institutional Service, U.S. Department of Education, 400 Maryland Avenue SW, Room 250-10, Washington, DC 20202. Telephone: (202) 453-7946. Email:

*Christopher.smith@ed.gov*; or Jason Cottrell, Institutional Service, U.S. Department of Education, 400 Maryland Avenue SW, room 250-50, Washington, DC 20202. Telephone: (202)453-7530. Email: *Jason.Cottrell@ed.gov*.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1-800-877-8339.

Section 312 of the HEA and 34 CFR 607.2-607.5 include most of the basic eligibility requirements for grant programs authorized under titles III and V of the HEA. Section 312(b)(1)(B) of the HEA provides that, to be eligible for

these programs, an institution of higher education's average "educational and general expenditures" (E&G) per full-time equivalent (FTE) undergraduate student must be less than the average E&G expenditures per FTE undergraduate student of institutions that offer similar instruction in that year.

The National Center for Education Statistics (NCES) calculates Core Expenses per FTE of institutions, a statistic similar to E&G per FTE. Both E&G per FTE and Core Expenses per FTE are based on regular operational expenditures of institutions (excluding auxiliary enterprises, independent operations, and hospital expenses). They differ only in that E&G per FTE is based on fall undergraduate enrollment, while Core Expenses per FTE is based on 12-month undergraduate enrollment for the academic year.

To avoid inconsistency in the data submitted to, and produced by, the Department, for the purpose of section 312(b)(1)(B) of the HEA, E&G per FTE is calculated using the same methodology as Core Expenses per FTE. Accordingly, the Department will apply the NCES methodology for calculating Core Expenses per FTE. Institutions requesting an eligibility exemption determination must use the Core Expenses per FTE data reported to NCES' Integrated Postsecondary Education Data System (IPEDS) for the most currently available academic year, in this case academic year 2017–2018.

#### **SUPPLEMENTARY INFORMATION:**

#### **Full Text of Announcement**

#### **I. Funding Opportunity Description**

*Purpose of Programs:* The Part A SIP, Part A ANNH, Part A PBI, Part A NASNTI, and Part A AANAPISI programs are authorized under title III, part A, of the HEA. The HSI and PPOHA programs are authorized under title V of the HEA. The Part F, HSI STEM and Articulation, Part F PBI, Part F AANAPISI, Part F ANNH, and Part F NASNTI programs are authorized under title III, part F of the HEA. Please note that certain programs in this notice have the same or similar names as other programs that are authorized under a different statutory authority. For this reason, we specify the statutory authority as part of the acronym for certain programs.

Under the programs discussed above, institutions are eligible to apply for grants if they meet specific statutory and regulatory eligibility requirements. An institution of higher education that is designated as an eligible institution may also receive a waiver of certain non-

Federal cost-sharing requirements for one year under the Federal Supplemental Educational Opportunity Grant (FSEOG) program authorized by title IV, part A of the HEA and the Federal Work-Study (FWS) program authorized by section 443 of the HEA. Qualified (eligible) institutions may receive the FSEOG and FWS waivers for one year even if they do not receive a grant under a title III or V grant program. An applicant that receives a grant from the Student Support Services (SSS) program that is authorized under section 402D of the HEA, 20 U.S.C. 1070a-14, may receive a waiver of the required non-Federal cost share for institutions for the duration of the grant. An applicant that receives a grant from the Undergraduate International Studies and Foreign Language (UISFL) program that is authorized under section 604 of the HEA, 20 U.S.C. 1124, may receive a waiver or reduction of the required non-Federal cost share for institutions for the duration of the grant.

*Special Note:* To qualify as an eligible institution under the grant programs listed in this notice, your institution must satisfy several criteria. For most of these programs, these criteria include those that relate to the enrollment of needy students and to the Core Expenses per FTE student count for a specified base year. The most recent data available in IPEDS for Core Expenses per FTE are for base year 2017–2018. In order to award FY 2020 grants in a timely manner, we will use these data to evaluate eligibility.

Accordingly, each institution interested in either applying for a new grant under the titles III or V programs addressed in this notice, or requesting a waiver of the non-Federal cost share, must be designated as an eligible institution in FY 2020. Under the HEA, any institution interested in applying for a grant under any of these programs must first be designated as an eligible institution. (34 CFR 606.5 and 607.5).

#### *Eligible Applicants*

The eligibility requirements for the programs authorized under part A of title III of the HEA are in sections 312 and 317–320 of the HEA (20 U.S.C. 1058, 1059d-1059g) and in 34 CFR 607.2 through 607.5. The regulations may be accessed at [www.ecfr.gov/cgi-bin/text-idx?SID=bc12bf5d685021e069cd1a15352b381a&mc=true&node=pt34.3.607&rgn=div5](http://www.ecfr.gov/cgi-bin/text-idx?SID=bc12bf5d685021e069cd1a15352b381a&mc=true&node=pt34.3.607&rgn=div5). The eligibility requirements for the programs authorized by part F of title III of the HEA are in section 371 of the HEA (20 U.S.C. 1067q). There are currently no specific regulations for these programs.

The eligibility requirements for the title V HSI program are in part A of title V of the HEA and in 34 CFR 606.2 through 34 CFR 606.5. The regulations may be accessed at [www.ecfr.gov/cgi-bin/text-idx?SID=bc12bf5d685021e069cd1a15352b381a&mc=true&node=pt34.3.606&rgn=div5l](http://www.ecfr.gov/cgi-bin/text-idx?SID=bc12bf5d685021e069cd1a15352b381a&mc=true&node=pt34.3.606&rgn=div5l).

The requirements for the PPOHA program are in part B of title V of the HEA and in the notice of final requirements published in the **Federal Register** on July 27, 2010 (75 FR 44055), and in 34 CFR 606.2(a) and (b), and 606.3 through 606.5.

The Department has instituted a process known as the Eligibility Matrix (EM), under which we will use information submitted by institutions to IPEDS to determine which institutions meet the basic eligibility requirements for the programs authorized by titles III or V of the HEA listed above. We will use enrollment and fiscal data for the 2017–2018 year submitted by institutions to IPEDS to make eligibility determinations for FY 2020. Beginning December 16, 2019, an institution will be able to review the Department's decision on whether it is eligible for the grant programs authorized by title III or V of the HEA through this process by checking the institution's eligibility in the eligibility system linked through the Department's Institutional Service Eligibility website: <http://www2.ed.gov/about/offices/list/ope/ides/eligibility.html>.

Please note that through this process, the Department does not certify, nor designate, an institution as a Historically Black College or University, Tribally Controlled College or University, Minority-Serving Institution, or Hispanic-Serving Institution. The Department's determination that an institution is eligible is solely for the purpose of the institution's ability to apply for and receive grants under certain programs as discussed in this notice.

The EM is part of the Department's eligibility data system. The EM is a read-only worksheet that lists all potentially eligible postsecondary institutions, as determined by the Department using the data described above. If the entry for your institution in the EM shows that your institution is eligible to apply for a grant for a particular program, and you plan to submit an application for a grant in that program, you will not need to apply for eligibility or for a waiver through the process described in this notice. Rather, you may print out the eligibility letter directly. However, if the EM does not show that your institution is eligible for a program in which you plan to apply

for a grant, you must submit an application as discussed in this notice before the January 31, 2020 deadline.

To check your institution’s eligibility in the EM, go to <https://HEPIS.ed.gov>, and log into the system using your email address and password. If you are not sure whether you have an account in the system, click the “New User” button. If you have an account, it will walk you through setup. Note that it may take up to five business days to verify user identity and to complete new account setup, so please allow yourself enough time to complete the application. If the Grant Eligibility Application (GEA) system is open, click the link on your dashboard to check your institution’s eligibility status by clicking the “View pre-Eligibility Information” button. Your institution’s eligibility information will display.

If the EM does not show that your institution is eligible for a program, or if your institution does not appear in the eligibility system, or if you disagree with the eligibility determination reflected in the eligibility system, you can apply for a waiver or reconsideration through the process described in this notice. The application process is similar to previous years; you will choose the waiver option on the website at <https://HEPIS.ed.gov/> and submit your institution’s application.

**Enrollment of Needy Students:** For title III and V programs (excluding the PBI programs), an institution is considered to have an enrollment of needy students if: (1) At least 50 percent of its degree-seeking students received financial assistance under the Federal Pell Grant, FSEOG, FWS, or the Federal Perkins Loan programs; or (2) the percentage of its undergraduate degree-seeking students who were enrolled on at least a half-time basis and received Federal Pell Grants exceeded the

average percentage of undergraduate degree students who were enrolled on at least a half-time basis and received Federal Pell Grants at comparable institutions that offer similar instruction.

To qualify under criterion 2, an institution’s Federal Pell Grant percentage for base year 2017–2018 must be more than the average for its category of comparable institutions provided in the 2017–2018 Average Pell Grant and Core Expenses per FTE Student table in this notice. If your institution qualifies under the first criterion, under which at least 50 percent of its degree-seeking students received financial assistance under one of several Federal student aid programs (the Federal Pell Grant, FSEOG, FWS, or the Federal Perkins Loan programs), but not the second criterion, under which an institution’s Federal Pell Grant percentage for base year 2017–2018 must be more than the average for its category of comparable institutions provided in the 2017–2018 Average Pell Grant and Core Expenses per FTE student table in this notice, you must submit an application including the requested data, which is not available in IPEDS.

For the definition of “Enrollment of Needy Students,” for purposes of the Part A PBI program, see section 318(b)(2) of the HEA, and for purposes of the Part F PBI program, see section 371(c)(9) of the HEA.

**Core Expenses per FTE Student:** For the Title III, Part A SIP; Part A ANNH; Part A PBI; Part A NASNTI; Part A AANAPISI; Title III, Part F HSI STEM and Articulation; Part F PBI; Part F AANAPISI; Part F ANNH; Part F NASNTI; Title V, Part A HSI; and Title V, Part B PPOHA programs, an institution should compare its base year 2017–2018 Core Expenses per FTE

student to the average Core Expenses per FTE student for its category of comparable institutions in the base year 2017–2018 Average Pell Grant and Average Core Expenses per FTE Student Table in this notice. The institution meets this eligibility requirement under these programs if its Core Expenses for the 2017–2018 base year are less than the average for its category of comparable institutions.

Core Expenses are defined as the total expenses for the essential education activities of the institution. Core Expenses for public institutions reporting under the Governmental Accounting Standards Board (GASB) requirements include expenses for instruction, research, public service, academic support, student services, institutional support, operation and maintenance of plant, depreciation, scholarships and fellowships, interest, and other operating and non-operating expenses. Core Expenses for institutions reporting under the Financial Accounting Standards Board (FASB) standards (primarily private, not-for-profit, and for-profit) include expenses for instruction, research, public service, academic support, student services, institutional support, net grant aid to students, and other expenses. Do not include Federal student financial aid. For both FASB and GASB institutions, Core Expenses do not include expenses for auxiliary enterprises (e.g., bookstores, dormitories), hospitals, and independent operations.

The following table identifies the relevant average Federal Pell Grant percentages for the base year 2017–2018 and the relevant Core Expenses per FTE student for the base year 2017–2018 for the four categories of comparable institutions:

Type of institution	Base year 2017–2018 average Pell Grant percentage	Base Year 2017–2018 average core expenses per FTE student
Two-year Public Institutions .....	26	\$14,194
Two-year Non-profit Private Institutions .....	55	15,960
Four-year Public Institutions .....	37	31,578
Four-year Non-profit Private Institutions .....	39	40,752

**Waiver Information:** Institutions that do not meet the needy student enrollment requirement or the Core Expenses per FTE requirement may apply to the Secretary for a waiver of these requirements, as described in sections 392 and 522 of the HEA, and

the implementing regulations at 34 CFR 606.3(b), 606.4(c) and (d), 607.3(b), and 607.4(c) and (d).

Institutions requesting a waiver of the needy student enrollment requirement or the Core Expenses per FTE requirement must include in their

application detailed evidence supporting the waiver request, as described in the instructions for completing the application.

The regulations governing the Secretary's authority to grant a waiver of the needy student requirement, 34 CFR 606.3(b)(2) and (3) and 607.3(b)(2) and (3), refer to "low-income" students or families. The regulations at 34 CFR

606.3(c) and 607.3(c) define "low-income" as an amount that does not exceed 150 percent of the amount equal to the poverty level, as established by the U.S. Census Bureau.

For the purposes of this waiver provision, the following table sets forth the low-income levels (at 150 percent) for various sizes of families:

2018 ANNUAL LOW-INCOME LEVELS

Size of family unit	Family income for the 48 contiguous states, DC, and outlying jurisdictions	Family income for Alaska	Family income for Hawaii
1 .....	\$18,210	\$22,770	\$20,940
2 .....	24,690	30,870	28,395
3 .....	31,170	38,970	35,850
4 .....	37,650	47,070	43,305
5 .....	44,130	55,170	50,760
6 .....	50,610	63,270	58,215
7 .....	57,090	71,370	65,670
8 .....	63,570	79,470	73,125

**Note:** We use the 2018 annual low-income levels because those are the amounts that apply to the family income reported by students enrolled for the fall 2017 semester. For family units with more than eight members, add the following amount for each additional family member: \$6,480 for the contiguous 48 States, the District of Columbia, and outlying jurisdictions; \$8,100 for Alaska; and \$7,455 for Hawaii.

The figures shown under family income represent amounts equal to 150 percent of the family income levels established by the U.S. Census Bureau for determining poverty status. The poverty guidelines were published on January 18, 2018, in the **Federal Register** by the U.S. Department of Health and Human Services (83 FR 2642).

Information about "metropolitan statistical areas" referenced in 34 CFR 606.3(b)(4) and 607.3(b)(4) may be obtained at: [www.census.gov/prod/2010pubs/10smadb/appendixc.pdf](http://www.census.gov/prod/2010pubs/10smadb/appendixc.pdf) and [www.census.gov/prod/2008pubs/07ccdb/appd.pdf](http://www.census.gov/prod/2008pubs/07ccdb/appd.pdf).

**Electronic Submission of Waiver Applications:** If your institution does not appear in the eligibility system as one that is eligible for the program under which you plan to apply for a grant, you must submit an application for a waiver of the eligibility requirements. To request a waiver, you must upload a narrative at: <https://HEPIS.ED.gov>.

**Exception to the Electronic Submission Requirement:** We discourage paper applications, but if electronic submission is not possible (e.g., you do not have access to the internet), you must provide a written statement that you intend to submit a paper application. Send this written

statement no later than two weeks before the application deadline date (14 calendar days or, if the 14th calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday).

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. Please send this statement to the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

If you submit a paper application, you must mail your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Attention: Jason Cottrell, Ph.D., 400 Maryland Avenue SW, Washington, DC 20202.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

**Note:** The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you

should check with your local post office.

We will not consider applications postmarked after the application deadline date.

**Applicable Regulations:** (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 79, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474. (d) The regulations for certain title III programs in 34 CFR part 607, and for the HSI program in 34 CFR part 606. (e) The notice of final requirements for the PPOHA program, published in the **Federal Register** on July 27, 2010 (75 FR 44055).

**Note:** The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian Tribes.

**Note:** The regulations in 34 CFR part 86 apply to institutions only.

**Note:** There are no program-specific regulations for the Part A AANAPISI, Part A NASNTI, and Part A PBI programs or any of the title III, part F programs. Also, there have been amendments to the HEA since the Department last issued regulations for the programs established under titles III and V of the statute. Accordingly, we encourage each potential applicant to read the applicable sections of the HEA in order to fully

understand the eligibility requirements for the program for which they are applying.

## II. Other Information

**Accessible Format:** Individuals with disabilities can obtain this document and a copy of the application in an accessible format (*e.g.*, braille, large print, audio tape, or compact disc) on request to one of the contact persons listed under **FOR FURTHER INFORMATION CONTACT**.

**Electronic Access to This Document:** The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at [www.govinfo.gov](http://www.govinfo.gov). At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: [www.federalregister.gov](http://www.federalregister.gov). Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: December 11, 2019.

**Robert L. King,**

*Assistant Secretary for the Office of Postsecondary Education.*

[FR Doc. 2019-27048 Filed 12-13-19; 8:45 am]

**BILLING CODE 4000-01-P**

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP20-19-000]

#### UGI Sunbury, LLC; Notice of Request Under Blanket Authorization

Take notice that on December 3, 2019, UGI Sunbury, LLC (UGI Sunbury), 835 Knitting Mills Way, Wyomissing, PA 19610, filed in the above referenced docket a prior notice request pursuant to sections 157.205, 157.208, and 157.216 of the Commission's regulations under the Natural Gas Act and its blanket certificate issued in Docket No. CP15-525-000 for authorization to remove, construct, own, operate, and maintain a one mile segment of the Sunbury Pipeline Project in Snyder County, Pennsylvania. Specifically, UGI Sunbury states that it will remove and relocate a portion of the Sunbury Pipeline Project to accommodate a

Pennsylvania Department of Transportation and Federal Highway Administration project known as the Central Susquehanna Valley Transportation Project. UGI Sunbury estimates the cost of the project to be \$12,500,000, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

The filing may also be viewed on the web at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov) or toll free at (866) 208-3676, or TTY, contact (202) 502-8659.

Any questions concerning this application may be directed to Brett Burch Project Manager, UGI Energy Services, LLC, 835 Knitting Mills Way, Wyomissing, PA 19610, by telephone at (570) 665-8603, or by email at [bburch@ugies.com](mailto:bburch@ugies.com).

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Pursuant to section 157.9 of the Commission's rules (18 CFR 157.9), within 90 days of this Notice, the Commission staff will either: Complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of

the date of issuance of the Commission staff's EA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, and will be notified of any meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters, will not receive copies of all documents filed by other parties or issued by the Commission and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests, and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 3 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

Dated: December 10, 2019.

**Kimberly D. Bose,**  
*Secretary.*

[FR Doc. 2019-27016 Filed 12-13-19; 8:45 am]

**BILLING CODE 6717-01-P**

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. IC19-45-000]

#### Commission Information Collection Activities (FERC Form 580); Comment Request; Extension

**AGENCY:** Federal Energy Regulatory Commission, DOE.

**ACTION:** Notice of information collection and request for comments.

**SUMMARY:** In compliance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the currently approved information collection, FERC Form 580 (Interrogatory on Fuel and Energy Purchase Practices) and submitting the information collection to the Office of Management and Budget (OMB) for review. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below.

**DATES:** Comments on the collection of information are due January 15, 2020.

**ADDRESSES:** Comments filed with OMB, identified by the OMB Control No. 1902–0137, should be sent via email to the Office of Information and Regulatory Affairs: [oir\\_submission@omb.gov](mailto:oir_submission@omb.gov); Attention: Federal Energy Regulatory Commission Desk Officer.

A copy of the comments should also be sent to the Commission, in Docket No. IC19–45–000, by either of the following methods:

- *eFiling at Commission’s Website:* <http://www.ferc.gov/docs-filing/efiling.asp>.

- *Mail/Hand Delivery/Courier:* Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

*Instructions:* All submissions must be formatted and filed in accordance with submission guidelines at: <http://www.ferc.gov/help/submission-guide.asp>. For user assistance, contact FERC Online Support by email at [ferconlinesupport@ferc.gov](mailto:ferconlinesupport@ferc.gov), or by phone at: (866) 208–3676 (toll-free), or (202) 502–8659 for TTY.

*Docket:* Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at <http://www.ferc.gov/docs-filing/docs-filing.asp>.

**FOR FURTHER INFORMATION CONTACT:** Ellen Brown may be reached by email at [DataClearance@FERC.gov](mailto:DataClearance@FERC.gov), telephone at (202) 502–8663, and fax at (202) 273–0873.

**SUPPLEMENTARY INFORMATION:**

*Title:* FERC Form 580, (Interrogatory on Fuel and Energy Purchase Practices Pursuant to Section 205 of the Federal Power Act).

*OMB Control No.:* 1902–0137.

*Type of Request:* Three-year extension of the FERC Form 580 with no changes to the current reporting requirements. The administrative changes to the time period covered in FERC Form 580 are listed in the abstract.

*Abstract:* On October 1, 2019 (84 FR 52080), the Commission published a

Notice in the **Federal Register** in Docket No. IC19–45–000 requesting public comments. The Commission received one public comment and is indicating that in the related submittal to OMB.

The Commission collects FERC Form 580 information every other year as required under Section 205(f)(2) of the FPA as amended by Section 208 of the Public Utility Regulatory Policies Act of 1978 (PURPA). The Commission uses the information collected on the FERC Form 580 interrogatory to review utility purchase and cost recovery practices through automatic adjustment clauses (AACs) in order to ensure efficient use of resources.<sup>1</sup> The Commission uses the information to evaluate costs in individual rate filings and to supplement periodic utility audits. The public also uses the information in this manner. Without the FERC Form 580 interrogatory, the Commission would not have the requisite information to conduct the necessary review the FPA mandates.

**Summary of Public Comments**

On December 2, 2019, American Electric Power Service Corporation (AEPSC) filed comments. AEPSC states that the Commission should further clarify in the Desk Reference the scope of necessary respondents including:

- (1) That only jurisdictional utilities with cost-based tariffs on file that contain AACs should be required to submit Form 580; and
- (2) that contracts entered into pursuant to a utilities’ market-based rate authority (regardless of whether such contract happens to be cost-based and contain an AAC) are outside the scope of the necessary reporting.

However, AEPSC explains that Form 580 itself indicates that such scope limitations are intended. AEPSC also states that while it has not estimated the time it spends on each form, the time spent collecting the information and completing the form appear to be understated. AEPSC provides suggestions for minimizing the burden on respondents, which AEPSC explains would be addressed through

implementing new software. Additionally, AEPSC asserts that the Commission should consider providing greater consistency in terms and directions across different forms.

**FERC Response to Public Comments**

First, the Commission finds that while AEPSC states that the Desk Reference is not clear enough, AEPSC acknowledges that FERC Form 580 provides the necessary level of clarity. The Desk Reference is provided to answer common questions and assist filers in completing the FERC Form 580. Therefore, the Commission finds that revisions to the Desk Reference are not necessary for respondents to understand what is required to report as long as the directions on the FERC Form 580 are clear.

Second, the Commission finds that while AEPSC states that the burden estimates appear understated, AEPSC has not provided sufficient evidence to support its claim. Without additional factual information, the Commission does not have a basis to revise the burden estimate.

Third, we find that implementing major software updates is beyond the scope and timing of this docket. We will take the comment under consideration for future activities on the FERC Form 580.

Lastly, while AEPSC asserts that the Commission should consider consistency in terms and directions across different forms, we find that this is not necessary for respondents to be able to understand how to complete FERC Form 580. Moreover, changes to forms other than FERC Form 580 are beyond the scope of this information collection and might require rulemaking(s).

FERC is making the following administrative changes<sup>2</sup> (e.g., to update the period covered) to the form:

*Question 2a*

—Revise Question 2a columns as follows:

From	To
Docket number under which rate schedule containing AAC through which costs were passed during 2016 and/or 2017 was accepted for filing by FERC.	Docket number under which rate schedule containing AAC through which costs were passed during 2018 and/or 2019 was accepted for filing by FERC.
Was rate schedule superseded or abandoned during 2016–2017? If so, provide Dates.	Was rate schedule superseded or abandoned during 2018–2019? If so, provide dates.

<sup>1</sup>By using the data in FERC Form 580, the Commission is able to review utility purchase and cost recovery practices and ensure the resources are

in compliance with Commission regulations in 18 Code of Federal Regulations (CFR) 35.14.

<sup>2</sup>These changes were inadvertently omitted in the 60-day notice published on October 1, 2019 (84 FR 52080).

Question 2b

—Revise the paragraph under Question 2b to read:

From	To
If any of the Utility’s wholesale rate and/or service agreements containing an AAC listed in Question 2a, that was used during 2016 and/or 2017, was filed with the Commission before January 1, 1990, attach an electronic copy of it with this filing. List the documents you are submitting below. Note: Once this information is submitted electronically in a text-searchable format it will not be necessary to submit it in future Form 580 filings. See: <a href="http://www.ferc.gov/docs-filing/elibrary/accept-file-formats.asp">http://www.ferc.gov/docs-filing/elibrary/accept-file-formats.asp</a> for listing of Commission accepted document types.	If any of the Utility’s wholesale rate and/or service agreements containing an AAC listed in Question 2a, that was used during 2018 and/or 2019, was filed with the Commission before January 1, 1990, attach an electronic copy of it with this filing. List the documents you are submitting below. Note: Once this information is submitted electronically in a text-searchable format it will not be necessary to submit it in future Form 580 filings. See: <a href="http://www.ferc.gov/docs-filing/elibrary/accept-file-formats.asp">http://www.ferc.gov/docs-filing/elibrary/accept-file-formats.asp</a> for listing of Commission accepted document types.

Question 3

—Revise the paragraph under Question 3 to read:

From	To
If during the 2016–2017 period, the Utility had any contracts or agreements for the purchase of either energy or capacity under which all or any portion of the purchase costs were passed through a fuel adjustment clause (FAC), for each purchase from a PURPA Qualifying Facility (QF) or Independent Power Producer (IPP) provide the information requested in the non-shaded columns of the table below. Provide the information separately for each reporting year 2016 and 2017. Do not report purchased power where none of the costs were recovered through an FAC. For each purchase where costs were flowed through an FAC, fill-in the non-shaded columns and either “Only energy charges” or “The total cost of the purchase of economic power” columns, whichever apply.	If during the 2018–2019 period, the Utility had any contracts or agreements for the purchase of either energy or capacity under which all or any portion of the purchase costs were passed through a fuel adjustment clause (FAC), for each purchase from a PURPA Qualifying Facility (QF) or Independent Power Producer (IPP) provide the information requested in the non-shaded columns of the table below. Provide the information separately for each reporting year 2018 and 2019. Do not report purchased power where none of the costs were recovered through an FAC. For each purchase where costs were flowed through an FAC, fill-in the non-shaded columns and either “Only energy charges” or “The total cost of the purchase of economic power” columns, whichever apply.

Question 4a

—Revise Question 4a columns as follows:

From	To
If emission allowance costs were incurred by the Utility in 2016 and/or 2017 and were recovered through a FAC, provide the following information. Dollar value of emission allowance cost passed through a FAC: 2016 2017.	If emission allowance costs were incurred by the Utility in 2018 and/or 2019 and were recovered through a FAC, provide the following information. Dollar value of emission allowance cost passed through a FAC: 2018 2019.

Question 5

—Revise the paragraph under Question 5 as follows:

From	To
Provide the information requested below regarding the Utility’s fuel procurement policies and practices in place during 2016 and/or 2017 for fuels whose costs were subject to 18 CFR 35.14. Note: Responses to this question may be filed as Privileged. To do so, skip this question now and answer it via the Fuel Procurement Policies and Practices Privileged Addendum provided. Otherwise, answer it here and your responses will be made public.	Provide the information requested below regarding the Utility’s fuel procurement policies and practices in place during 2018 and/or 2019 for fuels whose costs were subject to 18 CFR 35.14. Note: Responses to this question may be filed as Privileged. To do so, skip this question now and answer it via the Fuel Procurement Policies and Practices Privileged Addendum provided. Otherwise, answer it here and your responses will be made public.

Question 6

—Revise the paragraph under Question 6 as follows:

From	To
For each fuel supply contract, of longer than one year in duration, in force at any time during 2016 and/or 2017, where costs were subject to 18 CFR 35.14, (including informal agreements with associated companies), provide the requested information. Report the information individually for each contract, for each calendar year. [No response to any part of Question 6 for fuel oil no. 2 is necessary.] Report all fuels consumed for electric power generation and thermal energy associated with the production of electricity. Information for only coal, natural gas, and oil should be reported.	For each fuel supply contract, of longer than one year in duration, in force at any time during 2018 and/or 2019, where costs were subject to 18 CFR 35.14, (including informal agreements with associated companies), provide the requested information. Report the information individually for each contract, for each calendar year. [No response to any part of Question 6 for fuel oil no. 2 is necessary.] Report all fuels consumed for electric power generation and thermal energy associated with the production of electricity. Information for only coal, natural gas, and oil should be reported.

**Question 7**

—Revise the paragraph under Question 7 as follows:

From	To
For each fuel supply contract, including informal agreements with associated or affiliated companies in force at any time during 2016 or 2017 WHERE CONTRACT SHORTFALL COSTS WERE PASSED THROUGH an FAC subject to 18 CFR 35.14, provide for each contract separately the information requested below. Only report the information requested for shortfalls that occurred under your contracts during reporting years 2016 or 2017 and that are not under dispute, <i>i.e.</i> , parties agree there was indeed a shortfall.	For each fuel supply contract, including informal agreements with associated or affiliated companies in force at any time during 2018 or 2019 WHERE CONTRACT SHORTFALL COSTS WERE PASSED THROUGH an FAC subject to 18 CFR 35.14, provide for each contract separately the information requested below. Only report the information requested for shortfalls that occurred under your contracts during reporting years 2018 or 2019 and that are not under dispute, <i>i.e.</i> , parties agree there was indeed a shortfall.

**Question 8**

—Revise the paragraph under Question 8 as follows:

From	To
For each fuel supply contract that was bought-out or bought-down, including informal agreements with associated or affiliated companies in force at any time during 2016 or 2017 WHERE CONTRACT BUY-OUT AND/OR BUY-DOWN COSTS WERE PASSED THROUGH an FAC subject to 18 CFR 35.14, provide for each contract separately the information requested below. Only report the information requested for contract buy-downs and buy-outs that occurred under your contracts during reporting years 2016 or 2017 and that are not under dispute, <i>i.e.</i> , parties agree there was indeed a shortfall.	For each fuel supply contract that was bought-out or bought-down, including informal agreements with associated or affiliated companies in force at any time during 2018 or 2019 WHERE CONTRACT BUY-OUT AND/OR BUY-DOWN COSTS WERE PASSED THROUGH an FAC subject to 18 CFR 35.14, provide for each contract separately the information requested below. Only report the information requested for contract buy-downs and buy-outs that occurred under your contracts during reporting years 2018 or 2019 and that are not under dispute <i>i.e.</i> , parties agree there was indeed a shortfall.

*Type of Respondents:* The filing must be submitted by all FERC-jurisdictional utilities owning and/or operating at least one steam-electric generating station of 50 MW or greater capacity or having a majority ownership interest in

a jointly-owned steam-electric generating station of at least 50 MW. A jurisdictional utility without a cost-based tariff on file with the Commission is not required to file the form.

*Estimate of Annual Burden.*<sup>3</sup> The Commission estimates the annual<sup>4</sup> public reporting burden and cost<sup>5</sup> for the information collection as:

**FERC FORM 580 (INTERROGATORY ON FUEL AND ENERGY PURCHASE PRACTICES)**

	Number of respondents	Annual number of responses per respondent	Total number of responses	Average burden & cost (\$ per response)	Total annual burden hours & total annual cost (\$)	Annual cost per respondent (\$)
	(1)	(2)	(1) * (2) = (3)	(4)	(3) * (4) = (5)	(5) ÷ (1)
Respondents with FACs <sup>6</sup> .....	29	0.5	14.5	103 hrs.; \$8,240 .....	1,493.5 hrs.; \$119,480 ...	\$4,120
Respondents with AACs, but no FACs .....	9	0.5	4.5	20 hrs.; \$1,600 .....	90 hrs.; \$7,200 .....	800
Respondents with no AACs and no FACs .....	28	0.5	14	2 hrs.; \$160 .....	28 hrs.; \$2,240 .....	80

<sup>3</sup> Burden is defined as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. See 5 CFR 1320 for additional information on the definition of information collection burden.

<sup>4</sup> The FERC Form 580 interrogatory is conducted every two years, we are using 0.5 for annual number of responses.

<sup>5</sup> Commission staff finds that the work done on this information collection is typically done by wage categories like those at FERC. The estimates

for cost (for wages plus benefits) are derived using the 2019 FERC average salary plus benefits of \$167,091/year (or \$80.00/hour).

<sup>6</sup> Fuel Adjustment Clause (FAC).

FERC FORM 580 (INTERROGATORY ON FUEL AND ENERGY PURCHASE PRACTICES)—Continued

	Number of respondents (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden & cost (\$ per response) (4)	Total annual burden hours & total annual cost (\$) (3) * (4) = (5)	Annual cost per respondent (\$) (5) ÷ (1)
Total .....	.....	.....	33	.....	1,611.5 hrs.; \$128,920 ...	.....

*Comments:* Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Dated: December 10, 2019.

**Kimberly D. Bose,**  
Secretary.

[FR Doc. 2019-27015 Filed 12-13-19; 8:45 am]

BILLING CODE 6717-01-P

**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory Commission**

[Docket No. IC19-46-000]

**Commission Information Collection Activities (FERC-604); Comment Request; Extension**

**AGENCY:** Federal Energy Regulatory Commission, DOE.

**ACTION:** Notice of information collection and request for comments.

**SUMMARY:** In compliance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comments on the currently approved information collection, FERC-604 (Cash Management Agreements) and submitting the information collection to the Office of Management and Budget (OMB) for review. Any interested person may file comments directly with OMB and should address a copy of those comments to the Commission as explained below.

**DATES:** Comments on the collection of information are due January 15, 2020.

**ADDRESSES:** Comments filed with OMB, identified by the OMB Control No. 1902-0267, should be sent via email to the Office of Information and Regulatory Affairs: [oir\\_submission@omb.gov](mailto:oir_submission@omb.gov). Attention: Federal Energy Regulatory Commission Desk Office.

A copy of the comments should also be sent to the Commission, in Docket No. IC19-46-000, by either of the following methods:

- *eFiling at Commission's Website:* <http://www.ferc.gov/docs-filing/efiling.asp>.

- *Mail/Hand Delivery/Courier:* Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

*Instructions:* All submissions must be formatted and filed in accordance with submission guidelines at: <http://www.ferc.gov/help/submission-guide.asp>. For user assistance, contact FERC Online Support by email at [ferconlinesupport@ferc.gov](mailto:ferconlinesupport@ferc.gov), or by phone at: (866) 208-3676 (toll-free), or (202) 502-8659 for TTY.

*Docket:* Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at <http://www.ferc.gov/docs-filing/docs-filing.asp>.

**FOR FURTHER INFORMATION CONTACT:** Ellen Brown may be reached by email at [DataClearance@FERC.gov](mailto:DataClearance@FERC.gov), telephone at (202) 502-8663, and fax at (202) 273-0873.

**SUPPLEMENTARY INFORMATION:**

*Title:* FERC-604 (Cash Management Agreements).

*OMB Control No.:* 1902-0267.

*Type of Request:* Three-year extension of the FERC-604 with no changes to the current reporting requirements.

*Abstract:* On September 6, 2019 (84 FR 46949), the Commission published a Notice in the **Federal Register** in Docket No. IC19-46-000 requesting public comments. The Commission received no comments and is noting that in the related submittal to OMB. Cash management or "money pool" programs typically concentrate affiliates' cash

assets in joint accounts for the purpose of providing financial flexibility and lowering the cost of borrowing. In a 2001 investigation, FERC staff found that balances in cash management programs affecting FERC-regulated entities totaled approximately \$16 billion. Additionally, other investigations revealed large transfers of funds amounting to more than \$1 billion between regulated pipeline affiliates and non-regulated parents whose financial conditions were precarious. The Commission found that these and other fund transfers and the enormous (mostly unregulated) pools of money in cash management programs could detrimentally affect regulated rates.

To protect customers and promote transparency, the Commission issued Order No. 634-A (2003) requiring entities to formalize in writing and file with the Commission their cash management agreements. At that time, the Commission obtained OMB clearance for the new reporting requirement under the FERC-555 information collection (OMB Control No. 1902-0098). The Commission includes these reporting requirements for cash management agreements under the FERC-604 information collection (OMB Control No. 1902-0267). The Commission implemented these reporting requirements in 18 CFR 141.500, 260.400, and 357.5.

*Type of Respondents:* Public utilities, natural gas companies, and oil pipeline companies.

*Estimate of Annual Burden.*<sup>1</sup> The Commission estimates the annual public reporting burden and cost<sup>2</sup> for the information collection as:

<sup>1</sup> Burden is defined as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. See 5 CFR 1320 for additional information on the definition of information collection burden.

<sup>2</sup> The Commission staff estimates that industry is similarly situated in terms of hourly cost (for wages plus benefits). Based on the Commission's FY (Fiscal Year) 2019 average cost of \$167,091 (for wages plus benefits), \$80.00/hour is used.

## FERC—604—CASH MANAGEMENT AGREEMENTS

Number of respondents	Number of responses per respondent	Total number of responses	Average burden hours & average cost per response (\$)	Total annual burden hours & total annual cost (\$)	Cost per respondent (\$)
(1)	(2)	(1) * (2) = (3)	(4)	(3) * (4) = (5)	(5) ÷ (1) = (6)
35	1	35	1.5 hours; \$120.00 .....	52.5 hours; \$4,200.00 ....	\$120.00

*Comments:* Comments are invited on: (1) Whether the collection of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Dated: December 10, 2019.

**Kimberly D. Bose,**  
Secretary.

[FR Doc. 2019-27011 Filed 12-13-19; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. NJ20-5-000]

#### Notice of Filing; City of Anaheim, California

Take notice that on December 9, 2019, the City of Anaheim, California submitted its tariff filing: City of Anaheim 2020 Transmission Revenue Balancing Account Adjustment to be effective January 1, 2020.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to

serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

This filing is accessible on-line at <http://www.ferc.gov>, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the website that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

*Comment Date:* 5:00 p.m. Eastern Time on December 30, 2019.

Dated: December 10, 2019.

**Kimberly D. Bose,**  
Secretary.

[FR Doc. 2019-27017 Filed 12-13-19; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Project No. 2816-050]

#### North Hartland, LLC; Notice of Application Tendered for Filing with the Commission and Soliciting Additional Study Requests and Establishing Procedural Schedule for Relicensing and a Deadline For Submission of Final Amendments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Major License.

b. *Project No.:* P-2816-050.

c. *Date filed:* November 26, 2019.

d. *Applicant:* North Hartland, LLC (North Hartland).

e. *Name of Project:* North Hartland Hydroelectric Project.

f. *Location:* On the Ottauquechee River in the town of Hartland, Windsor County, Vermont. The project occupies 20.8 acres of land managed by the U.S. Army Corps of Engineers (Corps).

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)-825(r).

h. *Applicant Contact:* Andrew J. Locke, President, Essex Hydro Associates, LLC, 55 Union Street, Boston, MA 02108; Phone at (617) 367-0032, or email at [alocke@essexhydro.com](mailto:alocke@essexhydro.com).

i. *FERC Contact:* Bill Connelly at (202) 502-8587, or [william.connolly@ferc.gov](mailto:william.connolly@ferc.gov).

j. *Cooperating agencies:* Federal, state, local, and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests described in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. See 94 FERC ¶ 61,076 (2001).

k. Pursuant to section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. *Deadline for filing additional study requests and requests for cooperating agency status:* January 25, 2020.

The Commission strongly encourages electronic filing. Please file additional study requests and requests for cooperating agency status using the Commission's eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. For assistance, please contact FERC Online

Support at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), (866) 208-3676 (toll free), or (202) 502-8659 (TTY). In lieu of electronic filing, please send a paper copy to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. The first page of any filing should include docket number P-2816-050.

m. The application is not ready for environmental analysis at this time.

n. *Project Description:* The existing North Hartland Hydroelectric Project consists of: (1) A steel-lined intake structure in the Corps' North Hartland Dam that is equipped with 2-inch trashracks; (2) a 470-foot-long, 12-foot-diameter steel penstock that provides flow to a 4.0-megawatt (MW) adjustable blade, vertical shaft turbine-generator unit located inside of a 59-foot-long, 40-foot-wide concrete powerhouse; (3) a 12-foot-diameter bypass conduit that branches off of the 12-foot-diameter penstock about 100 feet before the powerhouse, and that empties into a 60-foot-long concrete-lined channel through a bypass control gate; (4) a 30-inch-diameter steel penstock that branches off of the 12-foot-diameter bypass conduit about 50 feet upstream of the bypass control gate, and that provides flow to a 0.1375-MW fixed geometry, horizontal pump turbine-generator unit located on a raised platform outside of the southern wall of the powerhouse; (5) a 400-foot-long, 50 to 150-foot-wide tailrace channel; (6) a transmission line that comprises an approximately 600-foot-long, 12.5 kilovolt (kV) underground segment, and a 4,000-foot-long, 12.5-kV overhead segment that connect the generators to Green Mountain Power Corporation's Clay Hill Road Line 66 Transmission Project No. 12766; and (9) appurtenant facilities.

The project is managed to meet daily peak electrical system demand, as needed using the available head and reservoir outflow from Corps' North Hartland dam. The current license requires North Hartland to release a continuous minimum flow of 23 cubic feet per second (cfs) from July 1 through October 31, and 40 cfs during the remainder of the year, or the inflow to the reservoir, whichever is less, for the purpose of protecting and enhancing aquatic resources in the Ottauquechee River. The project has an average annual generation of approximately 13,991,990 kilowatt-hours from 2014 through 2018.

North Hartland proposes to provide the following minimum and maximum flows, respectively: (1) 60 and 700 cfs, from October 1 through March 31; (2) 160 and 835 cfs, from April 1 through April 31; (3) 160 and 550 cfs, from May

1 through May 31; (4) 140 and 450 cfs, from June 1 through June 30; and (5) 60 and 300 cfs, from July 1 through September 30.

o. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's website at <http://www.ferc.gov> using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the town of Hartland's library, located at 153 Rt. 5, Hartland, VT.

You may also register online at <http://www.ferc.gov/docs-filing/esubscription.asp> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

p. *Procedural schedule and final amendments:* The application will be processed according to the following preliminary schedule. Revisions to the schedule will be made as appropriate. Issue Deficiency Letter (if necessary)—January 2020  
Request Additional Information—January 2020  
Issue Acceptance Letter—April 2020  
Issue Scoping Document 1 for comments—May 2020  
Request Additional Information (if necessary)—July 2020  
Issue Scoping Document 2—August 2020  
Issue Notice of Ready for Environmental Analysis—August 2020  
Commission issues Environmental Assessment—February 2021

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Dated: December 10, 2019.

**Kimberly D. Bose,**  
Secretary.

[FR Doc. 2019-27018 Filed 12-13-19; 8:45 am]

**BILLING CODE 6717-01-P**

## ENVIRONMENTAL PROTECTION AGENCY

[FRL-10002-94-Region 3]

### Clean Water Act: Maryland—Chester River Vessel Sewage No-Discharge Zone—Final Affirmative Determination

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of final determination.

**SUMMARY:** The Environmental Protection Agency (EPA) has approved the establishment of a no-discharge zone in the Chester River, Kent and Queen Anne's Counties, Maryland and its tributaries.

**DATES:** Comments must be received in writing to the EPA on or before January 15, 2020.

**ADDRESSES:** Comments should be sent to Matthew A. Konfirst, U.S. Environmental Protection Agency—Mid-Atlantic Region, 1650 Arch Street, Mail Code 3WD31, Philadelphia, PA 19103-2029, or emailed to [konfirst.matthew@epa.gov](mailto:konfirst.matthew@epa.gov).

**FOR FURTHER INFORMATION CONTACT:** Matthew A. Konfirst, U.S. Environmental Protection Agency—Mid-Atlantic Region. Telephone: (215) 814-5801; Fax number: (215) 814-2301; email address: [konfirst.matthew@epa.gov](mailto:konfirst.matthew@epa.gov).

**SUPPLEMENTARY INFORMATION:** On behalf of the State of Maryland, the Secretary of the Maryland Department of Natural Resources requested that the Regional Administrator, U.S. Environmental Protection Agency, Region 3 approve a no-discharge zone pursuant to section 312(f)(3) of the Clean Water Act, 33 U.S.C. 1322(f)(3). After review of Maryland's application, the EPA determined that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the entirety of the Chester River and its tributaries. The State's application is available upon request from the EPA (please contact the person identified in the **ADDRESSES** section of this document) or at [http://dnr.maryland.gov/boating/Documents/FINAL\\_CRA\\_NDZ\\_APPLICATION.pdf](http://dnr.maryland.gov/boating/Documents/FINAL_CRA_NDZ_APPLICATION.pdf).

The delineation of the proposed no-discharge zone of the Chester River and its tributaries to the Chesapeake Bay will begin at 39°8'54.48" N, 76°16'37.11" W and extend down to 39°2'23.56" N, 76°18'8.89" W. From there it will continue east throughout any navigable waters including all tributaries and bays. Included within this zone are Lankford Bay, Corsica River, Southeast Creek, and many smaller tributaries.

The application identifies 19 stationary and four mobile cart pumpout stations located at 17 marinas or docks throughout the Chester River. Sixteen of the nineteen stationary units also have a method to empty portable toilets. The pumpout stations were funded through the Clean Vessel Act and Maryland Waterway Improvement Fund with grants administered by the Maryland Department of Natural Resources. Use of the pumpout stations incurs a fee of no

more than \$5.00 for the first 50 gallons of sewage pumped plus an additional 10 cents per gallon for every gallon above

50. All pumpouts comply with local and state sanitary permitting requirements. A list of the facilities, phone numbers,

locations, and hours of operation can be found below.

LIST OF FACILITIES WITH PUMPOUTS IN THE PROPOSED NO-DISCHARGE ZONE

Pumpout facility	Operating hours in season	Mean low water depth (ft)	Phone No.	Address
Bayside Landing Park .....	24-7 .....	5	410-778-2600	20927 Bayside Avenue, Rock Hall, MD 21661.
Castle Harbor Marina .....	24-7 .....	6	410-643-5599	301 Tackle Cir, Chester, MD 21619.
Chestertown Marina .....	9:00-5:00 daily .....	10	410-778-0500	207 S Water St, Chestertown, MD 21620.
Gratitude Marina .....	9:00-5:00 daily .....	7	410-639-7011	5924 Lawton Ave, Rock Hall, MD 21661.
Haven Harbor Marina .....	8:00-5:00 daily .....	6	410-778-8687	20880 Rock Hall Ave, Rock Hall, MD 21661.
Kennerley Point Marina .....	8:00-5:00 daily .....	3	410-758-2394	223 Marina Ln, Church Hill, MD 21623.
Lankford Bay Marina .....	24-7 .....	7	410-778-1414	23002 McKinleyville Rd, Rock Hall, MD 21661.
Long Cove Marina .....	8:00-5:00 daily .....	6	410-778-6777	22589 Hudson Rd, Rock Hall, MD 21661.
Mears Point Marina .....	8:30-7:00 daily .....	6	410-827-8888	428 Kent Narrow Way N, Grasonville, MD 21638.
North Point Marina .....	9:00-5:00 daily .....	6	410-639-2907	5639 Walnut St, Rock Hall, MD 21661.
Osprey Point Marina .....	24-7 .....	6	410-639-2194	20786 Rock Hall Ave, Rock Hall, MD 21661.
Piney Narrows Yacht Haven .....	8:30-6:30 daily .....	8	410-643-6600	500 Piney Narrows Rd, Chester, MD 21619.
Queenstown Harbor Community Pier .....	24-7 .....	6	301-343-5487	252 Harbor Lane, Queenstown, MD 21658.
Rock Hall Landing Marina .....	9:00-5:00 daily .....	5	410-639-2224	5657 S Hawthorne Ave, Rock Hall, MD 21661.
Sailing Emporium .....	8:00-5:00 daily .....	8	410-778-1342	21144 Green Lane, Rock Hall, MD 21661.
Spring Cove Marina .....	24-7 .....	5	410-639-2110	21035 Spring Cove Rd, Rock Hall, MD 21661.
Swan Creek Marina .....	24-7 .....	7	410-639-7813	6043 Lawton Ave, Rock Hall, MD 21661.

The State of Maryland provided documentation demonstrating that the total resident and transient vessel population using the proposed waters is estimated to be between 2,705 and 4,700 boats. Using the higher of those estimates, the State identified approximately 3,196 as recreational vessels, 1,151 as commercial vessels, and 353 as "Other." Commercial vessels in the Chester River include crabbing and fishing boats, charter fishing boats, and passenger vessels. The estimated vessel population is based on length: The most conservative estimates provided by the State of Maryland suggest that there are no vessels less than 16 feet in length, 15 vessels between 16 feet and 25 feet in length, 3,034 vessels between 25 feet and 40 feet in length, and 1,651 vessels greater than 40 feet in length. Based on the number and size of vessels and EPA guidance (*Protecting Coastal Waters from Vessel and Marina Discharges: A Guide for State and Local Officials*, August 1994), the estimated number of vessels requiring pumpout facilities in the Chester River during peak occupancy is 1,207.

In the application, Maryland certified that the Chester River and its tributaries need greater environmental protection to improve water quality and protect important resources. Both the Chester River and the Chesapeake Bay into which it drains, are classified as impaired for not meeting applicable State water quality standards. The entirety of the Chester River is considered impaired by nutrients,

sediment, bacteria or a combination thereof. The two counties that surround the Chester River, Kent County and Queen Anne's County, rank as the top two Maryland waterfront counties in terms of beach closures by percentage of beaches. All beach closures were the result of elevated bacteria as evidenced by high levels of enterococci.

The Chester River is an important economic driver for the region, providing jobs and revenue through tourism, commercial and recreational fishing for fish and shellfish, boating, and more. Many people use the Chester River for hunting, cruising, nature observation, sightseeing, waterskiing, tubing, racing, and swimming. Based on a study by the Sage Policy Group in 2012, cited in the application, the Chester River supports \$86 million in annual local economic activity, 900 jobs, and \$26.7 million in annual labor income.

The EPA determined that the costs associated with designating the Chester River as a vessel sewage NDZ are reasonable. Sufficient pumpout stations exist to service the resident vessel population and the fee is capped at \$5.00 per pumpout of 50 gallons or less. The commercial vessels operating in Chester River include crabbing, fishing, and charter vessels. These vessels have drafts less than 10 feet and can therefore access the facilities described previously in this document. Neither the recreational vessels, nor most of the commercial vessels, are expected to require pumpouts in excess of 50 gallons. As identified in the application, two larger passenger vessels that may

generate greater volumes of sewage are already operating holding tanks, and therefore would not experience any incremental costs associated with designation of a NDZ.

Following publication of the Receipt of Petition in the **Federal Register** at 82 FR 15357, March 28, 2017, a 30-day public comment period was opened. The EPA received comments from 64 unique individuals regarding establishment of a no-discharge zone (NDZ) in the Chester River and its tributaries. Of those, 57 supported and 7 contested the effort. Comments critical of establishing a NDZ focused on five primary issues: *Issue 1:* The volume of discharge targeted by the establishment of a NDZ in the Chester River is minimal. *Response:* These comments go beyond the scope of the EPA's authority in this action. Because the EPA's authority is limited to determining whether adequate pumpout facilities exist, it is not appropriate to base its determination on whether vessel sewage is comparable in quantity or impact to other sources of pollution. *Issue 2:* Effective enforcement of the regulation will be difficult. *Response:* Both the US Coast Guard and Maryland Department of the Environment have the authority to enforce NDZ requirements; however, initial efforts to achieve compliance are expected to focus on boater education. *Issue 3:* The data used to determine boat populations is outdated and the formula used to calculate pumpout availability does not accurately represent on-the-ground conditions. *Response:* Calculations indicate that a minimum of

10 pumpout facilities are required to service the Chester River boating population. There are currently 23 facilities with the capacity to support 6,900 boats; the upper estimate of boats is 4,700. Therefore, even if there is an increase in the number of boats, there is adequate capacity for pumpout service. *Issue 4:* Pumpout facilities are concentrated in certain areas of the river and are not available on a year-round basis. *Response:* There is a concentration of pumpout facilities at Rock Hall near the northern end of the Chester River's mouth, but facilities are distributed along the river as far upstream as Chestertown. Ten of the 23 pumpout facilities are open year-round and are distributed throughout the Chester River NDZ. *Issue 5:* Establishing a NDZ would negate boaters' ability to operate certain flow-through marine sanitation devices that are currently Coast Guard-approved, thereby limiting boaters' options for handling sewage. *Response:* The NDZ only applies to the Chester River and its tributaries, not to the entirety of the Chesapeake Bay.

Based on the information above, the EPA hereby makes a final affirmative determination that adequate facilities for the safe and sanitary removal and treatment of sewage from all vessels are reasonably available for the Chester River and its tributaries such that the State of Maryland may establish a vessel sewage no-discharge zone.

Dated: November 18, 2019.

**Cosmo Servidio,**

*Regional Administrator, Mid-Atlantic Region.*

[FR Doc. 2019-27065 Filed 12-13-19; 8:45 am]

**BILLING CODE 6560-50-P**

**FEDERAL DEPOSIT INSURANCE CORPORATION**

**Agency Information Collection Activities: Submission for OMB Review; Comment Request (OMB No. 3064-0026; -00079; -0122 and -0139)**

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Agency information collection activities: Submission for OMB review; comment request.

**SUMMARY:** The FDIC, as part of its obligations under the Paperwork Reduction Act of 1995, invites the general public and other Federal agencies to take this opportunity to comment on the renewal of the existing information collections described below. On September 30, 2019, the FDIC requested comment for 60 days on a proposal to renew these information collections. No comments were received. The FDIC hereby gives notice of its plan to submit to OMB a request to approve the renewal of these information collections, and again invites comment on their renewal.

**DATES:** Comments must be submitted on or before January 15, 2020.

**ADDRESSES:** Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- <https://www.FDIC.gov/regulations/laws/federal>.
- *Email:* [comments@fdic.gov](mailto:comments@fdic.gov). Include the name and number of the collection in the subject line of the message.
- *Mail:* Manny Cabeza (202-898-3767), Regulatory Counsel, MB-3128,

Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Manny Cabeza, Regulatory Counsel, 202-898-3767, [mcabeza@fdic.gov](mailto:mcabeza@fdic.gov), MB-3128, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

**SUPPLEMENTARY INFORMATION:**

*Proposal to renew the following currently approved collection of information:*

1. *Title:* Transfer Agent Registration and Amendment Form.

*OMB Number:* 3064-0026.

*Form:* Transfer Agent Registration and Amendment Form (Form TA-1).

*Affected Public:* Private Sector, insured state nonmember banks and state savings associations.

*Burden Estimate:*

**SUMMARY OF ANNUAL BURDEN**

Information collection (IC) description	Type of burden	Obligation to respond	Estimated number of respondents	Estimated number of responses	Estimated time per response (hours)	Frequency of response	Total estimated annual burden (hours)
Transfer Agent Registration and Amendment Form.	Reporting .....	Mandatory .....	12	1	.39	On Occasion ..	4.73
Total Estimated Annual Burden Hours	.....	.....	.....	.....	.....	.....	4.73

*General Description of Collection:* Section 17A(c) of the Security Exchange Act of 1934 (the Act) requires all transfer agents for securities registered under section 12 of the Act or, if the security would be required to be registered except for the exemption from registration provided by Section 12(g)(2)(B) or Section 12(g)(2)(G), to "fil[e] with the appropriate regulatory agency . . . an application for registration in such form and containing such information and documents . . . as

such appropriate regulatory agency may prescribe as necessary or appropriate in furtherance of the purposes of this section." In general, an entity performing transfer agent functions for a security is required to register with its appropriate regulatory agency ("ARA") if the security is registered on a national securities exchange or if the issuer of the security has total assets exceeding \$10 million and a class of equity security held of record by 2,000 persons or, for an issuer that is not a bank, BHC,

or SLHC, by 500 persons who are not accredited investors. The Board's Regulation H (12 CFR 208.31(a)) and Regulation Y (12 CFR 225.4(d)), the OCC's 12 CFR 9.20, and the FDIC's 12 CFR part 341 implement these provisions of the Act. To accomplish the registration of transfer agents, Form TA-1 was developed in 1975 as an interagency effort by the Securities and Exchange Commission (SEC) and the agencies. The agencies primarily use the data collected on Form TA-1 to

determine whether an application for registration should be approved, denied, accelerated or postponed, and they use the data in connection with their supervisory responsibilities.

2. *Title:* Application for Consent to Reduce or Retire Capital.  
*OMB Number:* 3064-0079.  
*Form:* None.

*Affected Public:* Insured state nonmember banks and state savings associations.  
*Burden Estimate:*

SUMMARY OF ANNUAL BURDEN

Information collection (IC) description	Type of burden	Obligation to respond	Estimated number of respondents	Estimated number of responses	Estimated time per response (hours)	Frequency of response	Total estimated annual burden (hours)
Application for consent to reduce or retire capital.	Reporting .....	Mandatory .....	118	1	11	On Occasion ..	1,298
Total Estimated Annual Burden Hours	.....	.....	.....	.....	.....	.....	1,298

*General Description of Collection:* Insured state nonmember banks proposing to change their capital structure must submit an application containing information about the

proposed change to obtain FDIC's consent to reduce or retire capital.  
 3. *Title:* Forms Relating to FDIC Outside Counsel, Legal Support and Expert Services Programs.

*OMB Number:* 3064-0122.  
*Forms:* See Table below.  
*Affected Public:* Entities providing legal and expert services to the FDIC.  
*Burden Estimate:*

SUMMARY OF ANNUAL BURDEN

Information collection (IC) description	Type of burden	Obligation to respond	Estimated number of respondents	Estimated number of responses	Estimated time per response (hours)	Frequency of response	Total estimated annual burden (hours)
Non-Litigation Budget Form—Form No. 5000/26.	Reporting .....	Mandatory ...	185	1	0.50	On Occasion	92.50
Amended Litigation Budget—Form No. 5000/31.	Reporting .....	Mandatory ...	100	1	0.50	On Occasion	50.00
Amended Non-Litigation Budget—Form No. 5000/33.	Reporting .....	Mandatory ...	50	1	0.50	On Occasion	25.00
Litigation Budget—Form No. 5000/35.	Reporting .....	Mandatory ...	100	1	0.50	On Occasion	50.00
Representations and Certifications for Legal Contractors—Form No. 5210/01.	Reporting .....	Mandatory ...	60	1	0.75	On Occasion	45.00
Expert Invoice for Fees and Expenses (EIF&E)—Form No. 5000/01.	Reporting .....	Mandatory ...	50	1	0.50	On Occasion	25.00
Legal Support Services (LSS) Provider Invoice for Fees and Expenses (IF&E)—Form No..	Reporting .....	Mandatory ...	30	1	0.50	On Occasion	15.00
Agreement for Services (Expert/Legal Support Services (LSS) Provider) Amendment—Form No. 5210/03.	Reporting .....	Mandatory ...	30	1	1.00	On Occasion	30.00
Agreement for Services (Expert/Legal Support Services (LSS) Provider) Rate Schedule—Form No. 5210/04.	Reporting .....	Mandatory ...	100	1	1.00	On Occasion	100.00
Legal Services Agreement (LSA) Amendment—Form No. 5210/06.	Reporting .....	Mandatory ...	50	1	1.00	On Occasion	50.00
Expert budget—Form No. 5210/08.	Reporting .....	Mandatory ...	80	1	0.50	On Occasion	40.00
Representations and Certifications for Experts and Legal Support Services Providers—Form No. 5210/09.	Reporting .....	Mandatory ...	65	1	1.00	On Occasion	65.00
Outside Counsel Legal Services Agreement Rate Schedule—Form No. 5210/10.	Reporting .....	Mandatory ...	65	1	1.00	On Occasion	65.00

SUMMARY OF ANNUAL BURDEN—Continued

Information collection (IC) description	Type of burden	Obligation to respond	Estimated number of respondents	Estimated number of responses	Estimated time per response (hours)	Frequency of response	Total estimated annual burden (hours)
Legal Invoice for Fees and Expenses—Form No. 5210/11.	Reporting .....	Mandatory ...	100	1	1.00	On Occasion	100.00
Firm Travel Voucher—Form No. 5210/12.	Reporting .....	Mandatory ...	100	1	1.00	On Occasion	100.00
Oral Representations and Certifications for Expert Legal Support Services Telephone Authorization For Expenditures Under \$5,000—Form No. 5210/14.	Reporting .....	Mandatory ...	50	1	0.50	On Occasion	25.00
Legal Support Services (LSS) Provider Budget Form—Form No. 5210/15.	Reporting .....	Mandatory ...	25	1	0.50	On Occasion	12.50
Legal Services Agreement (LSA)—Form No. 5210/13.	Reporting .....	Mandatory ...	65	1	0.25	On Occasion	16.25
Total Estimated Annual Burden Hours.	.....	.....	.....	.....	.....	.....	906.25

*General Description of Collection:* The information collected enables the FDIC to ensure that all individuals, businesses and firms seeking to provide legal support services to the FDIC meet the eligibility requirements established by Congress. The information is also used to manage and monitor payments

to contractors, document contract amendments, expiration dates, billable individuals, minority law firms, and to ensure that law firms, experts, and other legal support services providers comply with statutory and regulatory requirements. This collection consists of 18 forms.

4. *Title:* CRA Sunshine.  
*OMB Number:* 3064–0139.  
*Forms:* None.  
*Affected Public:* Insured state nonmember banks and state savings associations and their affiliates and nongovernmental entities and persons.  
*Burden Estimate:*

SUMMARY OF ANNUAL BURDEN

Information collection (IC) description	Type of burden	Obligation to respond	Estimated number of respondents	Estimated number of responses	Estimated time per response (hours)	Frequency of response	Total estimated annual burden (hours)
Disclosure burden for insured depository institutions and affiliates—.6(b) covered agreements to public.	Third Party Disclosure.	Mandatory ...	10	1	1	Annually .....	14
Disclosure burden for insured depository institutions and affiliates—.6(d) copy of agreement to agency.	Third Party Disclosure.	Mandatory ...	10	1	1	Annually .....	14
Disclosure burden for insured depository institutions and affiliates—.6(b)(ii) list of agreements to agency.	Third Party Disclosure.	Mandatory ...	10	1	1	Annually .....	14
Disclosure burden for insured depository institutions and affiliates—.6(d) agreements relating to activities of CRA affiliates.	Third Party Disclosure.	Mandatory ...	10	1	1	Annually .....	14.00
Reporting burden for insured depository institutions and affiliates—.7(b) annual report.	Reporting .....	Mandatory ...	10	1	4	Annually .....	40
Reporting burden for insured depository institutions and affiliates—.7(f)(2)(ii): Filing NGEF annual report.	Reporting .....	Mandatory ...	6	1	1	Annually .....	6

## SUMMARY OF ANNUAL BURDEN—Continued

Information collection (IC) description	Type of burden	Obligation to respond	Estimated number of respondents	Estimated number of responses	Estimated time per response (hours)	Frequency of response	Total estimated annual burden (hours)
Disclosure burden for non-government entity or person—.6(c): Copy of agreement to agency.	Third Party Disclosure.	Mandatory ...	6	1	1	Annually .....	6
Disclosure burden for non-government entity or person—.6(b): Covered agreements to public.	Third Party Disclosure.	Mandatory ...	6	1	1	Annually .....	6
Reporting burden for NGEF—.7(b): Annual report.	Reporting .....	Mandatory ...	6	1	4	Annually .....	24
Total Estimated Annual Burden Hours.	.....	.....	.....	.....	.....	.....	138

*General Description of Collection:*

This collection implements a statutory requirement imposing reporting, disclosure and recordkeeping requirements on some community reinvestment-related agreements between insured depository institutions or affiliates, and nongovernmental entities or persons. The information assists interested members of the public in assessing whether the parties are fulfilling their agreements, and helps the agencies understand how the institutions they regulate are fulfilling their CRA responsibilities.

**Request for Comment**

*Comments are invited on:* (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, on December 10, 2019.

Federal Deposit Insurance Corporation.

**Anmarie H. Boyd,**

*Assistant Executive Secretary.*

[FR Doc. 2019-26981 Filed 12-13-19; 8:45 am]

BILLING CODE 6714-01-P

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION****Sunshine Act Meeting**

**TIME AND DATE:** 10:00 a.m., Wednesday, January 8, 2020.

**PLACE:** The Richard V. Backley Hearing Room, Room 511N, 1331 Pennsylvania Avenue NW, Washington, DC 20004 (enter from F Street entrance).

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** The Commission will hear oral argument in the matter *Secretary of Labor v. Knight Hawk Coal, LLC*, Docket No. LAKE 2019-87-R. (Issues include whether the Judge erred in overturning the Secretary's revocation of a mine's ventilation plan.)

Any person attending this oral argument who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and § 2706.160(d).

**CONTACT PERSON FOR MORE INFORMATION:** Emogene Johnson (202) 434-9935/(202) 708-9300 for TDD Relay/1-800-877-8339 for toll free.

*Phone Number for Listening to Meeting:* 1-(866) 236-7472; Passcode: 678-100.

**Authority:** 5 U.S.C. 552b.

Dated: December 12, 2019.

**Sarah L. Stewart,**

*Deputy General Counsel.*

[FR Doc. 2019-27181 Filed 12-12-19; 4:15 pm]

BILLING CODE 6735-01-P

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION****Sunshine Act Meeting**

**TIME AND DATE:** 10:00 a.m., Thursday, January 9, 2020.

**PLACE:** The Richard V. Backley Hearing Room, Room 511N, 1331 Pennsylvania Avenue NW, Washington, DC 20004 (enter from F Street entrance).

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:** The Commission will consider and act upon the following in open session: *Secretary of Labor v. Knight Hawk Coal, LLC*, Docket No. LAKE 2019-87-R. (Issues include whether the Judge erred in overturning the Secretary's revocation of a mine's ventilation plan.)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and § 2706.160(d).

**CONTACT PERSON FOR MORE INFORMATION:** Emogene Johnson (202) 434-9935/(202) 708-9300 for TDD Relay/1-800-877-8339 for toll free.

*Phone Number for Listening to Meeting:* 1-(866) 236-7472; Passcode: 678-100.

**Authority:** 5 U.S.C. 552b.

Dated: December 12, 2019.

**Sarah L. Stewart,**

*Deputy General Counsel.*

[FR Doc. 2019-27182 Filed 12-12-19; 4:15 pm]

BILLING CODE 6735-01-P

**FEDERAL RESERVE SYSTEM****Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company**

The notificants listed below have applied under the Change in Bank Control Act (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 Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th and Constitution Avenue NW, Washington DC 20551-0001, not later than December 31, 2019.

A. *Federal Reserve Bank of Kansas City* (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198-0001:

1. *Terri K. Boggess Revocable Trust, Terri K. Boggess, trustee, both of Chillicothe, Missouri; the Hal Boggess Revocable Trust, Hal Boggess, trustee, both of Chillicothe, Missouri; Gwendolyn Elaine Luzader, Gardner, Kansas; Joshua Seth Boggess, Normal, Illinois; the Linda D. Osborn Revocable Trust, Linda D. Osborn, trustee, both of Bethany, Missouri; Linda D. Osborn; the Ervin Cole Osborn Revocable Trust, Ervin Cole Osborn, trustee, both of Bethany, Missouri; Ervin Cole Osborn; the Diana L. Wheeler Trust, Paul Wheeler, trustee, both of Overland Park, Kansas; Justin P. Wheeler, Portland, Oregon; and Cole D. Wheeler, Kansas City, Kansas; as members acting in concert with the Boggess/Osborn/Wheeler Family Group to retain voting shares of Bethany Bankshares, Inc., and thereby indirectly retain voting shares of BTC Bank, both of Bethany, Missouri.*

2. *Emery E. Fager Exempt Trust DTD 12/28/14, Duane L. Fager and Jane A. Anderson, co-trustees; and the Emery E. Fager Marital Exempt Trust DTD 12/28/14, Duane L. Fager and Jane A. Anderson, co-trustees, all of Topeka, Kansas; as members of a group acting in concert to retain voting shares of*

*Commerce Bank and Trust Holding Company and thereby indirectly retain voting shares of CoreFirst Bank & Trust, both of Topeka, Kansas. In addition, the Elizabeth F. Fager Trust, Elizabeth F. Fager, trustee, both of Topeka, Kansas, as a member of the group acting in concert, to acquire voting shares of Commerce Bank and Trust Holding Company and thereby indirectly acquire voting shares of CoreFirst Bank & Trust.*

3. *David S. Fricke, individually, and as Plan Administrator of the Commerce Bank and Trust Holding Company Employee Stock Ownership Plan, both of Topeka, Kansas; together with Linda A. Fricke; the Brandon D. Fricke QSST Trust, David S. Fricke, trustee; the Lauren Hillary Fricke QSST Trust, David S. Fricke, trustee; and the Noah Morgan Fricke QSST Trust, David S. Fricke, trustee; all of Topeka, Kansas; as members of a group acting in concert 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.*

4. *John Traw, Vian, Oklahoma, as trustee of The Sloan Armstrong Living Trust; to acquire voting shares of Ironhorse Financial Group, Inc., and thereby indirectly acquire voting shares of Armstrong Bank, both of Muskogee, Oklahoma, and Republic Bank and Trust, Norman, Oklahoma.*

In addition, John Traw, Vian, Oklahoma; the Ashton McNeil Armstrong 2018 GST Exempt Trust, John Traw, trustee; the Sloan Armstrong Hart 2018 GST Exempt Trust, John Traw, trustee; Norma Lugene Armstrong, Vian, Oklahoma, as trustee of the Bruce McNeill Trust and the Jean McNeill Trust; Dale Brent Bumpers, Little Rock, Arkansas, as co-trustee of the Brent Alexander Bumpers Irrevocable Trust and the Margaret Aston Bumpers Irrevocable Trust; Kelsi Don Farmer, New York, New York, as co-trustee of the Brent Alexander Bumpers Irrevocable Trust and the Margaret Aston Bumpers Irrevocable Trust; and Courtney Quidley, Bixby, Oklahoma, as trustee of Elizabeth Ann Hensley Irrevocable Trust and the Allison Jane Hensley Irrevocable Trust, to join as members of the Armstrong Family Control Group, which controls Ironhorse Financial Group, Inc., and thereby indirectly controls Armstrong Bank and Republic Bank and Trust.

B. *Federal Reserve Bank of Boston* (Prabal Chakrabarti, Senior Vice President) 600 Atlantic Avenue, Boston, Massachusetts 02210-2204. Comments can also be sent electronically to [BOS.SRC.Applications.Comments@bos.frb.org](mailto:BOS.SRC.Applications.Comments@bos.frb.org):

1. *Sloane Family Enterprises, LP, Barbara J. Sloane, Barry R. Sloane, and Linda Sloane Kay, as general partners, all of Medford, Massachusetts; as members of a group acting in concert to acquire voting shares of Century Bancorp, Inc., Medford, Massachusetts, and thereby indirectly acquire voting shares of Century Bank and Trust Company, Somerville, Massachusetts.*

Board of Governors of the Federal Reserve System, December 10, 2019.

**Yao-Chin Chao,**

*Assistant Secretary of the Board.*

[FR Doc. 2019-26972 Filed 12-13-19; 8:45 am]

**BILLING CODE P**

**FEDERAL RESERVE SYSTEM****Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB**

**AGENCY:** Board of Governors of the Federal Reserve System.

**SUMMARY:** The Board of Governors of the Federal Reserve System (Board) is adopting a proposal to extend for three years, without revision, the Consumer Satisfaction Questionnaire, the Federal Reserve Consumer Help—Consumer Survey, the Consumer Online Complaint Form, and the Appraisal Complaint Form (FR 1379a, b, c, and d; OMB No. 7100-0135).

**FOR FURTHER INFORMATION CONTACT:** Federal Reserve Board Clearance Officer—Nuha Elmagrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452-3829. Office of Management and Budget (OMB) Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395-6974.

A copy of the Paperwork Reduction Act (PRA) OMB submission, including the reporting form and instructions, supporting statement, and other documentation will be placed into OMB's public docket files. These documents also are available on the Federal Reserve Board's public website at <https://www.federalreserve.gov/apps/reportforms/review.aspx> or may be requested from the agency clearance officer, whose name appears above.

**SUPPLEMENTARY INFORMATION:** On June 15, 1984, OMB delegated to the Board authority under the PRA to approve and assign OMB control numbers to collections of information conducted or

sponsored by the Board. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the PRA Submission, supporting statements, and approved collection of information instrument(s) are placed into OMB's public docket files.

### Final Approval Under OMB Delegated Authority of the Extension for Three Years, Without Revision, of the Following Information Collection

*Report title:* Consumer Satisfaction Questionnaire, the Federal Reserve Consumer Help—Consumer Survey, the Consumer Online Complaint Form, and the Appraisal Complaint Form.

*Agency form number:* FR 1379a, FR 1379b, FR 1379c, and FR 1379d.

*OMB control number:* 7100–0135.

*Frequency:* Event generated.

*Respondents:* Consumers, appraisers, and financial institutions.

*Estimated number of respondents:* FR 1379a, 551; FR 1379b, 1,455; FR 1379c, 6,719; FR 1379d, 7.

*Estimated average hours per response:* FR 1379a, 5 minutes; FR 1379b, 5 minutes; FR 1379c, 10 minutes; FR 1379d, 30 minutes.

*Estimated annual burden hours:* FR 1379a, 46 hours; FR 1379b, 121 hours; FR 1379c, 1,120 hours; FR 1379d, 4 hours.

*General description of report:* The FR 1379a is sent to consumers who have filed complaints with the Federal Reserve against state member banks or other financial institutions supervised by the Federal Reserve. The information is used to assess the satisfaction of the consumers with the Federal Reserve's handling of, and written response to, their complaints at the conclusion of an investigation. The FR 1379b is a survey sent to consumers who contact the Federal Reserve Consumer Help [desk] (FRCH)<sup>1</sup> to file a complaint or inquiry. The information is used to determine whether consumers are satisfied with the way the FRCH handled their complaint. The FR 1379c collection addresses the burden associated with consumers electronically submitting a complaint against a financial institution to the FRCH. The FR 1379d collects information about complaints regarding a regulated institution's non-compliance with the appraisal independence standards and the Uniform Standards of Professional Appraisal Practice, including complaints from appraisers, individuals, financial institutions, and other entities.

*Legal authorization and confidentiality:* The FR 1379 family of forms is authorized pursuant to section 8 of the Federal Deposit Insurance Act (Section 8)<sup>2</sup> and section 11(a) of the Federal Reserve Act (Section 11(a)).<sup>3</sup> Section 8 provides the Board broad authority to enforce compliance with laws against entities within its jurisdiction, including state member banks. Section 11(a) broadly empowers the Board to examine “the affairs of each Federal reserve bank and of each member bank.”<sup>4</sup> The Board uses the information obtained from the FR 1379 to help fulfill these obligations. The forms comprising the FR 1379 family of forms are voluntary. Individual respondents may request that information submitted to the Board through the FR 1379 family of forms be kept confidential on a case-by-case basis. The Consumer Satisfaction Questionnaire (FR 1379a) does not collect any personal information from the respondent and is not likely to be considered confidential. Three of the forms (the FRCH—Consumer Survey (FR 1379b), Consumer Online Complaint Form (FR 1379c), and Appraisal Complaint Form (FR 1379d)) collect personal information, such as the respondent's name, contact information, and information regarding the subject of the complaint. This personal information may be kept confidential under exemption 6 of the FOIA to the extent disclosure of such information would constitute an unwarranted invasion of personal privacy.<sup>5</sup> In addition, information concerning the subject of a complaint may be kept confidential under exemption 4 of the FOIA to the extent it involves trade secrets and confidential commercial and financial information.<sup>6</sup> With respect to the Consumer Online Complaint Form (FR 1379c) and Appraisal Complaint Form (FR 1379d), determinations regarding disclosure of the information to third parties of any confidential portions of these forms would be made in accordance with the Privacy Act.<sup>7</sup> A hyperlink directing the applicant to the relevant Privacy Act statement is provided in these forms on the Board's website.

<sup>2</sup> 12 U.S.C. 1818.

<sup>3</sup> 12 U.S.C. 248(a).

<sup>4</sup> The FR 1379d is additionally authorized pursuant to Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, which requires the Board to prescribe standards for appraisals used by its regulated entities. See, 12 U.S.C. 3331–3355.

<sup>5</sup> 5 U.S.C. 552(b)(6).

<sup>6</sup> 5 U.S.C. 552(b)(4).

<sup>7</sup> 5 U.S.C. 552a(b).

*Current actions:* On September 10, 2019, the Board published a notice in the **Federal Register** (84 FR 47507) requesting public comment for 60 days on the extension, without revision, of the FR 1379. The comment period for this notice expired on November 12, 2019. The Board did not receive any comments.

Board of Governors of the Federal Reserve System, December 11, 2019.

**Ann Misback,**

*Secretary of the Board.*

[FR Doc. 2019–27038 Filed 12–13–19; 8:45 am]

**BILLING CODE 6210–01–P**

## FEDERAL RESERVE SYSTEM

### Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

**AGENCY:** Board of Governors of the Federal Reserve System.

**SUMMARY:** The Board of Governors of the Federal Reserve System (Board) is adopting a proposal to extend for three years, with revision, the Reporting and Disclosure Requirements Related to Securities of State Member Banks as Required by Regulation H (FR H–1; OMB No. 7100–0091). The revisions are applicable January 1, 2020.

#### FOR FURTHER INFORMATION CONTACT:

Federal Reserve Board Clearance Officer—Nuha Elmaghrahi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452–3829.

Office of Management and Budget (OMB) Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

A copy of the Paperwork Reduction Act (PRA) OMB submission, including the reporting form and instructions, supporting statement, and other documentation will be placed into OMB's public docket files. These documents also are available on the Federal Reserve Board's public website at <https://www.federalreserve.gov/apps/reportforms/review.aspx> or may be requested from the agency clearance officer, whose name appears above.

**SUPPLEMENTARY INFORMATION:** On June 15, 1984, OMB delegated to the Board authority under the PRA to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. Board-

<sup>1</sup> See [www.federalreserveconsumerhelp.gov/](http://www.federalreserveconsumerhelp.gov/).

approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the PRA Submission, supporting statements, and approved collection of information instrument(s) are placed into OMB's public docket files.

### Final Approval Under OMB Delegated Authority of the Extension for Three Years, With Revision, of the Following Information Collection

*Report title:* Reporting and Disclosure Requirements Related to Securities of State Member Banks as Required by Regulation H.

*Agency form number:* FR H-1.

*OMB control number:* 7100-0091.

*Effective Date:* January 1, 2020.

*Frequency:* Annually, Quarterly, and on occasion.

*Respondents:* State member banks (SMBs).

*Estimated number of respondents:* 2.

*Estimated average hours per response:*

Reporting requirements: Form 8-A, 3.0 hours; Form 10, 218 hours; Regulation 12B, 1 hour; Rule 13e-1, 13.0 hours; Regulation 14C and Schedule 14C, 98.2 hours; Regulation 14D and Schedule 14D, 65.14 hours; Rule 14f-1, 2.0 hours; Form 10-K, 2395.73 hours; Form 10-Q, 190.42 hours; and Form 8-K, 7.71 hours; Disclosure requirements: Form 3, 0.16 hours; Form 4, 0.16 hours; and Form 5, 0.16 hours; Reporting and Disclosure requirements: Regulation 14A and Schedule 14A, 12.75 hours; Rule 12b-25 and Form 12b-25, 2.50 hours; Rule 13e-3 and Schedule 13E-3, 34.36 hours; and Form 15, 1.50 hours.

*Estimated annual burden hours:*

Reporting requirements: Form 8-A, 6 hours; Form 10, 436 hours; Regulation 12B, 2 hours; Rule 13e-1, 26 hours; Regulation 14C and Schedule 14C, 196 hours; Regulation 14D and Schedule 14D, 130 hours; Rule 14f-1, 4 hours; Form 10-K, 4,791 hours; Form 10-Q, 1,143 hours; and Form 8-K, 15 hours; Disclosure requirements: Form 3, 0.32 hours; Form 4, 11 hours; and Form 5, 3 hours; Reporting and Disclosure requirements: Regulation 14A and Schedule 14A, 26 hours; Rule 12b-25 and Form 12b-25, 5 hours; Rule 13e-3 and Schedule 13E-3, 69 hours; and Form 15, 3 hours.

*General description of report:* The Board's Regulation H requires SMBs whose securities are subject to registration pursuant to the Securities Exchange Act of 1934 (Exchange Act)<sup>1</sup> to disclose certain information to shareholders and securities exchanges and to report information relating to

their securities to the Board using forms adopted by the Securities and Exchange Commission (SEC) and in compliance with certain rules and regulations adopted by the SEC.

*Legal authorization and confidentiality:* Various provisions of the Exchange Act require issuers to file reports with the SEC and make certain disclosures, and sections 12(i) and 23(a)(1) of the Exchange Act authorize the Board to adopt rules and regulations requiring qualifying SMBs to file those reports with the Board (15 U.S.C. 78l(i) and 78w(a)(1)). The FR H-1 is mandatory. Reports filed with the Board pursuant to this collection are not considered confidential and must be disclosed publically under Regulation H (12 CFR 208.36(c)(3)). However, a SMB may request that a report or document not be disclosed to the public (12 CFR 208.36(d)). Should a SMB request confidential treatment of such information, the question of whether the information is entitled to confidential treatment would be determined on a case-by-case basis. Information may be kept confidential under exemption 4 of the Freedom of Information Act, which protects privileged or confidential commercial or financial information (5 U.S.C. 552(b)(4)).

*Current actions:* On August 12, 2019, the Board published an initial notice in the **Federal Register** (84 FR 39845) requesting public comment for 60 days on the extension, with revision, of the FR H-1. The Board proposed to revise the FR H-1 to account for certain collections of information in SEC regulations that apply to SMBs with registered securities (that have not previously been accounted for) and revisions made by the SEC to certain forms and disclosure requirements. The comment period for this notice expired on October 11, 2019. The Board did not receive any comments. The revisions will be implemented as originally proposed, effective January 1, 2020.

Board of Governors of the Federal Reserve System, December 11, 2019.

**Ann Misback,**

*Secretary of the Board.*

[FR Doc. 2019-27037 Filed 12-13-19; 8:45 am]

**BILLING CODE 6210-01-P**

### FEDERAL RESERVE SYSTEM

#### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part

225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, 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 the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the 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 January 9, 2020.

*A. Federal Reserve Bank of New York* (Ivan Hurwitz, Senior Vice President) 33 Liberty Street, New York, New York 10045-0001. Comments can also be sent electronically to

*Comments.applications@ny.frb.org:*

1. *First Bancorp, San Juan, Puerto Rico;* to acquire Santander BanCorp and thereby indirectly acquire Banco Santander Puerto Rico, both of San Juan, Puerto Rico. In addition, FirstBank Puerto Rico, San Juan, Puerto Rico, to become a bank holding company for a moment in time by acquiring Santander BanCorp and thereby indirectly acquiring Banco Santander Puerto Rico.

Board of Governors of the Federal Reserve System, December 10, 2019.

**Yao-Chin Chao,**

*Assistant Secretary of the Board.*

[FR Doc. 2019-26973 Filed 12-13-19; 8:45 am]

**BILLING CODE P**

### FEDERAL RESERVE SYSTEM

#### Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

**AGENCY:** Board of Governors of the Federal Reserve System.

**SUMMARY:** The Board of Governors of the Federal Reserve System (Board) is adopting a proposal to extend for three years, without revision, the Payments Research Survey (FR 3067; OMB No. 7100-0355).

**FOR FURTHER INFORMATION CONTACT:**

<sup>1</sup> 15 U.S.C. 78a *et seq.*

Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452-3829.

Office of Management and Budget (OMB) Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395-6974.

A copy of the Paperwork Reduction Act (PRA) OMB submission, including the reporting form and instructions, supporting statement, and other documentation will be placed into OMB's public docket files. These documents also are available on the Federal Reserve Board's public website at <https://www.federalreserve.gov/apps/reportforms/review.aspx> or may be requested from the agency clearance officer, whose name appears above.

**SUPPLEMENTARY INFORMATION:** On June 15, 1984, OMB delegated to the Board authority under the PRA to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the PRA Submission, supporting statements, and approved collection of information instrument(s) are placed into OMB's public docket files.

#### **Final Approval Under OMB Delegated Authority of the Extension for Three Years, Without Revision, of the Following Information Collection**

*Report title:* Payments Research Survey.

*Agency form number:* FR 3067.

*OMB control number:* 7100-0355.

*Frequency:* As needed.

*Respondents:* Private sector, individuals or households, and state and local governments.

*Estimated number of respondents:* Private sector: 4,300; individuals or households: 5,500; state and local governments: 200.

*Estimated average hours per response:* Private sector: 1.5; individuals or households: 1.5; state and local governments: 1.5.

*Estimated annual burden hours:* Private sector: 12,900; individuals or households: 16,500; state and local governments: 600; total: 30,000.

*General description of report:* The Board uses this collection to obtain information, as needed, on specific and time sensitive issues related to

payments research. Respondents may comprise depository institutions, financial and nonfinancial businesses, for profit and nonprofit enterprises, federal, state, and local governments, individual consumers, or households. The Board may conduct various surveys under this collection, as needed. The frequency and content of the questions depend on changing economic, regulatory, supervisory, or legislative developments.

*Legal authorization and confidentiality:* The legal framework for the collection of checks and other items by Reserve Banks and for funds transfers through Fedwire is provided by section 13 of the Federal Reserve Act (FRA),<sup>1</sup> section 16 of the FRA,<sup>2</sup> the Expedited Funds Availability Act,<sup>3</sup> and the Check Clearing for the 21st Century Act.<sup>4</sup> Within the Federal Reserve System, the Reserve Banks are generally the entities engaged in the payments system. The Board has broad authority to supervise the actions of Reserve Banks, provided by section 11 of the FRA.<sup>5</sup> To successfully maintain the operation of the payments system, the Board must collect payments related data and information related to the performance of Reserve Banks involved in the payments system. The Federal Reserve System has a long history of conducting surveys, including surveys of supervised institutions and of outside parties. Accordingly, FR 3067 is authorized by sections 11, 13, and 16 of the FRA, as well as the Expedited Funds Availability Act and the Check Clearing for the 21st Century Act. Depending on the survey respondent, the information collection may also be authorized under a specific statute. These statutes include:

- Section 809 of the Dodd-Frank Wall Street Reform and Consumer Protection Act,<sup>6</sup>
- Section 7 of the Bank Service Company Act,<sup>7</sup> and
- Section 920 of the Electronic Fund Transfer Act.<sup>8</sup>

Survey submissions are voluntary.

While unlikely, individual respondents may request that information submitted to the Board through a survey under FR 3067 be kept confidential. If a respondent requests confidential treatment, the Board will determine whether the information is

entitled to confidential treatment on a case-by-case basis. Information collected through these surveys may be kept confidential under exemption 4 for the Freedom of Information Act, which protects privileged or confidential commercial or financial information,<sup>9</sup> or under FOIA exemption 6, which covers personal information, the disclosure of which would constitute an unwarranted invasion of privacy.<sup>10</sup>

*Current actions:* On September 10, 2019, the Board published a notice in the **Federal Register** (84 FR 47511) requesting public comment for 60 days on the extension, without revision, of the Payments Research Survey. The comment period for this notice expired on November 12, 2019. The Board did not receive any comments.

Board of Governors of the Federal Reserve System, December 11, 2019.

**Ann Misback,**

*Secretary of the Board.*

[FR Doc. 2019-27041 Filed 12-13-19; 8:45 am]

**BILLING CODE 6210-01-P**

## **FEDERAL RESERVE SYSTEM**

### **Notice of Proposals To Engage in or To Acquire Companies Engaged in Permissible Nonbanking Activities**

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR part 225) to engage de novo, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue

<sup>1</sup> 12 U.S.C. 342.

<sup>2</sup> 12 U.S.C. 360.

<sup>3</sup> 12 U.S.C. 4001-4010.

<sup>4</sup> 12 U.S.C. 5001-5018.

<sup>5</sup> 12 U.S.C. 248.

<sup>6</sup> 12 U.S.C. 5468.

<sup>7</sup> 12 U.S.C. 1867.

<sup>8</sup> 15 U.S.C. 1693o-2.

<sup>9</sup> 5 U.S.C. 552(b)(4).

<sup>10</sup> 5 U.S.C. 552(b)(6).

NW, Washington, DC 20551-0001, not later than January 3, 2020.

*A. Federal Reserve Bank of San Francisco* (Gerald C. Tsai, Director, Applications and Enforcement) 101 Market Street, San Francisco, California 94105-1579:

1. *BayCom Corp, Walnut Creek, California*; to merge with Grand Mountain Bancshares, Inc., and thereby indirectly acquire Grand Mountain Bank, FSB, both of Granby, Colorado.

Board of Governors of the Federal Reserve System, December 10, 2019.

**Yao-Chin Chao,**

*Assistant Secretary of the Board.*

[FR Doc. 2019-26982 Filed 12-13-19; 8:45 am]

**BILLING CODE 6210-01-P**

## FEDERAL RESERVE SYSTEM

### Agency Information Collection Activities: Announcement of Board Approval Under Delegated Authority and Submission to OMB

**AGENCY:** Board of Governors of the Federal Reserve System.

**SUMMARY:** The Board of Governors of the Federal Reserve System (Board) is adopting a proposal to extend, with revision, the Savings and Loan Holding Company Registration Statement (FR LL-10(b); OMB No. 7100-0337).

**DATES:** The revisions are applicable January 15, 2020.

#### FOR FURTHER INFORMATION CONTACT:

Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452-3829.

Office of Management and Budget (OMB) Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395-6974.

A copy of the Paperwork Reduction Act (PRA) OMB submission, including the reporting form and instructions, supporting statement, and other documentation will be placed into OMB's public docket files. These documents also are available on the Federal Reserve Board's public website at <https://www.federalreserve.gov/apps/reportforms/review.aspx> or may be requested from the agency clearance officer, whose name appears above.

**SUPPLEMENTARY INFORMATION:** On June 15, 1984, OMB delegated to the Board authority under the PRA to approve and assign OMB control numbers to

collections of information conducted or sponsored by the Board. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the PRA Submission, supporting statements, and approved collection of information instrument(s) are placed into OMB's public docket files.

### Final Approval Under OMB Delegated Authority of the Extension for Three Years, With Revision, of the Following Information Collection

*Report title:* Savings and Loan Holding Company Registration Statement.

*Agency form number:* FR LL-10(b).

*OMB control number:* 7100-0337.

*Effective date:* January 15, 2020.

*Frequency:* As needed.

*Respondents:* Savings and Loan Holding Companies (SLHCs).

*Estimated number of respondents:* 8.

*Estimated average hours per response:*

Reporting: 8; recordkeeping: 0.25.

*Estimated annual burden hours:*

Reporting: 64; recordkeeping: 2; total: 66.

*General description of report:* The FR LL-10(b) requests information from registering SLHCs on the financial condition, ownership, operations, management, and intercompany relationships of the SLHC and its subsidiaries. Additionally, respondents must include information concerning the transaction that resulted in the respondent becoming an SLHC, a description of the SLHC's business, and a description of any changes related to the financial condition, ownership, operations, intercompany relationships, and management of the SLHC and its subsidiaries since the registrant's application to become an SLHC was approved. The principal executive or principal financial officer of the registering SLHC must certify that the information contained in the submission has been carefully reviewed and is true, correct, and complete.

*Current actions:* On August 8, 2019, the Board published a notice in the **Federal Register** (84 FR 38964) requesting public comment for 60 days on the extension, with revision, of the Savings and Loan Holding Company Registration Statement. The Board proposed to make the FR LL-10(b) more consistent with the format of other Board forms and incorporate references to the Board's regulations and to reflect a requirement that respondents retain a copy of the submitted form, which was not currently accounted for by the FR LL-10(b). The comment period for this notice expired on October 7, 2019. The

Board did not receive any comments. The revisions will be implemented as proposed.

Board of Governors of the Federal Reserve System, December 11, 2019.

**Ann Misback,**

*Secretary of the Board.*

[FR Doc. 2019-27039 Filed 12-13-19; 8:45 am]

**BILLING CODE 6210-01-P**

## FEDERAL RESERVE SYSTEM

### Proposed Agency Information Collection Activities; Comment Request

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Notice, request for comment.

**SUMMARY:** The Board of Governors of the Federal Reserve System (Board) invites comment on a proposal to extend for three years, without revision, the Recordkeeping and Disclosure Requirements Associated with Regulation R (FR R; OMB No. 7100-0316).

**DATES:** Comments must be submitted on or before February 14, 2020.

**ADDRESSES:** You may submit comments, identified by *FR R* by any of the following methods:

- *Agency Website:* <https://www.federalreserve.gov/>. Follow the instructions for submitting comments at <https://www.federalreserve.gov/apps/foia/proposedregs.aspx>.

- *Email:* [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Include the OMB number in the subject line of the message.

- *Fax:* (202) 452-3819 or (202) 452-3102.

- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

All public comments are available from the Board's website at <https://www.federalreserve.gov/apps/foia/proposedregs.aspx> as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter's request. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room 146, 1709 New York Avenue NW, Washington, DC 20006, between 9:00 a.m. and 5:00 p.m. on weekdays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452-3684.

Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, commenters may send a copy of their comments to the Office of Management and Budget (OMB) Desk Officer—Shagufta Ahmed—Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395-6974.

**FOR FURTHER INFORMATION CONTACT:** A copy of the Paperwork Reduction Act (PRA) OMB submission, including the reporting form and instructions, supporting statement, and other documentation will be placed into OMB's public docket files, if approved. These documents will also be made available on the Board's public website at <https://www.federalreserve.gov/apps/reportforms/review.aspx> or may be requested from the agency clearance officer, whose name appears below.

Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, Washington, DC 20551, (202) 452-3829.

**SUPPLEMENTARY INFORMATION:** On June 15, 1984, OMB delegated to the Board authority under the PRA to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. In exercising this delegated authority, the Board is directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

#### **Request for Comment on Information Collection Proposal**

The Board invites public comment on the following information collection, which is being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Board's functions, including whether the information has practical utility;

b. The accuracy of the Board's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal.

#### **Proposal Under OMB Delegated Authority To Extend for Three Years, Without Revision, the Following Information Collection**

*Report title:* Recordkeeping and Disclosure Requirements Associated with Regulation R.

*Agency form number:* FR R.

*OMB control number:* 7100-0316.

*Frequency:* As needed.

*Respondents:* "Banks," as defined in the Securities Exchange Act of 1934 (Exchange Act), that qualify for the exemptions from the Exchange Act definition of "broker."

*Estimated number of respondents:* Section 701, disclosures to customers: 1,500, disclosures to brokers: 1,500; section 723, recordkeeping: 75; section 741, disclosures to customers: 750.

*Estimated average hours per response:* Section 701, disclosures to customers: 0.08333, disclosures to brokers: 0.25; section 723, recordkeeping: 0.25; section 741, disclosures to customers: 0.08333.

*Estimated annual burden hours:* Section 701, disclosures to customers: 12,500, disclosures to brokers: 375; section 723, recordkeeping: 188; section 741, disclosures to customers: 62,500.

*General description of report:* The Board's Regulation R, 12 CFR part 218, implements certain exceptions for banks from the definition of "broker" under section 3(a)(4) of the Exchange Act. The Exchange Act defines "banks" to include banking institutions organized in the United States, including members of the Federal Reserve System, federal savings associations, and other commercial banks, savings associations, and nondepository trust companies that are organized under the laws of a state or the United States and subject to supervision and examination by state or federal authorities having supervision over banks and savings associations. Sections 701, 723, and 741 of Regulation R contain certain customer and counterparty disclosure requirements and certain transactional recordkeeping provisions for banks that utilize these exceptions.

*Legal authorization and confidentiality:* The FR R is authorized pursuant to sections 3(a)(4)(F) and 3(b) of the Exchange Act,<sup>1</sup> which, among other things, require the Board and the Security Exchange Commission (SEC) to jointly adopt rules to implement the bank exceptions to the definition of "broker" under the Exchange Act.<sup>2</sup> Banks seeking the exception from the definition of "broker" under the Exchange Act must comply with the requirements of FR R. The obligation, therefore, is required to obtain a benefit.

Because these records and disclosures would be maintained at each banking organization, the Freedom of Information Act ("FOIA") would only be implicated if the Board obtained such records as part of the examination or supervision of a banking organization. In the event the records are obtained by the Board as part of an examination or supervision of a financial institution, this information is considered confidential pursuant to exemption 8 of the FOIA, which protects information contained in "examination, operating, or condition reports" obtained in the bank supervisory process.<sup>3</sup> In addition, the information may also be kept confidential under exemption 4 for the FOIA, which protects commercial or financial information obtained from a person that is privileged or confidential.<sup>4</sup>

Board of Governors of the Federal Reserve System, December 11, 2019.

**Ann Misback,**

*Secretary of the Board.*

[FR Doc. 2019-27036 Filed 12-13-19; 8:45 am]

**BILLING CODE 6210-01-P**

## **DEPARTMENT OF DEFENSE**

### **GENERAL SERVICES ADMINISTRATION**

### **NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

[OMB Control No. 9000-0161; Docket No. 2019-0003; Sequence No. 34]

#### **Information Collection; Reporting Purchases From Sources Outside the United States**

**AGENCY:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

<sup>1</sup> 15 U.S.C. 78c(a)(4)(F) and 78c(b).

<sup>2</sup> Additionally, the Board has the authority to require reports from state member banks (12 U.S.C. 248(a) and 324).

<sup>3</sup> 5 U.S.C. 552(b)(8).

<sup>4</sup> 5 U.S.C. 552(b)(4).

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, and the Office of Management and Budget (OMB) regulations, DoD, GSA, and NASA invite the public to comment on a revision and renewal concerning reporting purchases from sources outside the United States. DoD, GSA, and NASA invite comments on: Whether the proposed collection of information is necessary for the proper performance of the functions of Federal Government acquisitions, including whether the information will have practical utility; the accuracy of the estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. OMB has approved this information collection for use through March 31, 2020. DoD, GSA, and NASA propose that OMB extend its approval for use for three additional years beyond the current expiration date.

**DATES:** DoD, GSA, and NASA will consider all comments received by February 14, 2020.

**ADDRESSES:** DoD, GSA, and NASA invite interested persons to submit comments on this collection by either of the following methods:

- *Federal eRulemaking Portal:* This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments. Go to <http://www.regulations.gov> and follow the instructions on the site.

- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405. ATTN: Lois Mandell/IC 9000-0161, Reporting Purchases from Sources Outside the United States.

*Instructions:* All items submitted must cite Information Collection 9000-0161, Reporting Purchases from Sources Outside the United States. Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check [www.regulations.gov](http://www.regulations.gov), approximately two-to-three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Zenaida Delgado, Procurement Analyst, at telephone 202-969-7207, or [zenaida.delgado@gsa.gov](mailto:zenaida.delgado@gsa.gov).

**SUPPLEMENTARY INFORMATION:**

A. *OMB control number, Title, and any Associated Form(s):* 9000-0161, Reporting Purchases from Sources Outside the United States.

B. *Need and Uses:* This clearance covers the information that offerors must submit to comply with the Federal Acquisition Regulation (FAR) provision 52.225-18, Place of Manufacture. This provision requires offerors of manufactured end products to provide information as to whether the offered end products are predominantly manufactured in the United States or outside the United States.

Contracting officers use the information as the basis for entry into the Federal Procurement Data System for further data on the rationale for purchasing foreign manufactured items. The data is necessary for analysis of the application of the Buy American statute and the trade agreements.

C. *Annual Burden:*

*Respondents:* 30,740.

*Total Annual Responses:* 2,908,096.

*Total Burden Hours:* 29,081.

*Obtaining Copies:* Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405, telephone 202-501-4755.

Please cite OMB Control No. 9000-0161, Reporting Purchases from Sources Outside the United States, in all correspondence.

Dated: December 10, 2019.

**Janet Fry,**

*Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.*

[FR Doc. 2019-26998 Filed 12-13-19; 8:45 am]

**BILLING CODE 6820-EP-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Agency for Healthcare Research and Quality**

**Supplemental Evidence and Data Request on Management of High-Need, High-Cost (HNHC) Patients: A Realist and Systematic Review**

**AGENCY:** Agency for Healthcare Research and Quality (AHRQ), HHS.

**ACTION:** Request for supplemental evidence and data submissions

**SUMMARY:** The Agency for Healthcare Research and Quality (AHRQ) is seeking scientific information submissions from the public. Scientific information is being solicited to inform our review on *Management of High-Need, High-Cost Patients: A Realist and Systematic Review*, which is currently being conducted by the AHRQ's Evidence-based Practice Centers (EPC) Program. Access to published and unpublished pertinent scientific information will improve the quality of this review.

**DATES:** *Submission Deadline* on or before 30 days after date of publication.

**ADDRESSES:** *Email submissions:* [epc@ahrq.hhs.gov](mailto:epc@ahrq.hhs.gov).

*Print submissions:*

*Mailing Address:* Center for Evidence and Practice Improvement, Agency for Healthcare Research and Quality, ATTN: EPC SEADs Coordinator, 5600 Fishers Lane, Mail Stop 06E53A, Rockville, MD 20857.

*Shipping Address (FedEx, UPS, etc.):* Center for Evidence and Practice Improvement, Agency for Healthcare Research and Quality, ATTN: EPC SEADs Coordinator, 5600 Fishers Lane, Mail Stop 06E77D, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** Jenae Benns, Telephone: 301-427-1496 or Email: [epc@ahrq.hhs.gov](mailto:epc@ahrq.hhs.gov).

**SUPPLEMENTARY INFORMATION:** The Agency for Healthcare Research and Quality has commissioned the Evidence-based Practice Centers (EPC) Program to complete a review of the evidence for Management of High-Need, High-Cost Patients: A Realist and Systematic Review. AHRQ is conducting this systematic review pursuant to Section 902(a) of the Public Health Service Act, 42 U.S.C. 299a(a).

The EPC Program is dedicated to identifying as many studies as possible that are relevant to the questions for each of its reviews. In order to do so, we are supplementing the usual manual and electronic database searches of the literature by requesting information from the public (e.g., details of studies conducted). We are looking for studies that report on *Management of High-Need, High-Cost Patients: A Realist and Systematic Review*, including those that describe adverse events. The entire research protocol is available online at: <https://effectivehealthcare.ahrq.gov/products/high-utilizers-health-care/protocol>.

This is to notify the public that the EPC Program would find the following information on *Management of High-Need, High-Cost Patients: A Realist and Systematic Review* helpful:

- A list of completed studies that your organization has sponsored for this indication. In the list, please *indicate whether results are available on ClinicalTrials.gov along with the ClinicalTrials.gov trial number.*

- *For completed studies that do not have results on ClinicalTrials.gov, a summary, including the following elements: Study number, study period, design, methodology, indication and diagnosis, proper use instructions, inclusion and exclusion criteria, primary and secondary outcomes, baseline characteristics, number of patients screened/eligible/enrolled/lost to follow-up/withdrawn/analyzed, effectiveness/efficacy, and safety results.*

- *A list of ongoing studies that your organization has sponsored for this indication. In the list, please provide the ClinicalTrials.gov trial number or, if the trial is not registered, the protocol for the study including a study number, the study period, design, methodology, indication and diagnosis, proper use instructions, inclusion and exclusion criteria, and primary and secondary outcomes.*

- *Description of whether the above studies constitute ALL Phase II and above clinical trials sponsored by your organization for this indication and an index outlining the relevant information in each submitted file.*

Your contribution is very beneficial to the Program. Materials submitted must be publicly available or able to be made public. Materials that are considered confidential; marketing materials; study types not included in the review; or information on indications not included in the review cannot be used by the EPC Program. This is a voluntary request for information, and all costs for complying with this request must be borne by the submitter.

The draft of this review will be posted on AHRQ's EPC Program website and available for public comment for a period of 4 weeks. If you would like to be notified when the draft is posted, please sign up for the email list at: <https://www.effectivehealthcare.ahrq.gov/email-updates>.

*The systematic review will answer the following questions. This information is provided as background. AHRQ is not requesting that the public provide answers to these questions.*

**Key Questions (KQ)**

*KQ 1. What criteria identify can be used to predict that patients will be HNHC and why?*

*KQ 1a. How do criteria incorporate patient clinical characteristics?*

*KQ 1b. How do criteria incorporate patient health behaviors and*

*sociodemographic characteristics (e.g., age, social determinants of health, insurance status and source of coverage, and access to the health care system)?*

*KQ 1c. How do criteria incorporate types, amount, duration, and patterns of persistent use of potentially preventable or modifiable health care use?*

*KQ 1d. Do criteria differ at the payer, health care system, or provider levels?*

*KQ 1e. How can observed or predicted potentially preventable or modifiable high use of health care be differentiated from necessary and appropriate use?*

*KQ 2. What are the mechanisms that lead to reductions in potentially preventable or modifiable health care use and result in improved health outcomes and cost savings in interventions serving HNHC patients?*

*KQ 2a. What are the important contexts, such as the characteristics of the HNHC patients, the broader health care delivery system, and the community, that impact whether mechanisms facilitate the desired outcomes?*

*KQ 3. Overall, what is the effectiveness and harms of interventions, included in answering KQ 2, in reducing potentially preventable or modifiable health care use and costs and improving health outcomes among HNHC patients?*

**PICOTS**

[Populations, Interventions, Comparators, Outcomes, Timing, Settings]

PICOTS	Inclusion	Exclusion
Population .....	<p>KQs 1, 2, and 3: Noninstitutionalized adults, 18 years of age or older .....</p> <p>KQ 1: One or more years of potentially preventable or modifiable high health care cost and/or use.</p> <p>KQs 2 and 3, two groups.</p> <p>(a) HNHC patients with one or more years of potentially preventable or modifiable high health care cost and/or use.</p> <p>(b) HNHC patients with one or more years of potentially preventable or modifiable high health care cost and/or use AND either 2 or more chronic physical health conditions, or a combination of 1 or more chronic physical health conditions and 1 or more behavioral health conditions.</p>	<p>Patients receiving a high level of health care services that are considered appropriate for their condition OR high level of health care services are measured for less than 1 year OR end-of-life care.</p>
Intervention .....	<p>KQ 1: Not relevant, interventions not necessary for inclusion .....</p> <p>KQs 2 and 3:</p> <p>Alternative delivery models (e.g., Accountable Care Organizations, coordinated care organizations, health homes, home-based primary care, behavioral health integration).</p> <p>System- or practice-level interventions (e.g., emergency department alerts, hotspotting).</p> <p>Patient supportive services (e.g., community health workers, social workers, patient navigators, care coordinators, case and care managers, intensive primary care support, medication management, health reliance specialists, self-management instruction, and peer-to-peer support).</p> <p>Social determinants of health-related interventions (e.g., transportation, health literacy, housing support, caregiver support).</p>	<p>KQs 2 and 3: Interventions for which the relevance for and impact on HNHC patients cannot be determined.</p>
Comparator .....	<p>KQ 1: Comparison population or no comparator .....</p> <p>KQ 2: Any intervention, treatment as usual, or no comparator intervention.</p> <p>KQ 3: Any intervention or treatment as usual.</p>	<p>KQ 3: No comparator.</p>
Outcomes .....	<p>KQ 1: Population characteristics described or predicted .....</p> <p>KQs 1, 2, and 3.</p>	<p>All other outcomes, including behavioral health outcomes.</p>

PICOTS—Continued

[Populations, Interventions, Comparators, Outcomes, Timing, Settings]

PICOTS	Inclusion	Exclusion
	Health care use: Decreases in emergency department visits, emergency management services use, and hospitalizations; changes in primary care or specialist visits or other necessary and appropriate types of care (e.g., care manager visits, telephone followup) and use of support services. Patient health behavior (e.g., treatment adherence, empowerment, knowledge, self-care). Patient health outcomes: All-cause mortality, disease and condition-specific outcomes, health indicators, quality of life. Patient satisfaction with care. Physicians' and health professionals' satisfaction with clinical practice. Costs. Patient and health professional harms such as increased barriers to necessary care, clinician time, and/or resource trade-offs of other duties.	
Time frame .....	Potentially preventable or modifiable high cost health care use measured for 1 year or more. KQ 3: Measurement of outcomes at 1 year or more after implementation of the intervention.	Shorter time periods.
Settings .....	Health care and support services delivery settings, including outpatient, emergency department, the broader health care delivery environment, community characteristics related to social determinants of health. KQ 1: United States. KQs 2 and 3: Patient-level interventions: very high human development index countries; Health system or payer-level interventions: United States.	Institutional care settings, such as hospitals, skilled nursing, long-term care facilities, and prisons or jails.
Study design ...	KQs 1 and 2: All study designs except reviews summarizing across original studies or interventions. KQ 3: Randomized controlled trials, cluster randomized trials, cohort studies, case-control studies, quasi-experimental designs with a comparison group.	KQ 3: All other designs.
Language .....	Studies published in English .....	Studies published in languages other than English.
Publication type	All publications that allow abstraction and interpretation of findings .....	KQ 3 only: Abstract-only publications.

Dated: December 10, 2019.

Virginia Mackay-Smith,

Associate Director.

[FR Doc. 2019-26953 Filed 12-13-19; 8:45 am]

BILLING CODE 4160-90-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Docket Number CDC-2019-0107, NIOSH-331]

NIOSH Center for Motor Vehicle Safety Strategic Plan, 2020-2029

AGENCY: National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

ACTION: Request for information and comment.

SUMMARY: The National Institute for Occupational Safety and Health of the Centers for Disease Control and Prevention announces the availability of a draft strategic plan titled NIOSH Center for Motor Vehicle Safety Strategic Plan, 2020-2029 now available for public comment.

DATES: Electronic or written comments must be received by February 14, 2020.

ADDRESSES: You may submit comments, identified by CDC-2019-0107 and docket number NIOSH-331, by any of the following methods:

- Federal eRulemaking Portal:

<https://www.regulations.gov> Follow the instructions for submitting comments.

- Mail: National Institute for Occupational Safety and Health, NIOSH Docket Office, 1090 Tusculum Avenue, MS C-34, Cincinnati, Ohio 45226-1998.

Instructions: All information received in response to this notice must include the agency name and docket number [CDC-2019-0107; NIOSH-331]. All relevant comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided. All electronic comments should be formatted as Microsoft Word. For access to the docket to read background documents or comments received, go to <https://www.regulations.gov>. All information received in response to this notice will also be available for public examination and copying at the NIOSH Docket Office, 1150 Tusculum Avenue, Room 155, Cincinnati, OH 45226-1998.

FOR FURTHER INFORMATION CONTACT: Kyla Retzer, Western States Division, P.O. Box 25226, Denver, Colorado 80225-0226, (303) 236-5934 (not a toll-free number), [kretzer@cdc.gov](mailto:kretzer@cdc.gov) OR Dr. Rosa Rodriguez-Acosta, Division of Safety Research, 1095 Willowdale Road, MS

1808, Morgantown, West Virginia, 26505-2888, (304) 285-6299 (not a toll-free number), [rer3@cdc.gov](mailto:rer3@cdc.gov).

SUPPLEMENTARY INFORMATION:

Background: The National Institute for Occupational Safety and Health (NIOSH) is seeking input on the draft NIOSH Center for Motor Vehicle Safety Strategic Plan, 2020-2029.

Motor vehicle crashes are the leading cause of work-related injury deaths in the United States. Millions of workers drive or ride in a motor vehicle as part of their jobs. The risk affects workers in all industries and occupations who drive as part of their job, whether they use a tractor-trailer or a passenger vehicle.

NIOSH is the only part of the U.S. Federal Government whose mission includes prevention of work-related crashes and resulting injuries for workers who drive all types of vehicles (not just the commercial motor vehicles regulated by the U.S. Department of Transportation).

NIOSH requests input on its strategic direction for research and communication to prevent work-related motor vehicle crashes and injuries. This plan aligns with the priority industry sectors (i.e., oil and gas extraction; public safety; transportation, warehousing, and utilities; and wholesale and retail trade) identified in

the current NIOSH Strategic Plan: FYs 2019–2023.

*Information Needs:* NIOSH seeks comments on the following: (1) Does the draft plan address the research that is most critical for understanding and reducing work-related motor vehicle crashes and injuries? If not, please provide details on research topics that are also critical and should therefore be added to the plan. (2) Are there research topics in the draft plan that are low-priority or are already being adequately addressed by others, which therefore should not be included in the plan? If so, please identify these topics and explain why they should not be included.

To view the notice and related materials, visit <https://www.regulations.gov> and enter CDC–2019–0107 in the search field and click “Search.”

**John J. Howard,**

*Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention.*

[FR Doc. 2019–26999 Filed 12–13–19; 8:45 am]

**BILLING CODE 4163–18–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

[CMS–3381–FN]

#### Medicare Program; Application From the Joint Commission for Initial CMS-Approval of its Home Infusion Therapy Accreditation Program

**AGENCY:** Centers for Medicare and Medicaid Services, HHS.

**ACTION:** Final notice.

**SUMMARY:** This final notice announces our decision to approve The Joint Commission (TJC) for initial recognition as a national accrediting organization for home infusion therapy (HIT) suppliers that wish to participate in the Medicare program. An HIT supplier that participates must meet the Medicare conditions for coverage (CfCs).

**DATES:** The approval announced in this final notice is effective December 15, 2019 through December 15, 2023.

**FOR FURTHER INFORMATION CONTACT:**

Christina Mister-Ward, (410)786–2441.

Lillian Williams, (410)786–8636.

#### I. Background

Home infusion therapy (HIT) is a treatment option for Medicare beneficiaries with a wide range of acute

and chronic conditions. Section 5012 of the 21st Century Cures Act added section 1861(iii) to the Social Security Act (the Act), establishing a new Medicare benefit for HIT services. Section 1861(iii)(1) of the Act defines HIT as professional services, including nursing services; training and education not otherwise covered under the durable medical equipment (DME) benefit; remote monitoring; and other monitoring services. HIT must be furnished by a qualified HIT supplier and furnished in the individual’s home. The individual must—

- Be under the care of an applicable provider (that is, physician, nurse practitioner, or physician assistant); and
- Have a plan of care established and periodically reviewed by a physician in coordination with the furnishing of home infusion drugs under Part B, that prescribes the type, amount, and duration of infusion therapy services that are to be furnished.

Section 1861(iii)(3)(D)(III) of the Act requires that a qualified HIT supplier be accredited by an accrediting organization (AO) designated by the Secretary in accordance with section 1834(u)(5) of the Act. Section 1834(u)(5)(A) of the Act identifies factors for designating AOs and in reviewing and modifying the list of designated AOs. These statutory factors are as follows:

- The ability of the organization to conduct timely reviews of accreditation applications.
- The ability of the organization take into account the capacities of suppliers located in a rural area (as defined in section 1886(d)(2)(D) of the Act).
- Whether the organization has established reasonable fees to be charged to suppliers applying for accreditation.
- Such other factors as the Secretary determines appropriate.

Section 1834(u)(5)(B) of the Act requires the Secretary to designate AOs to accredit HIT suppliers furnishing HIT not later than January 1, 2021. Section 1861(iii)(3)(D) of the Act defines “qualified HIT suppliers” as being accredited by a CMS-approved AO.

In the March 1, 2019 **Federal Register**, we published a solicitation notice entitled, “Medicare Program; Solicitation of Independent Accrediting Organizations To Participate in the Home Infusion Therapy Supplier Accreditation Program” (84 FR 7057). This notice informed national AOs that accredit HIT suppliers of an opportunity to submit applications to participate in the HIT supplier accreditation program. Complete applications will be considered for the January 1, 2021

designation deadline if received by February 1, 2020.

Regulations for the approval and oversight of AOs for HIT organizations are located at part 488, subpart L. The requirements for HIT suppliers are located at part 486, subpart I.

#### II. Approval of Accreditation Organizations

Section 1834(u)(5) of the Act and the regulations at 42 CFR 488.1010 require that our findings concerning review and approval of a national AO’s requirements consider, among other factors, the applying AO’s requirements for accreditation; survey procedures; resources for conducting required surveys; capacity to furnish information for use in enforcement activities; monitoring procedures for provider entities found not in compliance with the conditions or requirements; and ability to provide us with the necessary data.

Our regulations at § 488.1020(a) require that we publish, after receipt of an organization’s complete application, a notice identifying the national accrediting body making the request, describing the nature of the request, and providing at least a 30-day public comment period. In accordance with § 488.1010(d), we have 210 days from the receipt of a complete application to publish notice of approval or denial of the application.

#### III. Provisions of the Proposed Notice

In the July 16, 2019 **Federal Register** (84 FR 33944), we published a proposed notice announcing TJC’s request for initial approval of its Medicare HIT accreditation program. In the July 16, 2019 proposed notice, we detailed our evaluation criteria. Under section of 1834(u)(5) the Act and in our regulations at § 488.1010, we conducted a review of TJC Medicare home infusion accreditation application in accordance with the criteria specified by our regulations, which included, but are not limited to the following:

- An onsite administrative review of TJC’s: (1) Corporate policies; (2) financial and human resources available to accomplish the proposed surveys; (3) procedures for training, monitoring, and evaluation of its HIT surveyors; (4) ability to investigate and respond appropriately to complaints against accredited HITs; and (5) survey review and decision-making process for accreditation.

- The ability for TJC to conduct timely review of accreditation applications.

- The ability of TJC to take into account the capacities of suppliers located in a rural area.
- The comparison of TJC's Medicare HIT accreditation program standards to our current Medicare HIT CfCs.
- A documentation review of TJC's survey process to—
  - ++ Determine the composition of the survey team, surveyor qualifications, and TJC's ability to provide continuing surveyor training.
  - ++ Compare TJC's processes, including periodic resurvey and the ability to investigate and respond appropriately to complaints against accredited HITs.
  - ++ Evaluate TJC's procedures for monitoring HITs it has found to be out of compliance with TJC's program requirements.
  - ++ Assess TJC's ability to report deficiencies to the surveyed HIT and respond to the HIT's plan of correction in a timely manner.
  - ++ Establish TJC's ability to provide us with electronic data and reports necessary for effective validation and assessment of the organization's survey process.
  - ++ Determine the adequacy of TJC's staff and other resources.
  - ++ Confirm TJC's ability to provide adequate funding for performing required surveys.
  - ++ Confirm TJC's policies for surveys being unannounced.
  - ++ TJC's policies and procedures to avoid conflicts of interest, including the appearance of conflicts of interest, involving individuals who conduct surveys or participate in accreditation decisions.
  - ++ Obtain TJC's agreement to provide us with a copy of the most current accreditation survey together with any other information related to the survey as we may require, including corrective action plans.

In accordance with section 1834(u)(5) of the Act, the July 16, 2019 proposed notice also solicited public comments regarding whether TJC's requirements met or exceeded the Medicare CfCs for HIT. No comments were received in response to our proposed notice.

#### IV. Provisions of the Final Notice

##### A. Differences Between TJC's Standards and Requirements for Accreditation and Medicare Conditions and Survey Requirements

We compared TJC's HIT accreditation requirements and survey process with the Medicare CfCs of 42 CFR part 486, and the survey and certification process requirements of part 488. Our review and evaluation of TJC's HIT application,

which were conducted as described in section III. of this final notice, yielded the following areas where, as of the date of this notice, TJC has completed revising its standards and certification processes to meet the conditions at:

- § 486.520 (b), to address the requirement that the plan of care must be established by a physician prescribing the type, amount and duration for HIT.
- § 486.520 (c), to address the requirement that the plan of care must be periodically reviewed by the physician.
- § 486.525 (a), to address the requirement that the HIT suppliers to be available 7 days a week, 24 hours a day.
- § 486.525 (a)(1), to address the requirement of all professional services, including nursing services, to be available to the home infusion patient.
- § 486.525 (a)(2), to address the requirement for patient education and training to be available for patients on a 7 day a week, 24 hour a day basis.
- § 486.525 (a)(3), to address the requirement of remote monitoring for the provision of HIT.
- § 488.1010 (a)(6)(ii), to ensure surveyors are educated on TJC survey policies and survey process for patient and record selection.

##### B. Term of Approval

Based on the review and observations described in section III. of this final notice, we have determined that TJC's requirements for HITs meet or exceed our requirements. Therefore, we approve TJC as a national accreditation organization for HITs that request participation in the Medicare program, effective December 15, 2019 through December 15, 2023.

#### IV. Collection of Information Requirements

This document does not impose information collection and requirements, that is, reporting, recordkeeping or third party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35).

Dated: December 2, 2019.

##### Seema Verma,

Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2019-26954 Filed 12-13-19; 8:45 am]

BILLING CODE 4120-01-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2010-D-0529]

#### Qualification Process for Drug Development Tools; Draft Guidance for Industry; Availability

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice of availability.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) Center for Drug Evaluation and Research (CDER) and Center for Biologics Evaluation and Research (CBER) are announcing the availability of a draft guidance for industry and FDA staff entitled "Qualification Process for Drug Development Tools." Under the 21st Century Cures Act (Cures Act), enacted on December 13, 2016, a new section was added to the Federal Food, Drug, and Cosmetic Act (FD&C Act), which defined a three-stage qualification process for drug development tools (DDTs). This guidance meets the Cures Act's mandate to issue guidance on this qualification process and related Prescription Drug User Fee Act (PDUFA) VI commitments. It elaborates on the new qualification process and transparency requirements and discusses the taxonomy for biomarkers and other DDTs, and the draft guidance of the same name issued January 7, 2014, is withdrawn.

**DATES:** Submit either electronic or written comments on the draft guidance by February 14, 2020 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

**ADDRESSES:** You may submit comments on any guidance at any time as follows:

##### Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact

information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

#### Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

*Instructions:* All submissions received must include the Docket No. FDA-2010-D-0529 for “Qualification Process for Drug Development Tools.” 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.” CDER and CBER 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.govinfo.gov/content/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)).

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research (CDER), Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993-0002; or the Office of Communication, Outreach, and Development, Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

#### FOR FURTHER INFORMATION CONTACT:

Chris Leptak, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 6461, Silver Spring, MD 20993-0002, 301-796-0017; or Stephen Ripley, Center for Biologics Evaluation and Research, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993-0002; 240-402-7911.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

CDER and CBER are announcing the availability of a draft guidance for industry and FDA staff entitled “Qualification Process for Drug Development Tools.” Passed into law in December 2016, the Cures Act codified, in new section 507 of the FD&C Act (21 U.S.C. 357), a new statutory process for DDT qualification and added transparency provisions for information related to qualification submissions through which there is enhanced ability to share knowledge and engage with biomedical research consortia. In addition, Congress directed CDER and

CBER to establish a taxonomy for the classification of biomarkers (and related scientific concepts) for use in drug (including biological product) development. CDER and CBER convened a public meeting on December 11, 2018, both to solicit public input about implementing the new qualification process under section 507 and about the Biomarkers, EndpointS, and other Tools (BEST) glossary as the taxonomy for classifying types of DDTs, including biomarkers. CDER and CBER are issuing this draft guidance to implement the 507 qualification process, meeting Cures Act mandates and related PDUFA VI commitments.

DDTs are methods, materials, or measures that can aid drug development and regulatory review. Qualification means that a DDT and its proposed context of use can be relied upon to have a specific interpretation and application in drug development and regulatory review. Qualified DDTs can accelerate the integration of innovation, clinical knowledge, and scientific advances, thereby expediting drug development and aiding the regulatory review of applications.

Although the DDT qualification process is voluntary, requestors who seek qualification under section 507 must follow the three-stage process described in the Cures Act. This consists of the following stages: The Letter of Intent, the Qualification Plan, and the Full Qualification Package. These stages are discussed in detail in section III of the draft guidance.

The Cures Act includes transparency provisions that require CDER and CBER to make information with respect to qualification submissions publicly available. A description of information that is made public on the Agency’s website is provided in section II of the draft guidance.

CDER and CBER convened a public meeting on December 11, 2018, made available a discussion guide on the implementation of the new section 507 qualification process, and identified the taxonomy (the BEST glossary) for classifying types of DDTs. CDER and CBER have considered public comments made during the meeting and submitted to the docket in developing this draft guidance. This guidance meets the Cures Act’s mandate to issue guidance on the section 507 qualification process and related PDUFA VI commitments. This guidance does not address evidentiary standards or performance criteria for purposes of DDT qualification. It also does not address the qualification of medical device development tools or the programs under the Center for Devices and

Radiological Health oversight, which are not addressed in section 507.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on "Qualification Process for Drug Development Tools." It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

## II. Paperwork Reduction Act of 1995

This draft guidance contains information collection that is 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 information collection has been approved under OMB control numbers 0910–0001 and 0910–0014.

## III. Electronic Access

Persons with access to the internet may obtain the draft guidance at <https://www.fda.gov/drugs/guidance-compliance-regulatory-information/vaccines-blood-biologics/guidance-compliance-regulatory-information-biologics>, or <https://www.regulations.gov>.

Dated: December 11, 2019.

**Lowell J. Schiller,**

*Principal Associate Commissioner for Policy.*

[FR Doc. 2019–26994 Filed 12–13–19; 8:45 am]

BILLING CODE 4164–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA–2018–N–1262]

#### Notice of Approval of Product Under Voucher: Rare Pediatric Disease Priority Review Voucher

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the issuance of approval of a product redeeming a priority review voucher. The Federal Food, Drug, and Cosmetic Act (FD&C Act), as amended by the Food and Drug Administration Safety and Innovation Act (FDASIA), authorizes FDA to award priority review vouchers to sponsors of approved rare pediatric disease product applications that meet certain criteria. FDA is required to publish notice of the

issuance of vouchers as well as the approval of products redeeming a voucher. FDA has determined that BEOVU (brolucizumab-dbl), approved October 7, 2019, meets the redemption criteria.

#### FOR FURTHER INFORMATION CONTACT:

Althea Cuff, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993–0002, 301–796–4061, Fax: 301–796–9858, email: [althea.cuff@fda.hhs.gov](mailto:althea.cuff@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:** Under section 529 of the FD&C Act (21 U.S.C. 360ff), which was added by FDASIA, FDA will report the issuance of rare pediatric disease priority review vouchers and the approval of products for which a voucher was redeemed. FDA has determined that BEOVU (brolucizumab-dbl), approved October 7, 2019, meets the redemption criteria.

For further information about the Rare Pediatric Disease Priority Review Voucher Program and for a link to the full text of section 529 of the FD&C Act, go to <https://www.fda.gov/ForIndustry/DevelopingProductsforRareDiseasesConditions/RarePediatricDiseasePriorityVoucherProgram/default.htm>. For further information about BEOVU (brolucizumab-dbl), approved October 7, 2019, go to the "Drugs@FDA" website at <https://www.accessdata.fda.gov/scripts/cder/daf/>.

Dated: December 9, 2019.

**Lowell J. Schiller,**

*Principal Associate Commissioner for Policy.*

[FR Doc. 2019–27054 Filed 12–13–19; 8:45 am]

BILLING CODE 4164–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA–2019–N–3077]

#### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Obtaining Information To Understand Challenges and Opportunities Encountered by Compounding Outsourcing Facilities

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under

the Paperwork Reduction Act of 1995 (PRA).

**DATES:** Fax written comments on the collection of information by January 15, 2020.

**ADDRESSES:** To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, Fax: 202–395–7285, or emailed to [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov). All comments should be identified with the OMB control number 0910–New and title "Obtaining Information to Understand Challenges and Opportunities Encountered by Compounding Outsourcing Facilities". Also include the FDA docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Ila S. Mizrahi, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–7726, [PRASStaff@fda.hhs.gov](mailto:PRASStaff@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

#### Obtaining Information To Understand Challenges and Opportunities Encountered by Compounding Outsourcing Facilities

*OMB Control Number 0910–NEW*

This information collection supports Agency-sponsored research. Drug compounding is generally the practice of combining, mixing, or altering ingredients of a drug to create a medication tailored to the needs of an individual patient. Although compounded drugs can serve an important medical need for certain patients when an approved drug is not medically appropriate, they also present a risk to patients. Compounded drugs are not FDA-approved. Therefore, they do not undergo premarket review by FDA for safety, effectiveness, and quality. Since compounded drugs are subject to a lower regulatory standard than approved drugs, Federal law places conditions on compounding that are designed to protect the public health.

The Drug Quality and Security Act of 2013 created "outsourcing facilities"—a new industry sector of drug compounders held to higher quality standards to protect patient health. Outsourcing facilities are intended to offer a more reliable supply of

compounded drugs needed by hospitals, clinics, and other providers. Five years since its creation, this domestic industry is still relatively small and is experiencing growth and market challenges. In addition, FDA continues to find concerning quality and safety problems during inspections.

To help this industry meet its intended function, FDA intends to engage in several initiatives to address challenges and support compliance and advancement. One initiative includes conducting in-depth research to better understand challenges and opportunities encountered by the outsourcing facility sector in a number of different areas. These include: Operational barriers and opportunities related to the outsourcing facility market and business viability; knowledge and operational barriers and opportunities related to compliance with federal policies and good quality drug production; and barriers and opportunities related to outsourcing facility interactions with FDA.

The results of this research will be used by FDA to develop a comprehensive understanding of the outsourcing facility sector, its challenges, and opportunities for advancement. The information will be essential to help identify knowledge and information gaps, operational barriers, and views on interactions with FDA. The research results will inform FDA's future approaches to communication,

education, training, and other engagement with outsourcing facilities to address challenges and support advancement.

Researchers will engage pharmacists, staff, and management from outsourcing facilities and similar compounding businesses. Researchers may use surveys, interviews, and focus groups to obtain information concerning challenges and opportunities encountered by outsourcing facilities. Within this context, the following questions or similar, related questions may be posed:

1. What financial and operational considerations inform outsourcing facility operational and business model decisions?
2. What factors impact the development of a sustainable outsourcing facility business?
3. What financial and operational considerations inform outsourcing facility product decisions?
4. Do outsourcing facilities understand the federal legislative and regulatory policies that apply to them? What, if any, knowledge gaps need to be addressed?
5. What challenges do outsourcing facilities face when implementing federal Current Good Manufacturing Practice (CGMP) requirements?
6. How do outsourcing facilities implement quality practices at their facilities?
7. How is CGMP and quality expertise developed by outsourcing facilities?

How do they obtain this knowledge, and what training do they need?

8. What are the economic consequences of CGMP non-compliance/product failures for outsourcing facilities?
9. What are outsourcing facility management and staff views on current interactions with FDA? How do they want the interactions to change?
10. What are outsourcing facilities' understanding of how to engage with FDA during and following an inspection?

In the **Federal Register** of July 29, 2019 (84 FR 36609), FDA published a 60-day notice requesting public comment on the proposed collection of information. Although two comments were received, one was not responsive to the four collection of information topics solicited and therefore will not be discussed in this document. The other comment included a number of suggested questions to expand upon the questions posed in the 60-day notice and therefore can be considered ways to enhance the quality, utility, and clarity of the information to be collected. While the questions will not be included verbatim in our survey instrument, FDA will give the questions due consideration as the Agency proceeds with this study.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN <sup>1</sup>

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Surveys, focus groups, and interviews .....	300	2	600	1	600

<sup>1</sup> There are no capital costs or operating and maintenance costs associated with this collection of information.

We base our estimate of the average burden per response on review activities familiar to the Agency.

Dated: December 10, 2019.

**Lowell J. Schiller,**

*Principal Associate Commissioner for Policy.*  
[FR Doc. 2019-27053 Filed 12-13-19; 8:45 am]

BILLING CODE 4164-01-P

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

[Docket No. FDA-2007-D-0369]

**Product-Specific Guidance for Cocaine Hydrochloride; Nasal Solution; New Draft Guidance for Industry; Availability**

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice of availability.

**SUMMARY:** The Food and Drug Administration (FDA, Agency, or we) is announcing the availability of a new draft guidance for industry, entitled "Draft Guidance for Cocaine

Hydrochloride." The new draft guidance, when finalized, will provide product-specific recommendations on, among other things, the information and data needed to demonstrate bioequivalence (BE) to support abbreviated new drug applications (ANDAs) for a cocaine hydrochloride nasal solution.

**DATES:** Submit either electronic or written comments on the draft guidance by February 14, 2020 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

**ADDRESSES:** You may submit comments 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-2007-D-0369 for "Draft Guidance for Cocaine Hydrochloride." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," will be publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff office 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)).

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance.

**FOR FURTHER INFORMATION CONTACT:** Mara Miller, Center for Drug Evaluation and Research (HFD-600), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 4709C, Silver Spring, MD 20993-0002, 301-796-0683.

### SUPPLEMENTARY INFORMATION:

#### I. Background

In the **Federal Register** of June 11, 2010 (75 FR 33311), FDA announced the availability of a guidance for industry entitled "Bioequivalence Recommendations for Specific Products," which explained the process

that would be used to make product-specific guidances available to the public on FDA's website at <https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs>.

As described in that guidance, FDA adopted this process to develop and disseminate product-specific guidances and to provide a meaningful opportunity for the public to consider and comment on the guidances. This notice announces the availability of a new draft guidance on a generic cocaine hydrochloride nasal solution.

FDA initially approved new drug application 209963 GOPRELTO (cocaine hydrochloride) nasal solution in December 2017. We are now issuing a new draft guidance for industry on a generic cocaine hydrochloride nasal solution ("Draft Guidance on Cocaine Hydrochloride").

The new draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The new draft guidance, when finalized, will represent the current thinking of FDA on the information and data to demonstrate BE to support ANDAs for cocaine hydrochloride nasal solution. It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

#### II. Electronic Access

Persons with access to the internet may obtain the draft guidance at either <https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm> or <https://www.regulations.gov>.

Dated: December 6, 2019.

**Lowell J. Schiller,**

*Principal Associate Commissioner for Policy.*

[FR Doc. 2019-26971 Filed 12-13-19; 8:45 am]

**BILLING CODE 4164-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### Statement of Organization, Functions, and Delegations of Authority

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA), Center of Drug Evaluation and Research (CDER) has modified its structure. This new organizational structure was approved

by the Secretary of Health and Human Services on September 25, 2019.

**FOR FURTHER INFORMATION CONTACT:**

Edwin Echegoyen, Acting Director, Office of Management/Executive Officer, Food and Drug Administration, 10903 New Hampshire Ave., Building 51, Silver Spring, MD 20993, 301-796-3300.

**I. Summary**

Part D, Chapter D–B, (Food and Drug Administration), the Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services (35 FR 3685, February 25, 1970; 60 FR 56606, November 9, 1995; 64 FR 36361, July 6, 1999; 72 FR 50112, August 30, 2007; 74 FR 41713, August 18, 2009; and 76 FR 45270, July 28, 2011) is amended to reflect the reorganization of the Center for Drug Evaluation and Research.

This reorganization consists of the following Offices: Office of New Drugs (OND), Office of Translational Science (OTS), and Office of Pharmaceutical Quality (OPQ) within the Center for Drug Evaluation and Research and revises their functional statements. The proposed organizational changes align with the ReImagine HHS strategic shift moving to the 21st century: Maximizing Talent, Integrated Assessments, Benefit Risk Monitoring, and Leveraging the Power of Data. CDER will meet the definition of Maximizing Talent by focusing on growing our scientific leadership. This will result in clearly designed pathways to regulatory approval and enhanced emphasis on multidisciplinary teams. The proposed reorganization will integrate assessments to critically, collaboratively, and consistently assess whether information in submissions meets statutory and regulatory requirements. OND, OPQ, and OTS will establish Benefit-Risk Monitoring to unify the post-market safety surveillance framework leading to operational excellence by aligning the therapeutic focus. Each of these offices will incorporate Leveraging the Power of Data to provide access to analytical tools and systems to help the reviewers evaluate and interpret submitted data, thereby improving and streamlining the processes which will impact the critical analyses leading to efficiencies and effectiveness in CDER's scientific regulatory review.

Under Part D, FDA, the Center for Drug Evaluation and Research (CDER) has been restructured as follows:

Standard Administrative Codes (SAC). ORGANIZATION—CDER is

headed by the Director and includes the following organizational units:

Office of Regulatory Policy (SAC)  
 Office of Management (SAC)  
 Office of Communications (SAC)  
 Office of Compliance (SAC)  
 Office of Manufacturing Quality (SAC)  
 Office of Unapproved Drugs and Labeling Compliance (SAC)  
 Office of Scientific Investigations (SAC)  
 Office of Program and Regulatory Operations (SAC)  
 Office of Medical Policy (SAC)  
 Office of Prescription Drug Promotion (SAC)  
 Office of Medical Policy Initiatives (SAC)  
 Office of Translational Sciences (SAC)  
 Office of Biostatistics (SAC)  
 Office of Clinical Pharmacology (SAC)  
 Office of Computational Science (SAC)  
 Office of Study Integrity and Surveillance (SAC)  
 Office of Administrative Operations (SAC)  
 Office of Executive Programs (SAC)  
 Office of Surveillance and Epidemiology (SAC)  
 Office of Medication Error Prevention and Risk Management (SAC)  
 Office of Pharmacovigilance and Epidemiology (SAC)  
 Office of New Drugs (SAC)  
 Office of Administrative Operations (SAC)  
 Office of Cardiology, Hematology, Endocrinology & Nephrology (SAC)  
 Office of Drug Evaluation Science (SAC)  
 Office of Immunology & Inflammation (SAC)  
 Office of Infectious Diseases (SAC)  
 Office of Neuroscience (SAC)  
 Office of New Drug Policy (SAC)  
 Office of Nonprescription Drugs (SAC)  
 Office of Oncologic Diseases (SAC)  
 Office of Program Operations (SAC)  
 Office of Rare Diseases, Pediatrics, Urology & Reproductive Medicine (SAC)  
 Office of Regulatory Operations (SAC)  
 Office of Specialty Medicine (SAC)  
 Office of Therapeutic Biologics and Biosimilars (SAC)  
 Office of Strategic Programs (SAC)  
 Office of Program and Strategic Analysis (SAC)  
 Office of Business Informatics (SAC)  
 Office of Generic Drugs (SAC)  
 Office of Research Standards (SAC)  
 Office of Bioequivalence (SAC)  
 Office of Generic Drug Policy (SAC)  
 Office of Regulatory Operations (SAC)  
 Office of Pharmaceutical Quality (SAC)  
 Office of Administrative Operations (SAC)  
 Office of Biotechnology Products (SAC)  
 Office of Lifecycle Drug Products (SAC)  
 Office of New Drug Products (SAC)

Office of Pharmaceutical Manufacturing Assessment (SAC)  
 Office of Policy for Pharmaceutical Quality (SAC)  
 Office of Program and Regulatory Operations (SAC)  
 Office of Quality Surveillance (SAC)  
 Office of Testing and Research (SAC)

**II. Delegations of Authority**

Pending further delegation, directives, or orders by the Commissioner of Food and Drugs, all delegations and redelegations of authority made to officials and employees of affected organizational components will continue in them or their successors pending further redelegations, provided they are consistent with this reorganization.

**III. Electronic Access**

This reorganization is reflected in FDA's Staff Manual Guide (SMG). Persons interested in seeing the complete SMG can find it on FDA's website at: <https://www.fda.gov/AboutFDA/ReportsManualsForms/StaffManualGuides/default.htm>.

**Authority:** 44 U.S.C. 3101.

**Alex M. Azar, II,**  
 Secretary.

[FR Doc. 2019-26952 Filed 12-13-19; 8:45 am]

**BILLING CODE 4164-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**National Institutes of Health**

**National Cancer Institute; Notice of Closed Meetings**

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Cancer Institute Special Emphasis Panel; NCI SPORE (P50) III Review.

*Date:* January 29–30, 2020.

*Time:* 3:00 p.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Gaithersburg Marriott Washingtonian Center, 9751 Washington Blvd., Gaithersburg, MD 20878.

*Contact Person:* Anita T. Tandle, Ph.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W248, Bethesda, MD 20892, 240-276-5085, [tandlea@mail.nih.gov](mailto:tandlea@mail.nih.gov).

*Name of Committee:* National Cancer Institute Special Emphasis Panel; NCI Program Project (P01) Review III.

*Date:* February 6–7, 2020.

*Time:* 8:00 a.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Bethesda North Marriott Hotel & Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, MD 20852.

*Contact Person:* Jennifer C. Schiltz, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, National Institutes of Health, Rockville, MD 20850, 240-276-5864, [jennifer.schiltz@nih.gov](mailto:jennifer.schiltz@nih.gov).

*Name of Committee:* National Cancer Institute Special Emphasis Panel; SEP 7: NCI Clinical and Translational R21 and Omnibus R03.

*Date:* February 12–13, 2020.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

*Contact Person:* Robert Stephen Coyne, Ph.D., Scientific Review Officer, National Cancer Institute, NIH, Division of Extramural Activities, Special Review Branch, 9609 Medical Center Drive, Room 7W236, Rockville, MD 20850, 240-276-5120, [coyners@mail.nih.gov](mailto:coyners@mail.nih.gov).

*Name of Committee:* National Cancer Institute Special Emphasis Panel; SEP-3: NCI Clinical and Translational R21 and Omnibus R03.

*Date:* February 13–14, 2020.

*Time:* 8:00 a.m. to 12:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Bethesda North Marriott Hotel & Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, MD 20852.

*Contact Person:* Hasan Siddiqui, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W240, Rockville, MD 20850, 240-276-5122, [hasan.siddiqui@nih.gov](mailto:hasan.siddiqui@nih.gov).

*Name of Committee:* National Cancer Institute Special Emphasis Panel; TEP-1: SBIR Contract Review.

*Date:* February 19–20, 2020.

*Time:* 6:00 p.m. to 4:00 p.m.

*Agenda:* To review and evaluate contract proposals.

*Place:* Marriott Bethesda North Hotel & Conference Center, 5701 Marinelli Road, Rockville, MD 20850.

*Contact Person:* Nadeem Khan, Ph.D., Scientific Review Officer, Research

Technology and Contract Review Branch, Division of Extramural Activities, 9609 Medical Center Drive, Room 7W260, National Cancer Institute, NIH, Bethesda, MD 20892–9745, 240-276-5856, [nadeem.khan@nih.gov](mailto:nadeem.khan@nih.gov).

*Name of Committee:* National Cancer Institute Special Emphasis Panel; NCI Research Specialist Award R50.

*Date:* February 27–28, 2020.

*Time:* 5:00 p.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

*Contact Person:* Zhiqiang Zou, M.D., Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, 7W242, Bethesda, MD 20892, 240-276-6372, [zouzhiq@mail.nih.gov](mailto:zouzhiq@mail.nih.gov).

*Name of Committee:* National Cancer Institute Special Emphasis Panel; Transition to Independence SEP.

*Date:* March 10, 2020.

*Time:* 10:30 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W602, Rockville, MD 20850 (Telephone Conference Call).

*Contact Person:* Delia Tang, M.D., Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W602, Bethesda, MD 20892, 240-276-6456, [tangd@mail.nih.gov](mailto:tangd@mail.nih.gov).

*Name of Committee:* National Cancer Institute Special Emphasis Panel; Quantitative Imaging Methods and Resources (UG3/UH3, U24).

*Date:* March 13, 2020.

*Time:* 11:00 a.m. to 3:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 6W030, Rockville, MD 20850 (Telephone Conference Call).

*Contact Person:* Saejeong J. Kim, Ph.D., Scientific Review Officer, Special Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W640, Rockville, MD 20850, 240-276-7684, [saejeong.kim@nih.gov](mailto:saejeong.kim@nih.gov).

*Name of Committee:* National Cancer Institute Special Emphasis Panel; HIV-Associated Malignancy Research.

*Date:* March 26–27, 2020.

*Time:* 5:00 p.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Marriott Bethesda North Hotel & Conference Center, 5701 Marinelli Road, Rockville, MD 20852.

*Contact Person:* Nadeem Khan, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, 9609 Medical Center Drive, Room 7W260, National Cancer Institute, NIH, Bethesda, MD 20892–9745, 240-276-5856, [nadeem.khan@nih.gov](mailto:nadeem.khan@nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction;

93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: December 10, 2019.

**Melanie J. Pantoja,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2019-27003 Filed 12-13-19; 8:45 am]

BILLING CODE 4140-01-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### Prospective Grant of an Exclusive Patent License: The Development of Siglec-6-Specific Chimeric Antigen Receptor (CAR) for the Treatment Acute Myeloid Leukemia (AML), Chronic Lymphocytic Leukemia (CLL), and Other Forms of Acute and Chronic B- and T-Cell Leukemia and Lymphoma

**AGENCY:** National Institutes of Health, HHS.

**ACTION:** Notice.

**SUMMARY:** The National Cancer Institute, an institute of the National Institutes of Health, Department of Health and Human Services, is contemplating the grant of an Exclusive Patent License to practice the inventions embodied in the Patents and Patent Applications listed in the **SUPPLEMENTARY INFORMATION** section of this notice to T-CURX GmbH (T-CURX), located in Würzburg, Germany.

**DATES:** Only written comments and/or applications for a license which are received by the National Cancer Institute's Technology Transfer Center on or before December 31, 2019 will be considered.

**ADDRESSES:** Requests for copies of the patent application, inquiries, and comments relating to the contemplated an Exclusive Patent License should be directed to: Abritee Dhal, Ph.D., Technology Transfer Manager, NCI Technology Transfer Center, 9609 Medical Center Drive, RM 3W610, MSC 9702, Bethesda, MD 20892-9702, (for business mail), Rockville, MD 20850-9702, Telephone: (240) 276-6154; Facsimile: (240) 276-5504; Email: [abritee.dhal@nih.gov](mailto:abritee.dhal@nih.gov).

#### SUPPLEMENTARY INFORMATION:

##### Intellectual Property

U.S. Provisional Patent Application 61/178,688 entitled "A Panel Of Fully

Human Monoclonal Antibodies To The Same Epitope Of An Unknown Cell Surface Antigen Expressed In B-cell Lymphocytic Leukemia (B-CLL)” [HHS Ref. E-163-2009-0-US-01], PCT Patent Application PCT/US2010/034491 entitled “B-cell Surface Reactive Antibodies” [HHS Ref. E-163-2009-0-PCT-02], and United States Patent 8,877,199, entitled “B-cell Surface Reactive Antibodies” [HHS Ref. E-163-2009-0-US-03].

The patent rights in these inventions have been assigned and/or exclusively licensed to the government of the United States of America.

The prospective exclusive license territory may be worldwide and the field of use may be limited to

The development, production, and commercialization of a Siglec-6-specific chimeric antigen receptor (CAR) based immunotherapy using autologous (meaning one individual is both the donor and recipient) T cells modified by virus-free Sleeping Beauty (SB)-based gene transposition compromising of at least:

- a. A single antigen specificity; and
- b. comprising at least:
  - i. The complementary determining region (CDR) sequences of the Siglec-6 antibody known as JML-1, and
  - ii. a CD3 $\zeta$  activation module and either a CD28 or a 4-1BB co-stimulation moiety.

for the treatment of acute myeloid leukemia (AML), chronic lymphocytic leukemia (CLL), and other forms of acute and chronic B- and T-cell leukemia and lymphoma.

The licensed field of use excludes any (a) non-specified immunoconjugates, including, but not limited to, antibody drug conjugates and immunotoxins and (b) unconjugated antibodies.

This technology discloses monoclonal antibodies that are specific for the cell surface domain of Siglec-6. The antibodies can potentially be used for the treatment of acute myeloid leukemia (AML), chronic lymphocytic leukemia (CLL), and other forms of acute and chronic B- and T-cell leukemia and lymphoma cells. In the subject situation, the antibodies can be used in a CAR, leading to the selective destruction of the cancerous cells.

This notice is made in accordance with 35 U.S.C. 209 and 37 CFR part 404. The prospective exclusive license will be royalty bearing, and the prospective exclusive license may be granted unless within fifteen (15) days from the date of this published notice, the National Cancer Institute receives written evidence and argument that establishes that the grant of the license would not

be consistent with the requirements of 35 U.S.C. 209 and 37 CFR part 404.

In response to this Notice, the public may file comments or objections. Comments and objections, other than those in the form of a license application, will not be treated confidentially, and may be made publicly available.

License applications submitted in response to this Notice will be presumed to contain business confidential information and any release of information in these license applications will be made only as required and upon a request under the Freedom of Information Act, 5 U.S.C. 552.

Dated: December 5, 2019.

**Richard U. Rodriguez,**

*Associate Director, Technology Transfer Center, National Cancer Institute.*

[FR Doc. 2019-27002 Filed 12-13-19; 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 Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the meetings of the Council of Councils.

The meetings will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The open session will be videocast and can be accessed from the NIH Videocasting and Podcasting website (<http://videocast.nih.gov>).

A portion of 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:* Council of Councils.

*Open:* January 24, 2020.

*Time:* 8:15 a.m. to 12:10 p.m.

*Agenda:* Call to Order and Introductions; Announcements and Updates; Scientific Talks; NIH Program Updates.

*Place:* National Institutes of Health, John E. Porter Neuroscience Research Center, Building 35A, Rooms 620/630, 35 Convent Drive, Bethesda, MD 20892.

*Closed:* January 24, 2020.

*Time:* 12:10 p.m. to 1:10 p.m.

*Agenda:* Review of Grant Applications.

*Place:* National Institutes of Health, John E. Porter Neuroscience Research Center, Building 35A, Rooms 620/630, 35 Convent Drive, Bethesda, MD 20892.

*Open:* January 24, 2020.

*Time:* 1:10 p.m. to 4:00 p.m.

*Agenda:* Scientific Talks and NIH Program Updates.

*Place:* National Institutes of Health, John E. Porter Neuroscience Research Center, Building 35A, Rooms 620/630, 35 Convent Drive, Bethesda, MD 20892.

*Contact Person:* Franziska Grieder, D.V.M., Ph.D., Executive Secretary, Council of Councils Director, Office of Research Infrastructure Programs, Division of Program Coordination, Planning, and Strategic Initiatives, Office of the Director, NIH, 6701 Democracy Boulevard, Room 948, Bethesda, MD 20892, [GriederF@mail.nih.gov](mailto:GriederF@mail.nih.gov), 301-435-0744.

*Name of Committee:* Council of Councils.

*Open:* May 15, 2020.

*Time:* 8:15 a.m. to 12:00 p.m.

*Agenda:* Call to Order and Introductions; Announcements and Updates; Scientific Talks; NIH Program Updates.

*Place:* National Institutes of Health, 6001 Executive Boulevard, Neuroscience Center, Room C, E, Bethesda, MD 20892.

*Closed:* May 15, 2020.

*Time:* 12:00 p.m. to 1:00 p.m.

*Agenda:* Review of Grant Applications.

*Place:* National Institutes of Health, 6001 Executive Boulevard, Neuroscience Center, Room C, E, Bethesda, MD 20892.

*Open:* May 15, 2020.

*Time:* 1:00 p.m. to 4:00 p.m.

*Agenda:* Scientific Talks and NIH Program Updates.

*Place:* National Institutes of Health, 6001 Executive Boulevard, Neuroscience Center, Room C, E, Bethesda, MD 20892.

*Contact Person:* Franziska Grieder, D.V.M., Ph.D., Executive Secretary, Council of Councils Director, Office of Research Infrastructure Programs, Division of Program Coordination, Planning, and Strategic Initiatives, Office of the Director, NIH, 6701 Democracy Boulevard, Room 948, Bethesda, MD 20892, [GriederF@mail.nih.gov](mailto:GriederF@mail.nih.gov), 301-435-0744.

*Name of Committee:* Council of Councils.

*Open:* September 11, 2020.

*Time:* 8:15 a.m. to 12:00 p.m.

*Agenda:* Call to Order and Introductions; Announcements and Updates; Scientific Talks; NIH Program Updates.

*Place:* National Institutes of Health, Natcher Building, Building 45, Room D, C1/C2 and G1/G2, 45 Center Drive, Bethesda, MD 20892.

*Closed:* September 11, 2020.

*Time:* 12:00 p.m. to 1:00 p.m.

*Agenda:* Review of Grant Applications.

*Place:* National Institutes of Health, Natcher Building, Building 45, Room D, C1/

C2 and G1/G2, 45 Center Drive, Bethesda, MD 20892.

Open: September 11, 2020.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: Scientific Talks and NIH Program Updates.

Place: National Institutes of Health, Natcher Building, Building 45, Room D, C1/C2 and G1/G2, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Franziska Grieder, D.V.M., Ph.D., Executive Secretary, Council of Councils Director, Office of Research Infrastructure Programs, Division of Program Coordination, Planning, and Strategic Initiatives, Office of the Director, NIH, 6701 Democracy Boulevard, Room 948, Bethesda, MD 20892, [GriederF@mail.nih.gov](mailto:GriederF@mail.nih.gov), 301-435-0744.

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 Council of Council's home page at <http://dpcpsi.nih.gov/council/> where an agenda will be posted before the meeting date.

(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: December 10, 2019.

**Ronald J. Livingston, Jr.,**

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2019-27004 Filed 12-13-19; 8:45 am]

BILLING CODE 4140-01-P

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

[Docket No. USCG-2019-0753]

### Collection of Information Under Review by Office of Management and Budget; OMB Control Number: 1625-NEW

AGENCY: Coast Guard, DHS.

**ACTION:** Thirty-Day notice requesting comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995 the U.S. Coast Guard is forwarding an Information Collection Request (ICR), abstracted below, to the Office of Management and Budget (OMB), Office of Information and Regulatory Affairs (OIRA), requesting approval for the following collection of information: 1625-NEW, Merchant Mariner Credentialing—Job Task Analysis. Our ICR describe the information we seek to collect from the public. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

**DATES:** Comments must reach the Coast Guard and OIRA on or before January 15, 2020.

**ADDRESSES:** You may submit comments identified by Coast Guard docket number [USCG-2019-0753] to the Coast Guard using the Federal eRulemaking Portal at <https://www.regulations.gov>. Alternatively, you may submit comments to OIRA using one of the following means:

(1) *Email:* [OIRA-submission@omb.eop.gov](mailto:OIRA-submission@omb.eop.gov).

(2) *Mail:* OIRA, 725 17th Street NW, Washington, DC 20503, attention Desk Officer for the Coast Guard.

(3) *Fax:* 202-395-6566. To ensure your comments are received in a timely manner, mark the fax, attention Desk Officer for the Coast Guard.

A copy of the ICR is available through the docket on the internet at <https://www.regulations.gov>. Additionally, copies are available from: Commandant (CG-612), Attn: Paperwork Reduction Act Manager, U.S. Coast Guard, 2703 Martin Luther King Jr. Ave. SE, Stop 7710, Washington, DC 20593-7710.

**FOR FURTHER INFORMATION CONTACT:** Mr. Anthony Smith, Office of Information Management, telephone 202-475-3532, or fax 202-372-8413, for questions on these documents.

### SUPPLEMENTARY INFORMATION:

### Public Participation and Request for Comments

This Notice relies on the authority of the Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended. An ICR is an application to OIRA seeking the approval, extension, or renewal of a Coast Guard collection of information (Collection). The ICR contains information describing the Collection's purpose, the Collection's likely burden on the affected public, an explanation of the necessity of the Collection, and

other important information describing the Collection. There is one ICR for each Collection.

The Coast Guard invites comments on whether this ICR should be granted based on the Collection being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the Collection; (2) the accuracy of the estimated burden of the Collection; (3) ways to enhance the quality, utility, and clarity of information subject to the Collection; and (4) ways to minimize the burden of the Collection on respondents, including the use of automated collection techniques or other forms of information technology. Consistent with the requirements of Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, and Executive Order 13777, Enforcing the Regulatory Reform Agenda, the Coast Guard is also requesting comments on the extent to which this request for information could be modified to reduce the burden on respondents. These comments will help OIRA determine whether to approve the ICR referred to in this Notice.

We encourage you to respond to this request by submitting comments and related materials. Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICR. They must also contain the docket number of this request, [USCG-2019-0753], and must be received by January 15, 2020.

### Submitting Comments

We encourage you to submit comments through the Federal eRulemaking Portal at <https://www.regulations.gov>. If your material cannot be submitted using <https://www.regulations.gov>, contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions. Documents mentioned in this notice, and all public comments, are in our online docket at <https://www.regulations.gov> and can be viewed by following that website's instructions. Additionally, if you go to the online docket and sign up for email alerts, you will be notified when comments are posted.

We accept anonymous comments. All comments received will be posted without change to <https://www.regulations.gov> and will include any personal information you have provided. For more about privacy and the docket, you may review a Privacy Act notice regarding the Federal Docket Management System in the March 24,

2005, issue of the **Federal Register** (70 FR 15086).

OIRA posts its decisions on ICRs online at <http://www.reginfo.gov/public/do/PRAMain> after the comment period for each ICR. An OMB Notice of Action on each ICR will become available via a hyperlink in the OMB Control Number: 1625–NEW.

#### Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard has published the 60-day notice (84 FR 54351, October 7, 2019) required by 44 U.S.C. 3506(c)(2). That Notice elicited no comments. Accordingly, no changes have been made to the Collection.

#### Information Collection Request

*Title:* Merchant Mariner Credentialing—Job Task Analysis.

*OMB Control Number:* 1625–NEW.

*Summary:* The Coast Guard's Merchant Mariner Credentialing Program establishes the requirements for the issuance of a Merchant Mariner Credential (MMC) with the officer or rating endorsements necessary for employment on U.S. flagged vessels. To improve the credentialing process, inform future decisions, and ensure the Coast Guard maintains standards reflecting changes in technology, the Coast Guard is conducting a Job Task Analysis (JTA) for each officer and rating endorsement issued on an MMC. Information shall be collected through focus group discussions and the administration of surveys. Participation is voluntary.

*Need:* The Coast Guard issues credentials to merchant mariners in accordance with 46 CFR Subchapter B. Screening and assessing applicants for competency ensure they do not present a safety or security risk, they are medically qualified to serve, and that they have the training and experience to serve in the position for which they are applying. The JTA shall inform the training and assessment processes.

*Forms:* None.

*Respondents:* Merchant mariners and shoreside personnel.

*Frequency:* On occasion.

*Hour Burden Estimate:* The estimated burden is 3,060 hours per year.

*Authority:* The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended.

Dated: December 10, 2019.

#### James D. Roppel,

Chief, U.S. Coast Guard, Office of Information Management.

[FR Doc. 2019–26997 Filed 12–13–19; 8:45 am]

**BILLING CODE 9110–04–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4079–DR; Docket ID FEMA–2019–0001]

#### New Mexico; Amendment No. 2 to Notice of a Major Disaster Declaration

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster for the State of New Mexico (FEMA–4079–DR), dated August 24, 2012, and related determinations.

**DATES:** This amendment was issued November 8, 2019.

#### FOR FURTHER INFORMATION CONTACT:

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that, in a letter dated November 8, 2019, the President amended the cost-sharing arrangements regarding Federal funds provided under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”), in a letter to Pete Gaynor, Acting Administrator, Federal Emergency Management Agency, Department of Homeland Security, under Executive Order 12148, as follows:

I have determined that the damage to the Santa Clara Pueblo resulting from flooding during the period of June 22 to July 12, 2012, is of sufficient severity and magnitude that special cost sharing arrangements are warranted regarding Federal funds provided under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”).

Therefore, I amend the declaration of August 24, 2012, to now authorize Federal funds for all categories of Public Assistance at 90 percent of the total eligible costs for the Santa Clara Pueblo.

This adjustment to the Santa Clara Pueblo's cost sharing applies only to Public Assistance costs and direct Federal assistance eligible for such adjustments under the law. Section 404 of the Stafford Act, 42 U.S.C. 5170c, specifically prohibits a similar adjustment for funds provided for the Hazard Mitigation Grant Program. Thus, Hazard Mitigation Grant Program funds will continue to be reimbursed at 75 percent of total eligible costs.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034,

Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

**Pete Gaynor,**

Acting Administrator, Federal Emergency Management Agency.

[FR Doc. 2019–27025 Filed 12–13–19; 8:45 am]

**BILLING CODE 9111–23–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–4047–DR; Docket ID FEMA–2019–0001]

#### New Mexico; Amendment No. 2 to Notice of a Major Disaster Declaration

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster for the State of New Mexico (FEMA–4047–DR), dated November 23, 2011, and related determinations.

**DATES:** This amendment was issued November 8, 2019.

#### FOR FURTHER INFORMATION CONTACT:

Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646–2833.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that, in a letter dated November 8, 2019, the President amended the cost-sharing arrangements regarding Federal funds provided under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”), in a letter to Pete Gaynor, Acting Administrator, Federal Emergency Management Agency, Department of Homeland Security, under Executive Order 12148, as follows:

I have determined that the damage to the Santa Clara Pueblo resulting from flooding during the period of August 19 to August 24, 2011, is of sufficient severity and magnitude that special cost sharing arrangements are warranted regarding Federal funds provided under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the “Stafford Act”).

Therefore, I amend the declaration of November 23, 2011, to now authorize Federal funds for all categories of Public Assistance at 90 percent of the total eligible costs for the Santa Clara Pueblo.

This adjustment to the Santa Clara Pueblo's cost sharing applies only to Public Assistance costs and direct Federal assistance eligible for such adjustments under the law. Section 404 of the Stafford Act, 42 U.S.C. 5170c, specifically prohibits a similar adjustment for funds provided for the Hazard Mitigation Grant Program. Thus, Hazard Mitigation Grant Program funds will continue to be reimbursed at 75 percent of total eligible costs.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

**Pete Gaynor,**

*Acting Administrator, Federal Emergency Management Agency.*

[FR Doc. 2019-27024 Filed 12-13-19; 8:45 am]

**BILLING CODE 9111-23-P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

[Internal Agency Docket No. FEMA-4469-DR; Docket ID FEMA-2019-0001]

#### South Dakota; Major Disaster and Related Determinations

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Notice.

**SUMMARY:** This is a notice of the Presidential declaration of a major disaster for the State of South Dakota (FEMA-4469-DR), dated November 18, 2019, and related determinations.

**DATES:** The declaration was issued November 18, 2019.

**FOR FURTHER INFORMATION CONTACT:** Dean Webster, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472, (202) 646-2833.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that, in a letter dated

November 18, 2019, the President issued a major disaster declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"), as follows:

I have determined that the damage in certain areas of the State of South Dakota resulting from severe storms, tornadoes, and flooding during the period of September 9 to September 26, 2019, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.* (the "Stafford Act"). Therefore, I declare that such a major disaster exists in the State of South Dakota.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Individual Assistance and Public Assistance in the designated areas and Hazard Mitigation throughout the State. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance, Hazard Mitigation, and Other Needs Assistance under section 408 of the Stafford Act will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration for the approved assistance to the extent allowable under the Stafford Act.

The time period prescribed for the implementation of section 310(a), Priority to Certain Applications for Public Facility and Public Housing Assistance, 42 U.S.C. 5153, shall be for a period not to exceed six months after the date of this declaration.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Administrator, under Executive Order 12148, as amended, James R. Stephenson, of FEMA is appointed to act as the Federal Coordinating Officer for this major disaster.

The following areas of the State of South Dakota have been designated as adversely affected by this major disaster:

Brookings, Charles Mix, Davison, Hanson, Hutchinson, Lake, Lincoln, McCook, Minnehaha, Moody, and Yankton Counties and the Flandreau Santee Indian Reservation and the Yankton Indian Reservation for Individual Assistance.

Aurora, Brookings, Brule, Charles Mix, Davison, Douglas, Gregory, Hanson, Hutchinson, Kingsbury, Lake, McCook, Miner, Minnehaha, Moody, Sanborn, Turner, Union, and Yankton Counties and the Flandreau Santee Indian Reservation and the Yankton Indian Reservation for Public Assistance.

All areas within the State of South Dakota are eligible for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

**Pete Gaynor,**

*Acting Administrator, Federal Emergency Management Agency.*

[FR Doc. 2019-27032 Filed 12-13-19; 8:45 am]

**BILLING CODE 9111-23-P**

## DEPARTMENT OF THE INTERIOR

### Geological Survey

[DOI-2019-0014; 201G0804MD  
GGHDF A3500 GF0200000  
GX20FA35SA40000]

#### Privacy Act of 1974; System of Records

**AGENCY:** United States Geological Survey, Interior.

**ACTION:** Rescindment of a system of records notice.

**SUMMARY:** In accordance with the Privacy Act of 1974, as amended, the Department of the Interior is rescinding six systems of records notices from its existing inventory. These notices are maintained by the United States Geological Survey and have been superseded by Government-wide and Department-wide system of records notices. With this rescindment, the affected bureau records will realign under the appropriate Government and Department of the Interior system of records notices.

**DATES:** These changes take effect on December 16, 2019.

**ADDRESSES:** You may send comments identified by docket number [DOI-2019-0014] by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for sending comments.
- *Email:* [DOI\\_Privacy@ios.doi.gov](mailto:DOI_Privacy@ios.doi.gov). Include docket number [DOI-2019-0014] in the subject line of the message.
- *U.S. Mail or Hand-Delivery:* Teri Barnett, Departmental Privacy Officer, U.S. Department of the Interior, 1849 C

Street NW, Room 7112, Washington, DC 20240.

*Instructions:* All submissions received must include the agency name and docket number [DOI-2019-0014]. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

You should be aware your entire comment including your personal identifying information, such as your address, phone number, email address, or any other personal identifying information in your comment, may be made publicly available at any time. While you may request to withhold your personal identifying information from public review, we cannot guarantee we will be able to do so.

**FOR FURTHER INFORMATION CONTACT:**

Cozenja Berry, Associate Privacy Officer, Office of Enterprise Information, U.S. Geological Survey, 12201 Sunrise Valley Drive, Room 4A229, Mail Stop 159, Reston, VA 20192, email at [privacy@usgs.gov](mailto:privacy@usgs.gov) or by telephone at (703) 648-7062.

**SUPPLEMENTARY INFORMATION:** Pursuant to the provisions of the Privacy Act of 1974, as amended, the Department of the Interior (DOI), United States Geological Survey (USGS), is rescinding the following six systems of records notices from its system of records inventory.

- INTERIOR/GS-05, Contract Files
- INTERIOR/GS-07, Personal Property Accountability Records
- INTERIOR/GS-11, Security
- INTERIOR/GS-23, Personnel Investigations Records
- INTERIOR/GS-24, Employee Work Report Edit and Individual Employee Production Rates
- INTERIOR/GS-27, Office of Management Services (OMS) Badging and Access Control System

An assessment of these six systems of records by the USGS Associate Privacy Officer revealed that the records contained therein are covered by published Department-wide and Government-wide systems of record notices. To eliminate duplicate system of records notices, the USGS is rescinding the identified notices and realigning the records under their corresponding system of records notice. Rescinding these six notices will have no adverse impacts on individuals as the Department-wide and Government-wide notices apply to all associated

records regardless of their custodial location. The affected records will continue to be maintained under their disposition schedules as approved by the National Archives and Records Administration. This rescindment will promote the overall streamlining and management of Department of the Interior Privacy Act systems of records. This notice hereby rescinds aforementioned USGS systems of records notices and realigns the records under the DOI system of records as identified below.

**SYSTEM NAME AND NUMBER:**

1. INTERIOR/GS-05, Contract Files, 63 FR 60371 (November 9, 1998). The records contained in the system of records are covered by and maintained in two Department-wide systems of records: INTERIOR/DOI-86, Accounts Receivable: FBMS, 73 FR 43772 (July 28, 2008); and INTERIOR/DOI-87, Acquisition of Goods and Services: FBMS, 73 FR 43766 (July 28, 2008).

2. INTERIOR/GS-07, Personal Property Accountability Records, 63 FR 60372 (November 9, 1998). The records contained in the system of records are covered by and maintained in INTERIOR/DOI-58, Employee Administrative Records, 64 FR 19384 (April 20, 1999).

3. INTERIOR/GS-11, Security, 63 FR 60373 (November 9, 1998). The records contained in the system of records are covered by and maintained in INTERIOR/DOI-45, HSPD-12: Identity Management System and Personnel Security Files, 72 FR 11036 (March 12, 2007); INTERIOR/DOI-46, HSPD-12: Physical Security Files, 72 FR 11043 (March 12, 2007); and INTERIOR/DOI-47, HSPD-12: Logical Security Files (Enterprise Access Control Service/EACS), 72 FR 11040 (March 12, 2007).

4. INTERIOR/GS-23, Personnel Investigations Records, 63 FR 60378 (November 9, 1998). The records contained in the system of records are covered by and maintained in INTERIOR/DOI-45, HSPD-12: Identity Management System and Personnel Security Files, 72 FR 11036 (March 12, 2007) and INTERIOR/DOI-46, HSPD-12: Physical Security Files, 72 FR 11043 (March 12, 2007). Records from this system may also be maintained under INTERIOR/DOI-47, HSPD-12: Logical Security Files (Enterprise Access Control Service/EACS), 72 FR 11040 (March 12, 2007).

5. INTERIOR/GS-24, Employee Work Report Edit and Individual Employee Production Rates, 63 FR 60379 (November 9, 1998). The records contained in the system of records are

covered by and maintained in INTERIOR/DOI-85, Payroll, Attendance, Retirement, and Leave Records, 83 FR 34156 (July 19, 2018).

6. INTERIOR/GS-27, Office of Management Services (OMS) Badging and Access Control System, 62 FR 6553 (February 12, 1997). The records contained in the system of records are covered by and maintained in INTERIOR/DOI-45, HSPD-12: Identity Management System and Personnel Security Files, 72 FR 11036 (March 12, 2007); INTERIOR/DOI-46, HSPD-12: Physical Security Files, 72 FR 11043 (March 12, 2007); and INTERIOR/DOI-47, HSPD-12: Logical Security Files (Enterprise Access Control Service/EACS), 72 FR 11040 (March 12, 2007). Records related to Personal Identity Verification (PIV) cards issued to employees may also be maintained under Government-wide system of records notice, GSA/GOVT-7, HSPD-12 USAccess, published by the General Services Administration at 80 FR 64416 (October 23, 2015).

**HISTORY:**

1. INTERIOR/GS-05, Contract Files, 63 FR 60371 (November 9, 1998); modification published at 74 FR 23430 (May 19, 2009).

2. INTERIOR/GS-07, Personal Property Accountability Records, 63 FR 60372 (November 9, 1998); modification published at 74 FR 23430 (May 19, 2009).

3. INTERIOR/GS-11, Security, 63 FR 60373 (November 9, 1998); modification published at 74 FR 23430 (May 19, 2009).

4. INTERIOR/GS-23, Personnel Investigations Records, 63 FR 60378 (November 9, 1998);

5. INTERIOR/GS-24, Employee Work Report Edit and Individual Employee Production Rates, 63 FR 60379 (November 9, 1998); modification published at 74 FR 23430 (May 19, 2009).

6. INTERIOR/GS-27, Office of Management Services (OMS) Badging and Access Control System, 62 FR 6553 (February 12, 1997); modification published at 74 FR 23430 (May 19, 2009).

**Teri Barnett,**

*Departmental Privacy Officer, Department of the Interior.*

[FR Doc. 2019-26976 Filed 12-13-19; 8:45 am]

**BILLING CODE 4338-11-P**

**DEPARTMENT OF THE INTERIOR****Bureau of Safety and Environmental Enforcement**

[Docket ID BSEE–2018–0004; 201E1700D2 ET1SF0000.EAQ000 EEEE500000; OMB Control Number 1014–0002]

**Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Oil and Gas Production Measurement, Surface Commingling, and Security**

**AGENCY:** Bureau of Safety and Environmental Enforcement, Interior.

**ACTION:** Notice of information collection; request for comment.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, the Bureau of Safety and Environmental Enforcement (BSEE) proposes to renew an information collection.

**DATES:** Interested persons are invited to submit comments on or before January 15, 2020.

**ADDRESSES:** Send written comments on this information collection request (ICR) to the Office of Management and Budget's Desk Officer for the Department of the Interior by email at [OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov); or via facsimile to (202) 395–5806. Please provide a copy of your comments to the Bureau of Safety and Environmental Enforcement; Regulations and Standards Branch; ATTN: Nicole Mason; 45600 Woodland Road, Sterling, VA 20166; or by email to [kye.mason@bsee.gov](mailto:kye.mason@bsee.gov). Please reference OMB Control Number 1014–0002 in the subject line of your comments.

**FOR FURTHER INFORMATION CONTACT:** To request additional information about this ICR, contact Nicole Mason by email at [kye.mason@bsee.gov](mailto:kye.mason@bsee.gov), or by telephone at (703) 787–1607. You may also view the ICR at <http://www.reginfo.gov/public/do/PRAMain>.

**SUPPLEMENTARY INFORMATION:** In accordance with the Paperwork Reduction Act of 1995, we provide the general public and other Federal agencies with an opportunity to comment on new, proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

A **Federal Register** notice with a 60-day public comment period soliciting

comments on this collection of information was published on August 8, 2019 (84 FR 39012). No comments were received.

We are again soliciting comments on the proposed ICR that is described below. We are especially interested in public comments addressing the following issues: (1) Is the collection necessary to the proper functions of BSEE; (2) Will this information be processed and used in a timely manner; (3) Is the estimate of burden accurate; (4) How might BSEE enhance the quality, utility, and clarity of the information to be collected; and (5) How might BSEE minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**Abstract:** The regulations at 30 CFR part 250, subpart L, concern the Oil and Gas Production Measurement, Surface Commingling, and Security regulatory requirements of oil, gas, and sulphur operations in the Outer Continental Shelf (OCS) and are the subject of this collection. This request also covers any related Notices to Lessees and Operators (NLTs) that BSEE issues to clarify, supplement, or provide additional guidance on some aspects of our regulations.

The BSEE uses the information collected under the Subpart L regulations to ensure that operations on the OCS are carried out in a safe and pollution-free manner, do not interfere with the rights of other users on the OCS, and balance the protection and development of OCS resources. Specifically, we use the information collected to do the following:

In regard to Liquid Hydrocarbon Measurement—

- Determine if measurement equipment is properly installed, provides accurate measurement of production on which royalty is due, and is operating properly;
- Ascertain if all removals of oil and condensate from the lease are reported;

• Obtain rates of production measured at royalty meters, which can be examined during field inspections; In regard to Gas Measurement—

• Ensure that the sales location is secure and production cannot be removed without the volumes being recorded;

In regard to Surface Commingling—

• Review gas volume statements and compare them with the Oil and Gas Operations Reports to verify accuracy.

In regard to Miscellaneous & Recordkeeping—

• Review proving reports to verify that data on run tickets are calculated and reported accurately.

*Title of Collection:* 30 CFR part 250, subpart L, *Oil and Gas and Sulfur Operations in the OCS—Oil and Gas Production Measurement, Surface Commingling, and Security.*

*OMB Control Number:* 1014–0002.

*Form Number:* None.

*Type of Review:* Extension of a currently approved collection.

*Respondents/Affected Public:* Potential respondents comprise Federal OCS oil, gas, and sulfur lessees/operators and holders of pipeline rights-of-way.

*Total Estimated Number of Annual Respondents:* Not all potential respondents will submit information in any given year and some may submit multiple times.

*Total Estimated Number of Annual Responses:* 104,291.

*Estimated Completion Time per Response:* Varies from 10 minutes to 35 hours, depending on activity.

*Total Estimated Number of Annual Burden Hours:* 38,986.

*Respondent's Obligation:* Most responses are mandatory, while others are required to obtain or retain benefits, or are voluntary.

*Frequency of Collection:* On occasion, monthly, and varies by section.

*Total Estimated Annual Nonhour Burden Cost:* \$219,765.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The authority for this action is the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*)

**Amy White,**  
*Acting Chief, Regulations and Standards Branch.*

[FR Doc. 2019–27022 Filed 12–13–19; 8:45 am]

**BILLING CODE 4310–VH–P**

**INTERNATIONAL TRADE COMMISSION**

[Investigation No. 731–TA–1443 (Final)]

**Carbon and Alloy Steel Threaded Rod From Taiwan; Supplemental Schedule for the Final Phase of an Anti-Dumping Duty Investigation****AGENCY:** United States International Trade Commission.**ACTION:** Notice.**DATES:** December 10, 2019.

**FOR FURTHER INFORMATION CONTACT:** Kristina Lara ((202) 205–3386), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server (<https://www.usitc.gov>). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>.

**SUPPLEMENTARY INFORMATION:** Effective August 7, 2019, the Commission established a general schedule for the conduct of the final phase of its investigations on carbon and alloy steel threaded rod (“threaded rod”) from China, India, Taiwan, and Thailand,<sup>1</sup> following a preliminary determination by the U.S. Department of Commerce (“Commerce”) that imports of threaded rod from Thailand were being sold at less than fair value (LTFV) in the United States.<sup>2</sup> Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of August 27, 2019 (84 FR 44916). The hearing was held in Washington, DC, on October 15, 2019, and all persons who requested the opportunity were permitted to appear in person or by counsel. On October 21, 2019, Commerce issued a final affirmative determination of sales at LTFV and critical circumstances with respect to imports of threaded rod from Thailand.<sup>3</sup> The Commission issued its

final affirmative determination regarding LTFV imports of threaded rod from Thailand on December 5, 2019.

On December 9, 2019, Commerce issued its final affirmative determination that imports of threaded rod from Taiwan were being sold at LTFV in the United States.<sup>4</sup> Accordingly, the Commission currently is issuing a supplemental schedule for its antidumping investigation on imports of threaded rod from Taiwan.

This supplemental schedule is as follows: The deadline for filing supplemental party comments on Commerce's final antidumping duty determination is December 17, 2019. Supplemental party comments may address only Commerce's final antidumping duty determination regarding imports of threaded rod from Taiwan. These supplemental final comments may not contain new factual information and may not exceed five (5) pages in length. The supplemental staff report in the final phase of this investigation regarding subject imports from Taiwan will be placed in the nonpublic record on January 3, 2019; and a public version will be issued thereafter.

For further information concerning this investigation see the Commission's notice cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

**Authority:** This investigation is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

By order of the Commission.

4 84 FR 67258, December 9, 2019.

Issued: December 10, 2019.

**Lisa Barton,***Secretary to the Commission.*

[FR Doc. 2019–26975 Filed 12–13–19; 8:45 am]

BILLING CODE 7020–02–P

**DEPARTMENT OF JUSTICE****Drug Enforcement Administration**

[Docket No. DEA–564]

**Importer of Controlled Substances Application: Meridian Medical Technologies****ACTION:** Notice of application.

**DATES:** Registered bulk manufacturers of the affected basic classes, and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before January 15, 2020. Such persons may also file a written request for a hearing on the application on or before January 15, 2020.

**ADDRESSES:** Written comments should be sent to: Drug Enforcement Administration, Attention: DEA **Federal Register** Representative/DPW, 8701 Morrisette Drive, Springfield, Virginia 22152. All requests for a hearing must be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrisette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrisette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA **Federal Register** Representative/DPW, 8701 Morrisette Drive, Springfield, Virginia 22152.

**SUPPLEMENTARY INFORMATION:** In accordance with 21 CFR 1301.34(a), this is notice that on November 13, 2019, Meridian Medical Technologies, 2555 Hermelin Drive, Saint Louis, Missouri 63144 applied to be registered as an importer of the following basic class of controlled substance:

Controlled substance	Drug code	Schedule
Morphine .....	9300	II

The company manufactures a product containing morphine in the United States. The company exports this product to customers around the world. The company has been asked to ensure that its product, which is sold to European customers, meets the standards established by the European Pharmacopoeia, administered by the

<sup>1</sup> 84 FR 44916, August 27, 2019.<sup>2</sup> 84 FR 38597, August 7, 2019.<sup>3</sup> 84 FR 56162, October 21, 2019.

Directorate for the quality of Medicines (EDQM). In order to ensure that its product will meet European specifications, the company seeks to import morphine supplied by EDQM for use as reference standards.

Dated: December 2, 2019.

William T. McDermott, Assistant Administrator.

[FR Doc. 2019-27093 Filed 12-13-19; 8:45 am] BILLING CODE 4410-09-P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA-560]

Importer of Controlled Substances Application: Novitium Pharma LLC

ACTION: Notice of application.

DATES: Registered bulk manufacturers of the affected basic classes, and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before January 15, 2020. Such persons may also file a written request for a hearing on the application on or before January 15, 2020.

ADDRESSES: Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DPW, 8701 Morrisette Drive, Springfield, Virginia 22152. All requests for a hearing must be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrisette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrisette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrisette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION:

In accordance with 21 CFR 1301.34(a), this is notice that on July 18, 2018, Novitium Pharma, LLC., 70 Lake Drive, East Windsor, New Jersey 08520 applied to be registered as an importer of the following basic class of controlled substance:

Table with 3 columns: Controlled substance, Drug code, Schedule. Row 1: Levorphanol, 9220, II

The company plans to import the controlled substance to develop the manufacturing process for a drug product that will in turn be used to

produce a tablet equivalent to the current brand product.

Dated: December 3, 2019.

William T. McDermott, Assistant Administrator.

[FR Doc. 2019-27095 Filed 12-13-19; 8:45 am] BILLING CODE 4410-09-P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA-553]

Importer of Controlled Substances Application: Mylan Pharmaceuticals Inc.

ACTION: Notice of application.

DATES: Registered bulk manufacturers of the affected basic classes, and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before January 15, 2020. Such persons may also file a written request for a hearing on the application on or before January 15, 2020

ADDRESSES: Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DPW, 8701 Morrisette Drive, Springfield, Virginia 22152. All requests for a hearing must be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrisette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrisette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrisette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION:

In accordance with 21 CFR 1301.34(a), this is notice that on October 17, 2019, Mylan Pharmaceuticals Inc., 3711 Collins Ferry Road, Morgantown, West Virginia 26505 applied to be registered as an importer of the following basic classes of controlled substances:

Table with 3 columns: Controlled substance, Drug code, Schedule. Rows: Amphetamine (1100, II), Methyphenidate (1724, II), Oxycodone (9143, II), Hydromorphone (9150, II), Methadone (9250, II), Morphine (9300, II), Fentanyl (9801, II)

The company plans to import the listed controlled substances in finished dosage form (FDF) from foreign sources for analytical testing and clinical trials in which the foreign FDF will be compared to the company's own domestically-manufactured FDF. This analysis is required to allow the company to export domestically-manufactured FDF to foreign markets.

Authorization will not extend to the import of Food and Drug Administration approved or non-approved finished dosage forms for commercial sale.

Dated: November 14, 2019.

William T. McDermott, Assistant Administrator.

[FR Doc. 2019-27094 Filed 12-13-19; 8:45 am] BILLING CODE 4410-09-P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Jeffrey D. Olsen, M.D.; Decision and Order

On August 2, 2016, a former Acting Administrator of the Drug Enforcement Administration (hereinafter, DEA or Government), issued an Order to Show Cause (OSC) and Immediate Suspension of Registration (ISO) to Jeffrey D. Olsen, M.D. (hereinafter, Registrant), of Newport Beach, CA. Order to Show Cause and Immediate Suspension of Registration (hereinafter collectively, OSC 2)), at 1; see also Government Exhibit (hereinafter, GX) 26, at 1-6. OSC 2 informed Registrant of the immediate suspension of his DEA Certificate of Registration (hereinafter, COR) FO6043638 pursuant to 21 U.S.C. 824(d) "because . . . [his] continued registration constitute[d] an imminent danger to the public health and safety." Id.

The substantive ground for the proceeding, as alleged in OSC 2, was that Registrant's "continued registration is inconsistent with the public interest, as that term is defined in 21 U.S.C. 823(f)." Id. (citing 21 U.S.C. 824(a)(4)). Specifically, the OSC alleged that Registrant issued numerous prescriptions outside the usual course of the professional practice of medicine in violation of 21 U.S.C. 841(a)(1) and 21 CFR 1306.04(a) and in violation of California law and the minimum standards of medical practice in California. Id. at 2-4. The OSC stated that "[Registrant's] conduct, viewed as a whole, 'completely betrayed any semblance of legitimate medical treatment.'" Id. at 4 (citing Jack A. Danton, D.O., 76 FR 60900, 60904

(2011)). Further, OSC 2 alleged that, on March 15, 2016, DEA had served Registrant with an initial Order to Show Cause and Immediate Suspension Order (hereinafter, collectively OSC 1), which immediately suspended Registrant's previous COR B02524204. *Id.* at 1–2; *see also* GX 26, at 7–12 (OSC 1). After receiving OSC 1, Registrant surrendered his DEA COR B02524204 for cause on March 18, 2016. GX 17 (Voluntary Surrender of Controlled Substances Privileges). However, OSC 2 alleged that on May 20, 2016, Registrant filed an application for a new COR, and he materially falsified his application by providing an answer in the negative to the question of whether he had ever surrendered his federal COR. OSC 2, at 2. OSC 2 further alleged that pursuant to 21 U.S.C. 824, this action “constitute[d] independent grounds for revocation.” *Id.* OSC 2 also enclosed a copy of, and incorporated by reference, OSC 1, which detailed numerous other issuances of prescriptions outside the usual course of the professional practice of medicine in violation of 21 U.S.C. 841(a)(1) and 21 CFR § 1306.04(a) and in violation of California law and the minimum standards of medical practice in California. OSC 2, at 2; *see also* GX 26, at 7–12 (OSC 1).

OSC 2 notified Registrant of his right to request a hearing on the allegations, or to submit a written statement while waiving his right to a hearing, the procedures for electing either option, and the consequence of failing to elect either option. OSC 2, at 5–6 (citing 21 CFR 1301.43).

#### Adequacy of Service and Timeliness of Hearing Request

In a Declaration dated December 22, 2017, a Diversion Investigator (hereinafter, DI) assigned to the Los Angeles Field Division declared under penalty of perjury that, in the presence of a DEA Special Agent and a DEA Task Force Officer, she personally served OSC 2 on Registrant at his registered address on August 3, 2016. GX 31, at 7 (Second Sworn DI Declaration, dated Dec. 22, 2017). According to the DI, Registrant acknowledged receipt of OSC 2 by signing a DEA–12, Receipt for Cash or Other Items, on August 3, 2016. GX 27 (DEA–12 signed by Registrant).

Based on the DI's Declaration, the Government's written representations, and my review of the record, I find that the Government accomplished service of OSC 2 on Registrant on August 3, 2016.

On October 18, 2016, the Office of Administrative Law Judges (hereinafter, OALJ) received “what appeared to be a hearing request and a request for an

extension of time to respond to the OSC.” RFAA, at 2; *see also* GX 29 (Registrant's Request for Reasonable Time Extension). The request was signed by Registrant, referenced an attorney, and requested additional time “due to recent medical problems, deterioration of his health and due to the time consuming, expensive, medical care required on his behalf.” GX 29, at 1 (capitalization omitted). The request described multiple medical complaints and stated, “This long list of simultaneous, major medical problems have converged upon and legitimately burdened [Registrant], who has struggled with the symptoms, signs and consequences of all of these.” *Id.* at 1.

The matter was assigned to the Chief Administrative Law Judge (hereinafter, ALJ), who denied Registrant's request for an extension of time, found that Registrant waived his opportunity for a hearing, and terminated the proceeding. GX 30 (Order Denying the Registrant's Request for Additional Time to Respond to the Order to Show Cause/Immediate Suspension of Registration and Terminating Proceedings, dated October 28, 2016), at 4. The Chief ALJ found that the Registrant's letter “arrived 76 days after service—46 days after the deadline to respond to the OSC/ISO.” *Id.* at 1. The Chief ALJ cited 21 CFR 1301.43(d), which states in relevant part that a registrant who fails to request a timely hearing, “shall be deemed to have waived the opportunity for a hearing or to participate in the hearing, unless such person shows good cause for such failure.” *See* GX 30, at 2.

I concur with the Chief ALJ that, in this case, “[i]t is not necessary to accept the Government's broad and uncompromising suggestion that preoccupation with other matters cannot constitute good cause for an untimely filing, under any circumstances, to decide the [Registrant's] Enlargement Motion.” *Id.* at 3.

I further agree with the Chief ALJ's reasoning in denying Registrant's request for an extension of time:

Even accepting, *arguendo*, that . . . [Registrant's] medical conditions are serious and impactful, as described, they do not present a scenario where the [Registrant] was precluded from answering for 76 days. While certainly true that responding and seeking out counsel would have required some commitment of time, sending a response to the OCS/ISO was hardly rendered ‘impossible,’ by his ailments as he described them and by his other distractions. The [Registrant] does not allege that he was hospitalized or otherwise unable (physically or mentally) to prepare and submit a response or seek out representation.

*Id.*

I therefore find that, because Registrant did not provide good cause for his failure to meet the deadline for requesting a hearing, he waived his right to a hearing.

On January 2, 2018, the Government forwarded its Request for Final Agency Action (RFAA), along with the evidentiary record in this matter, to my office. The Government argued that Registrant offered no evidence that he accepted responsibility for [his] actions and would not engage in future misconduct, and his COR should be revoked, because it is contrary to the public interest. RFAA, at 21. I issue this Decision and Order after considering the entire record before me. 21 CFR 1301.43(e).

#### Question of Mootness

On January 7, 2019, I issued an Order taking notice of the Agency's registration records, which showed that on December 31, 2018, Registrant's COR was due to expire, and requested that the parties address whether the case was moot. January Order, at 1.

On January 15, 2019, the Government timely responded to my Order with a two-page filing arguing that “[w]here, as here, the DEA registrations that are the subject of a pending litigation expire or otherwise terminate prior to the issuance of a final order, DEA precedent (with one recent exception) makes clear that the matter should be dismissed as moot, at least absent collateral consequences not present here.” Government's Response to Order and Suggestion of Mootness (hereinafter, GR), at 1 (citations omitted). The Government requested, “consistent with the significant majority of agency precedent on point” that this case be dismissed as moot “notwithstanding” a DEA decision to the contrary. *Id.* at 2. Beyond citation of the cases, the Government did not elaborate on, or offer the legal analysis behind, its assertions regarding “controlling agency precedent” and the “significant majority of agency precedent on point.” *Id.* at 1, 2.

Registrant did not submit a filing or otherwise respond to my Order.<sup>1</sup>

My analysis of the constitutional origins of administrative agencies and of federal and Agency decisions addressing mootness sets me on a

<sup>1</sup> As a courtesy, my office gave Registrant an opportunity to respond to my Order. Although my office mailed the Order to the most recent address he provided in these proceedings, the address on Registrant's Request, the certified envelope was returned “unclaimed.” When my office re-mailed the Order by first-class mail, it was not returned as undeliverable. Thus, it appears that Registrant received a copy of my Order.

different course from many, but not all, previous Agency decisions in which the registrant allowed the registration at issue in an Immediate Suspension Order and/or in an Order to Show Cause (hereinafter, ISO/OSC) to expire before final adjudication of that ISO/OSC.<sup>2</sup> As an initial matter, therefore, I note that Agency decisions from 1977 to the present do not exhibit uniformity regarding mootness or the ramifications of a registration's expiration before issuance of a final decision. Instead, almost since the Agency's inception, my predecessors have grappled with this matter.<sup>3</sup>

*Park and King Pharmacy*, 52 FR 13136 (1987), involved an OSC alleging that the registrant dispensed controlled substances other than pursuant to the lawful order of a practitioner, and that the president and registered pharmacist

<sup>2</sup> In *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), the Supreme Court acknowledged that administrative agency adjudications change course and addressed how an agency may do so and continue to pass muster on appellate review under the Administrative Procedure Act (hereinafter, APA). First, the Supreme Court pointed out that the APA does not mention a heightened standard of review for agency adjudication course adjustments. *Id.* at 514. Instead, it stated that the narrow and deferential standard of review of agency adjudications set out in 5 U.S.C. 706 continues to apply. *Id.* at 513–14 (concluding that “our opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.”).

Second, according to the Supreme Court, an agency would “ordinarily display awareness that it is changing position” and it may not “depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.” *Id.* at 515. Further, an agency must “show that there are good reasons for the new policy” but need not “demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better.” *Id.* (emphases in original). Finally, the Supreme Court had warned in an earlier decision that an “irrational departure” from agency policy, “as opposed to an avowed alteration of it,” could be overturned as arbitrary and capricious, or an abuse of discretion. *I.N.S. v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996).

Given the lack of uniformity over time in the body of Agency decisions concerning adjudications when the registration at issue is allowed to expire before issuance of a final decision, my current mootness-related analysis may not be the “agency change” the Supreme Court contemplated in *Fox Television*. Nevertheless, I am following the parameters the Court announced to support my CSA-related responsibilities and out of respect for, and to facilitate, any appellate review.

<sup>3</sup> Mootness, as described in federal case law, differs from the mootness that results from action such as an appellate court’s reversal of the criminal convictions on which an OSC charge under 21 U.S.C. 824(a)(2) is based. *See, e.g., William Russell Greenfield, Jr., M.D.*, 42 FR 34386, 34386 (1977) (finding no lawful basis for revocation after the underlying criminal convictions were overturned). I agree with the mootness finding in *William Russell Greenfield, Jr., M.D.*, because the criminal convictions, which were the factual premise and essential bases of the OSC, were overturned.

of registrant pled nolo contendere to the felony possession of a controlled substance with intent to deliver or sell. 52 FR at 13136. *Park and King Pharmacy* is among the earliest decisions addressing the expiration of a registration before issuance of a final decision. In it, my predecessor rejected the suggestion that the matter was moot, adjudicated the matter, and revoked the registration. *Id.* at 13,137. According to the decision, both DEA and its predecessor agency, since implementation of the Controlled Substances Act (hereinafter, CSA), “maintain[ed] registrations on a day-to-day basis pending resolution of administrative proceedings seeking to revoke such registrations.” *Id.* Also according to the decision, this “administrative ‘hold’” prevented both the registration from expiring and Respondent from renewing the registration. *Id.* at 13,138. Based on this understanding, my predecessor concluded that, “[N]either the nominal expiration date on the face of Respondent’s registration nor . . . [Respondent’s] inability to file a renewal application have any effect upon the matter pending before the Administrator.”<sup>4</sup> *Id.*

*Park and King Pharmacy* was reconsidered in late 1998. In *Ronald J. Riegel, D.V.M.*, 63 FR 67132 (1998), the then-Acting Deputy Administrator stated that he was “troubled” by *Park and King Pharmacy*, because “no authority was cited . . . for the position that an expired registration can still be revoked if no renewal application has been filed.”<sup>5</sup> *Id.* at 67,133. He agreed

<sup>4</sup> The decision notes four points that DEA counsel made in support of adjudication to a final decision and revocation. First, DEA counsel argued that, had respondent been a medical practitioner, “there is no question but that the DEA would not permit him to surrender his registration . . . during the 23rd hour of a proceeding.” 52 FR at 13137. Second, Respondent’s ability to “direct the destiny of his registration” terminated with the issuance of the OSC. *Id.* Third, permitting an individual or entity under an OSC to “duck the issue” at the “last minute” would enable him/it to “put the agency to the expense of a hearing, with a commitment of public resources which is not insubstantial.” *Id.* The individual/entity could thereby “avoid any or all of the collateral sanctions which accompany the revocation of a registration[,] . . . reopen at a later time or in a different location, submitting a new application for registration and truthfully answering on such application that he had never had a registration revoked . . . . This would diminish the chances that the application would be noticed for further administrative proceedings.” *Id.* Fourth, if Respondent’s “last minute withdrawal” meant that no final order would issue, “another full hearing on the new application might be required . . . prevent[ing] the administrative processes of DEA from operating effectively.” *Id.*

<sup>5</sup> In *Ronald J. Riegel, D.V.M.*, the OSC was based on 21 U.S.C. 824(a)(2) (controlled substance-related felony conviction) and (a)(4) (contrary to the public interest). The veterinarian’s registration expired

with DEA counsel who argued that “there is no viable registration to revoke.” *Id.* The then-Acting Deputy Administrator determined, however, that “it would be unfair to now terminate the proceedings without resolution . . . ‘mid-case, without notice [to Respondent] and opportunity to comply with the changed procedure.’” *Id.* He revoked the veterinarian’s registration after stating that he was “deeply troubled by Respondent’s conduct.” *Id.* at 67,134. Agency decisions from then until the end of 2006 concerning similar facts cited mootness and dismissed the OSCs when the registration at issue had been allowed to expire during OSC proceedings.<sup>6</sup>

At the end of 2006, the then-Deputy Administrator (later, Administrator) repudiated *Ronald J. Riegel, D.V.M.* and suggested multiple reasons, legal and practical, for not finding mootness. *William R. Lockridge, M.D.*, 71 FR 77,791 (2006). In that case, the ISO/OSC charged respondent with issuing prescriptions for persons he never physically examined and, thus, without a legitimate medical purpose. Many of the reasons cited in *William R. Lockridge, M.D.* had been discussed in *Park and King Pharmacy* as arguments raised by DEA counsel.

First, *William R. Lockridge, M.D.* stated that Article III’s “case or controversy” limitation does not apply to federal administrative agency adjudications.

Having carefully considered . . . [*Ronald J. Riegel, D.V.M.*], as well as authorities discussing the mootness doctrine in both the judicial and administrative settings, I conclude that Riegel is not controlling. “[A]n administrative agency is not bound by the constitutional requirement of a ‘case or controversy’ that limits the authority of [A]rticle III courts to rule on moot issues.” *Id.* at 77796.

Second, *William R. Lockridge, M.D.* stated that its repudiation of mootness “finds ample support” in “long settled principles . . . applied by the courts.” *Id.* at 77797. Citing the Supreme Court, *William R. Lockridge, M.D.* stated, “[A]

about three months after the OSC was issued and the doctor did not submit a renewal application. 63 FR at 67132.

<sup>6</sup> *Daniel Koller, D.V.M.*, 71 FR 66975, 66981 (2006) (concluding that the revocation portion of the OSC was moot because the registration expired and “Respondent did not file a renewal application, let alone a timely one, for this registration”); *William Franklin Prior, Jr., M.D.*, 64 FR 15806, 15807 (1999) (citing mootness to terminate proceedings initiated pursuant to 21 U.S.C. 823(f), 824(a)(1) (materially falsified application), and 824(a)(4) (against the public interest) because Respondent’s criminal plea agreement required him to surrender his registration and withdraw his pending application).

defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice' because 'if it did, the courts would be compelled to leave "[t]he defendant . . . free to return to his old ways.'" *Id.* (citing *Friends of the Earth, Inc. v. Laidlaw Env. Servs., Inc.*, 528 U.S. 167, 189 (2000)). *William R. Lockridge, M.D.* pointed out that the standard for determining whether a defendant's voluntary conduct moots a case is stringent—"if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." 71 FR at 77797 (citing *Friends of the Earth*, 528 U.S. at 189). Because Respondent had not submitted any "evidence (such as a declaration) establishing that he intends to permanently cease the practice of medicine. . . . Respondent can apply for a new registration at any time and could re-engage in the practice at issue here." 71 FR at 77797 (citing 21 CFR 1301.52(a)). *William R. Lockridge, M.D.* concluded that "[i]t is thus not "absolutely clear that [Respondent's] allegedly wrongful behavior could not reasonably be expected to recur." " 71 FR at 77797 (citing *Friends of the Earth*, 528 U.S. at 189).

Third, *William R. Lockridge, M.D.* determined that the collateral consequences of an OSC militate against finding mootness. Citing "several courts . . . in cases involving sanctions against licensed professionals such as attorneys," *William R. Lockridge, M.D.* found that "even a temporary suspension followed by a reinstatement does not moot a challenge to the initial suspension because the action 'is harmful to a [professional's] reputation'" and this possibility is sufficient to preclude a finding of mootness. 71 FR at 77,797 (citing *In re Surrick*, 338 F.3d 224, 230 (3d Cir. 2003)). Likewise, according to *William R. Lockridge, M.D.*, the issuance of an ISO along with an OSC is an "extraordinary step to protect public health and safety" that has potentially harmed Respondent's reputation. 71 FR at 77 797. Finally, *William R. Lockridge, M.D.* noted that an additional collateral consequence to an ISO is being required to report the ISO when renewing a state medical license and when applying for a DEA registration. *Id.*

Fourth, *William R. Lockridge, M.D.* further noted that both parties had "expended substantial resources in litigating this case," and that the ALJ "committed an extensive amount of time to preparing her decision." *Id.* As such, it reasoned, "[t]o dismiss this proceeding without making the findings

which the evidence in this case compels would prejudice the public interest." *Id.* Thus, *William R. Lockridge, M.D.* concluded, "Respondent's failure to submit a renewal application does not preclude the entry of a final order in this matter." <sup>7</sup> *Id.* Agency decisions into the middle of 2007 cited *William R. Lockridge, M.D.*<sup>8</sup>

Starting in the middle of 2007, adjudications during which registrations were allowed to expire before the issuance of a final decision were resolved in particularly fact-specific ways. *Ronald J. Riegel, D.V.M.* and its progeny, despite the more recent and substantive *William R. Lockridge, M.D.* decision, controlled adjudications and were cited to moot proceedings.<sup>9</sup> Further, the Administrator initiated dismissals due to mootness after taking official notice of the status of the registration at issue in DEA's database.<sup>10</sup>

<sup>7</sup> *William R. Lockridge, M.D.* affirmed the ISO and cancelled Respondent's DEA number. It did not dismiss the OSC.

<sup>8</sup> See *Trinity Health Care Corp., D/B/A Oviedo Discount Pharmacy*, 72 FR 30849, n.14 (2007) (concluding that the case is not moot, declining to adopt the ALJ's recommendation to revoke the registration, affirming the ISO, and stating that "there is neither an existing registration to revoke nor a pending application to deny"); *Rose Mary Jacinta Lewis, M.D.*, 72 FR 4035, 4042 (2007) (affirming the ISO, cancelling the registration number, but not dismissing the OSC).

<sup>9</sup> See *Amy S. Benjamin, N.P.*, 77 FR 72408, 72409 (2012) (citing *Ronald J. Riegel, D.V.M.* and dismissing the OSC as moot); *Louisiana All Snax, Inc.*, 76 FR 20034 (2011) (dismissing as moot an OSC alleging lack of state authority after the ALJ anticipated mootness based on the registration's expiration date and the 25-day mandated period for the filing of exceptions); *Thomas E. Mitchell, M.D.*, 76 FR 20032 (2011) (dismissing as moot an OSC alleging lack of state authority and specifically noting that Respondent must again be authorized to dispense controlled substances under the laws of the state in which he practices before he would be entitled to a registration); *John G. Costino, D.O.*, 76 FR 4940 (2011) (dismissing as moot an OSC alleging lack of state authority); *Kermit B. Gosnell, M.D.*, 76 FR 4938, 4938–39 (2011) (rejecting the ALJ's recommended decision, concluding the case is moot, and dismissing the OSC); *Sylvester A. Nathan*, 74 FR 17516 (2009) (dismissing as moot an OSC alleging lack of state authority); *William W. Nucklos, M.D.*, 73 FR 34330 (2008) (dismissing as moot the OSC based on ten felony convictions, and noting that dismissal on mootness grounds does not have collateral estoppel effect if Respondent were to apply for a registration in the future); *Benjamin Levine, M.D.*, 73 FR 34329 (2008) (dismissing as moot the OSC based on material falsification, loss of state authority, and acts inconsistent with the public interest, and noting that dismissal on mootness grounds does not have collateral estoppel effect if Respondent were to apply for a registration in the future); *David L. Wood, M.D.*, 72 FR 54936 (2007) (dismissing as moot the OSC after citing *Ronald J. Riegel, D.V.M.* and limiting *William R. Lockridge, M.D.*'s application to ISOs).

<sup>10</sup> See *Donald Kenneth Shreves, D.V.M.*, 83 FR 22518, 22518 (2018) (dismissing as moot "effective immediately" an OSC alleging lack of state authority after taking official notice of Registrant's registration record); *Keith F. Ostrosky, D.D.S.*, 83 FR 12406 (2018) (same); *Mohammed S. Aljanaby, M.D.*,

Meanwhile, *William R. Lockridge, M.D.* was explicitly limited to ISOs, but not uniformly applied to them.<sup>11</sup> Indeed, over time, the analysis actually applied to ISO cases that cited *William R. Lockridge, M.D.* was reduced to invoking *William R. Lockridge, M.D.* and describing it as a "limited exception to the mootness rule" due to the "collateral consequences" associated with an ISO.<sup>12</sup> The full scope of the "collateral consequences" addressed in *William R. Lockridge, M.D.*, in turn, focused on the forfeiture ramifications,

82 FR 34552 (2017) (taking official notice of Registrant's registration record in DEA's files and dismissing the OSC because Registrant's registration expired without a pending renewal application); *David M. Lewis, D.M.D.*, 78 FR 36591 (2013) (same); *Donald Brooks Reece II, M.D.*, 77 FR 35054, 35054 (2012) (taking official notice of Respondent's registration record in DEA's files and dismissing the OSC after Respondent's registration expired while the case was pending with the Administrator and after the ALJ recommended revocation because "Respondent's continued registration would be fully inconsistent with the public interest"); *James Edgar Lundeen, Sr., M.D.*, 77 FR 29696 (2012) (dismissing the OSC after taking official notice of Respondent's registration record in DEA's files, determining that Respondent's registration expired, and finding that Respondent did not file a renewal application).

<sup>11</sup> See *Meetinghouse Community Pharmacy, Inc.*, 74 FR 10073, n.10 (2009) (noting that Respondent was still in business and that controlled substances were seized, relied on *William R. Lockridge, M.D.* to affirm the ISO and "make clear" that the registration would have been revoked if it had not expired); *Nirmal and Nisha Saran, M.D./D.O.*, 73 FR 78827 (2008) (adjudicating the ISO/OSC as the best way to serve principles of judicial economy given Respondents' desire to remain registered); *Elmer P. Manalo, M.D.*, 73 FR 50353 (2008) (citing *William R. Lockridge, M.D.* as authority, but finding the ISO to be moot and dismissing the OSC because Respondent stopped participating in the proceeding and had not provided evidence of his intent to remain in professional practice or of any collateral consequence of the ISO); *Paul H. Volkanan*, 73 FR 30630 (2008), *correction*, 73 FR 32629 (2008) (adjudicating the renewal application and modification, but not following *William R. Lockridge, M.D.*); *RX Direct Pharmacy, Inc.*, 72 FR 54070 (2007) (dismissing the OSC as moot after the state license expired, the business closed, and no plan to re-enter the pharmacy business at some future date was evident, and stating that controlled substances seized pursuant to the ISO may be forfeited in any number of ways); *CRJ Pharmacy, Inc. and YPM Total Care Pharmacy, Inc.*, 72 FR 30846 (2007) (not adjudicating the ISO; revoking the registrations for lack of state authority).

<sup>12</sup> In *Robert Charles Ley, D.O.*, 76 FR 20033 (2011), for example, the ISO/OSC charged that Respondent had issued to undercover police officers numerous prescriptions for controlled substances lacking a legitimate medical purpose. Respondent allowed his registration to expire and DEA counsel moved to terminate the proceeding on the ground that the case was moot. Respondent's response to the termination motion stated that the summary suspension of his registration was "improper and unjustified" and that he did not object to the termination of the proceeding. The then-Administrator dismissed the ISO/OSC based on *Ronald J. Riegel, D.V.M.* while citing *William R. Lockridge, M.D.* as a "limited exception to the mootness rule." 76 FR at 20033.

if any, of seized controlled substances.<sup>13</sup> Thus, the reach of *William R. Lockridge, M.D.* was virtually narrowed to ISOs, and only ISOs for which the status of seized controlled substances had not been sufficiently resolved. In sum, the decisions in this period continued to exhibit a lack of uniformity.

In 2012 and thereafter, decisions “affirm” ISOs based on an analysis of the merits while indicating that there is no registration to revoke because the registration at issue had been allowed to expire.<sup>14</sup> *Ronald J. Riegel, D.V.M.*, 63 FR at 67,133. In 2015, an ALJ cited a regulatory provision, 21 CFR 1301.36(h), as a legal basis for not dismissing ISOs.<sup>15</sup> *Odette L. Campbell, M.D.*, 80 FR 41,062 (2015).<sup>16</sup> Citing this regulation, *William R. Lockridge, M.D.*, and *Meetinghouse Community Pharmacy, Inc.*, the ALJ concluded that “application of the mootness doctrine . . . is unwarranted and would deny

<sup>13</sup> See *Martin L. Korn, M.D.*, 79 FR 66406 (2014) (elaborating on, and agreeing with, *Quigley* that it is appropriate to dismiss an ISO/OSC when the Registrant does not respond and when he allows his registration to expire, acknowledging some of the collateral consequences originally identified in *William R. Lockridge, M.D.*, and explicitly noting that there is no issue to resolve concerning seized controlled substances); *Richard C. Quigley, D.O.*, 79 FR 50945 (2014) (dismissing the ISO/OSC as moot because Registrant did not answer the ISO/OSC, noting that no controlled substances had been seized, and finding that Registrant’s fleeing the country meant he did not intend to remain in professional practice, thus mitigating the concerns implicit in *William R. Lockridge, M.D.*’s original collateral consequences); *Tin T. Win, M.D.*, 78 FR 52802 (2013) (dismissing the ISO/OSC after the Registrant allowed her registration to expire and finding no collateral consequence because no controlled substances had been seized pursuant to the ISO); but see *Patricia A. Newton, M.D.*, 82 FR 26516, 26516 (2017) (dismissing the OSC after finding that there was “no showing of any collateral consequence which precludes a finding of mootness”).

<sup>14</sup> See *ChipRX, L.L.C., d/b/a City Center Pharmacy*, 82 FR 51433 (2017) (“affirming” the ISO after stating that there is neither a registration to revoke nor an application to act upon, addressing the merits, and ordering the forfeiture of all seized controlled substances); *S&S Pharmacy, Inc., d/b/a Platinum Pharmacy & Compounding*, 78 FR 57656 (2013) (“affirming” the ISO after addressing the merits, noting the existence of a federal court order that the registration be forfeited, stating that there is neither a registration to revoke nor an application to act upon, and ordering forfeiture of all seized controlled substances); *Darryl J. Mohr, M.D.*, 77 FR 34998, 34999 (2012) (“affirming” the ISO when Respondent allowed his registration to expire after the ALJ issued his recommendation that it be revoked, and finding the allegations “off the table” despite Respondent’s and DEA counsel’s arguments against mootness).

<sup>15</sup> “Any suspension shall continue in effect until the conclusion of all proceedings upon the revocation or suspension, including any judicial review thereof, unless sooner withdrawn by the Administrator or dissolved by a court of competent jurisdiction.”

<sup>16</sup> There is no indication that the Administrator adopted any part of the ALJ’s recommended decision even though it is attached in its entirety.

both Parties an opportunity to resolve the evidentiary issues, as well as prejudice the public interest. Additionally, there is no indication that Respondent intends to suspend her medical practice or not seek restoration of her registration.” *Id.* at 41,068.

Less than a week after publication of *Odette L. Campbell*, the then-Administrator again “affirmed” an ISO and ordered the immediate forfeiture of all seized controlled substances.<sup>17</sup> The practices of dismissing OSCs when the registration at issue was allowed to expire, and “affirming” ISOs when controlled substances had been seized and required a final disposition, continued.<sup>18</sup>

While I may find a proceeding moot in appropriate situations, the Government has cited no legal authority requiring me to do so when a registrant/respondent has allowed the registration at issue in an ISO/OSC to expire before issuance of a final decision. It is imperative to handle such expired registrations in a manner that is consistent with the Constitution, applicable legal authority, and sound law enforcement policy.

The U.S. Constitution does not mandate that I find mootness when a registrant/respondent allows the registration subject to an ISO/OSC to expire before issuance of my final decision. According to the case law, mootness is a product of Article III of the Constitution and the judicially-created prudential rules for federal courts. As the D.C. Circuit stated concerning Article III courts and mootness, the history of federal courts’ refusal to hear moot cases traces back to the common law notion that courts lack power to decide abstract questions when no dispute exists. *Tennessee Gas Pipeline v. Federal Power Comm’n*, 606 F.2d 1373, 1379 (D.C. Cir. 1979). More recently, also according to the D.C. Circuit, this “prudential rule has been raised to constitutional proportion, based specifically on the case or controversy requirement of Article III.” *Id.*

The D.C. Circuit cited the need for a “present, live controversy” to ensure avoidance of “advisory opinions on abstract propositions of law.” *Id.* It noted that the “case or controversy

<sup>17</sup> *Syed Jawed Akhtar-Zaidi, M.D.*, 80 FR 42,962 (2015).

<sup>18</sup> *Perry County Food & Drug*, 80 FR 70084 (2015) (affirming the ISO after taking official notice of a late-filed renewal application and vesting all right to forfeited controlled substances in the United States); *Victor B. Williams, M.D.*, 80 FR 50029 (2015) (dismissing the OSC as moot); *AIM Pharmacy & Surgical S. Corp.*, 80 FR 46326 (2015) (dismissing the OSC as moot).

requirement preserves the separation of powers by ‘assur(ing) that the federal courts will not intrude into areas committed to the other branches of government.’” *Id.* Finally, it noted that the mootness doctrine’s purpose also includes “limit[ing] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.” *Id.*

Administrative agencies, such as DEA, however, do not exist by virtue of Article III. According to the D.C. Circuit, the different constitutional origins of Article III courts and administrative agencies mean that mootness does not play the same role in administrative agency adjudications as it plays in Article III court proceedings.

The subject matter of agencies’ jurisdiction naturally is not confined to cases or controversies inasmuch as agencies are creatures of [A]rticle I. Though agencies must act without arbitrariness, . . . still agencies are generally free to act in advisory or legislative capacities. While this is obvious in the case of rulemaking, it is also true where an agency proceeds via traditional adjudicatory forms of decision. Thus the Commission correctly observes that an agency may, if authorized by statute, issue an advisory opinion or abstract declaration without regard to the existence of an actual controversy. The . . . [APA] expressly permits such practices: The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

*Id.* at 1380 (citing 5 U.S.C. 554(e)); see also *Climax Molybdenum Co. v. Sec’y of Labor, Mine Safety and Health Admin.*, 703 F.2d 447, 451 (10th Cir. 1983) (“At the outset, we note that an administrative agency is not bound by the constitutional requirement of a ‘case or controversy’ that limits the authority of [A]rticle III courts to rule on moot issues.”).<sup>19</sup>

More recently, the Tenth Circuit, citing the D.C. Circuit, reaffirmed that administrative agencies are not bound by the constitutional requirement of a

<sup>19</sup> Federal courts’ recognition that Article III and judicially created gateway prudential rules are not binding on administrative agency adjudications not only applies to mootness, but also applies to advisory opinions and declaratory orders. *Americans for Safe Access v. Drug Enf’t Admin.*, 706 F.3d 438, 443 (D.C. Cir. 2013) (“An administrative agency, which is not subject to Article III of the Constitution . . . and related prudential limitations, may issue a declaratory order in mere anticipation of a controversy or simply to resolve an uncertainty.” (citing *Pfizer Inc. v. Shalala*, 182 F.3d 975, 980 (D.C. Cir. 1999))); *Metropolitan Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1161 (D.C. Cir. 1995) (“[A]n agency may issue a declaratory order to terminate a controversy or remove uncertainty.”).

“case or controversy” that limits the authority of Article III courts to rule on moot issues. *RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1267 (10th Cir. 2000). Further, according to the Tenth Circuit, an agency has “substantial discretion” to decide moot issues. *Id.* In exercising this discretion, according to that Court, the agency should be guided by two factors: “(1) whether resolution of the issue is the proper role of the agency as an adjudicatory body; and (2) whether concerns for judicial economy weigh in favor of present resolution.” *Id.* (citing *Climax Molybdenum Co.*, 703 F.2d at 451).

Even as to Article III courts, however, the Supreme Court rejected the strict application of mootness in a law enforcement context. In *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953), the parties agreed that “voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot.” 345 U.S. at 632. According to the Court, the controversy that may remain to be settled, even after cessation of the allegedly illegal conduct, is the “dispute over . . . [the challenged practices’] legality.” *Id.* The Court explained that a mootness determination could be appropriate, but only if the defendant met the “heavy” burden of demonstrating that “there is no reasonable expectation that the wrong will be repeated.” *Id.* at 633. Otherwise, because “say[ing] that the case has become moot means that the defendant is entitled to a dismissal as a matter of right, . . . [t]he courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.” *Id.* at 632. The application of mootness, therefore, even by Article III courts, is not always appropriate.

I consider robust law enforcement and public safety to be paramount as I enforce the CSA, lead those who serve this Agency’s mission every day, and guide the registrant community’s compliance with the law.<sup>20</sup> As a

<sup>20</sup>In *Gonzales v. Oregon*, the Supreme Court addressed the scope of the CSA. 546 U.S. 243, 248–49 (2006). The case was filed after the U.S. Attorney General issued an Interpretive Rule stating that using controlled substances to assist suicide is not a legitimate medical purpose and, therefore, unlawful under the CSA. *Id.*

In ruling for Oregon, the Supreme Court stated that the main objectives of the CSA are to combat drug abuse and to control the legitimate and illegitimate traffic in controlled substances. *Id.* at 250. To accomplish these objectives, the Supreme Court stated, the CSA “creates a comprehensive, closed regulatory regime criminalizing the unauthorized manufacture, distribution, dispensing, and possession” of controlled substances. *Id.* (citing *Gonzales v. Raich*, 545 U.S.

corollary, it is inconsistent with robust law enforcement and public safety to allow a registrant/respondent “such a powerful weapon against public law enforcement” by allowing the registration at issue to expire and thereby bringing about the termination of ISO/OSC proceedings without a final decision. *Id.* Adjudicating OSCs/ISOs to finality allows DEA personnel to focus on conducting the most effective and efficient law enforcement work possible without the distraction of having to maneuver around the possibility of a mootness dismissal simply because they detected possible registrant wrongdoing too close to the expiration date of the registrant’s registration.

Further, final adjudications are particularly helpful in supporting the purposes of the CSA and my responsibilities to enforce the CSA because nothing in the CSA prohibits an individual or an entity from applying for a registration even when there is a history of being denied a registration, or a history of having a registration suspended or revoked. As such, having a final, official record of allegations, evidence, and the Administrator’s decisions regarding those allegations and evidence, assists and supports future interactions between the Agency and the registrant or applicant. Thus, these records and final decisions also support and facilitate my responsibilities under the CSA.

Next, concerning the regulated community as a whole, a final adjudication is a public record of the Agency’s expectations for current and prospective members of that community. Such a record helps all current and prospective registrants comply with the CSA and avoid ISOs/ OSCs. Further, similar to what has already been suggested, a final reviewable, or reviewed, decision provides the Agency, the registrant, and current and prospective members of the registrant community the additional benefit of circuit court correction and imprimatur. Circuit court review, and the lapsed possibility of circuit court review, enhance the authoritativeness of Agency decisions for all concerned.

Further, final adjudications inform the Executive Branch, the Legislative

1, 12–13 (2005)). The Court noted that part of this regime requires a physician, who wishes to prescribe controlled substances, to obtain a registration from the Attorney General, a function the Attorney General delegated to the DEA Administrator. *Oregon*, 546 U.S. at 251. The decision whether to issue, deny, suspend, or revoke a registration involves an evaluation of whether the physician’s having, or continuing to have, a registration is consistent with the public interest or is appropriate under other circumstances that the CSA articulates. *Id.*; see also 21 U.S.C. 823 and 824.

Branch, and the public about the Agency’s work, the CSA’s provisions, and the Agency’s CSA-related law enforcement activities. Final adjudications supply information to support those stakeholders’ duties and responsibilities concerning drug law enforcement. The stakeholders may then provide feedback to the Agency based on this information, thereby helping shape how the Agency carries out its responsibilities.

Lastly, final adjudications provide continuing education for all DEA personnel and help coordinate law enforcement efforts. They support efficient communications among law enforcement personnel because they contain information critical to how DEA personnel and their law enforcement partners are expected to meet law enforcement challenges and implement solutions.

In this matter, both an ISO and an OSC are at issue. Registrant’s Request makes clear that he has a “genuine overriding desire [to] be able to practice medicine once again.” Registrant’s Request, at 6. His decision to let his registration expire, therefore, does not reflect a commitment to leave the medical profession. After being served with OSC 1 and voluntarily surrendering it, Registrant applied for another registration. There is nothing to stop Registrant from doing the same in the future. Thus, I shall adjudicate OSC 2 to finality.<sup>21</sup> I reject the Government’s suggestion that this proceeding be dismissed as moot.<sup>22</sup>

I make the following findings of fact.

## Findings of Fact

### *Registrant’s DEA Registrations*

Registrant was previously registered with the DEA as a practitioner in schedules II through V under DEA COR BO2524204 at 901 Dover Drive, Suite 123, Newport Beach, California, 92660. GX 31 (Sworn DI Declaration dated October 21, 2016), at 2.

This COR was suspended pursuant to an Immediate Suspension Order, dated March 15, 2016 (OSC 1). *Id.* On March 18, 2016, after the Government served Registrant with OSC 1, he surrendered that COR. GX 17.

<sup>21</sup>The input that Registrant provided about his situation in Registrant’s Request does not control my analysis. Nevertheless, inasmuch as it indicates Registrant’s desire to practice medicine again, it certainly supports my decision to adjudicate OSC 2 to finality.

<sup>22</sup>At this time, I see no reason why my analysis of the constitutional origins of administrative agencies and of federal and Agency decisions addressing mootness would set me on a different course if, in the matter before me, only an OSC were at issue.

On May 20, 2016, Registrant submitted an application for a new COR. GX 18. Registrant answered in the negative to Question Two on the application, which reads “[h]as the applicant ever surrendered (for cause) or had a federal [COR] revoked, suspended, restricted or denied, or is any such action pending?” *Id.* Subsequently, on June 8, 2016, Registrant was issued a new COR, FO6043638, as a practitioner in schedules II through V at the registered address of 901 Dover Drive, Suite 123, Newport Beach, California, 92660. GX 25 (Registrant’s COR), at 1.<sup>23</sup>

On August 2, 2016, DEA issued OSC 2 concerning COR FO6043638. OSC 2, at 1. OSC 2 incorporated and attached OSC 1, and therefore, the facts included herein are derived from both OSC 1 and 2. *See* OSC 2, at 2; *see also* GX 26, at 7–12 (OSC 1).

#### *The Investigation of Registrant*

##### Undercover S.M.

On August 27, 2013,<sup>24</sup> an Irvine, California Police Department law enforcement officer acting in an undercover capacity (hereinafter, S.M.) visited the Registrant at his office and asked for an appointment, but was told that none was available. GX 31, at 2. Registrant asked S.M. whether he had “documentation to validate his injury,” and S.M. responded in the negative. *Id.* The Registrant then told S.M. that “the fee for an appointment would be \$400 if [S.M.] required a Schedule II medication.” *Id.* On August 29, 2013, S.M. returned to the office, where Registrant gave him a short physical examination for his “arm pain and numbness.” *Id.* They discussed S.M.’s lack of health insurance and lack of medical documentation and x-rays or MRIs, and Registrant urged S.M. to get an x-ray, but “[e]ventually, [Registrant] agreed to prescribe hydrocodone, stating that it ‘would still be crazy for me to do, but just cause I feel bad that you were here and I asked you to come back.’” *Id.* Registrant wrote a prescription for 30-ten milligram tablets of hydrocodone with one refill, which S.M. filled the

next day, and refilled on September 10, 2013. *Id.*

On September 24, 2013, S.M. visited Registrant at his office and audio recorded the interaction, which the Government provided along with a transcription certified by the DI. GX 2 (Transcription of Undercover Visit); GX 31, at 2; *see also* GX 1, at audio Enclosure 14 olson uc buy walk 9–24–13. S.M. told Registrant that he had “been taking the Roxys,<sup>25</sup>” and when Registrant asked him who prescribed them, S.M. told him “I’ve been taking them but not prescribed.” GX 2, at 2. Registrant then referred S.M. to a radiologist to obtain x-rays, and S.M. asked, “Am I able to get another set of Norcos in the meantime until I can get in?” *Id.* Registrant responded, “Uhhhh, yeah, yeah, yeah I’ll do that.” *Id.* However, when S.M. asked Registrant for “Roxys,” in addition to the “Norcos,” because the Roxys might show up on his drug test for a job interview, Registrant refused stating, “[I]t’s pretty liberal of me to even prescribe the pain medication without any real strong diagnosis,” and then described the scrutiny that he was under for controlled substances prescriptions. *Id.* at 4–5. When writing the prescription for the Norco, Registrant asked, “[H]ow many did I give you last time?” *Id.* at 7. S.M. replied, “I think you gave me 30 and a refill.” *Id.* S.M. received the prescription from Registrant for Norco, which he filled on September 25, 2013, and refilled on November 6, 2013. GX 31, at 3; *see also* GX 3 (prescription from Registrant to S.M. for a quantity of 30 “Norco tabs” 10 milligrams with one refill).

In sum, regarding S.M., I find that Registrant prescribed hydrocodone, or Norco, to S.M. on two different occasions with two refills, based on a minimal physical exam, without x-rays or pain assessments and knowing that S.M. was taking controlled substances that had not been prescribed.

##### Confidential Source K.B.

On February 13, 2015, a confidential source, K.B., audio/video recorded a visit with Registrant, a copy of which the government provided along with a transcription certified by the DI. GX 5 (Transcription of recorded interaction with K.B.); *see also* GX 1, at 02–13–uc–video.001 and 002. Registrant stated that he was “selective of taking new patients,” because “there’s a lot at stake

. . . particularly for the doctor,” so he had “to be really confident in who [he] take[s] . . . because [his] future is in their hands as well.” GX 5, at 2. K.B. told Registrant that she had “previously obtained prescriptions for controlled substances from a physician whose prescriptions had been declined by her pharmacy.” GX 31, at 3; GX 5, at 3. When K.B. told Registrant that she was on oxycodone and Xanax, he said, “See, it’s just, the more patients that I have that are on oxycodone, just the more attention I get from the DEA.” GX 5, at 5. K.B. identified the source of pain as being in her neck and shoulder, but the medical records she produced were for her lower back. *Id.* at 6–7. In response to Registrant’s questions about whether the pain was in her neck or her back, K.B. stated “[d]epends” and “[i]t’s up and down.” *Id.* at 10. Registrant stated that “sometimes people will come in and they think that the more painful things that they have, the more likely it would be that the [doctor]<sup>26</sup> would continue them on medications—that’s really not the case.”<sup>27</sup> *Id.* When K.B. repeated that her pain was in her shoulder and lower back, Registrant replied, “That’s my—that’s the point—you’ve got to be careful when you—doctors just kind of shut you out if you talk about too many spots.” *Id.* K.B. then said, “My shoulder more than my back,” but admitted that she did not have an MRI on her shoulder. *Id.* at 11, 13. Registrant asked K.B. to perform some basic movements and describe whether they hurt and stated, “See your range of motion is pretty good.” *Id.* at 11–12. The video recording demonstrated that Registrant remained behind his desk for his brief requests to K.B. to demonstrate movement of her arms and neck. GX 1, 02–13–uc video.001, at 29:52–30:45. Registrant told her that she needed an MRI on her shoulder despite her difficulty with insurance, because “[t]hey hold me to a standard of medical care . . . and so—I’m just exposed that way . . . unless people can find ways to at least get the minimum.” GX 5, at 14. Registrant continued stating, “Well . . . that’s the thing . . . you have a legitimate reason, but according to what you say . . . this MRI is kind of soft for . . . being on oxycodone—for long term.” *Id.* at 15.

<sup>23</sup> As noted previously, this COR expired on December 31, 2018. *See* GX 25.

<sup>24</sup> Although there is no supporting documentation demonstrating this encounter or the resulting prescription, nor any basis in the declaration for the DI’s knowledge of the encounter, I have no reason to doubt the veracity of the DI’s sworn Declaration, nothing in the record contradicts the DI’s Declaration, and further, the encounter the DI Declaration describes is consistent with the audio recording and transcript of the September 24, 2013 encounter in GX 1 and 2; therefore, I find the events as described by the DI to be facts.

<sup>25</sup> The DI’s Declaration asserts that “Roxys” refers to “Roxycodone, a brand name for the generic Schedule II controlled substances, oxycodone.” GX 31, at 2.

<sup>26</sup> Based on my review of the audio recording, I find that the transcription occasionally contains a scrivener’s error in using “Olsen” instead of “doctor.” *See, e.g.,* GX 1, 2015–02–13\_uc\_video.001, at 28:27.

<sup>27</sup> Throughout the transcripts, the DI used ellipses to depict pauses in the conversation. I have removed these and replaced them with dashes to prevent confusion between pauses and omissions of words from the quotations.

Registrant asked her if she had taken any other “meds” for “anxiety or depression,” and she responded that she was currently taking 2 milligrams of Xanax. *Id.* at 18. Later in the appointment, Registrant determined the dosage and quantity of the drugs he prescribed based solely on what K.B. requested. GX 5, at 22, 29; *see also* GX 31, at 3. Registrant also advised K.B. to not fill her prescription at a big chain pharmacy, because they “will just give you a big problem.” GX 5, at 29. While appearing to fill out her prescriptions, Registrant asked K.B. if she had ever been seen by a psychiatrist for [her] anxiety; she responded, “Yeah—I don’t think I have.” *Id.* at 29–30. As a result of this visit, Registrant prescribed K.B. 120 thirty-milligram tablets of oxycodone and 60 two-milligram tablets of alprazolam. GX 31, at 3; *see also*, GX 4, at 1 (copy of oxycodone and alprazolam prescriptions).

On March 9, 2015, K.B. returned to Registrant, and during an audio/video recorded conversation, she requested an increased dosage of oxycodone. GX 7, at 2. This visit was audio/video recorded, which the Government provided along with a transcription certified by the DI. GX 7, at 2 (transcript); *see also* GX 1, 17 UC 3.9.15 Olsen 3–9, 3–9(2). Registrant discussed surgery, which K.B. said she would consider after she could get insurance. GX 7, at 3. When asked, she told Registrant that she normally took 120 oxycodone, presumably, each month, and when he asked why she wanted “to go up,” she told him that she “need[ed] it.” *Id.* at 2. Registrant stated, “Well, I’ve been giv[ing] you 120 so I could give you 180,” to which K.B. replied, “Perfect. And then I don’t know if you do, do you do ADD?” *Id.* at 4. They discussed whether K.B. had taken Adderall before, and she said that she had, and that she wanted to try it because the oxycodone made her tired. *Id.* Registrant replied, “[I]t’s just kinda hard on the body being on an opiate and then a stimulant as well,” but he acquiesced. *Id.* K.B. reminded Registrant when writing the prescription to “put the Xanax on the one too” and “any chance you could go up to 90 on that?” referring to the prescriptions he was writing. *Id.* at 6; *see also* GX 1, 17 UC 3.9.15 3–9(2). Registrant told her that he “sure hate[d] to prescribe a lot of Xanax,” and she replied that she usually took it before bed to calm herself down. GX 7, at 6. Registrant told her “Xanax with oxycodone has been red flagged as associated with overdoses.” *Id.* Later, Registrant was determining how much Adderall to prescribe and he said, “Since I’m just starting you, I’ll give

you—uh—I think there’s 10, 20, and 30. . . .” K.B. replied, “I was doing 30’s once a day.” *Id.* at 10. Although Registrant expressed some concern about the potency, he prescribed K.B. thirty 30-milligram tablets of Adderall, one hundred and eighty 30-milligram tablets of oxycodone; and sixty 2-milligram tablets of alprazolam. GX 6 (copy of Adderall, oxycodone, and alprazolam prescriptions dated March 9, 2015).

In sum, regarding K.B., I find that Registrant repeatedly prescribed to K.B. multiple controlled substances, with limited physical examination, without assessing her pain or verifying the injuries, and in spite of drug seeking behavior.

Confidential Sources K.B. and J.W.

On April 9, 2015, K.B. returned to see Registrant, along with J.W., another confidential source. GX 10, at 1. This visit was audio/video recorded, which the Government provided along with a transcription certified by the DI. GX 1, at 2015–4–09\_uc\_video.001 and 002 (video); GX 10 (Transcription of recorded interaction with K.B. and J.W.). After introductions, Registrant reviewed K.B.’s prescriptions stating, “[W]e have oxycodone, Xanax, and Adderall.” *Id.* at 1–3. K.B. asked him, “[C]an we go . . . up to 200?” *Id.* at 4. Registrant answered, “No—I don’t want to go up.” *Id.* He told K.B., “[Y]ou have to set out the number you are going to allow yourself to have that day . . . and do it that way—otherwise you will always take more.” *Id.* K.B. told Registrant, “It just kind of helps me sleep,” and he responded, “Now—I get that, but . . . you’re taking the Adderall, so that’s going to work against that . . . and then you have the alprazolam should help you sleep.” *Id.* She then asked for something she could take “for sleeping.” *Id.* at 5. He responded, “[S]ee the thing is—you’re on three very big time drugs . . . [n]ow just to throw in another one.” *Id.* at 6.

K.B. then told Registrant she was taking the Adderall twice a day, and he noted “I’m only giving you thirty—‘[o]ne a day,’” and she admitted that she had been running out. *Id.* at 7. She replied, “I feel like when I was taking two it was good.” *Id.* Registrant advised her to break the Adderall in half, taking one-half in the morning and half at noon, and “shift [the Xanax] later.” *Id.* at 7–8.

Registrant then asked when she was taking the Xanax and she told him “first thing in the morning.” *Id.* at 8. He questioned why, and she said it made her “mellow.” *Id.* Finally, he told her, “I don’t really want to add another drug

. . . to this.” *Id.* at 10. K.B. agreed to “just do what we’re doing—[k]eep it simple.” *Id.*

Registrant told her that because she was “a new patient” she had to “stay in—the directions,” because it was “too dangerous” to have “people run out early—and having you—calling.” *Id.* He then counseled K.B. that one of the pitfalls of “medications is—um—you kind of start living like you should be in the mood to do everything—that you do,” and that “this kind of a “regimen[] kind of speaks to that—that—you also have to just kind of make yourself do stuff . . . [c]onsistently—or you don’t—mature really.” *Id.*

Registrant then asked K.B., “How’s your shoulder?” to which she responded, “Better.” *Id.* at 11. He then apologized for “lecturing” her. *Id.* at 11.

At this point, J.W. told Registrant that she went to school with K.B., and that K.B. “has failed to mention too is like—there has been a couple times where she has allowed me—cause I deal with anxiety, too—as well.” *Id.* at 11. Registrant then broke in and said, “She’s sharing her medicine.” *Id.* J.W. affirmed and told Registrant that the Xanax was helping her too and she didn’t want K.B. “to take all the heat for it.” *Id.* at 11, 12. J.W. also said, “So she’s been sharing some of the meds and like I’m an ex dancer as well—so like—I have some injuries, so it’s not just like—[K.B.] has been burning through everything.” *Id.* at 12. Registrant replied, “I guess I should have expected that . . . sometimes I’m a little naïve.” *Id.* J.W. then told Registrant she had injuries and asked if Registrant would consider “taking [her] on separately . . . since [she was] already here . . . .” *Id.*

Registrant stated, “[I]t is a good way to do it, I have to admit—is have somebody who I’ve seen bring in someone else and sort of endorse them—but no I just kind of met you.” *Id.* K.B. protested that they were “going on three months now,” and J.W. and K.B. then joked about relationships and told him they had brought “extra money, so we can pay you a little bit more—we’ll give you \$800.” *Id.* at 12–13. Registrant answered, “No I don’t want—I don’t want to get into doing that,” but then asked J.W. if her issues were “primarily anxiety? Or [p]lain?” *Id.* at 13. J.W. answered, “Both,” and agreed that they were similar problems to K.B. *Id.* J.W. told Registrant the Xanax was “good for [her]” at night, because she waitressed so she got “tense” (Registrant’s interrupted with the word), and then she discussed her ankle pain, which she claimed was caused by a fractured ankle in a skydiving accident several years before. *Id.* at 13–17.

Registrant asked if she was “taking medication?” *Id.* at 17. J.W. said she was taking “like probably 1 or 2,” and when Registrant asked if she was dependent on it she said, “No.” *Id.* K.B. told him, “She just doesn’t want to get it off the street,” and Registrant warned them that “strong pain medication like oxycodone is a way that you get kind of lured in.” *Id.* J.W. told Registrant that she could “have a bottle of prescription and not even touch it,” but since living with K.B., she “would just like dip into hers.” *Id.* at 18.

Registrant told K.B., “I know you kind of run out—but we found it’s another reason too,” and warned “it’s never a good thing when early and people are taking more than they should—or they run out.” *Id.* He then told them he had to focus while writing up the prescriptions. *Id.* at 19. After prompting from K.B., Registrant asked J.W. to fill out an initial visit form and one that “looks like a little contract.” *Id.*

Registrant asked K.B., “I’ve just been giving you one month at a time, right?” *Id.* at 23. She affirmed and asked, “Now if I wanted [two] refills or something like that, do I pay you more—or?” *Id.* at 24. Registrant responded, “This is what I do—I will do two months at a time and you just pay me a second \$100 for the second month.” *Id.* He explained that he would give a second prescription “to save people time and hassle coming in to see me,” but then added that “it’s not like I’ll do it for free—I still ask that they pay for the \$100 coverage for that month . . . because I still have to do everything that goes into covering these scripts—like they will call and verify and it’s . . . [i]t’s a big deal.” *Id.* Then he added, “[A]lthough to tell you the truth, that’s where I sometimes have problems. People do as they should, submit the second prescription when it’s time to submit it . . . Because pharmacies are on the lookout as well—they don’t want people getting their medication early.” *Id.* at 25.

Registrant also said, “[O]nce I get to know you, I’ll give a person more leeway. I’ll even go a third month as long as everything has been ok and you know I feel like I can trust you . . . then you know I’ll just work with you so that you get—you[re] covered.” *Id.* at 26.

Registrant asked J.W., “[W]hich ankle is it?” and “that’s by far the worst pain?” *Id.* at 31. J.W. told him she had a neck injury, too, from a back handspring accident, and that she had had an MRI that was “probably” in her files at home. *Id.* at 31–32. Registrant told her he would “love to see that” and it would be very helpful to see “x-rays of [her] ankle—just some of the background of [her] injuries.” *Id.* at 32.

He added, “In fact it’d be essential.” *Id.* He asked when the injuries occurred, and about the symptoms of her neck injury, and if she had any other medical problems. *Id.* at 32–35. When Registrant repeated that J.W. had “been using some of [K.B.]’s oxycodone,” J.W. responded, “Yeah, oxycodone, her Xanax and I’m taking Adderall for studying too.” *Id.* at 35.

Registrant told J.W. he had to “decide where to start [her] in terms of medication . . . you want to take as little as you can get by with—first of all—that’s just important.” *Id.* at 36. He added he was going to start her off at 15mg strength oxycodone, because the 30 mg was “the strongest pain pill you can take” and “for [him] to just start [J.W.] off on that would be bad medicine.” *Id.*

K.B. suggested “15 and then 60?” and Registrant stated, “So I give you the 15 and I’ll give you like 60 of them, so you can have the—you know—one to two as needed . . . and we’ll just see how it goes with that.” *Id.* at 37. While writing J.W.’s prescription, Registrant told her he was “going to put your neck injury here—it’s just—it’s more of a potentially serious injury.” *Id.* at 39. J.W. replied, “Ok—whatever you think is best—I trust you—whatever you tell me to do.” *Id.* He added that he chose “the 15mg, cause most pharmacies will have that—oh, if they have oxycodone, they’ll have this one.” *Id.* He then decided to give her 90 [tablets] to start instead of 60, because it “gives you a little bit more value for your money.” *Id.*

K.B. asked if Registrant could mail a prescription for a second month (presumably of oxycodone), and they agreed K.B. could pay for the prescription at this visit and Registrant would mail the prescription to her. *Id.* at 41.

Registrant then turned to the Adderall prescription for J.W., and she said, “It helps with school—it really does.” *Id.* He told J.W. that he would “give [her] 30 of those and just take ½ to 1 tab.” *Id.*

J.W. then left the office to use the bathroom, and after chatting a bit, Registrant asked K.B. (presumably referring to J.W.) “[S]he takes the alprazolam, right?” *Id.* at 43. K.B. answered, “Yeah—I’d do like 60,” and Registrant replied, “Yeah—thanks.” When J.W. returned, he told her he was giving her “the one milligram Xanax—rather than the 2,” because he was starting her off. *Id.* at 43–44. Registrant finished writing prescriptions for both women, which he gave to J.W. and told her “just be really careful with the medication—just really respect it.” *Id.* at 47.

Registrant issued to J.W. a prescription dated April 9, 2015, for 90 oxycodone 15mg, listing the diagnosis as “Dx Cervical Disk.” GX 8, at 1. He also issued her a prescription for 30 Adderall tabs 30mg, listing ADHD as the diagnosis, and a third prescription for 60 alprazolam 1 mg, listing the diagnosis as “Anxiety/Insomnia” and authorizing 1 refill. GX 8, at 2–3.<sup>28</sup>

At the same visit, Registrant issued a prescription to K.B. for 30 Adderall tabs 30mg with a diagnosis of “Rotator Cuff/ADHD.” GX 9, at 1. He also issued a single prescription, with the diagnosis of “Rotator Cuff Tear [L] Shoulder,” which included 180 oxycodone 30 mg, and 60 alprazolam 2mg for “Severe Anxiety/Insomnia.” *Id.* at 2. On the same date, April 9, 2015, Registrant issued to K.B. another prescription for 30 Adderall 30mg for “Attention Deficit Dys,” which includes a note “Release date April 30, 2015.” GX 11, at 1. Registrant wrote another prescription, also dated April 9, 2015, and noting “Release April 30, 2015,” for 180 oxycodone 30mg for “severe pain,” 60 alprazolam 2mg “PRN Anxiety,” and 60 Naproxen 550 “PRN Inflammation/Pain” with a diagnosis “C/S Disk [ ] Rot Cuff Tear [.]” *Id.* at 2. The Government’s evidence also includes a copy of an envelope bearing a postmark of April 17, 2015, Registrant’s name and return office address at 901 Dover Drive, Suite #123, Newport Beach, California, and addressed to K.B. in Las Vegas, NV 89101. GX 12. Although the DI does not state the origin of the envelope, at the undercover meeting, K.B. discussed Registrant mailing her second prescriptions. *See* GX 10, at 45.

On April 28, 2015, J.W. returned to Registrant’s office alone. This visit was audio/video recorded, which the Government provided along with a transcription certified by the DI. GX 14 (Transcription of recorded interaction with J.W.); *see also* GX 1, 24 UC 4.28.15, 0431.001–003. Registrant greeted her and asked, “How’d it go with the medication the past few weeks?” GX 14, at 1. J.W. replied that it “went well” but then told him that K.B. had left town, and J.W. “gave [K.B.] some of [J.W.’s] because she ran out before she left and she didn’t know if she’d be able to get the script from [Registrant] . . . That’s why [J.W.] came in so much earlier for a refill.” *Id.* Registrant said, “Right . . . I owed her one.” *Id.*

<sup>28</sup> Registrant did not include an address on any of the prescriptions to K.B. or J.W., which would constitute a violation of 21 CFR 1306.05(a), but neither OSC alleged this violation, so I am not basing my findings on these violations. *See e.g.*, GX 8, GX 11, GX 13.

She told him she was taking the “smaller Oxy’s” and was taking them more often, and asked, “[I]s there any way just so I won’t have to take them as frequently?” *Id.* at 3. Registrant replied that it was “bad form to start with the highest dose” in the initial prescription, but he could “bump it up now.” *Id.* Registrant then stated he had given her “90 last time so I’ll give you 90 of the 30 milligram.” *Id.* at 5. J.W. repeated that she had given K.B. “half of them before she left town.” *Id.* Registrant said, “I see,” but added he had already written “the 90” and that he “still owe[d] her,” but that he thought the prescriptions were sent out. *Id.* He added, “And um you guys can just settle up.” *Id.*

Registrant then inquired, “[s]o the [o]xycodone and then the Adderall and the alprazolam, right?” to which J.W. agreed. *Id.* at 6. He told her he was giving her 30 tablets of 30-milligram Adderall, which “is the max dose” and 1 milligram of Xanax. *Id.* at 7. J.W. said she thought [K.B.] got “the 2’s” and began to ask if Registrant “fe[lt] comfortable with, sorry, I hope you don’t mind . . .” *Id.* Registrant interrupted, “No, it’s okay I don’t mind. It’s just when you first write a prescription for somebody it just looks bad to like hit them with the highest dosage.” *Id.* at 8. Finally, Registrant told her she owed “just 100” and that the \$400 was just the initial fee. *Id.* at 11. He also told her that he didn’t “put a refill on the [a]lprazolam,” because he would need to see her the following month. *Id.* He took a picture of the prescriptions using his cellphone, which he said he forwarded to his daughter, “so she can validate them with the pharmacist.” *Id.* at 11–12.

J.W. then asked for a receipt, and if she could “come back a little earlier than the month,” if she needed to. *Id.* at 12–13. Registrant agreed that J.W. had “a little bit of [a] situation,” likely referring to the uncertainty of K.B.’s return, and added, “I’ll take care of you.” *Id.* at 13. Registrant told her, “100—uh—charge we’re gonna go with cash so . . .” *Id.* at 14. J.W. handed \$100 cash to Registrant, who then obtained her email address to email her receipt, and the visit concluded. *Id.*

The Government’s evidence included copies of three prescriptions issued to J.W. by Registrant on April 28, 2015; one for 90 oxycodone 30mg for a diagnosis of Cervical Disk w/[ ], another for “Anxiety” for 60 alprazolam 2mg tab<sup>29</sup> and the third for “DX-ADHD” for 30 Adderall 30mg. GX 13, at 1–3.

<sup>29</sup> There is no date on this prescription, but the Government did not allege violations of the CSA

On January 20, 2016, J.W. returned to Registrant’s office to obtain refills of her prescriptions. GX 31, at 4; GX 16, at 1–5. This visit was audio/video recorded, which the Government provided along with a transcription certified by the DI.<sup>30</sup> GX 16, at 5 (Transcription of recorded interaction with J.W.); GX 24 (CD containing audio/video recording [Olsen\_Buy\_Walk\_1–20–16.005], transcript and DEA 6—Report of Investigation).

According to the recording and the transcript, Registrant noted that he had not seen J.W. “in a while,” and she told Registrant that she had been living in Monterey and “just came back in town again” and she “usually come[s] back for like 6 months at a time . . . so [she]’ll probably see [Registrant] more regularly now.” GX 16, at 1. Registrant said, “I was giving you before, I guess, oxycodone . . . and alprazolam and Adderall,” and later asked “do you just make these last longer or . . . [d]id you see other doctors?” *Id.* J.W. replied, “Up in Monterey? Yeah, I don’t have any of his stuff on me right now.” *Id.* at 2. Registrant then told her that the other doctor would appear on her CURES (Controlled Substance Utilization Review and Evaluation System) report, and explained that report to her. *Id.* He told her to “be a little careful with that,” but that “it’s fine,” because “[she] didn’t know probably if [she was] going to come back.” *Id.*

Registrant then asked her, “[S]o . . . exactly what I did before—oxycodone 30 mg #90 . . . Alprazolam 2mg #60/ . . . Adderall 30mg[?]” *Id.* J.W. asked, “If you can you give me something that will last me a little longer and then I’ll come back in February—I mean end of February.” *Id.* at 3. Registrant told her he could “give [her] 120 oxycodone” and warned “you just have to be careful.” *Id.* According to the video, while J.W. and Registrant talked, he remained seated behind his desk writing and referring to paperwork. GX 24, at Olsen\_Buy\_Walk\_1–20–16.005 at 26–37. He asked, “Your main pain problem—was it your lower back?” GX 16, at 4. J.W. told him it was an “ankle issue and then a neck as well,” and he responded, “[o]h, cervical is what I put.” *Id.* at 4. He then asked “Does this control your pain pretty well?” and she replied “[y]eah—it’s good for sleeping.” *Id.* He then told her, “It’s \$150,” which she paid and he texted her a receipt. *Id.*

regulations, so I will not include it in my findings of fact.

<sup>30</sup> The oath states that the visit occurred on 4/28/15, but the DI signed and dated the transcription on January 22, 2016, thus I find the date April 28, 2015 to be a scrivener’s error.

at 4–5; *see also* GX 24, Olsen\_Buy\_Walk\_1–20–16.005, at 36:26–37:11.

The Government’s evidence includes copies of three prescriptions issued by Registrant to J.W. on January 20, 2016: “Adderall tabs 30mg #30;” “Alprazolam tabs 2.0mg 60 1 tab . . . severe anxiety;” “Oxycodone tabs 30mg 120 . . . Severe pain (Max 4/day).” GX 15, at 1–3.

In sum, regarding K.B. and J.W., I find that Registrant issued both of them multiple prescriptions for several controlled substances, conducted no physical examinations or pain assessments, changed J.W.’s primary injury to justify controlled substance prescription, and ignored drug seeking behavior for both J.W. and K.B., including that K.B. was sharing her medication and that J.W. had been prescribed unknown quantities of medication by another doctor.

#### B.H. Records

OSC 2 also alleged prescribing below the standard of care for B.H. and M.C., whose medical records were seized as a result of the execution of a criminal search warrant at Registrant’s registered address. <sup>31</sup> GX 31, at 5. From the evidence seized, the DI identified B.H., to whom Registrant had issued prescriptions for controlled substances, including “oxymorphone, carisoprodol, oxycodone, alprazolam, on at least 29 different occasions. For example, [Registrant] issued a prescription for 120-forty milligram tablets of oxymorphone, 180-thirty milligram tablets of oxycodone” and 30 two-milligram tablets of alprazolam on the same day.<sup>32</sup> *Id.* at 6; *see also* GX 20, at

<sup>31</sup> OSC 2 lists the date of the search warrant as March 16, 2016, but the rest of the evidence, including the Declaration and the Registrant’s Voluntary Surrender points to the date as being March 18, 2016. *See* GX 17; GX 31, at 5. I otherwise find the DI Declaration credible that the search warrant was conducted and that it resulted in the seizure of these records, so I am not including the date, but am relying on the submitted evidence.

<sup>32</sup> OSC 2 and the DI Declaration also allege that in addition to these medications, Registrant prescribed “two different prescriptions for 30 two-milligram tablets of alprazolam.” GX 31, at 6; *see also* OSC 2, at 2. OSC 2 states that this transaction occurred on March 16, 2016; however, the Government’s evidence includes only one prescription for alprazolam on that date. GX 31, at 6; *see also* OSC 2, at 2; *but see* GX 20, at 12, 14 (showing one prescription for 60 tablets of 2-milligram alprazolam on February 23, 2016, and one prescription for 30 tablets of 2-milligram alprazolam on March 16, 2016). It appears that the mistake may have been made using the Dr. Munzing’s list of B.H.’s prescriptions, where he includes the correct prescription amounts, but mistook the date for the first 60 tablet prescription. GX 32, at 10. Dr. Munzing makes no further findings related to the double prescription, so I am deeming the error to be nonessential to the Government’s case. Had it been included in the OSC, it appears that B.H. could not have possibly

Continued

16, 18, 14. Additionally, Registrant issued a new prescription for 120 forty-milligram tablets of oxymorphone to B.H. on July 6, 2016, after Registrant surrendered his previous COR following the issuance of OSC 1 and obtained a new COR. *Id.*; see also GX 20, at 19.

The DI also declared that the search warrant did not reveal any record of the “patient’s chief complaint or vital signs,” or “of any medical history or examination,” or “progress notes or treatment plan.” GX 31, at 5. The DI stated that “[e]lectronic records indicated that B.H. was a ‘new patient’ on January 15, 2015, and had been referred by another physician who ‘was working on a plan to get [B.H.] off of meds slowly.’” *Id.* Further, the DI stated that the electronic files included a note about a “dirt bike injury L5 S1” and “previous shoulder surgeries.” *Id.* According to the DI, the only paper records that were found were prescriptions and a pain agreement. *Id.* GX 22 (seized prescription paper records). The Government’s evidence includes prescriptions issued to B.H.<sup>33</sup> for multiple controlled substances on six different dates. See GX 20, at 1, 2 (Prescription for oxycodone, two for oxymorphone, and one for carisoprodol issued August 11, 2015); at 3 (oxycodone November 24, 2015); at 5, 6 (oxymorphone, oxycodone and alprazolam issued December 22, 2015); at 7, 8 (oxycodone, oxymorphone and

exhausted his supply of 60 tablets by taking 2 per day for 22 days (B.H. could have been diverting them), but I make my findings based on the other evidence presented on B.H.

It does appear from the records submitted that Registrant issued two prescriptions on the same day for varying amounts of 40 milligram oxymorphone tablets with no release date, but neither the OSC, nor Dr. Munzing included allegations regarding the double prescribing of oxymorphone, so I will not include it in my findings of fact. GX 20, at 1&2.

<sup>33</sup> In the vast majority of the prescriptions to B.H., the Registrant did not include an address, which would also constitute a violation of 21 CFR 1306.05(a). It also appears that as a result of this empty address, B.H. was able to fill prescriptions from multiple different pharmacies, using different addresses, potentially in an attempt to avoid detection by law enforcement. See e.g., GX 20, at 5&6 (demonstrating that B.H. used two different addresses and two different pharmacies to fill Registrant’s prescriptions dated December 22, 2015). Because the regulatory violation was not charged in either OSC, I am not including that charge in my findings, but OSC 2 does note that B.H.’s utilization of multiple pharmacies to fill his prescriptions was a red flag indicating drug abuse and/or diversion, so I believe that Registrant had adequate notice that the Government was charging him with B.H.’s indications of drug abuse/diversion, one of which is using multiple addresses, and so I include that fact herein.

alprazolam issued January 25, 2016); at 9, 11, 12 (oxycodone and two different prescriptions for oxymorphone and alprazolam issued on February 23, 2016); at 14, 16, 18 (alprazolam, oxycodone, oxymorphone issued March 16, 2016); at 22 (oxycodone issued on July 6, 2016).

In sum, regarding B.H., I find that Registrant issued multiple prescriptions for several controlled substances to B.H., and it appears from Registrant’s records that Registrant did not conduct physical examinations, pain assessments, did not obtain documentation of B.H.’s injuries and ignored red flags for diversion/abuse.

#### M.C. Records

OSC 2 also includes allegations related to prescribing below the standard of care related to M.C. based on the records obtained from the search warrant. OSC 2, at 3. The DI reviewed the prescriptions for M.C. and determined that Registrant had issued prescriptions for controlled substances, including oxycodone, hydrocodone and alprazolam, on 14 different occasions from June 2015 to July 2016. GX 31, at 6. “For example, on February 18, 2016, [Registrant] issued prescriptions to M.C. for 240 thirty-milligram tablets of oxycodone and 180 ten-milligram tablets of hydrocodone” and 90 two-milligram tablets of alprazolam.<sup>34</sup> *Id.*; see also GX 19, at 20, 18, 15. (M.C. prescriptions). Additionally, Registrant issued prescriptions to M.C. for hydrocodone and oxycodone on July 1, 2016, after Registrant had surrendered his first COR and obtained his new COR. GX 31, at 6; see also GX 19, at 22 (prescription). The Government included prescriptions for multiple controlled substances issued to M.C. on six different dates in its exhibits. See GX 19, at 1 (Prescription for hydrocodone and alprazolam issued February 25, 2015); at 2, 4 (oxycodone and hydrocodone June 16, 2015); at 6, 8 (oxycodone and hydrocodone issued August 26, 2015); 10 (testosterone September 21, 2015); at 11, 13

<sup>34</sup> Again, it appears from the evidence that the DI made a mistake about the existence of two prescriptions for alprazolam. See OSC 2, at 3; see also GX 31, at 6. The evidence demonstrates that there was one refill, which might have been the source of the confusion. GX 19, at 17. Once again, there is no finding related to this, nor is there any indication in Dr. Munzing’s declaration, so I am not sustaining any allegation on the double prescription and I am basing my findings on the other uncontroverted evidence.

(oxycodone and hydrocodone issued December 16, 2015); at 15, 18, 20 (alprazolam, hydrocodone, and oxycodone issued February 18, 2016); at 22 (oxycodone and hydrocodone issued July 1, 2016 (after he had surrendered his first COR and obtained a new COR)).

The DI declared that the electronic records for M.C. stated that he was diagnosed with “chronic pain syndrome,” but there were no records of the chief complaint, vital signs, medical history, physical examination, progress notes or treatment plan. GX 31, at 5. The DI included the only three paper records seized related to M.C., which consisted of two prescriptions and a note documenting “chest pain.” *Id.*; see also GX 21 (three paper records on M.C.).

In sum, regarding M.C., I find that Registrant issued multiple prescriptions for several controlled substances to M.C. and it appears from Registrant’s records that Registrant did not conduct physical examinations, pain assessments, did not obtain documentation of M.C.’s injuries and ignored red flags for diversion/abuse.

The Government Expert’s Review of Registrant’s Prescribing to S.M., K.B. and J.W.

Dr. Munzing, the Government’s Expert, is a physician licensed and practicing in the State of California, who has more than three decades of clinical work and who has served as a Medical Expert Reviewer for the Medical Board of California.<sup>35</sup> GX 32, at 1 (Declaration of Dr. Munzing); see also, GX 23 (Dr. Munzing’s Curriculum Vitae). I find that Dr. Munzing is an expert in standard of care for prescribing controlled substances in California and I give his report full credit.

Dr. Munzing concluded, and I agree, that with regard to the controlled substances prescribed to S.M., K.B., and J.W., and M.C. and B.H., Registrant’s actions “were both dangerous and reckless and fell far below the acceptable standard of care in the State of California.” *Id.* at 7 (S.M., K.B., and J.W.); see also 10 (related to M.C. and B.H.). He relied in part on the standard of care in California, as described in the *Guidelines for Prescribing Controlled Substances for Pain* (Medical Board of

<sup>35</sup> Currently named California Department of Consumer Affairs, Division of Investigation, and Health Quality Investigation Unit (“HQIU”). GX 32, at 1.

California November 2014<sup>36</sup>)<sup>37</sup> (hereinafter, “the Guidelines”). *Id.* He declared that the Guidelines state that “at a minimum, a physician must complete a medical history and physical examination.” *Id.* (citing Guidelines, at 9). Dr. Munzing attested that the Guidelines also set the standard that a physician “should perform a psychological evaluation that includes the risk of addictive disorders”; “should establish a diagnosis and medical necessity based on reviewing past medical records, laboratory [studies], and imaging studies”; “should also order new studies if necessary”; should “employ screening tools such as scales that measure pain intensity and interference”; “should also explore non-opioid therapeutic options”; “should evaluate the potential risks and benefits of opioid therapy, remain cognizant of aberrant or drug seeking behaviors, and review CURES data to monitor such behavior.” GX 32, at 7 (citing the Guidelines, at 9–10).

Dr. Munzing also based his conclusions on California law, specifically California Health and Safety Code § 11153(a),<sup>38</sup> which “states that a prescription for [a] controlled substance shall only be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his or her professional practice[.]” *Id.* at 7 (citing Cal. Health & Safety Code § 11153(a) (West 2019)). He also referenced California Health and Safety Code Section 11154(a), which “states

<sup>36</sup> It is noted that these guidelines were published in November of 2014 and Registrant saw S.M. in 2013; however, Dr. Munzing also based his opinion on the Guide to the Laws Governing the Practice of Medicine by Physicians and Surgeon’s 2013, which he identified as the 7th Edition. GX 32, at 8. Upon review of the guide, it does not state a particular date of publication, but the portions of the guide on which he relies are statutory and preexisted 2013. See <https://www.mbc.ca.gov/Download/Documents/laws-guide.pdf>. Because the California laws on which Dr. Munzing relied for his assessment of the standard of care, were in existence at the time of S.M.’s visit to Registrant, I find that the fact that Dr. Munzing relied in part on guidelines that were issued after S.M.’s visit does not affect his overall assessment that Registrant’s prescribing to S.M. was below the standard of care in California. I have not considered Dr. Munzing’s bases that appeared to rely on the 2014 Guide, but I believe that his underlying finding that the prescription was not issued for a legitimate medical purpose and that there was no physical examination as required by California law demonstrates that Registrant’s prescribing to S.M. fell below the standard of care in California. See GX 32, at 5.

<sup>37</sup> Although the Government’s evidence did not include the Guidelines, they are publically available at: [http://www.mbc.ca.gov/Licensees/PrescribingPain\\_Guidelines.pdf](http://www.mbc.ca.gov/Licensees/PrescribingPain_Guidelines.pdf).

<sup>38</sup> In citing the California code sections, Dr. Munzing cited to 1153(a) and 1154(a) instead of 11153(a) and 11154(a); however, I find that this merely to be a scrivener’s error. See G.X. 32, at 7.

that no person shall knowingly prescribe or furnish a controlled substance to any person not under his treatment for a pathology or condition.” *Id.* (citing Cal. Health & Safety Code § 11154(a) (West 2019)). He concluded, and I agree, that Registrant “failed to adequately identify a pathology or condition that would justify the prescribing of controlled substances.” *Id.* Additionally, Dr. Munzing “considered California Business and Profession[s] Code §§ 2242 (prescribing without an appropriate prior examination and medication indication); 2241 (prescribing to a person presenting him/herself as an addict); 2234 (defining ‘unprofessional conduct’ as an act of gross negligence, repeated negligent acts, or incompetence); and 725 (repeated acts of clearly excessive prescribing).” *Id.* at 7.

Dr. Munzing also based his conclusions on the “Guide to the Laws Governing the Practice of Medicine by Physicians and Surgeons” published by the Medical Board of California, 7th Edition 2013 (hereinafter, “the Physician’s Guide”), which, in his opinion, further sets out the applicable standard of care in California. *Id.* at 8. According to him, the Physician’s Guide explains that when prescribing controlled substances for the treatment of pain, a practitioner must perform a sufficient physical examination and take a medical history. *Id.* at 8. (citing Cal. Health & Safety Code §§ 11150, 11154 (West 2019)). “The practitioner must make an assessment of the patients’ pain, their physical and psychological function, and their history of prior pain treatment.” *Id.*

The practitioner must also make an assessment of any underlying or coexisting diseases or conditions and order and perform diagnostic testing if necessary. [Citing the Guide at 57]. Finally, the practitioner must adequately discuss the risks and benefits of the use of controlled substances and any other treatment modalities; periodically review the course of pain treatment or gather any new information about the etiology of the patient or the patients’ state of health, and give special attention to patients, who, by their own words and actions, pose a risk for medication misuse and/or diversion.

*Id.* Finally, Dr. Munzing continued, the Physician’s Guide mandates that a physician should “keep accurate and complete records which document the items listed . . . including the medical history and physical examination, other evaluations and consultations, treatment plan objectives, informed consent, treatments, medication, rationale for changes in the treatment plan or medications, agreements with the

patient, and periodic reviews of the treatment plan.” *Id.* at 8 (citing the Physician’s Guide, at 59). “The [Physician’s] Guide also states, “[p]lain levels, levels of function, and quality of life should be documented.” *Id.* (citing the Physician’s Guide, at 59).

According to his sworn Declaration, Dr. Munzing reviewed the audio recording of S.M.’s undercover visit on September 24, 2013, and a copy of the prescription issued at that visit. GX 32, at 1–2. He concluded, and I agree, that S.M. presented “numerous red flags” for diversion, including that on September 24th, he had specifically asked for “Roxys” and “further indicated he had been taking oxycodone illegally and was afraid it would show up in a drug screen.” *Id.* at 4–5. He also found that Registrant failed to take an appropriate current medical history, review S.M.’s past medical history, and take S.M.’s vital signs. *Id.* at 5. He also opined, and I agree, that Registrant “performed a minimal, substandard physical examination” during the first visit only, that “he failed to determine the patient’s current or past alcohol and/or drug use and/or abuse,” and that “he failed to note the patient’s pain level or functional level.” *Id.* He also noted that no imaging was ordered on the first visit and no prior images were provided to Registrant by the patient, and that “there was no indication that [Registrant] ordered any other tests, made any referrals, explored any alternatives to controlled substances, or checked to see [S.M.’s] prescription history on the state prescription monitoring program CURES.” *Id.* Finally, Dr. Munzing opined, and I agree, that Registrant “prescribed hydrocodone based on feeling sorry for the patient and not for any legitimate medical reason.” *Id.*

Regarding K.B.’s February 13, 2015, and March 9, 2015, appointments, Dr. Munzing concluded, and I agree, that K.M. had demonstrated numerous indicia of diversion, which were ignored by Registrant. *Id.* According to Dr. Munzing these red flags included that: She admitted she had obtained prescriptions that were declined by a pharmacy; she complained of neck and shoulder pain, but the MRI she presented was of her lower back; and, she requested Adderall, a third controlled substance and an increase in oxycodone, without offering any legitimate medical reason on her second visit. *Id.* For both visits, Dr. Munzing determined that Registrant took a minimal, but inadequate current medical history, as well as past medical history; failed to take vital signs; “performed only a minimal, but

inadequate, physical examination” on the first visit (and none on the second visit); failed to determine past alcohol and/or drug use and/or abuse; and failed to note the pain level or functional level. *Id.* No controlled substance agreement was signed, urine drug tests ordered, and there was only “minimal but inadequate discussion about the risks and benefits of controlled substance use.” *Id.* Further, Dr. Munzing concluded that Registrant had not “ordered any other tests, made any referrals, or checked to see the patient’s prescription history on CURES.” The diagnosis of anxiety justifying the prescription for alprazolam, “was not based on any evidence gathered during the visit.” *Id.* Dr. Munzing concluded, and I agree, that the controlled substances prescribed to K.B. on March 9, 2015, “were not prescribed for a medically legitimate purpose.” *Id.* at 6.

Dr. Munzing concluded, and I agree, that on April 9, 2015, J.W. and K.B. demonstrated further indicia of diversion. *Id.* Specifically, K.B. requested an increase in oxycodone and admitted that she had abused the oxycodone that had been prescribed by increasing her dosage. *Id.* J.W. admitted that “she had obtained alprazolam and oxycodone from K.B.” *Id.*; *see also* GX 10, at 11–12. K.B. mentioned that J.W. obtained controlled substances “off the street” and J.W. discussed filling her prescriptions at out-of-state pharmacies. GX 32, at 6; *see also* GX 10, at 17. Additionally, Dr. Munzing concluded, and I agree, that on April 28, 2015, J.W. admitted diverting controlled substances when she stated that she was sharing medication with K.B., and exhibited other drug seeking activity by requesting a higher dose of oxycodone without providing a medical justification, and without providing any documentation of her injuries. GX 32, at 6. Dr. Munzing concluded that J.W. demonstrated further indicia of abuse or diversion that Registrant ignored, including, obtaining controlled substances from multiple providers; asking for an increased quantity of oxycodone; and telling Registrant that oxycodone was “good for sleeping.” *Id.* For all of the visits with J.W., including the joint visit with K.B., Dr. Munzing found that Registrant took no current or past medical history, failed to take vital signs, “performed no physical examination,” failed to determine past alcohol and/or drug use and/or abuse, and failed to note the patient’s pain level or functional level. *Id.* According to Dr. Munzing, no urine drug tests were ordered, and no imaging was provided or ordered. *Id.* Further, Dr. Munzing

determined, “There is no indication that [Registrant] ordered any other tests, made any referrals, or checked to see the patient’s prescription histories on CURES.” *Id.* at 6–7.

Dr. Munzing also reviewed the prescriptions and medical records for M.C. and B.H. that were included in the Government’s evidence and reviewed the CURES reports for these individuals. *Id.* at 8–10. In reviewing the medical records for M.C. and B.H., Dr. Munzing opined that there was no record of any medical history or examination, pain history, progress notes, or treatment plan for either patient. *Id.* at 9, 10. He also found that there was no legitimate diagnosis on which to base the prescriptions. *Id.* at 9 (finding that M.C.’s “chronic pain syndrome” is not a legitimate medical diagnosis); *see also id.* at 10. Furthermore, he identified numerous indicia of abuse and/or diversion, such as, B.H. and M.C. utilized multiple pharmacies, received dangerous prescription cocktails (both received opioids along with benzodiazepines), received high doses of opioid medications. Additionally, B.H. drove long distances, and M.C. did not fill prescriptions until several weeks after they were written. *Id.* at 11.

Dr. Munzing further concluded, and I agree, that Registrant “failed to adhere to the above-described California requirements for prescribing controlled substances for pain,” and that “to the extent that [Registrant] attempted to comply with some of the requirements, his attempts fell far below the acceptable standard of care.” *Id.* at 8 (related to S.M., K.B., and J.W.). He further concluded that Registrant’s “treatment of M.C. and B.H. was both dangerous and reckless and fell far below the standard of care for prescribing controlled substances in the State of California.” *Id.* at 10. He concluded, and I agree, in summary, that it was his “professional opinion that the prescriptions issued to S.M., K.B., J.W., M.C. and B.H. lacked a legitimate medical purpose and were issued outside the usual course of professional practice.” *Id.* at 11.

#### *Allegation That Registrant Issued Prescriptions for Controlled Substances Outside the Usual Course of the Professional Practice*

Having read and analyzed all of the record evidence, I agree with and incorporate the conclusions of Dr. Munzing and find that the record contains substantial evidence that Registrant prescribed controlled substances outside of the usual course of the professional practice in California. *See* GX 32, at 11. In

particular, Dr. Munzing stated that the Guide requires that a practitioner prescribing controlled substances must perform a “sufficient physical examination and take a medical history.” GX 32, at 8 (citing The Guide, at 57). With respect to S.M. and K.B., Registrant conducted minimal physical evaluations on the first visit and no physical evaluation on subsequent visits. *See* GX 31, at 2 (brief physical examination for S.M.); *see also* GX 5, at 11–12 (minimal physical evaluation of K.B.). Moreover, Registrant never conducted a physical examination on J.W. *See* GX 10, 14, 16. The video evidence demonstrates that Registrant spent most of the time during the appointments sitting behind his desk and writing prescriptions. *See* GX 1, GX 24. To the extent that Registrant conducted any physical evaluation on patients B.H. and M.C., it was not documented. *See* GX 21 and 22; *see also* GX 31, at 5. Dr. Munzing stated that the “Guide mandates that a physician should keep accurate and complete records.” GX 31, at 5 (citing to the Guide, at 59). Registrant also failed to complete any documented medical history, treatment plans other evaluations or consultations. *See* GX 31, at 5. Registrant failed to make any progress notes or treatment plans or even assessments of the patients’ pain. *Id.* He only maintained records of pain agreements for two out of the five individuals. *Id.* I find that Registrant failed to meet the standards for prescribing controlled substances in California as to B.H. and M.C.

Further, I find that Registrant ignored signs of abuse and/or diversion. I find that Registrant noticed drug-seeking behavior and failed to address that behavior as the applicable standard of care requires. Dr. Munzing credibly declared that: The 2014 Guidelines require that a physician prescribing controlled substances must “remain cognizant of aberrant or drug seeking behaviors”; the Physician’s Guide mandates that special attention be paid to patients who “pose a risk for medication misuse and/or diversion”; and, with limited exceptions, California state law forbids prescribing to an addict. GX 32, at 7, 8. S.M. asked for specific controlled substances and indicated that he was taking medication without a prescription. GX 31, at 2; GX 32, at 4. K.B. repeatedly requested increases in dosages, new medications, admitted to sharing her medication without a prescription and did very little to justify her need for the prescription. GX 7, at 4; GX 10, at 4, 17; GX 32, at 5, 6. J.W. admitted to

“dip[ping] into” her roommate’s controlled substances, and getting medication “off the street.” GX 10, at 17, 18. She asked for increased dosages and admitted to seeing another doctor for opioid prescriptions. GX 16, at 2, 3. B.H. and M.C. used multiple pharmacies, received high doses of dangerous prescription cocktails, and B.H. also used multiple addresses, and drove long distances. GX 32, at 11; *See e.g.*, GX 20, at 5, 6.

In sum, based on all of the evidence in the record, I find substantial evidence that Registrant prescribed controlled substances outside of the usual course of the professional practice in California and without a legitimate medical purpose.

#### *Allegations of Violations of State Law*

I also find that there is substantial evidence that Registrant violated state law. California law requires that a “prescription for a controlled substance shall only be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his or her professional practice.” Cal. Health & Safety Code § 11153(a) (Westlaw, current with urgency legislation through Ch 706 of the 2019 Regular Session). Further, a prescription is unlawful if it is issued to “an addict or habitual user” outside of a narcotic treatment program or professional practice. *Id.* Additionally, practitioners prescribing to addicts are required to comply with the regular practice of their profession and a patient receiving controlled substances must be under their “treatment for a pathology or condition.” *Id.* at 11154(a). With inapplicable exceptions to this situation, the state law again makes clear that “no person shall prescribe . . . a controlled substance . . . [for] an addict, or to any person representing himself or herself as such.” *Id.* at 11156(a). The California Business and Professions Code states that “prescribing . . . dangerous drugs . . . without an appropriate prior examination and a medical indication constitutes unprofessional conduct.” Cal. Bus. & Prof. Code § 2242(a) (Westlaw, current with urgency legislation through Ch 706 of the 2019 Regular Session). Additionally, California law states that “Repeated acts of clearly excessive prescribing, furnishing, dispensing, or administering of drugs or treatment . . . as determined by the standard of the community of licensees is unprofessional conduct for a physician.” Cal. Bus. & Prof. Code § 725(a) (Westlaw, current with urgency legislation through Ch 706 of the 2019 Regular Session).

I find that none of the controlled substances prescriptions issued to S.M., K.B., J.W. M.C., or B.H. were issued for a legitimate medical purpose. GX 32, at 11. Dr. Munzing opined, and I agree, that physical exams on S.M., K.B. and J.W. were either not conducted or were “wholly inadequate,” and that the three presented themselves as “drug seeking individuals and the amounts prescribed to them were both excessive and unjustified.” *Id.* at 8–10 (no evidence of a physical examination on M.C. or B.H.) Registrant ignored obvious signs of addiction to controlled substances and prescribed strong doses of controlled substances despite those signs. *Id.* at 11. Registrant’s failure to document or perform medical exams, and his repeated prescriptions below the standard of care constituted unprofessional conduct in California. *Id.* at 7.

#### *Allegation That Registrant Materially Falsified His Application for a COR*

The record evidence demonstrates that Registrant’s initial COR was suspended pursuant to an Order to Show Cause and Immediate Suspension Order, dated March 16, 2016, and that he surrendered this COR on March 18, 2016. GX 26, at 7; GX 17. The record also demonstrates that on May 20, 2016, Registrant completed an application for a new DEA COR. GX 18. Registrant answered in the negative to Question Number Two on the application, which reads “[h]as the applicant ever surrendered (for cause) or had a federal controlled substance registration revoked, suspended, restricted or denied, or is any such action pending?” *Id.* at 1. Subsequently, on June 8, 2016, Registrant was issued a new registration. GX 25, at 1. When asked by the DI about the false statements on his application, Registrant stated that “he was trying to do what he thought was right for his patients.” GX 31, at 7. I find that the substantial evidence on the record shows that Registrant materially falsified his application for a COR.

#### **Discussion**

##### *Allegation That Registrant’s COR Is Inconsistent With the Public Interest*

Under Section 304 of the Controlled Substances Act (hereinafter, CSA), “[a] registration . . . to . . . distribute[ ] or dispense a controlled substance . . . may be suspended or revoked by the Attorney General upon a finding that the registrant . . . has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined by such section.” 21 U.S.C.

824(a)(4). In the case of a “practitioner,” which is defined in 21 U.S.C. 802(21) to include a “physician,” Congress directed the Attorney General to consider the following factors in making the public interest determination:

- (1) The recommendation of the appropriate State licensing board or professional disciplinary authority.
- (2) The applicant’s experience in dispensing . . . controlled substances.
- (3) The applicant’s conviction record under Federal or State laws relating to the . . . distribution[ ] or dispensing of controlled substances.
- (4) Compliance with applicable State, Federal, or local laws relating to controlled substances.
- (5) Such other conduct which may threaten the public health and safety. 21 U.S.C. 823(f). These factors are considered in the disjunctive. *Robert A. Leslie, M.D.*, 68 FR 15227, 15230 (2003).

According to Agency decisions, I “may rely on any one or a combination of factors and may give each factor the weight [I] deem[ ] appropriate in determining whether” to revoke a COR. *Id.*; *see also Jones Total Health Care Pharmacy, LLC v. Drug Enf’t Admin.*, 881 F.3d 823, 830 (11th Cir. 2018) (citing *Akhtar-Zaidi v. Drug Enf’t Admin.*, 841 F.3d 707, 711 (6th Cir. 2016); *MacKay v. Drug Enf’t Admin.*, 664 F.3d 808, 816 (10th Cir. 2011); *Volkman v. U. S. Drug Enf’t Admin.*, 567 F.3d 215, 222 (6th Cir. 2009); *Hoxie v. Drug Enf’t Admin.*, 419 F.3d 477, 482 (6th Cir. 2005). Moreover, while I am required to consider each of the factors, I “need not make explicit findings as to each one.” *MacKay*, 664 F.3d at 816 (quoting *Volkman*, 567 F.3d at 222); *see also Hoxie*, 419 F.3d at 482. “In short, . . . the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest; what matters is the seriousness of the registrant’s misconduct.” *Jayam Krishna-Iyer, M.D.*, 74 FR 459, 462 (2009). Accordingly, as the Tenth Circuit has recognized, findings under a single factor can support the revocation of a COR. *MacKay*, 664 F.3d at 821.

Under DEA’s regulation, “[a]ny hearing for the revocation . . . of a registration, the . . . [Government] shall have the burden of proving that the requirements for such revocation . . . pursuant to . . . 21 U.S.C. [§] 824(a) . . . are satisfied.” 21 CFR 1301.44(e). In this matter, while I have considered all of the factors, the Government’s evidence in support of its *prima facie* case is confined to Factors Two and

Four. I find that the Government's evidence with respect to Factors Two and Four satisfies its *prima facie* burden of showing that Registrant's continued registration would be "inconsistent with the public interest." 21 U.S.C. 823(f). However, Registrant's request for a hearing was untimely. I find that he had not rebutted the Government's *prima facie* showing. I find Registrant's misconduct to be egregious and I will order that Registrant's COR be revoked.

*Factors Two and/or Four—The Registrant's Experience in Dispensing Controlled Substances and Compliance With Applicable Laws Related to Controlled Substances*

Under Factor Two, I evaluate the registrant's "experience in dispensing . . . with respect to controlled substances." 21 U.S.C. 823(f)(2). There is no evidence in the record as to the Registrant's positive dispensing experience; however, the Government has clearly established the Registrant's significant history of unlawful and dangerous dispensing practices through the undercover officer, confidential sources and the seized medical records.

Factor Four is demonstrated by evidence that a registrant has not complied with laws related to controlled substances, including violations of the CSA, DEA regulations, or other state or local laws regulating the dispensing of controlled substances. According to the CSA's implementing regulations, a lawful prescription for controlled substances is one that is "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." 21 CFR 1306.04(a). The Supreme Court has stated, in the context of the CSA's requirement that schedule II controlled substances may be dispensed only by written prescription, that "the prescription requirement . . . ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse . . . [and] also bars doctors from peddling to patients who crave the drugs for those prohibited uses." *Gonzales v. Oregon, supra*, 546 U.S. at 274.

Under the CSA, it is fundamental that a practitioner must establish and maintain a legitimate doctor-patient relationship in order to act "in the usual course of . . . professional practice" and to issue a prescription for a "legitimate medical purpose." *Ralph J. Chambers*, 79 FR 4962 at 4970 (2014) (citing *Paul H. Volkman*, 73 FR 30629, 30642 (2008), *pet. for rev. denied Volkman v. Drug Enf't Admin.*, 567 F.3d 215, 223–24 (6th Cir. 2009)); see also

*U.S. v. Moore*, 423 U.S. 122, 142–43 (1975) (noting that evidence established that the physician exceeded the bounds of professional practice, when "he gave inadequate physical examinations or none at all," "ignored the results of the tests he did make," and "took no precautions against . . . misuse and diversion"). The CSA, however, generally looks to state law to determine whether a doctor and patient have established a legitimate doctor-patient relationship. *Volkman*, 73 FR 30642.

*Allegations that Registrant Prescribed Below the California Standard of Care*

In this case, as found above, Dr. Munzing has credibly opined that none of the prescriptions in evidence were issued for a legitimate medical purpose under the standard of care in California. GX 32, at 11. Registrant conducted little-to-no physical examination during all of the visits in violation of California law and below of the California standard of care. See *Moore*, 423 U.S. at 142–43 (noting that evidence established that physician "exceeded the bounds of professional practice," when, *inter alia*, "he gave inadequate physical examinations or none at all" and ignored signs of diversion); see also Cal. Bus. & Prof. Code section 2242(a) (requiring a "prior examination" before prescribing medication, such as controlled substances); see also *Gabriel Sanchez, M.D.*, 78 FR 59060, 59063–64 (2013) (finding that a doctor acted outside the usual course of professional practice by not conducting an adequate physical examination before prescribing controlled substances).

Additionally, as already discussed the evidence demonstrates that S.M., K.B. and J.W. were not seeking the drugs for a legitimate medical condition, but rather for the purpose of abusing or diverting them. See *e.g.*, GX 16, at 4 (When Registrant asked if the oxycodone controlled her pain, she said "it's good for sleeping."); see also GX 7, at 2 (K.B. wanted to try Adderall because the oxycodone made her tired); see also GX 10, at 35 (J.W. asked for Adderall "for studying"). These prescriptions amounted to "outright drug deals." *James Clopton, M.D.*, 79 FR 2475, 2478 (2014) (holding that a California physician who prescribed controlled substances to an undercover with no physical exam after the undercover disclosed that he borrowed pills from a friend and that the medication's purpose was "it helps [me] unwind" to be a clear violation of the law amounting to a drug deal). I also find that Registrant, by his own repeated admissions, demonstrated that the purpose of any constraint he was

exercising in his prescribing practices was to avoid detection. See *e.g.*, GX 8, at 14 (Registrant told J.W. that when first prescribing it looked "bad to like hit them with the highest dosage," and then increased the dosage on the second visit when requested). I further find that Registrant blatantly altered his rationale for his prescribing pain medication for J.W. from her ankle to her neck on the prescription stating that her "neck injury here—it's just—it's more of a potentially serious injury." GX 10, at 39. Based on this and all of the other evidence herein, I find that Registrant prescribed below the standard of care in California and issued prescriptions without a legitimate medical purpose.

*Allegations of Violations of State and Federal Law*

OSCs 1 and 2 alleged multiple violations of state law and unprofessional conduct in violation of California Health and Safety Code §§ 11153(a), 11154(a), 11156 and California Business Professional Code §§ 725, 2242(a).<sup>39</sup> In addition, the OSCs alleged the Registrant's issuance of prescriptions for controlled substances without a medical purpose violated 21 U.S.C. 841(a)(1) (unlawful distribution of a controlled substance) and 21 CFR 1306.04(a) ("A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice"). I find that the Government has established that the controlled substances were prescribed without a legitimate medical purpose and below the standard of care in California, and in violation of state law, as detailed above, and therefore that Registrant's prescribing practices violated federal law.

*Summary of Factors Two and Four and Imminent Danger*

As found above, the Government's case establishes by substantial evidence that Registrant issued controlled substance prescriptions outside the usual course of the professional practice. I conclude that Registrant engaged in egregious misconduct, which supports the revocation of his COR. See *Wesley Pope*, 82 FR 14944, 14985 (2017).

For purposes of the imminent danger inquiry, my findings also lead to the conclusion that Registrant has "fail[ed] . . . to maintain effective controls

<sup>39</sup>I am excluding Cal. Bus. & Prof. Code section 2234 from my finding regarding violations of state law, because neither the Government's Expert, nor the Government fully explained its application to this proceeding.

against diversion or otherwise comply with the obligations of a registrant” under the CSA. 21 U.S.C. 824(d)(2). Dr. Munzing credibly opined that Registrant’s “treatment of M.C. and B.H. was both dangerous and reckless and fell far below the standard of care for prescribing controlled substances in the State of California,” and stated that he was “particularly concerned that [Registrant] was continuing to prescribe excessive amounts of opioid medication and prescription cocktails to both M.C. and B.H., even after he had surrendered one DEA registration . . . and obtained another. . . .” GX 32, at 10. The substantial evidence that Registrant issued controlled substance prescriptions outside the usual course of the professional practice establishes that there was “a substantial likelihood of an immediate threat that death, serious bodily harm, or abuse of a controlled substance . . . [would] occur in the absence of the immediate suspension” of Registrant’s registration. *Id.* Therefore, I affirm the ISO<sup>40</sup> issued on Registrant’s COR.

#### Allegation That Registrant Materially Falsified His Application for a COR

Based on the facts of this case, it is abundantly clear that Registrant falsified his application in answering in the negative to the question about surrendering his COR. GX 18, at 1. The Government argues that Registrant’s negative answer meets the test of “misrepresentation or concealment . . . predictably capable of affecting the official decision” and thus “meets the definition of materiality.” RFAA, at 21, citing *Scott C. Bickman, M.D.*, 76 FR 17694, 17701 (2011), quoting *Kungys v. United States*, 485 U.S. 759, 770, (1988). The Government contends that Registrant’s “subsequent DEA registration would not have been granted” had Registrant disclosed OSC 1 at the time of the application. RFAA, at 21.

I find that Registrant’s answer of “N” [symbolizing “no”] to the question of whether he had surrendered his COR was materially false.

Registrant’s false answer clearly affected the decision of whether to grant his application. See *Jose G. Zavaleta, M.D.* 78 FR 27431 (2013) (physician’s failure to disclose prior voluntary surrender of DEA COR following investigation into prescribing to

undercover officers was clearly capable of influencing the decision of the Agency and thus material); see also *Arthur H. Bell, D.O.*, 80 FR 50033, at 50038 (2015).

I therefore find substantial evidence that Registrant materially falsified his May 20, 2016, application for registration when he failed to disclose that he had surrendered his DEA registration “for cause.” I further conclude that this finding alone constitutes an independent basis for revocation of Registrant’s COR. See *Murphy v. Drug Enf’t Admin.* 111 F.3d 140 (10th Cir. 1997) (finding that “material falsification of his application is itself sufficient grounds for revocation of his COR.”)

In sum, I find that there is substantial evidence on the record that Registrant repeatedly issued prescriptions for controlled substances without a legitimate medical purpose and dangerously below the standard of care in California, committed multiple violations of state law, and engaged in numerous acts of unprofessional conduct in violation of state law. Further, I find that Registrant materially falsified his application for a DEA COR after having been served with OSC 1 and surrendering his previous COR, which constitutes an independent basis for revocation of Registrant’s COR.

#### Sanction

Where, as here, the Government has met its *prima facie* burden of showing by two independent bases that Registrant’s COR should be revoked because he materially falsified his application and his continued registration is inconsistent with the public interest, the burden shifts to the Registrant to show why he can be entrusted with a registration. *Garrett Howard Smith, M.D.*, 83 FR 18882, 18910 (2018) (collecting cases).

The CSA authorizes the Attorney General to “promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions under this subchapter.” 21 U.S.C. 871(b). This authority specifically relates “to ‘registration’ and ‘control,’ and ‘for the efficient execution of his functions’ under the statute.” *Gonzales*, 546 U.S. at 259. “Because ‘past performance is the best predictor of future performance,’ *ALRA Labs, Inc. v. Drug Enf’t Admin.*, 54 F.3d 450, 452 (7th Cir. 1995), [the Agency] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [the

registrant’s] actions and demonstrate that [registrant] will not engage in future misconduct.” *Jayam Krishna-Iyer*, 74 FR at 463 (quoting *Medicine Shoppe*, 73 FR 364, 387 (2008)); see also *Jackson*, 72 FR at 23853; *John H. Kennedy, M.D.*, 71 FR 35705, 35709 (2006); *Prince George Daniels, D.D.S.*, 60 FR 62884, 62887 (1995). The issue of trust is necessarily a fact-dependent determination based on the circumstances presented by the individual registrant; therefore, the Agency looks at factors, such as the acceptance of responsibility, and the credibility of that acceptance as it relates to the probability of repeat violations or behavior, and the nature of the misconduct that forms the basis for sanction, while also considering the Agency’s interest in deterring similar acts. See *Arvinder Singh, M.D.*, 81 FR 8247, 8248 (2016).

Here, Registrant failed to timely respond to the Government’s second Order to Show Cause and Immediate Suspension Order and did not avail himself of the opportunity to refute the Government’s case. As such, Registrant has made no representations as to his future compliance with the CSA or to demonstrate that he can be entrusted with a COR. All evidence of Registrant’s egregious conduct constituting two independent bases for revocation indicates clearly that he cannot be so entrusted.

Accordingly, I shall order the sanctions the Government requested, as contained in the Order below.

#### Order

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 823(f) and 824(a), I hereby revoke DEA Certificate of Registration FO6043638 issued to Jeffrey Olsen, M.D. I further hereby deny any pending application of Jeffrey D. Olsen, M.D., to renew or modify this COR, as well as any other applications of Jeffrey D. Olsen, M.D. for an additional COR in California. Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a) and (d), I hereby affirm the Order of Immediate Suspension of Registration issued to Jeffrey Olsen, M.D. This Order is effective January 15, 2020.

Dated: December 6, 2019.

**Uttam Dhillon,**

*Acting Administrator.*

[FR Doc. 2019–27096 Filed 12–13–19; 8:45 am]

**BILLING CODE 4410–09–P**

<sup>40</sup> As explained herein, OSC/ISO 2 incorporated by reference OSC/ISO 1, and therefore, I am issuing this revocation on the bases of both OSC/ISOs issued on Registrant’s COR, and in affirming OSC/ISO 2, I am also affirming OSC/ISO 1. See OSC 2, at 2.

**DEPARTMENT OF JUSTICE**

**Notice of Lodging of Proposed Consent Decree Under the Clean Air Act and EPCRA**

On December 9, 2019, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Eastern District of California in the lawsuit entitled *United States and San Joaquin Valley Unified Air Pollution Control District v. Kern Oil & Refining Co.*, Civil Action No. 2:19-cv-02460-KJM-CKD.

This case involves claims for alleged violations of Section 111 of the Clean Air Act (“CAA”), 42 U.S.C. 7411 and Section 313 of the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. 11023 (“EPCRA”), with respect to Kern Oil’s petroleum refinery (“Facility”) located in Bakersfield, California. The complaint seeks injunctive relief and civil penalties stemming from Kern Oil’s failure to meet new source performance standards monitoring and reporting requirements under the CAA and failure to meet hazardous substance reporting requirements under EPCRA. The settlement requires Kern to pay a civil penalty of \$500,000 that will be divided evenly with the United States and San Joaquin Valley Unified Air Pollution Control District and requires Kern Oil to comply with all monitoring and reporting requirements and other injunctive relief geared towards ensuring the Facility remains in compliance with the law. Additionally, the settlement requires Kern Oil to perform two supplemental environmental projects, estimated to cost at least \$100,000 each, for which Kern Oil will purchase and operate for five years an infrared gas-imaging camera and purchase emergency responder equipment for the Kern County Public Health Services Department and the Kern County Fire Department.

The publication of this notice opens a period for public comment on the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States, et al. v. Kern Oil and Refining Co.*, D.J. Ref. No. 90–5–2–1–10464/1. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

<i>To submit comments:</i>	<i>Send them to:</i>
By email .....	<i>pubcomment-ees.enrd@usdoj.gov.</i>
By mail .....	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>. We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for \$11.75 (25 cents per page reproduction cost) payable to the United States Treasury.

**Lori Jonas,**  
*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*  
[FR Doc. 2019–26967 Filed 12–13–19; 8:45 am]

**BILLING CODE 4410–15–P**

**DEPARTMENT OF JUSTICE**

**Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980**

On November 25, 2019, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the District of Colorado in the lawsuit entitled *United States of America v. Pioneer Natural Resources Company and Pioneer Natural Resources USA, Inc.*, Civil Action No. 1: 17–CV–00168–WJM–NYM.

In January 2017, the United States, on behalf of the United States Environmental Protection Agency (“EPA”) filed a complaint against Pioneer Natural Resources Company and Pioneer Natural Resources USA, Inc. (“Settling Defendants”) seeking reimbursement of response costs incurred under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. 9607(a), for response actions at or in connection with the release or threatened release of hazardous substances at Operable Unit 1 (“OU1”) of the Nelson Tunnel/Commodore Waste Rock Pile Superfund Site (“Site”). The United States also

sought a declaration of Settling Defendants’ liability, pursuant to Section 113(g) of CERCLA for all future response costs to be incurred by the United States in connection with the OU1 Site.

In September 2017, Pioneer filed a counterclaim against the United States alleging that the United States is liable under Sections 107 and 113 of CERCLA, 42 U.S.C. 9607 and 9613, as both an owner of OU1 at the time that hazardous substances were disposed of at OU1 and a current owner of OU1. Settling Defendants in their counterclaims sought a judgment against the United States for the United States’ equitable share of costs incurred and that may, in the future, be incurred as a result of the release or threatened release of hazardous substances at the OU1 Site.

The proposed Consent Decree requires Settling Defendants to pay \$5,775,000 for past and future response costs incurred by the United States in connection with the Site. The proposed Consent Decree also requires Settling Federal Agencies, the United States, on behalf of the United States Department of Interior and the United States Department of Agriculture, on behalf of the United States Forest Service (“USFS”), to pay EPA \$425,000 for past and future response costs incurred in connection with OU1 at the Site. Future response costs associated with the OU2 remedial action will be resolved through a memorandum of understanding or interagency agreement between the USFS and EPA. The proposed consent decree will resolve all CERCLA claims alleged in this action by the United States against Settling Defendants and any potential liability within the meaning of Sections 107 and 113 of CERCLA, 42 U.S.C. 9607 and 9613(f)(2), for Settling Federal Agencies.

The publication of this notice opens a period for public comment on the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States v. Pioneer Natural Resources Company and Pioneer Natural Resources USA, Inc.*, D.J. Ref. No. 90–11–3–10841/1. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

<i>To submit comments:</i>	<i>Send them to:</i>
By email .....	<i>pubcomment-ees.enrd@usdoj.gov.</i>

<i>To submit comments:</i>	<i>Send them to:</i>
By mail .....	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>. We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for \$9.25 (25 cents per page reproduction cost) payable to the United States Treasury. For a paper copy without the exhibits and signature pages, the cost is \$6.50.

**Jeffrey Sands,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 2019–26974 Filed 12–13–19; 8:45 am]

**BILLING CODE P**

**NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES**

**National Endowment for the Arts**

**Arts Advisory Panel Meetings**

**AGENCY:** National Endowment for the Arts.

**ACTION:** Notice of meetings.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act, as amended, notice is hereby given that 10 meetings of the Arts Advisory Panel to the National Council on the Arts will be held by teleconference.

**DATES:** See the **SUPPLEMENTARY INFORMATION** section for individual meeting times and dates. All meetings are Eastern time and ending times are approximate.

**ADDRESSES:** National Endowment for the Arts, Constitution Center, 400 7th St. SW, Washington, DC 20506.

**FOR FURTHER INFORMATION CONTACT:** Further information with reference to these meetings can be obtained from Ms. Sherry Hale, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC 20506; [hales@arts.gov](mailto:hales@arts.gov), or call 202/682–5696.

**SUPPLEMENTARY INFORMATION:** The closed portions of meetings are for the

purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chairman of September 10, 2019, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of title 5, United States Code.

**The Upcoming Meetings Are**

*Our Town* (review of applications): This meeting will be closed.

*Date and time:* January 13, 2020; 2:30 p.m. to 5:00 p.m.

*National Heritage Fellowships* (review of applications): This meeting will be closed.

*Date and time:* January 14, 2020; 1:00 p.m. to 4:00 p.m.

*Our Town* (review of applications): This meeting will be closed.

*Date and time:* January 14, 2020; 11:00 a.m. to 1:30 p.m.

*Our Town* (review of applications): This meeting will be closed.

*Date and time:* January 14, 2020; 2:30 p.m. to 5:00 p.m.

*Creative Forces: NEA Military Healing Arts Network (Clinical Component)* (review of applications): This meeting will be closed.

*Date and time:* January 15, 2020; 5:00 p.m. to 6:00 p.m.

*National Heritage Fellowships* (review of applications): This meeting will be closed.

*Date and time:* January 16, 2020; 1:00 p.m. to 4:00 p.m.

*Research Grants in the Arts* (review of applications): This meeting will be closed.

*Date and time:* January 23, 2020; 2:30 p.m. to 4:30 p.m.

*Research Grants in the Arts* (review of applications): This meeting will be closed.

*Date and time:* January 24, 2020; 2:30 p.m. to 4:30 p.m.

*Jazz Masters Fellowships* (review of applications): This meeting will be closed.

*Date and time:* February 6, 2020; 2:00 p.m. to 3:00 p.m.

*Jazz Masters Fellowships* (review of applications): This meeting will be closed.

*Date and time:* February 6, 2020; 3:00 p.m. to 4:00 p.m.

Dated: December 11, 2019.

**Sherry Hale,**  
*Staff Assistant, National Endowment for the Arts.*

[FR Doc. 2019–27033 Filed 12–13–19; 8:45 am]

**BILLING CODE 4537–01–P**

**NATIONAL SCIENCE FOUNDATION**

**Alan T. Waterman Award Committee; Notice of Meeting**

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following meeting:

**NAME AND COMMITTEE CODE:** Alan T. Waterman Award Committee (#1172).

**DATE AND TIME:** January 17, 2020; 9:00 a.m. to 2:00 p.m.

**PLACE:** National Science Foundation, 2415 Eisenhower Avenue, Suite W19000, Alexandria, Virginia 22314.

**TYPE OF MEETING:** Closed.

**CONTACT PERSON:** Sherrie B. Green, Program Manager, NSF, 2415 Eisenhower Avenue, Suite W17126, Alexandria, VA 22314; Telephone: (703) 292–8040.

**PURPOSE OF MEETING:** To provide advice and recommendations in the selection of the Alan T. Waterman Award recipient.

**AGENDA:** To review and evaluate nominations as part of the selection process for awards.

**REASON FOR CLOSING:** The nominations being reviewed include information of a personal nature where disclosure would constitute unwarranted invasions of personal privacy. These matters are exempt under 5 U.S.C. 552b(c), (6) of the Government in the Sunshine Act.

Dated: December 11, 2019.

**Crystal Robinson,**

*Committee Management Officer.*

[FR Doc. 2019–27060 Filed 12–13–19; 8:45 am]

**BILLING CODE 7555–01–P**

**NUCLEAR REGULATORY COMMISSION**

[Docket No. 72–10; NRC–2019–0231]

**Northern States Power Company; Prairie Island Independent Spent Fuel Storage Installation**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** License amendment application; opportunity to request a hearing and to petition for leave to intervene.

**SUMMARY:** The U.S. Nuclear Regulatory Commission (NRC) has received a license amendment application from Northern States Power Company (NSPM) for an amendment to Materials License No. SNM–2506 for the Prairie Island Independent Spent Fuel Storage Installation (PI ISFSI) located in Welch, Minnesota. The amendment would

increase the maximum amount of spent fuel that may be possessed and stored at the PI ISFSI, and approve the construction of an additional concrete pad within the confines of the existing facility.

**DATES:** A request for a hearing must be filed by February 14, 2020.

**ADDRESSES:** Please refer to Docket ID NRC–2019–0231 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to <https://www.regulations.gov> and search for Docket ID NRC–2019–0231. Address questions about NRC docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: [Jennifer.Borges@nrc.gov](mailto:Jennifer.Borges@nrc.gov). For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- *NRC’s Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select “Begin Web-based ADAMS Search.” For problems with ADAMS, please contact the NRC’s Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to [pdr.resource@nrc.gov](mailto:pdr.resource@nrc.gov). The license amendment request and the NRC acceptance letter are available in ADAMS under Accession Nos. ML19217A311 and ML19301D285, respectively.

- *NRC’s PDR:* You may examine and purchase copies of public documents at the NRC’s PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

**FOR FURTHER INFORMATION CONTACT:** Chris Allen, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–6877; email: [William.Allen@nrc.gov](mailto:William.Allen@nrc.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Introduction**

The NRC received, by letter dated July 26, 2019 (ADAMS Accession No. ML19210D273), a license amendment application from Northern States Power Company (NSPM), requesting a revision to Materials License No. SNM–2506, which authorizes the storage of spent fuel at the Prairie Island Independent Spent Fuel Storage Installation (PI ISFSI) located in Welch, Minnesota. Specifically, the amendment, if approved, would allow an increase in

the maximum amount of spent fuel that may be possessed and stored at the PI ISFSI, and approve the construction of an additional concrete pad to be built within the confines of the existing facility utilizing alternate methods from those described in the existing PI ISFSI safety analysis report.

An NRC administrative completeness review, documented in a letter to NSPM dated October 28, 2019 (ADAMS Accession No. ML19301D285), found the application acceptable to begin a technical review. Prior to approving the proposed amendment, the NRC will need to make the findings required by the Atomic Energy Act of 1954, as amended (the Act), and the NRC’s regulations. The NRC’s findings will be documented in a safety evaluation report and an environmental assessment. The environmental assessment will be the subject of a subsequent notice in the **Federal Register**.

**II. Opportunity To Request a Hearing and Petition for Leave To Intervene**

Within 60 days after the date of publication of this notice, any persons (petitioner) whose interest may be affected by this action may file a request for a hearing and petition for leave to intervene (petition) with respect to the action. Petitions shall be filed in accordance with the Commission’s “Agency Rules of Practice and Procedure” in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.309. The NRC’s regulations are accessible electronically from the NRC Library on the NRC’s website at <https://www.nrc.gov/reading-rm/doc-collections/cfr/>. Alternatively, a copy of the regulations is available at the NRC’s Public Document Room, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (First Floor), Rockville, Maryland 20852. If a petition is filed, the Commission or a presiding officer will rule on the petition and, if appropriate, a notice of a hearing will be issued.

As required by 10 CFR 2.309(d) the petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements for standing: (1) The name, address, and telephone number of the petitioner; (2) the nature of the petitioner’s right to be made a party to the proceeding; (3) the nature and extent of the petitioner’s property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the petitioner’s interest.

In accordance with 10 CFR 2.309(f), the petition must also set forth the specific contentions which the petitioner seeks to have litigated in the proceeding. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner must provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue. The petition must include sufficient information to show that a genuine dispute exists with the applicant or licensee on a material issue of law or fact. Contentions must be limited to matters within the scope of the proceeding. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to satisfy the requirements at 10 CFR 2.309(f) with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene. Parties have the opportunity to participate fully in the conduct of the hearing with respect to resolution of that party’s admitted contentions, including the opportunity to present evidence, consistent with the NRC’s regulations, policies, and procedures.

Petitions must be filed no later than 60 days from the date of publication of this notice. Petitions and motions for leave to file new or amended contentions that are filed after the deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the three factors in 10 CFR 2.309(c)(1)(i) through (iii). The petition must be filed in accordance with the filing instructions in the “Electronic Submissions (E-Filing)” section of this document.

A State, local governmental body, Federally-recognized Indian Tribe, or agency thereof, may submit a petition to the Commission to participate as a party under 10 CFR 2.309(h)(1). The petition should state the nature and extent of the petitioner’s interest in the proceeding. The petition should be submitted to the Commission no later than 60 days from the date of publication of this notice. The petition must be filed in accordance with the filing instructions in the “Electronic Submissions (E-Filing)” section of this document, and should

meet the requirements for petitions set forth in this section. Alternatively, a State, local governmental body, Federally-recognized Indian Tribe, or agency thereof may participate as a non-party under 10 CFR 2.315(c).

If a hearing is granted, any person who is not a party to the proceeding and is not affiliated with or represented by a party may, at the discretion of the presiding officer, be permitted to make a limited appearance pursuant to the provisions of 10 CFR 2.315(a). A person making a limited appearance may make an oral or written statement of his or her position on the issues but may not otherwise participate in the proceeding. A limited appearance may be made at any session of the hearing or at any prehearing conference, subject to the limits and conditions as may be imposed by the presiding officer. Details regarding the opportunity to make a limited appearance will be provided by the presiding officer if such sessions are scheduled.

### III. Electronic Submissions (E-Filing)

All documents filed in NRC adjudicatory proceedings, including a request for hearing and petition for leave to intervene (petition), any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities that request to participate under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007, as amended at 77 FR 46562; August 3, 2012). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Detailed guidance on making electronic submissions may be found in the Guidance for Electronic Submissions to the NRC and on the NRC website at <https://www.nrc.gov/site-help/e-submittals.html>. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at [hearing.docket@nrc.gov](mailto:hearing.docket@nrc.gov), or by telephone at 301-415-1677, to (1) request a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign submissions and access the E-Filing system for any proceeding in which it is participating; and (2) advise the

Secretary that the participant will be submitting a petition or other adjudicatory document (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public website at <https://www.nrc.gov/site-help/e-submittals/getting-started.html>. Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit adjudicatory documents. Submissions must be in Portable Document Format (PDF). Additional guidance on PDF submissions is available on the NRC's public website at <https://www.nrc.gov/site-help/electronic-sub-ref-mat.html>. A filing is considered complete at the time the document is submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the document on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before adjudicatory documents are filed so that they can obtain access to the documents via the E-Filing system.

A person filing electronically using the NRC's adjudicatory E-Filing system may seek assistance by contacting the NRC's Electronic Filing Help Desk through the "Contact Us" link located on the NRC's public website at <https://www.nrc.gov/site-help/e-submittals.html>, by email to [MSHD.Resource@nrc.gov](mailto:MSHD.Resource@nrc.gov), or by a toll-free call at 1-866-672-7640. The NRC Electronic Filing Help Desk is available between 9 a.m. and 6 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with

10 CFR 2.302(g), with their initial paper filing stating why there is good cause for not filing electronically and requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, 11555 Rockville Pike, Rockville, Maryland 20852, Attention: Rulemaking and Adjudications Staff. Participants filing adjudicatory documents in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at <https://adams.nrc.gov/ehd>, unless excluded pursuant to an order of the Commission or the presiding officer. If you do not have an NRC-issued digital ID certificate as described above, click "cancel" when the link requests certificates and you will be automatically directed to the NRC's electronic hearing dockets where you will be able to access any publicly available documents in a particular hearing docket. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or personal phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. For example, in some instances, individuals provide home addresses in order to demonstrate proximity to a facility or site. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Dated at Rockville, Maryland, this 10th day of December, 2019.

For the Nuclear Regulatory Commission.  
**Daniel I. Doyle,**  
*Acting Chief, Storage and Transportation  
 Licensing Branch, Division of Fuel  
 Management, Office of Nuclear Material  
 Safety and Safeguards.*

[FR Doc. 2019-27009 Filed 12-13-19; 8:45 am]

**BILLING CODE 7590-01-P**

## **PENSION BENEFIT GUARANTY CORPORATION**

### **Proposed Submission of Information Collections for OMB Review; Comment Request; Payment of Premiums; Termination Premium**

**AGENCY:** Pension Benefit Guaranty Corporation.

**ACTION:** Notice of intent to request extension of OMB approval of collection of information.

**SUMMARY:** The Pension Benefit Guaranty Corporation (PBGC) intends to request the Office of Management and Budget (OMB) to extend approval, under the Paperwork Reduction Act, of a collection of information for the termination premium under its regulation on Payment of Premiums (29 CFR part 4007) (OMB control number 1212-0064; expires May 31, 2020), without change. This notice informs the public of PBGC's intent and solicits public comment on the collection of information.

**DATES:** Comments must be received on or before February 14, 2020 to be assured of consideration.

**ADDRESSES:** Comments may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Email:* [paperwork.comments@pbgc.gov](mailto:paperwork.comments@pbgc.gov).

- *Mail or Hand Delivery:* Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005-4026.

All submissions received must include the agency's name (Pension Benefit Guaranty Corporation, or PBGC) and refer to termination premium information collection. All comments received will be posted without change to PBGC's website, <http://www.pbgc.gov>, including any personal information provided.

Copies of the collection of information may be obtained by writing to Disclosure Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005-4026, or

calling 202-326-4040 during normal business hours. TTY users may call the Federal Relay Service toll-free at 800-877-8339 and ask to be connected to 202-326-4040.

**FOR FURTHER INFORMATION CONTACT:**

Melissa Rifkin ([rifkin.melissa@pbgc.gov](mailto:rifkin.melissa@pbgc.gov)), Attorney, Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005-4026; 202-229-6563. (TTY users may call the Federal Relay Service toll-free at 800-877-8339 and ask to be connected to 202-229-6563.)

**SUPPLEMENTARY INFORMATION:** The Pension Benefit Guaranty Corporation (PBGC) administers the pension plan termination insurance program under title IV of the Employee Retirement Income Security Act of 1974 (ERISA). Section 4006(a)(7) of ERISA provides for a "termination premium" (in addition to the flat-rate and variable-rate premiums under section 4006(a)(3) and (8) of ERISA) that is payable for three years following certain distress and involuntary plan terminations. PBGC's regulations on Premium Rates (29 CFR part 4006) and Payment of Premiums (29 CFR part 4007) implement the termination premium. Sections 4007.3 and 4007.13(b) of the premium payment regulation require the filing of termination premium information and payments with PBGC. PBGC has promulgated Form T and instructions for paying the termination premium.

In general, the termination premium applies where a single-employer plan terminates in a distress termination under ERISA section 4041(c) (unless contributing sponsors and controlled group members meet the bankruptcy liquidation requirements of ERISA section 4041(c)(2)(B)(i)) or in an involuntary termination under ERISA section 4042, and the termination date under section 4048 of ERISA is after 2005. The termination premium does not apply in certain cases where termination occurs during a bankruptcy proceeding filed before October 18, 2005.

The termination premium is payable for three years. The same amount is payable each year. The amount of each payment is based on the number of participants in the plan as of the day before the termination date. In general, the amount of each payment is equal to \$1,250 times the number of participants. However, the rate is increased from \$1,250 to \$2,500 in certain cases involving commercial airline or airline catering service plans. The termination premium is due on the 30th day of each of three consecutive 12-month periods.

The first 12-month period generally begins shortly after the termination date or after the conclusion of bankruptcy proceedings in certain cases.

The termination premium and related information must be filed by a person liable for the termination premium. The persons liable for the termination premium are contributing sponsors and members of their controlled groups, determined on the day before the plan termination date. Interest on late termination premiums is charged at the rate imposed under section 6601(a) of the Internal Revenue Code, compounded daily, from the due date to the payment date. Penalties based on facts and circumstances may be assessed both for failure to timely pay the termination premium and for failure to timely file required related information and may be waived in appropriate circumstances. A penalty for late payment will not exceed the amount of termination premium paid late. Section 4007.10 of the premium payment regulation requires the retention of records supporting or validating the computation of premiums paid and requires that the records be made available to PBGC.

OMB has approved the termination premium collection of information (Form T and instructions) under control number 1212-0064 through May 31, 2020. PBGC intends to request that OMB extend approval of this collection of information for three years, without change. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

PBGC estimates that it will each year receive an average of about one filing for the first year a termination premium is due, one filing for the second year a termination premium is due, and one filing for the third year a termination premium is due, from a total of about 3 respondents. PBGC estimates that the total annual burden of—the collection of information will be about 15 minutes and \$200.

PBGC is soliciting public comments to—

- 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 methodologies 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.

Issued in Washington, DC.

**Stephanie Cibinic,**

*Deputy Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation.*

[FR Doc. 2019-26951 Filed 12-13-19; 8:45 am]

BILLING CODE 7709-02-P

**POSTAL REGULATORY COMMISSION**

[Docket Nos. MC2020-61 and CP2020-59; MC2020-62 and CP2020-60]

**New Postal Products**

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

**DATES:** *Comments are due:* December 18, 2019.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

**FOR FURTHER INFORMATION CONTACT:** David A. Trissell, General Counsel, at 202-789-6820.

**SUPPLEMENTARY INFORMATION:**

**Table of Contents**

- I. Introduction
- II. Docketed Proceeding(s)

**I. Introduction**

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product

currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (<http://www.prc.gov>). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.301.<sup>1</sup>

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

**II. Docketed Proceeding(s)**

1. *Docket No(s):* MC2020-61 and CP2020-59; *Filing Title:* USPS Request to Add Priority Mail Express & Priority Mail Contract 109 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 9, 2019; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.*, and 39 CFR 3015.5; *Public Representative:* Christopher C. Mohr; *Comments Due:* December 18, 2019.

2. *Docket No(s):* MC2020-62 and CP2020-60; *Filing Title:* USPS Request to Add Priority Mail Contract 577 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 9, 2019; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.*, and 39 CFR 3015.5;

<sup>1</sup> See Docket No. RM2018-3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19-22 (Order No. 4679).

*Public Representative:* Christopher C. Mohr; *Comments Due:* December 18, 2019.

This Notice will be published in the **Federal Register**.

**Ruth Ann Abrams,**

*Acting Secretary.*

[FR Doc. 2019-26965 Filed 12-13-19; 8:45 am]

BILLING CODE 7710-FW-P

**POSTAL SERVICE**

**Product Change—Priority Mail Negotiated Service Agreement**

**AGENCY:** Postal Service™.

**ACTION:** Notice.

**SUMMARY:** The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

**DATES:** *Date of required notice:* December 16, 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 December 10, 2019, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 580 to Competitive Product List*. Documents are available at [www.prc.gov](http://www.prc.gov), Docket Nos. MC2020-65, CP2020-64.

**Sean Robinson,**

*Attorney, Corporate and Postal Business Law.*

[FR Doc. 2019-26968 Filed 12-13-19; 8:45 am]

BILLING CODE 7710-12-P

**POSTAL SERVICE**

**Product Change—Priority Mail Express 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:* December 16, 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 December 10, 2019, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Express Contract 80 to Competitive Product List*. Documents are available at [www.prc.gov](http://www.prc.gov), Docket Nos. MC2020–67, CP2020–66.

**Sean Robinson,**

*Attorney, Corporate and Postal Business Law.*

[FR Doc. 2019–26962 Filed 12–13–19; 8:45 am]

**BILLING CODE 7710–12–P**

## POSTAL SERVICE

### Product Change—Priority Mail Negotiated Service Agreement

**AGENCY:** Postal Service™.

**ACTION:** Notice.

**SUMMARY:** The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

**DATES:** *Date of required notice:* December 16, 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 December 10, 2019, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 581 to Competitive Product List*. Documents are available at [www.prc.gov](http://www.prc.gov), Docket Nos. MC2020–66, CP2020–65.

**Sean Robinson,**

*Attorney, Corporate and Postal Business Law.*

[FR Doc. 2019–26960 Filed 12–13–19; 8:45 am]

**BILLING CODE 7710–12–P**

## POSTAL SERVICE

### Product Change—Priority Mail Negotiated Service Agreement

**AGENCY:** Postal Service™.

**ACTION:** Notice.

**SUMMARY:** The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

**DATES:** *Date of required notice:* December 16, 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 December 10, 2019, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 578 to Competitive Product List*. Documents are available at [www.prc.gov](http://www.prc.gov), Docket Nos. MC2020–63, CP2020–62.

**Sean Robinson,**

*Attorney, Corporate and Postal Business Law.*

[FR Doc. 2019–26964 Filed 12–13–19; 8:45 am]

**BILLING CODE 7710–12–P**

## POSTAL SERVICE

### Product Change—Priority Mail Negotiated Service Agreement

**AGENCY:** Postal Service™.

**ACTION:** Notice.

**SUMMARY:** The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

**DATES:** *Date of required notice:* December 16, 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 December 10, 2019, it filed with the Postal Regulatory Commission a *USPS Request to Add Priority Mail Contract 579 to Competitive Product List*. Documents are available at [www.prc.gov](http://www.prc.gov), Docket Nos. MC2020–64, CP2020–63.

**Sean Robinson,**

*Attorney, Corporate and Postal Business Law.*

[FR Doc. 2019–26961 Filed 12–13–19; 8:45 am]

**BILLING CODE 7710–12–P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87708; File No. SR–NASDAQ–2019–094]

### Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Transaction Fees at Equity 7, Section 118(a)

December 10, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

(“Act”),<sup>1</sup> and Rule 19b–4 thereunder,<sup>2</sup> notice is hereby given that on November 27, 2019, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's transaction fees at Equity 7, Section 118(a) to: (i) Adjust the criteria for members to qualify for a credit; and (ii) to adjust the categories of credits which the Exchange will provide to members that enter Orders with Midpoint Pegging that receive price improvement with respect to the national best bid and best offer (“NBBO”), as described further below.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on December 2, 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 the schedule of credits it provides to members, pursuant to Equity 7, Section 118(a), in two respects.

First, the Exchange proposes to amend its schedule of credits by

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b–4.

adjusting a volume threshold to qualify for one of the credits it provides to its members. For Orders in securities in each of Tapes A, B, and C, the Exchange presently provides a \$0.00305 per share executed credit to a member with shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 1.25% of Consolidated Volume<sup>3</sup> during the month. The Exchange proposes to raise the qualifying volume threshold for this credit from 1.25% to 1.50% of Consolidated Volume. The Exchange intends for this amendment to incentivize members to increase the extent of their liquidity adding activity to qualify for and to continue to qualify for this credit.

Second, the Exchange proposes to amend its credits for Non-Displayed Orders<sup>4</sup> in securities in each Tape (other than Supplemental orders) that provide liquidity to the Exchange. Under the existing schedules for these credits, a member that enters a Midpoint Order<sup>5</sup> that adds liquidity to the Exchange may be entitled to receive one of several tiers of rebates and supplemental rebates, which vary to the extent that the member also engages in specified volumes, amounts, and types of corresponding activities.<sup>6</sup> The Exchange also provides rebates for between \$0.0010 and \$0.0005 per share executed for other types of Non-Displayed Orders entered by members that achieve certain specified volume thresholds. Finally, the Exchange provides no credits to, but also imposes no charges upon, members that enter other Non-Displayed Orders if they do

<sup>3</sup> As used in Equity 7, Section 118(a), the term "Consolidated Volume" means the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during a month in equity securities, excluding executed orders with a size of less than one round lot.

<sup>4</sup> As set forth in Rule 4702(b), a "Non-Displayed Order" is an Order Type that is not displayed to other participants, but nevertheless remains available for potential execution against incoming Orders until executed in full or cancelled.

<sup>5</sup> Pursuant to Rule 4703, an "Order with Midpoint Pegging" is a Non-Displayed Order that is pegged with reference to the midpoint between the Inside Bid and the Inside Offer (the "Midpoint").

<sup>6</sup> The Exchange provides a baseline rebate of \$0.0010 per share executed for Midpoint Orders. It provides higher rebates, varying from \$0.0013 per share executed to \$0.0025 per share executed, for Midpoint Orders where members provide specified threshold volumes of Midpoint Orders during a month, add certain threshold numbers of shares, or increases its orders provided and executed by specified amounts. Additionally, the Exchange provides a supplemental rebate of between \$0.0001 and \$0.0002 per share executed for Midpoint Orders where members execute specified average daily volumes of shares through Midpoint Extended Life Orders. See Equity 7, Section 118(a).

not achieve the specified volume or activity thresholds.

The Exchange proposes to amend the schedule of credits (and supplemental credits) that apply to Midpoint Orders that add liquidity to the Exchange and, in particular, buy (sell) Orders with Midpoint Pegging that receive execution prices that are lower (higher) than the midpoint of the NBBO. Under the proposal, members entering Orders with Midpoint Pegging that execute at prices which are less aggressive than the midpoint of the NBBO will be entitled to receive credits applicable to "other non-displayed orders"—to the extent such members achieve certain volume thresholds during a month—or no credits if they do not achieve these thresholds (in which case the executions will, however, continue to be free of charge). The Exchange believes that it is reasonable to offer the credit schedule applicable to Non-Displayed Orders to members that enter Orders with Midpoint Pegging which execute at prices less aggressive than the midpoint of the NBBO because such Orders behave the same way as do Non-Displayed Orders. Moreover, members that enter Orders with Midpoint Pegging which execute at prices less aggressive than the midpoint of the NBBO already benefit from the fact that their orders receive price improvements, such that these members do not require additional inducements to enter their Orders on the Exchange.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>7</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>8</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The proposal is also consistent with Section 11A of the Act relating to the establishment of the national market system for securities.

### The Proposal Is Reasonable

The Exchange's proposed changes to its schedule of credits are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for equity securities transaction services that constrain its pricing determinations in that market. The fact that this market

is competitive has long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: "[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . . ."<sup>9</sup>

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."<sup>10</sup>

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for equity security transaction services. The Exchange is only one of several equity venues to which market participants may direct their order flow. Competing equity exchanges offer similar tiered pricing structures to that of the Exchange, including schedules of rebates and fees that apply based upon members achieving certain volume thresholds.

Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

In particular, the Exchange proposes to raise the volume threshold to qualify for its \$0.00305 per share executed credit as a means of encouraging members to increase their extent of their

<sup>9</sup> *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

<sup>10</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) ("Regulation NMS Adopting Release").

<sup>7</sup> 15 U.S.C. 78f(b).

<sup>8</sup> 15 U.S.C. 78f(b)(4) and (5).

liquidity adding activity to qualify for or to continue to qualify for this credit. To the extent that this proposal results in an increase in liquidity adding activity on the Exchange, this will improve the quality of the Nasdaq market and increase its attractiveness to existing and prospective participants.

Likewise, the Exchange believes that it is reasonable to treat Orders with Midpoint Pegging that execute at prices that are less aggressive than the midpoint of the NBBO the same as “other Non-Displayed Orders,” because Orders with Midpoint Pegging that execute at prices that are less aggressive than the midpoint of the NBBO behave the same way that Non-Displayed Orders behave. Furthermore, these Orders receive price improvements and incur no execution fees, which benefit members. Therefore, members that enter these Orders already have incentives to submit them to the Exchange and do not require added incentives in the form of credits to do so.

The Exchange notes that those participants that are dissatisfied with the proposed amended credits are free to shift their order flow to competing venues.

#### The Proposal Is an Equitable Allocation of Charges

The Exchange believes its proposal will allocate its charges fairly among its market participants. It is equitable for the Exchange to raise the qualification requirement for the \$0.00305 per share executed credit as a means of incentivizing increased liquidity providing activity on the Exchange. An increase in liquidity providing activity on the Exchange will improve the quality of the Nasdaq market and increase its attractiveness to existing and prospective participants.

It is also equitable to treat Orders with Midpoint Pegging that execute at prices that are less aggressive than the midpoint of the NBBO the same as “other Non-Displayed Orders,” because Orders with Midpoint Pegging that execute at prices that are less aggressive than the midpoint of the NBBO behave the same way that Non-Displayed Orders behave. Furthermore, these Orders receive price improvements and incur no execution fees, which benefit members. Therefore, members that enter these Orders already have incentives to submit them to the Exchange and do not require added incentives in the form of credits to do so.

#### The Proposed Amended Credits Are Not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory.

As an initial matter, the Exchange believes that nothing about its volume-based tiered pricing model is inherently unfair; instead, it is a rational pricing model that is well-established and ubiquitous in today’s economy among firms in various industries—from co-branded credit cards to grocery stores to cellular telephone data plans—that use it to reward the loyalty of their best customers that provide high levels of business activity and incent other customers to increase the extent of their business activity. It is also a pricing model that the Exchange and its competitors have long employed with the assent of the Commission. It is fair because it incentivizes customer activity that increases liquidity, enhances price discovery, and improves the overall quality of the equity markets.

Although the Exchange’s proposal to raise the qualifying criteria for its \$0.00305 per share executed credit will require members to add more liquidity than is currently required to qualify for this credit, any resulting increase in liquidity to the market will improve market-wide quality and price discovery, to the benefit all market participants. And although under the proposal, Exchange members entering Orders with Midpoint Pegging that execute at prices less aggressive than the midpoint of the NBBO will receive the schedule of credits applicable to Non-Displayed Orders going forward, this is not unfairly discriminatory because these Orders behave in the same manner as do Non-Displayed Orders, and it is fair to treat such Orders the same. Moreover, members that enter these Orders with Midpoint Pegging will continue to receive the benefits of price improvements and no execution charges associated with their Orders. Finally, the Exchange will be able to apply the savings from changes to its credit schedule to incentivize market improving behavior in other areas, again, to the ultimate benefit of all market participants. Finally, the Exchange notes that any participant that does not find the amended credits to be sufficiently attractive is free to shift its order flow to a competing venue.

#### *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.

#### Intramarket Competition

The Exchange does not believe that its proposal will place any category of Exchange participant at a competitive

disadvantage. All members of the Exchange will benefit from any increase in market activity that the proposal to amend the \$0.00305 per share executed credit effectuates. Members that enter Orders with Midpoint Pegging that execute at prices less aggressive than the midpoint of the NBBO will also continue to receive benefits in the form of free executions and price improvements on their Orders.

Moreover, members are free to trade on other venues to the extent they believe that the credits provided are too low or the qualification criteria are not attractive. As one can observe by looking at any market share chart, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes. The Exchange notes that the tier structure is consistent with broker-dealer fee practices as well as the other industries, as described above.

#### Intermarket Competition

The Exchange believes that its proposed modification to its schedule of credits will not impose a burden on competition because the Exchange’s execution services are completely voluntary and subject to extensive competition both from the other 12 live exchanges and from off-exchange venues, which include 32 alternative trading systems. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its credits to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which credit changes in this market may impose any burden on competition is extremely limited.

The proposed amended credits are reflective of this competition because, even as one of the largest U.S. equities exchanges by volume, the Exchange has less than 20% market share, which in most markets could hardly be categorized as having enough market power to burden competition. Moreover, as noted above, price competition between exchanges is fierce, with liquidity and market share moving

freely between exchanges in reaction to fee and credit changes. This is in addition to free flow of order flow to and among off-exchange venues which comprised more than 37% of industry volume for the month of July 2019.

The Exchange's proposal to raise the qualification requirement for its \$0.00305 per share executed credit is procompetitive in that it is intended to increase liquidity on the Exchange and thereby render the Exchange a more attractive and vibrant venue to market participants.

Similarly, the proposed amendments to the Exchange's schedule of credits applicable to Non-Displayed Orders (other than Supplemental Orders) is not a burden on competition because the Exchange has limited resources to apply as credits and such resources must be applied in a manner that the Exchange believes will best improve market quality thereon. The Exchange believes that providing credits to members that are already receiving price improvement is not the most efficient allocation of such limited resources, since such Orders already receive the benefits of price improvement and free execution, and thus do not need to be incentivized. Instead, this proposal will allow the Exchange to apply its limited resources to other areas wherein it can promote market-improving behavior by its participants. In doing so, the proposed changes again have the potential to make the Exchange a more attractive trading venue, and consequently may promote competition among markets.

In sum, if the change proposed herein is unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed change will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>11</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may

temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2019-094 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-2019-094. 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-2019-094 and should be submitted on or before January 6, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>12</sup>

**J. Matthew DeLesDernier,**  
*Assistant Secretary.*

[FR Doc. 2019-26985 Filed 12-13-19; 8:45 am]

BILLING CODE 8011-01-P

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-87704; File No. SR-BOX-2019-35]

**Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule on the BOX Options Market LLC ("BOX") Facility To Remove the QOO Order Rebate Cap**

December 10, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 27, 2019, BOX Exchange LLC (the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change**

The Exchange is filing with the Securities and Exchange Commission ("Commission") a proposed rule change to amend the Fee Schedule to amend the Fee Schedule on the BOX Options Market LLC ("BOX") facility. While changes to the Fee Schedule pursuant to this proposal will be effective upon filing, the changes will become operative on December 2, 2019. The text of the proposed rule change is available from the principal office of the

<sup>12</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>4</sup> 17 CFR 240.19b-4(f)(2).

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

Exchange, at the Commission's Public Reference Room and also on the Exchange's internet website at <http://boxexchange.com>.

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 Section II.C (QOO Order Rebate) of the BOX Fee Schedule. Specifically, the Exchange proposes to remove the monthly rebate cap of \$30,000 per month per Broker Dealer. Currently, Floor Brokers are eligible to receive a \$0.075 per contract rebate for all QOO Orders executed on the BOX Trading Floor. The rebate is not applied to Public Customer executions, executions subject to the Strategy QOO Order Fee Cap, or Broker Dealer executions where the Broker Dealer is facilitating a Public Customer.

The Exchange notes that it is not making any other changes to the QOO Order Rebate, and that the QOO rebate will continue to apply to both sides of the paired QOO Order. The rebate will not apply to Public Customer executions, executions subject to the Strategy QOO Order Fee Cap, or Broker Dealer executions where the Broker Dealer is facilitating a Public Customer.

#### 2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Act, in general, and Section 6(b)(4) and 6(b)(5) of the Act,<sup>5</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among BOX Participants and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

BOX established the QOO Order Rebate program and the monthly rebate

cap in August 2017.<sup>6</sup> As discussed in the 2017 proposal to establish the QOO Order Rebate program and rebate cap, the rebate was created to incentivize order flow to the BOX Trading Floor. Unlike competing exchanges, the Exchange does not offer a front-end order entry on the BOX Trading Floor. With this Participants have two possible means of bringing orders to the Exchange's Trading Floor for possible execution: (1) They can invest in the technology, systems and personnel to participate on the Trading Floor and deliver the order to the Exchange matching engines for validation and execution; or (2) they can utilize the services of another Participant acting as a Floor Broker. The QOO Order Rebate program was established to attract order flow by rewarding Floor Brokers with rebates for directing qualifying orders to the BOX Trading Floor.

The Exchange now believes that removing the rebate cap is reasonable, because it will continue to allow Floor Brokers to price their services at a level that would enable them to attract increased QOO order flow from market participants who might otherwise utilize the front-end order entry mechanism offered by the Exchange's competitors, instead of incurring the cost in time and resources to install and develop their own internal systems to deliver QOO orders directly to the Exchange system. As such, the Exchange believes it is beneficial from a competitive standpoint to continue to offer the rebate to the executing Floor Broker on a QOO order without capping the dollar amount allowed for the rebate. Further, the Exchange believes removing the rebate cap will encourage Floor Brokers to bring additional QOO order flow to the Exchange because Floor Brokers will be further incentivized by the removal of the QOO Order Rebate cap for these specific QOO orders. Lastly, the Exchange believes the proposed change is reasonable and appropriate, as the Exchange is offering eligible participants greater opportunities to lower their fees related to the execution of qualifying QOO transactions.

In addition, the Exchange believes that removing the QOO Order Rebate cap is reasonable as a competing exchange with a similar rebate program offered to Floor Brokers currently has a rebate cap twelve times higher than the QOO Order Rebate cap on BOX.<sup>7</sup>

<sup>6</sup> See Securities Exchange Act Release Nos. 34-81504 (August 30, 2017), 82 FR 42195 (September 6, 2017) (SR-BOX-2017-28).

<sup>7</sup> See NYSE Arca Options Fees and Charges, Qualified Contingent Cross ("QCC") Transactions

The Exchange believes that the removal of the rebate cap is equitable and not unfairly discriminatory because the proposal allows all similarly situated Floor Brokers to benefit from the removal of the QOO Order Rebate cap. Furthermore, the Exchange believes that all market participants would benefit from additional trading opportunities generated from increased order flow due to the removal of the QOO Order Rebate cap. The Exchange believes that it is equitable and not unfairly discriminatory to remove the QOO Order rebate cap for Floor Brokers, as the previous cap only applied to Floor Brokers and not to Floor Market Makers. Floor Market Makers only represent their own interest on the Trading Floor and thus do not need additional incentives.

### B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that its proposal to remove the QOO Order Rebate cap does not impose a burden on competition. The Exchange notes that it operates in a highly competitive market in which competitors are free to modify their own fee schedules in response, and the Exchange believes that the degree to which rebate increases impose any burden on competition is limited. As noted above, one of the Exchange's competitors offers QCC credit cap that is twelve times higher than the Exchange's QOO Order Rebate cap.<sup>8</sup> In addition, as mentioned above, the Floor Broker Credit for QCC Transactions on NYSEArca is similar to the QOO Order Rebate on BOX in that it is applied to both sides of the paired order and is directed to the Floor Broker and not to the Participant who is assessed the QOO Order fee. Moreover, similar to the BOX QOO Rebate, the NYSEArca QCC credit is only applied when the Floor Broker

Fees and Credits, Footnote 13 (stating the "maximum Floor Broker credit paid shall not exceed \$375,000 per month per Floor Broker firm."). Similar to the Floor Broker Credit for Executed QCC Transactions on NYSEArca, the QOO Order Rebate on BOX is applied to both sides of the paired order and is directed to the Floor Broker, and not to the Participant who is assessed the QOO Order fee. Finally, similar to the BOX QOO Rebate, the NYSE Arca QCC credit is only applied when the Floor Broker executes the QCC Order manually on the NYSE Arca trading floor.

<sup>8</sup> *Id.* See also NASDQ PHLX ("Phlx") Pricing Schedule, Section 4 (stating the "maximum QCC Rebate to be paid in a given month will not exceed \$550,000."). The Exchange notes Phlx's QCC Rebate cap is over eighteen times higher than the QOO Order Rebate cap on BOX.

<sup>5</sup> 15 U.S.C. 78f(b)(4) and (5).

executes the QCC Order manually on the NYSEArca trading floor.

Further, the Exchange does not believe that removing the QOO Order rebate cap will impose an undue burden on intra-market competition because all Floor Brokers will remain eligible to transact QOO Orders and receive the same rebate. Further, the Exchange believes that the removal of the rebate cap will promote competition by allowing Floor Brokers to competitively price their services and for the Exchange to remain competitive with other exchanges.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Exchange Act<sup>9</sup> and Rule 19b-4(f)(2) thereunder,<sup>10</sup> because it establishes or changes a due, or fee.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-BOX-2019-35 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-BOX-2019-35. 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 such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. 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-BOX-2019-35, and should be submitted on or before January 6, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2019-26987 Filed 12-13-19; 8:45 am]

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-87711; File No. SR-CboeEDGX-2019-071]

**Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Introduce a Small Retail Broker Distribution Program**

December 10, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

(“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 27, 2019, Cboe EDGX Exchange, Inc. (“Exchange” or “EDGX”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the 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**

Cboe EDGX Exchange, Inc. (“EDGX” or the “Exchange”) is filing with the Securities and Exchange Commission (the “Commission”) a proposed rule change to introduce a Small Retail Broker Distribution Program. The text of the proposed changes to the fee schedule are enclosed [sic] as Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website ([http://markets.cboe.com/us/options/regulation/rule\\_filings/edgx/](http://markets.cboe.com/us/options/regulation/rule_filings/edgx/)), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

**1. Purpose**

The purpose of the proposed rule change is to introduce a pricing program that would allow small retail brokers that purchase top of book market data from the Exchange to benefit from discounted fees for access to such market data. The Small Retail Broker Distribution Program (the “Program”) would reduce the distribution and consolidation fees paid by small broker-dealers that operate a retail business. In turn, the Program may increase retail

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>10</sup> 17 CFR 240.19b-4(f)(2).

<sup>11</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

investor access to real-time U.S. equity quote and trade information, and allow the Exchange to better compete for this business with competitors that offer similar optional products. The Exchange initially filed to introduce the Program on August 1, 2019 (“Initial Proposal”) to further ensure that retail investors served by smaller firms have cost effective access to its market data products, and as part of its ongoing efforts to improve the retail investor experience in the public markets. The Initial Proposal was published in the **Federal Register** on August 20, 2019,<sup>3</sup> and the Commission received no comment letters on the Initial Proposal. The Program remained in effect until the fee change was temporarily suspended pursuant to a suspension order (the “Initial Suspension Order”).<sup>4</sup> The Initial Suspension Order also instituted proceedings to determine whether to approve or disapprove the Initial Proposal.<sup>5</sup> On October 1, 2019, the Exchange re-filed its proposed rule change with additional information about the basis for the proposed fee change (“Second Proposal”), which as noted above is designed to facilitate retail investor access to reasonably priced market data. The Second Proposal was published in the **Federal Register** on October 15, 2019,<sup>6</sup> and the Commission received no comment letters on the Second Proposal. The Program again remained in effect until the fee change was temporarily suspended pursuant to a suspension order (the “Second Suspension Order”).<sup>7</sup> The Second Suspension Order also instituted proceedings to determine whether to approve or disapprove the Second Proposal.<sup>8</sup>

#### Current Fees

Today, the Exchange offers two top of book data feeds that provide real-time U.S. equity quote and trade information to investors. First, the Exchange offers the EDGX Top Feed, which is an uncompressed data feed that offers top of book quotations and execution information based on equity orders entered into the System. The fee for external distribution of EDGX Top data

is \$1,500 per month, and external distributors are also liable for a fee of \$4 per month for each Professional User, and \$0.10 per month for each Non-Professional User.

Second, the Exchange offers the Cboe One Summary Feed, which offers similar information based on equity orders submitted to the Exchange and its affiliated equities exchanges—*i.e.*, Cboe EDGA Exchange, Inc., Cboe BZX Exchange, Inc., and Cboe BYX Exchange, Inc. Specifically, the Cboe One Summary Feed is a data feed that contains the aggregate best bid and offer of all displayed orders for securities traded on the Exchange and its affiliated exchanges. The Cboe One Summary Feed also contains the individual last sale information for the Exchange and each of its affiliated exchanges, and consolidated volume for all listed equity securities. The fee for external distribution of the Cboe One Summary Feed is \$5,000 per month, and external distributors are also liable for a Data Consolidation Fee of \$1,000 per month, and User fees equal to \$10 per month for each Professional User, and \$0.25 per month for each Non-Professional User.<sup>9</sup>

#### Small Retail Broker Eligibility Requirements

The Exchange proposes to introduce a Program that would reduce costs for small retail brokers that provide top of book data to their clients. In order to be approved for the Small Retail Broker Distribution Program, Distributors would have to provide either the EDGX Top Feed or Cboe One Summary Feed (“EDGX Equities Exchange Data”) to a limited number of clients with which the firm has established a brokerage relationship, and would have to provide such data primarily to Non-Professional Data Users. Specifically, distributors would have to attest that they meet the following criteria: (1) Distributor is a broker-dealer distributing EDGX Equities Exchange Data to Non-Professional Data Users with whom the broker-dealer has a brokerage relationship; (2) At least 90% of the Distributor’s total Data User population must consist of Non-Professional Data Users, inclusive of those not receiving EDGX Equities Exchange Data; and (3) Distributor distributes EDGX Equities

Exchange Data to no more than 5,000 Non-Professional Data Users.<sup>10</sup>

These proposed requirements for participating in the Program are designed to ensure that the benefits provided by the Program inure to the benefit of small retail brokers that provide EDGX Equities Exchange Data to a limited number of subscribers. As explained later in this filing, distributors that provide EDGX Equities Exchange Data to a larger number of subscribers can benefit from the current pricing structure through scale, due to subscriber fees that are significantly lower than those charged by the Exchange’s competitors, and an Enterprise license that caps the total fees to be paid by firms that distribute market data to a sizeable customer base. The Exchange believes that offering similarly attractive pricing to small retail brokers, including regional firms both inside and outside of the U.S. that may not have the same established client base as the larger retail brokers, would make the Exchange’s data a more competitive alternative for those firms, and would help ensure that such information is widely available to a larger number of retail investors globally. The Program would also be available to retail brokers more generally, regardless of size, that wish to trial the Exchange’s top of book products with a limited number of subscribers before potentially expanding distribution to additional clients, potentially further increasing the accessibility of the Exchange’s market data to retail investors. The Program would be exclusive to the Exchange’s top of book offerings as retail investors typically do not need or use depth of book data to facilitate their equity investments, and their brokers typically do purchase such market data on their behalf.

#### Discounted Fees

Distributors that participate in the Program would be liable for lower distribution fees for access to the EDGX Top Feed, and lower distribution and consolidation fees for access to the Cboe One Summary Data Feed.<sup>11</sup> First, the

<sup>3</sup> See Securities Exchange Act Release No. 86678 (August 14, 2019), 84 FR 43246 (August 20, 2019) (SR-CboeEDGX-2019-048).

<sup>4</sup> See Securities Exchange Act Release No. 87172 (September 30, 2019), 84 FR 53192 (October 4, 2019) (SR-CboeEDGX-2019-048).

<sup>5</sup> *Id.*

<sup>6</sup> See Securities Exchange Act Release No. 87295 (October 11, 2019), 84 FR 55624 (October 17, 2019) (SR-CboeEDGX-2019-059).

<sup>7</sup> See Securities Exchange Act Release No. 87635 (November 26, 2019) (SR-CboeEDGX-2019-059) (**Federal Register** publication pending).

<sup>8</sup> *Id.*

<sup>9</sup> The Exchange also offers an Enterprise license for the EDGX Top and Cboe One Summary Feeds. An Enterprise license permits distribution to an unlimited number of Professional and Non-Professional Users, keeping costs down for firms that provide access to a large number of subscribers. An Enterprise license is \$15,000 per month for the EDGX Top Feed, and \$50,000 per month for the Cboe One Summary Feed.

<sup>10</sup> Distributors would have to meet these requirements for whichever product they would like to distribute pursuant to the Program. For example, a distributor that distributes Cboe One Summary Feed data pursuant to the Program, would be limited to distributing the Cboe One Summary Feed to no more than 5,000 Non-Professional Data Users.

<sup>11</sup> New external distributors of the EDGX Top Feed or Cboe One Summary Feed are not currently charged external distributor fees for their first month of service. This would continue to be the case for external distributors that participate in the Program.

distribution fee charged for EDGX Top would be lowered by 50% from the current \$1,500 per month to \$750 per month for distributors that meet the requirements of the Program. Second, the distribution fee charged to these distributors for the Cboe One Summary Feed would be lowered by 30% from the current \$5,000 per month to \$3,500 per month. Finally, the Data Consolidation Fee charged for the Cboe One Summary Feed would be lowered by 65% from the current \$1,000 per month to \$350 per month. User fees for any Professional or Non-Professional Users that access EDGX Top or Cboe One Summary Feed data from a distributor that participates in the Program would remain at their current levels as the current subscriber charges are already among the most competitive in the industry.<sup>12</sup>

The Exchange believes that these fees, which represent a significant cost savings for small retail brokers, would help ensure that retail investors continue to have fair and efficient access to U.S. equity market data. While retail investors normally pay a fixed commission when buying or selling equities, and do not typically pay separate fees for market data, the Exchange believes that the proposed reduction in fees would make the Exchange's data more competitive with other available alternatives, and may encourage retail brokers to make such data more readily available to their clients. In sum, the Exchange believes that the proposed fee reductions may facilitate more cost effective access to top of book data that is purchased on a voluntary basis by retail brokers and provided to their retail investor clients.

#### Market Background

The market for top of book data is highly competitive as national securities exchanges compete both with each other and with the securities information processors ("SIPs") to provide efficient, reliable, and low cost data to a wide range of investors and market participants. In fact, Regulation NMS requires all U.S. equities exchanges to provide their best bids and offers, and executed transactions, to the two registered SIPs for dissemination to the public. Top of book data is therefore widely available to investors today at a relatively modest cost. National securities exchanges may also

disseminate their own top of book data, but no rule or regulation of the Commission requires market participants to purchase top of book data from an exchange.<sup>13</sup> The EDGX Top Feed and Cboe One Summary Feed therefore compete with the SIP and with similar products offered by other national securities exchanges that offer their own competing top of book products. In fact, there are ten competing top of book products offered by other national securities exchanges today, not counting products offered by the Exchange's affiliates.<sup>14</sup>

The purpose of the proposed rule change is to further increase the competitiveness of the Exchange's top of book market data products compared to competitor offerings that may currently be cheaper for firms with a limited subscriber base that do not yet have the scale to take advantage of the lower subscriber fees offered by the Exchange. In turn, the Exchange believes that this change may benefit market participants and investors by spurring additional competition and increasing the accessibility of the Exchange's top of book data.

As explained, the Exchange filed the Initial Proposal to introduce the Program in August in order to provide an attractive pricing option for small retail brokers. Although that filing was ultimately suspended by the Commission, and a Second Proposal filed and withdrawn [sic], the Exchange believes that its experience in offering the Program while it has been in effect reflect the competitive nature of the market for the creation and distribution of top of book data. Specifically, after the Exchange reduced the fees charged to small retail brokers under the Initial Proposal and Second Proposal, it successfully onboarded two new customers due to the attractive pricing.<sup>15</sup> These customers are now able to offer high quality and cost effective data to their retail investor clients. The Exchange has also been discussing the Program with a handful of additional prospective clients that are interested in

providing top of book data to retail investors. Without the proposed pricing discounts, the Exchange believes that those customers and prospective customers may not be interested in purchasing top of book data from the Exchange, and would instead purchase such data from other national securities exchanges or the SIPs, potentially at a higher cost than would be available pursuant to the Program. The Program has therefore already been successful in increasing competition for such market data, and continued operation of the Program would serve to both reduce fees for such customers and to provide alternatives to data and pricing offered by competitors. Ultimately, the Exchange believes that it is critical that it be allowed to compete by offering attractive pricing to customers as increasing the availability of such products ensures continued competition with alternative offerings. Such competition may be constrained when competitors are impeded from offering alternative and cost effective solutions to customers.

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,<sup>16</sup> in general, and furthers the objectives of Section 6(b)(4),<sup>17</sup> in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other recipients of Exchange data.

The Exchange also believes that the proposed rule change is consistent with Section 11(A) of the Act.<sup>18</sup> Specifically, the proposed rule change supports (i) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets, and (ii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. In addition, the proposed rule change is consistent with Rule 603 of Regulation NMS,<sup>19</sup> which provides that any national securities exchange that distributes information with respect to quotations for or transactions in an NMS stock do so on terms that are not unreasonably discriminatory.

In adopting Regulation NMS, the Commission granted SROs and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would

<sup>12</sup> By comparison, The Nasdaq Stock Market LLC ("Nasdaq") charges a subscriber fee for Nasdaq Basic that adds up to \$26 per month for Professional Subscribers and \$1 per month for Non-Professional Subscribers (Tapes A, B, and C). See Nasdaq Equity Rules, Equity 7, Pricing Schedule, Section 147(b)(1).

<sup>13</sup> By contrast, Rule 603(c) of Regulation NMS (the "Vendor Display Rule") effectively requires that SIP data or some other consolidated display be utilized in any context in which a trading or order-routing decision can be implemented.

<sup>14</sup> Competing top of book products include, Nasdaq Basic, BX Basic, PSX Basic, NYSE BQT, NYSE BBO/Trades, NYSE Arca BBO/Trades, NYSE American BBO/Trades, NYSE Chicago BBO/Trades, and IEX TOPS.

<sup>15</sup> See e.g., Cboe Innovation Spotlight, "dough—The commission-free online broker with premium content and insights," available at [https://markets.cboe.com/us/equities/market\\_data\\_products/spotlight/](https://markets.cboe.com/us/equities/market_data_products/spotlight/). The second customer will begin participating in the Program on December 1, 2019.

<sup>16</sup> 15 U.S.C. 78f.

<sup>17</sup> 15 U.S.C. 78f(b)(4).

<sup>18</sup> 15 U.S.C. 78k-1.

<sup>19</sup> See 17 CFR 242.603.

expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes that the proposed fee change would further broaden the availability of U.S. equity market data to investors, and in particular retail investors, consistent with the principles of Regulation NMS.

The Exchange operates in a highly competitive environment. Indeed, there are thirteen registered national securities exchanges that trade U.S. equities and offer associated top of book market data products to their customers. The national securities exchanges also compete with the SIPs for market data customers. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>20</sup> The proposed fee change is a result of the competitive environment, as the Exchange seeks to amend its fees to attract additional subscribers for its proprietary top of book data offerings.

The proposed fee change would reduce fees charged to small retail brokers that provide access to two top of book data products: The EDGX Top Feed and the Cboe One Summary Feed. The EDGX Top Feed provides top of book quotations and transactions executed on the Exchange, and provides a valuable window into the market for securities traded on a market that accounts for about 5% of U.S. equity market volume today.<sup>21</sup> The Cboe One Summary Feed is a competitively-priced alternative to top of book data disseminated by SIPs, or similar data disseminated by other national securities exchanges.<sup>22</sup> It provides subscribers with consolidated top of book quotes and trades from four Cboe U.S. equities markets, which together account for about 17% of consolidated U.S. equities trading volume.<sup>23</sup> Together, these products are purchased by a wide variety of market participants

and vendors, including data platforms, websites, fintech firms, buy-side investors, retail brokers, regional banks, and securities firms inside and outside of the U.S. that desire low cost, high quality, real-time U.S. equity market data. By providing lower cost access to U.S. equity market data, the EDGX Top and Cboe One Summary Feeds benefit a wide range of investors that participate in the national market system. Reducing fees for broker-dealers that represent retail investors and that may have more limited resources than some of their larger competitors would further increase access to such data and facilitate a competitive market for U.S. equity securities, consistent with the goals of the Act.

While the Exchange is not required to make any data, including top of book data, available through its proprietary market data platform, the Exchange believes that making such data available increases investor choice, and contributes to a fair and competitive market. Specifically, making such data publicly available through proprietary data feeds allows investors to choose alternative, potentially less costly, market data based on their business needs. While some market participants that desire a consolidated display choose the SIP for their top of book data needs, and in some cases are effectively required to do so under the Vendor Display Rule, others may prefer to purchase data directly from one or more national securities exchanges. For example, a buy-side investor may choose to purchase the Cboe One Summary Feed, or a similar product from another exchange, in order to perform investment analysis. The Cboe One Summary Feed represents quotes from four highly liquid equities markets. As a result, the Cboe One Summary Feed is within 1% of the national best bid and offer approximately 98% of the time,<sup>24</sup> and therefore serves as a valuable reference for investors that do not require a consolidated display that contains quotations for all U.S. equities exchanges. Making alternative products available to market participants ultimately ensures increased competition in the marketplace, and constrains the ability of exchanges to charge supracompetitive fees. In the event that a market participant views one exchanges top of book data fees as more or less attractive than the competition they can and frequently do switch between competing products. In fact, the competitiveness of the market for such top of book data products is one

of the primary factors animating this proposed rule change, which is designed to allow the Exchange to further compete for this business.

Indeed, the Exchange has already successfully onboarded one new Distributor that has decided to purchase Cboe One Summary Data from the Exchange rather than purchasing top of book data from a competitor exchange, and is in the process of onboarding another new Distributor. In addition, the Exchange is in discussions with a handful of other Distributors that are interested in procuring market data from the Exchange due to the attractive pricing offered pursuant to the Program. Distributors can discontinue use at any time and for any reason, including due to an assessment of the reasonableness of fees charged. Further, firms have a wide variety of alternative market data products from which to choose, such as similar proprietary data products offered by other national securities exchanges. Making the Exchange’s top of book data available at a lower cost, ultimately serves the interests of retail investors that rely on the public markets. The Exchange understands that the Commission is interested in ensuring that retail investors are appropriately served in the U.S. equities market. The Exchange agrees that it is important to ensure that our markets continue to serve the needs of ordinary investors, and the Program is consistent with this goal.

The Exchange believes that the proposed fees are reasonable as they represent a significant cost reduction for smaller, primarily regional, retail brokers that provide top of book data from EDGX and its affiliated equities exchanges to their retail investor clients. The market for top of book data is intensely competitive due to the availability of substitutable products that can be purchased either from other national securities exchanges, or from registered SIPs that make such top of book data publicly available to investors at a modest cost. The proposed fee reduction is being made to make the Exchange’s fees more competitive with such offerings for this segment of market participants, thereby increasing the availability of the Exchange’s data products, and expanding the options available to firms making data purchasing decisions based on their business needs. The Exchange believes that this is consistent with the principles enshrined in Regulation NMS to “promote the wide availability of market data and to allocate revenues to

<sup>20</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

<sup>21</sup> See [https://markets.cboe.com/us/equities/market\\_share/](https://markets.cboe.com/us/equities/market_share/).

<sup>22</sup> See e.g., supra note 12 (discussing Nasdaq Basic).

<sup>23</sup> *Id.*

<sup>24</sup> See [https://markets.cboe.com/us/equities/market\\_data\\_services/cboe\\_one/](https://markets.cboe.com/us/equities/market_data_services/cboe_one/).

SROs that produce the most useful data for investors.”<sup>25</sup>

Today, the Exchange’s top of book market data products are among the most competitively priced in the industry due to modest subscriber fees, and a lower Enterprise cap, both of which keep fees at a relatively modest level for larger firms that provide market data to a sizeable number of Professional or Non-Professional Users. Distributors with a smaller user base, however, may choose to use competitor products that have a lower distribution fee and higher subscriber fees. The Program would help the Exchange compete for this segment of the market, and may broaden the reach of the Exchange’s data products by providing an additional low cost alternative to competitor products for small retail brokers. While such firms may already utilize similar market data products from other sources, the Exchange believes that offering its own data to small retail brokers at lower distribution and data consolidation costs has the potential to increase choice for market participants, and ultimately increase the data available to retail investors when coupled with the Exchange’s lower subscriber fees.

The Exchange also believes that the proposed fees are equitable and not unfairly discriminatory as the proposed fee structure is designed to decrease the price and increase the availability of U.S. equities market data to retail investors. The Program is designed to reduce the cost of top of book market data for broker-dealers that provide such data to Non-Professional Data User clients that make up a significant majority of the distributor’s total subscriber population. While there is no “exact science” to choosing one eligibility threshold compared to another, the Exchange believes that having significantly more Non-Professional Data Users than Professional Data User across a firm’s entire business, *i.e.*, not limited exclusively to Data Users that are provided access to the Exchange’s data products, is indicative of a broker-dealer that is primarily and actively engaged in the business of serving retail investors.

This understanding is confirmed by an analysis conducted by the Exchange on the user population of its retail broker clients that purchase market data from the Exchange and its affiliated exchanges. When the Exchange initially filed to introduce the Program, it included a simple majority requirement—*i.e.*, more than 50% of the

broker dealer’s user population would have to be Non-Professional Users. The Exchange’s experience to date has been that this requirement has been sufficient to ensure that the benefits of the Program go to retail brokers, and indeed each of the current customers that participate in or are soon to participate in the Program have been focused on providing trading services to ordinary investors. Based on additional analysis, however, the Exchange believes that this threshold can be safely increased to require at least 90% Non-Professional Users, as proposed today, without limiting the benefits provided to broker dealers that primarily serve retail investors. To perform its analysis, the Exchange reviewed user populations for each broker dealer that it identified as primarily engaged in serving retail investors (*i.e.*, retail brokers), and for which the Exchange has reported usage broken down into Professional and Non-Professional Users.<sup>26</sup> This analysis showed that each retail broker identified currently provides market data from the Exchange or its affiliates to at least 90% Non-Professional Users, with the Professional/Non-Professional breakdown ranging from 90.9% Non-Professional Users on the low end to 100% Non-Professional Users on the high end.

As such, even with the higher threshold proposed, the Program would be broadly available to a wide range of retail brokers that either purchase EDGX Equities Exchange Data today, or that may choose to switch from competing products due to the potential cost savings. In addition to the subscribers that are participating and are soon to participate in the Program, a number of distributors that currently purchase top of book data from one of the four Cboe U.S. equities exchanges, and many more prospective customers, could benefit from the Program. Each of these current or prospective retail broker customers would receive the same benefits in terms of reduced distribution and consolidation fees based on the product that they purchase from the Exchange.

The Commission has long stressed the need to ensure that the equities markets are structured in a way that meets the needs of ordinary investors. For example, the Commission’s strategic plan for fiscal years 2018–2022 touts “focus on the long-term interests of our

<sup>26</sup> Broker dealers with an Enterprise license are required to report total user populations but not whether each user is a Professional or Non-Professional User. As a result, the Exchange has excluded those firms from this portion of its analysis. That said, the Exchange believes those firms may have a similar Professional/Non-Professional breakdown to other retail brokers.

Main Street investors” as the Commission’s number one strategic goal.<sup>27</sup> The Program would be consistent with the Commission’s stated goal of improving the retail investor experience in the public markets. Furthermore, national securities exchanges commonly charge reduced fees and offer market structure benefits to retail investors, and the Commission has consistently held that such incentives are consistent with the Act. The Exchange believes that the Program is consistent with longstanding precedent indicating that it is consistent with the Act to provide reasonable incentives to retail investors that rely on the public markets for their investment needs.

In addition, while the Program would be effectively limited to smaller firms that distribute data to no more than 5,000 Non-Professional Data Users, the Exchange does not believe that this limitation makes the fees inequitable, unfairly discriminatory, or otherwise contrary to the purposes of the Act. The Program is designed to ensure that small retail brokers have access to Exchange data at a modest cost, and therefore contains an eligibility cutoff based on the number of Non-Professional Users that would receive EDGX Equities Exchange Data. The retail broker clients identified by the Exchange provide data from the Exchange or its affiliates to an average of more than 160,000 Non-Professional Users, with a small handful of large retail brokers operating pursuant to an Enterprise license accounting for about 95% of those Non-Professional Users.<sup>28</sup> Many retail broker clients, however, have significantly smaller Non-Professional User populations, with retail brokers that are not operating pursuant to an Enterprise license providing data from the Exchange or its affiliates to an average of 8,845 Non-Professional Users. The 5,000 Non-Professional User threshold would therefore ensure that the benefits of the Program flow to small retail brokers, as intended, and not larger firms that already benefit from the current fee structure.

Large broker-dealers and/or vendors that distribute the Exchange’s data

<sup>27</sup> See U.S. Securities and Exchange Commission, Strategic Plan, Fiscal Years 2018–2022, available at [https://www.sec.gov/files/SEC\\_Strategic\\_Plan\\_FY18-FY22\\_FINAL\\_0.pdf](https://www.sec.gov/files/SEC_Strategic_Plan_FY18-FY22_FINAL_0.pdf).

<sup>28</sup> As explained, broker dealers with an Enterprise license are required to report total user populations but not whether each user is a Professional or Non-Professional User. See *supra* note 26. To perform this analysis, the Exchange therefore assumed that retail brokers qualifying for the enterprise cap had a similar breakdown of Professional/Non-Professional Users as retail brokers that reported this information.

<sup>25</sup> See Regulation NMS Adopting Release, *supra* note 20, at 37503.

products to a sizeable number of investors benefit from the current fee structure, which includes lower subscriber fees and Enterprise licenses. Due to lower subscriber fees, distributors that provide EDGX Equities Exchange Data to more than 5,000 Non-Professional Data Users already enjoy cost savings compared to competitor products. The Program would therefore ensure that small retail brokers that distribute top of book data to their retail investor customers could also benefit from reduced pricing, and would aid in increasing the competitiveness of the Exchange's data products for this key segment of the market.

The table below illustrates the impact of the proposed pricing on firms that qualify for the Program, both compared to the Exchange's current pricing, and compared to the fees charged for a

competitor product, *i.e.*, Nasdaq Basic. As shown, Cboe One Summary Feed Data provided pursuant to the Program would be cheaper than Nasdaq Basic for firms with more than 1,200 Non-Professional Users, and the benefits of the pricing structure would continue to scale up to firms with 5,000 Non-Professional Users. Further, EDGX Top Data, which is already subject to a lower distribution fee than Nasdaq Basic, would become even more cost effective. After 5,000 Non-Professional Users the firm would no longer be eligible for the Small Retail Broker Distribution Program but would already enjoy significant cost savings compared to Nasdaq Basic under the current pricing structure. The Exchange therefore believes that the Program would allow the Exchange to better compete with competitors for smaller firms that

currently pay a lower fee under, for example, the Nasdaq Basic pricing model, while also ensuring that larger firms continue to receive attractive pricing that is already cheaper than top of book data offered by the main competitor product. The Exchange believes this supplemental information further validates its assessment that the proposed fee reduction is reasonable, equitable, and not unfairly discriminatory. Without the proposed fee reduction, small retail brokers that would otherwise qualify for the reduced fees proposed would be subject to either higher fees for accessing Exchange top of book data, or may switch to competitor offerings that are also less cost effective, but at current fees levels, cheaper than the current Cboe One Summary fee.

		1,200		Nasdaq Basic		Difference vs. Nasdaq Basic	
Product	Non-Professional User Qty	Standard Model Total Fee	SRBP Total Fee	Total Fee	Total Fee	Total Fee	Total Fee
Cboe One Summary	1,200	\$ 6,000.00	\$ 3,850.00	\$3,850	0.00		
EDGX Top	1,200	\$ 1,500.00	\$ 750.00	\$3,850	3100.00		

		3,350		Nasdaq Basic		Difference vs. Nasdaq Basic	
Product	Non-Professional User Qty	Standard Model Total Fee	SRBP Total Fee	Total Fee	Total Fee	Total Fee	Total Fee
Cboe One Summary	3,350	\$ 6,000.00	\$ 3,850.00	\$6,000	2150.00		
EDGX Top	3,350	\$ 1,500.00	\$ 750.00	\$6,000	5250.00		

		7,500		Nasdaq Basic		Difference vs. Nasdaq Basic	
Product	Non-Professional User Qty	Standard Model Total Fee	SRBP Total Fee	Total Fee	Total Fee	Total Fee	Total Fee
Cboe One Summary	7,500	\$ 6,000.00	\$ 3,850.00	\$10,150	4150.00		
EDGX Top	7,500	\$ 1,500.00	\$ 750.00	\$10,150	9400.00		

### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange operates in a highly competitive environment, and its ability to price these data products is constrained by: (i) Competition among exchanges that offer similar data products to their customers; and (ii) the existence of inexpensive real-time consolidated data disseminated by the SIPs. Top of book data is disseminated by both the SIPs and the thirteen equities exchanges. There are therefore a number of alternative products available to market participants and investors. In this competitive environment potential subscribers are free to choose which competing product to purchase to satisfy their need for market information. Often, the choice comes down to price, as broker-dealers or vendors look to purchase the cheapest top of book data product, or quality, as market participants seek to purchase data that represents significant market liquidity. In order to better compete for this segment of the market, the Exchange is proposing to reduce the cost of top of book data provided by small retail brokers to their retail investor clients. The Exchange believes that this would facilitate greater access to such data, ultimately benefiting the retail investors that are provided access to such market data.

The Exchange does not believe that this price reduction would cause any unnecessary or inappropriate burden on intermarket competition as other exchanges and data vendors are free to lower their prices to better compete with the Exchange's offering. Indeed, as explained in the basis section of this proposed rule change, the Exchange's decision to lower its distribution and consolidation fees for small retail brokers is itself a competitive response to different fee structures available on competing markets. The Exchange therefore believes that the proposed rule change is pro-competitive as it seeks to offer pricing incentives to customers to better position the Exchange as it competes to attract additional market data subscribers. The Exchange also believes that the proposed reduction in fees for small retail brokers would not cause any unnecessary or inappropriate burden on intramarket competition. Although the proposed fee discount

would be largely limited to small retail broker subscribers, larger broker-dealers and vendors can already purchase top of book data from the Exchange at prices that represent a significant cost savings when compared to competitor products that combine higher subscriber fees with lower fees for distribution. In light of the benefits already provided to this group of subscribers, the Exchange believes that additional discounts to small retail brokers would increase rather than decrease competition among broker-dealers that participate on the Exchange. Furthermore, as discussed earlier in this proposed rule change, the Exchange believes that offering pricing benefits to brokers that represent retail investors facilitates the Commission's mission of protecting ordinary investors, and is therefore consistent with the Act.

### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>29</sup> and paragraph (f) of Rule 19b-4<sup>30</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

<sup>29</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>30</sup> 17 CFR 240.19b-4(f).

- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CboeEDGX-2019-071 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-CboeEDGX-2019-071. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet 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-CboeEDGX-2019-071 and should be submitted on or before January 6, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>31</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. 2019-26989 Filed 12-13-19; 8:45 am]

**BILLING CODE 8011-01-P**

<sup>31</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-87712; File No. SR-CboeBZX-2019-101]

### Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Introduce a Small Retail Broker Distribution Program

December 10, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 27, 2019, Cboe BZX Exchange, Inc. (“Exchange” or “BZX”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Cboe BZX Exchange, Inc. (“BZX” or the “Exchange”) is filing with the Securities and Exchange Commission (the “Commission”) a proposed rule change to introduce a Small Retail Broker Distribution Program. The text of the proposed changes to the fee schedule are enclosed [sic] as Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website ([http://markets.cboe.com/us/equities/regulation/rule\\_filings/bzx/](http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/)), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

#### A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

The purpose of the proposed rule change is to introduce a pricing program that would allow small retail brokers that purchase top of book market data from the Exchange to benefit from discounted fees for access to such market data. The Small Retail Broker Distribution Program (the “Program”) would reduce the distribution and consolidation fees paid by small broker-dealers that operate a retail business. In turn, the Program may increase retail investor access to real-time U.S. equity quote and trade information, and allow the Exchange to better compete for this business with competitors that offer similar optional products. The Exchange initially filed to introduce the Program on August 1, 2019 (“Initial Proposal”) to further ensure that retail investors served by smaller firms have cost effective access to its market data products, and as part of its ongoing efforts to improve the retail investor experience in the public markets. The Initial Proposal was published in the **Federal Register** on August 20, 2019,<sup>3</sup> and the Commission received no comment letters on the Initial Proposal. The Program remained in effect until the fee change was temporarily suspended pursuant to a suspension order (the “Initial Suspension Order”).<sup>4</sup> The Initial Suspension Order also instituted proceedings to determine whether to approve or disapprove the Initial Proposal.<sup>5</sup> On October 1, 2019, the Exchange re-filed its proposed rule change with additional information about the basis for the proposed fee change (“Second Proposal”), which as noted above is designed to facilitate retail investor access to reasonably priced market data. The Second Proposal was published in the **Federal Register** on October 15, 2019,<sup>6</sup> and the Commission received no comment letters on the Second Proposal. The Program again remained in effect until the fee change was temporarily suspended pursuant to a suspension order (the “Second Suspension

Order”).<sup>7</sup> The Second Suspension Order also instituted proceedings to determine whether to approve or disapprove the Second Proposal.<sup>8</sup>

##### Current Fees

The Cboe One Summary Feed is a top of book data feed that provides real-time U.S. equity quote and trade information to investors based on equity orders submitted to the Exchange and its affiliated equities exchanges—*i.e.*, Cboe BYX Exchange, Inc., Cboe EDGX Exchange, Inc., and Cboe EDGA Exchange, Inc. Specifically, the Cboe One Summary Feed is a data feed that contains the aggregate best bid and offer of all displayed orders for securities traded on the Exchange and its affiliated exchanges. The Cboe One Summary Feed also contains the individual last sale information for the Exchange and each of its affiliated exchanges, and consolidated volume for all listed equity securities. The fee for external distribution of the Cboe One Summary Feed is \$5,000 per month, and external distributors are also liable for a Data Consolidation Fee of \$1,000 per month, and User fees equal to \$10 per month for each Professional User, and \$0.25 per month for each Non-Professional User.<sup>9</sup>

##### Small Retail Broker Eligibility Requirements

The Exchange proposes to introduce a Program that would reduce costs for small retail brokers that provide top of book data to their clients. In order to be approved for the Small Retail Broker Distribution Program, Distributors would have to provide Cboe One Summary Feed Data to a limited number of clients with which the firm has established a brokerage relationship, and would have to provide such data primarily to Non-Professional Data Users. Specifically, distributors would have to attest that they meet the following criteria: (1) Distributor is a broker-dealer distributing Cboe One Summary Feed Data to Non-Professional Data Users with whom the broker-dealer has a brokerage relationship; (2) At least 90% of the Distributor’s total Data User population must consist of Non-Professional Data Users, inclusive of those not receiving Cboe One Summary Feed Data; and (3) Distributor

<sup>3</sup> See Securities Exchange Act Release No. 86667 (August 14, 2019), 84 FR 43233 (August 20, 2019) (SR-CboeBZX-2019-069).

<sup>4</sup> See Securities Exchange Act Release No. 87164 (September 30, 2019), 84 FR 53208 (October 4, 2019) (SR-CboeBZX-2019-069).

<sup>5</sup> *Id.*

<sup>6</sup> See Securities Exchange Act Release No. 87312 (October 15, 2019), 84 FR 56235 (October 21, 2019) (SR-CboeBZX-2019-086).

<sup>7</sup> See Securities Exchange Act Release No. 87629 (November 26, 2019) (SR-CboeBZX-2019-086) (**Federal Register** publication pending).

<sup>8</sup> *Id.*

<sup>9</sup> The Exchange also offers an Enterprise license for the Cboe One Summary Feed at a cost of \$50,000 per month. An Enterprise license permits distribution to an unlimited number of Professional and Non-Professional Users, keeping costs down for firms that provide access to a large number of subscribers.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

distributes Cboe One Summary Feed Data to no more than 5,000 Non-Professional Data Users.

These proposed requirements for participating in the Program are designed to ensure that the benefits provided by the Program inure to the benefit of small retail brokers that provide Cboe One Summary Feed Data to a limited number of subscribers. As explained later in this filing, distributors that provide Cboe One Summary Feed Data to a larger number of subscribers can benefit from the current pricing structure through scale, due to subscriber fees that are significantly lower than those charged by the Exchange's competitors, and an Enterprise license that caps the total fees to be paid by firms that distribute market data to a sizeable customer base. The Exchange believes that offering similarly attractive pricing to small retail brokers, including regional firms both inside and outside of the U.S. that may not have the same established client base as the larger retail brokers, would make the Exchange's data a more competitive alternative for those firms, and would help ensure that such information is widely available to a larger number of retail investors globally. The Program would also be available to retail brokers more generally, regardless of size, that wish to trial the Cboe One Summary Feed with a limited number of subscribers before potentially expanding distribution to additional clients, potentially further increasing the accessibility of the Exchange's market data to retail investors. The Program would be exclusive to the Cboe One Summary Feed, which is a top of book offering, as retail investors typically do not need or use depth of book data to facilitate their equity investments, and their brokers typically do purchase such market data on their behalf.

#### Discounted Fees

Distributors that participate in the Program would be liable for lower distribution and consolidation fees for access to the Cboe One Summary Data Feed.<sup>10</sup> The distribution fee charged for the Cboe One Summary Feed would be lowered by 30% from the current \$5,000 per month to \$3,500 per month for distributors that meet the requirements of the Program. In addition, the Data Consolidation Fee charged for the Cboe One Summary Feed would be lowered by 65% from the current \$1,000 per

month to \$350 per month. User fees for any Professional or Non-Professional Users that access Cboe One Summary Feed data from a distributor that participates in the Program would remain at their current levels as the current subscriber charges are already among the most competitive in the industry.<sup>11</sup>

The Exchange believes that these fees, which represent a significant cost savings for small retail brokers, would help ensure that retail investors continue to have fair and efficient access to U.S. equity market data. While retail investors normally pay a fixed commission when buying or selling equities, and do not typically pay separate fees for market data, the Exchange believes that the proposed reduction in fees would make the Exchange's data more competitive with other available alternatives, and may encourage retail brokers to make such data more readily available to their clients. In sum, the Exchange believes that the proposed fee reductions may facilitate more cost effective access to top of book data that is purchased on a voluntary basis by retail brokers and provided to their retail investor clients.

#### Market Background

The market for top of book data is highly competitive as national securities exchanges compete both with each other and with the securities information processors ("SIPs") to provide efficient, reliable, and low cost data to a wide range of investors and market participants. In fact, Regulation NMS requires all U.S. equities exchanges to provide their best bids and offers, and executed transactions, to the two registered SIPs for dissemination to the public. Top of book data is therefore widely available to investors today at a relatively modest cost. National securities exchanges may also disseminate their own top of book data, but no rule or regulation of the Commission requires market participants to purchase top of book data from an exchange.<sup>12</sup> The Cboe One Summary Feed therefore competes with the SIP and with similar products offered by other national securities exchanges that offer their own

competing top of book products. In fact, there are ten competing top of book products offered by other national securities exchanges today, not counting products offered by the Exchange's affiliates.<sup>13</sup>

The purpose of the proposed rule change is to further increase the competitiveness of the Exchange's top of book market data products compared to competitor offerings that may currently be cheaper for firms with a limited subscriber base that do not yet have the scale to take advantage of the lower subscriber fees offered by the Exchange. In turn, the Exchange believes that this change may benefit market participants and investors by spurring additional competition and increasing the accessibility of the Exchange's top of book data.

As explained, the Exchange filed the Initial Proposal to introduce the Program in August in order to provide an attractive pricing option for small retail brokers. Although that filing was ultimately suspended by the Commission, and a Second Proposal filed and withdrawn [sic], the Exchange believes that its experience in offering the Program while it has been in effect reflect the competitive nature of the market for the creation and distribution of top of book data. Specifically, after the Exchange reduced the fees charged to small retail brokers under the Initial Proposal and Second Proposal, it successfully onboarded two new customers due to the attractive pricing.<sup>14</sup> These customers are now able to offer high quality and cost effective data to their retail investor clients. The Exchange has also been discussing the Program with a handful of additional prospective clients that are interested in providing top of book data to retail investors. Without the proposed pricing discounts, the Exchange believes that those customers and prospective customers may not be interested in purchasing top of book data from the Exchange, and would instead purchase such data from other national securities exchanges or the SIPs, potentially at a higher cost than would be available pursuant to the Program. The Program has therefore already been successful in increasing competition for such market

<sup>11</sup> By comparison, The Nasdaq Stock Market LLC ("Nasdaq") charges a subscriber fee for Nasdaq Basic that adds up to \$26 per month for Professional Subscribers and \$1 per month for Non-Professional Subscribers (Tapes A, B, and C). See Nasdaq Equity Rules, Equity 7, Pricing Schedule, Section 147(b)(1).

<sup>12</sup> By contrast, Rule 603(c) of Regulation NMS (the "Vendor Display Rule") effectively requires that SIP data or some other consolidated display be utilized in any context in which a trading or order-routing decision can be implemented.

<sup>13</sup> Competing top of book products include, Nasdaq Basic, BX Basic, PSX Basic, NYSE BQT, NYSE BBO/Trades, NYSE Arca BBO/Trades, NYSE American BBO/Trades, NYSE Chicago BBO/Trades, and IEX TOPS.

<sup>14</sup> See e.g., Cboe Innovation Spotlight, "dough—The commission-free online broker with premium content and insights," available at [https://markets.cboe.com/us/equities/market\\_data/products/spotlight/](https://markets.cboe.com/us/equities/market_data/products/spotlight/). The second customer will begin participating in the Program on December 1, 2019.

<sup>10</sup> New external distributors of the Cboe One Summary Feed are not currently charged external distributor fees for their first month of service. This would continue to be the case for external distributors that participate in the Program.

data, and continued operation of the Program would serve to both reduce fees for such customers and to provide alternatives to data and pricing offered by competitors. Ultimately, the Exchange believes that it is critical that it be allowed to compete by offering attractive pricing to customers as increasing the availability of such products ensures continued competition with alternative offerings. Such competition may be constrained when competitors are impeded from offering alternative and cost effective solutions to customers.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,<sup>15</sup> in general, and furthers the objectives of Section 6(b)(4),<sup>16</sup> in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other recipients of Exchange data.

The Exchange also believes that the proposed rule change is consistent with Section 11(A) of the Act.<sup>17</sup> Specifically, the proposed rule change supports (i) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets, and (ii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. In addition, the proposed rule change is consistent with Rule 603 of Regulation NMS,<sup>18</sup> which provides that any national securities exchange that distributes information with respect to quotations for or transactions in an NMS stock do so on terms that are not unreasonably discriminatory.

In adopting Regulation NMS, the Commission granted SROs and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes that the proposed fee change would further broaden the availability of U.S. equity market data to investors, and in particular retail investors, consistent with the principles of Regulation NMS.

The Exchange operates in a highly competitive environment. Indeed, there are thirteen registered national securities exchanges that trade U.S.

equities and offer associated top of book market data products to their customers. The national securities exchanges also compete with the SIPs for market data customers. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>19</sup> The proposed fee change is a result of the competitive environment, as the Exchange seeks to amend its fees to attract additional subscribers for its proprietary top of book data offerings.

The proposed fee change would reduce fees charged to small retail brokers that provide access to the Cboe One Summary Feed. The Cboe One Summary Feed is a competitively-priced alternative to top of book data disseminated by SIPs, or similar data disseminated by other national securities exchanges.<sup>20</sup> It provides subscribers with consolidated top of book quotes and trades from four Cboe U.S. equities markets, which together account for about 17% of consolidated U.S. equities trading volume.<sup>21</sup> The Cboe One Summary Feed is purchased by a wide variety of market participants and vendors, including data platforms, websites, fintech firms, buy-side investors, retail brokers, regional banks, and securities firms inside and outside of the U.S. that desire low cost, high quality, real-time U.S. equity market data. By providing lower cost access to U.S. equity market data, the Cboe One Summary Feed benefits a wide range of investors that participate in the national market system. Reducing fees for broker-dealers that represent retail investors and that may have more limited resources than some of their larger competitors would further increase access to such data and facilitate a competitive market for U.S. equity securities, consistent with the goals of the Act.

While the Exchange is not required to make any data, including top of book data, available through its proprietary market data platform, the Exchange

believes that making such data available increases investor choice, and contributes to a fair and competitive market. Specifically, making such data publicly available through proprietary data feeds allows investors to choose alternative, potentially less costly, market data based on their business needs. While some market participants that desire a consolidated display choose the SIP for their top of book data needs, and in some cases are effectively required to do so under the Vendor Display Rule, others may prefer to purchase data directly from one or more national securities exchanges. For example, a buy-side investor may choose to purchase the Cboe One Summary Feed, or a similar product from another exchange, in order to perform investment analysis. The Cboe One Summary Feed represents quotes from four highly liquid equities markets. As a result, the Cboe One Summary Feed is within 1% of the national best bid and offer approximately 98% of the time,<sup>22</sup> and therefore serves as a valuable reference for investors that do not require a consolidated display that contains quotations for all U.S. equities exchanges. Making alternative products available to market participants ultimately ensures increased competition in the marketplace, and constrains the ability of exchanges to charge supracompetitive fees. In the event that a market participant views one exchanges top of book data fees as more or less attractive than the competition they can and frequently do switch between competing products. In fact, the competitiveness of the market for such top of book data products is one of the primary factors animating this proposed rule change, which is designed to allow the Exchange to further compete for this business.

Indeed, the Exchange has already successfully onboarded two new Distributors that have decided to purchase Cboe One Summary Data from the Exchange rather than purchasing top of book data from a competitor exchange. In addition, the Exchange is in discussions with a handful of other Distributors that are interested in procuring market data from the Exchange due to the attractive pricing offered pursuant to the Program. Distributors can discontinue use at any time and for any reason, including due to an assessment of the reasonableness of fees charged. Further, firms have a wide variety of alternative market data products from which to choose, such as similar proprietary data products

<sup>19</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

<sup>20</sup> See e.g., supra note 11 (discussing Nasdaq Basic).

<sup>21</sup> *Id.*

<sup>22</sup> See [https://markets.cboe.com/us/equities/market\\_data\\_services/cboe\\_one/](https://markets.cboe.com/us/equities/market_data_services/cboe_one/).

<sup>15</sup> 15 U.S.C. 78f.

<sup>16</sup> 15 U.S.C. 78f(b)(4).

<sup>17</sup> 15 U.S.C. 78k-1.

<sup>18</sup> See 17 CFR 242.603.

offered by other national securities exchanges. Making the Exchange's top of book data available at a lower cost, ultimately serves the interests of retail investors that rely on the public markets. The Exchange understands that the Commission is interested in ensuring that retail investors are appropriately served in the U.S. equities market. The Exchange agrees that it is important to ensure that our markets continue to serve the needs of ordinary investors, and the Program is consistent with this goal.

The Exchange believes that the proposed fees are reasonable as they represent a significant cost reduction for smaller, primarily regional, retail brokers that provide top of book data from BZX and its affiliated equities exchanges to their retail investor clients. The market for top of book data is intensely competitive due to the availability of substitutable products that can be purchased either from other national securities exchanges, or from registered SIPs that make such top of book data publicly available to investors at a modest cost. The proposed fee reduction is being made to make the Exchange's fees more competitive with such offerings for this segment of market participants, thereby increasing the availability of the Exchange's data products, and expanding the options available to firms making data purchasing decisions based on their business needs. The Exchange believes that this is consistent with the principles enshrined in Regulation NMS to "promote the wide availability of market data and to allocate revenues to SROs that produce the most useful data for investors."<sup>23</sup>

Today, the Cboe One Summary Feed is among the most competitively priced top of book offerings in the industry due to modest subscriber fees, and a lower Enterprise cap, both of which keep fees at a relatively modest level for larger firms that provide market data to a sizeable number of Professional or Non-Professional Users. Distributors with a smaller user base, however, may choose to use competitor products that have a lower distribution fee and higher subscriber fees. The Program would help the Exchange compete for this segment of the market, and may broaden the reach of the Exchange's data products by providing an additional low cost alternative to competitor products for small retail brokers. While such firms may already utilize similar market data products from other sources, the Exchange believes that offering its own

data to small retail brokers at lower distribution and data consolidation costs has the potential to increase choice for market participants, and ultimately increase the data available to retail investors when coupled with the Exchange's lower subscriber fees.

The Exchange also believes that the proposed fees are equitable and not unfairly discriminatory as the proposed fee structure is designed to decrease the price and increase the availability of U.S. equities market data to retail investors. The Program is designed to reduce the cost of top of book market data for broker-dealers that provide such data to Non-Professional Data User clients that make up a significant majority of the distributor's total subscriber population. While there is no "exact science" to choosing one eligibility threshold compared to another, the Exchange believes that having significantly more Non-Professional Data Users than Professional Data User across a firm's entire business, *i.e.*, not limited exclusively to Data Users that are provided access to the Exchange's data products, is indicative of a broker-dealer that is primarily and actively engaged in the business of serving retail investors.

This understanding is confirmed by an analysis conducted by the Exchange on the user population of its retail broker clients that purchase market data from the Exchange and its affiliated exchanges. When the Exchange initially filed to introduce the Program, it included a simple majority requirement—*i.e.*, more than 50% of the broker dealer's user population would have to be Non-Professional Users. The Exchange's experience to date has been that this requirement has been sufficient to ensure that the benefits of the Program go to retail brokers, and indeed each of the current customers that participate in or are soon to participate in the Program have been focused on providing trading services to ordinary investors. Based on additional analysis, however, the Exchange believes that this threshold can be safely increased to require at least 90% Non-Professional Users, as proposed today, without limiting the benefits provided to broker dealers that primarily serve retail investors. To perform its analysis, the Exchange reviewed user populations for each broker dealer that it identified as primarily engaged in serving retail investors (*i.e.*, retail brokers), and for which the Exchange has reported usage broken down into Professional and Non-Professional Users.<sup>24</sup> This analysis

showed that each retail broker identified currently provides market data from the Exchange or its affiliates to at least 90% Non-Professional Users, with the Professional/Non-Professional breakdown ranging from 90.9% Non-Professional Users on the low end to 100% Non-Professional Users on the high end.

As such, even with the higher threshold proposed, the Program would be broadly available to a wide range of retail brokers that either purchase the Cboe One Summary Feed today, or that may choose to switch from competing products due to the potential cost savings. In addition to the subscribers that are participating and are soon to participate in the Program, a number of distributors that currently purchase top of book data from one of the four Cboe U.S. equities exchanges, and many more prospective customers, could benefit from the Program. Each of these current or prospective retail broker customers would receive the same benefits in terms of reduced distribution and consolidation fees based on the product that they purchase from the Exchange.

The Commission has long stressed the need to ensure that the equities markets are structured in a way that meets the needs of ordinary investors. For example, the Commission's strategic plan for fiscal years 2018–2022 touts "focus on the long-term interests of our Main Street investors" as the Commission's number one strategic goal.<sup>25</sup> The Program would be consistent with the Commission's stated goal of improving the retail investor experience in the public markets. Furthermore, national securities exchanges commonly charge reduced fees and offer market structure benefits to retail investors, and the Commission has consistently held that such incentives are consistent with the Act. The Exchange believes that the Program is consistent with longstanding precedent indicating that it is consistent with the Act to provide reasonable incentives to retail investors that rely on the public markets for their investment needs.

In addition, while the Program would be effectively limited to smaller firms that distribute data to no more than 5,000 Non-Professional Data Users, the

whether each user is a Professional or Non-Professional User. As a result, the Exchange has excluded those firms from this portion of its analysis. That said, the Exchange believes those firms may have a similar Professional/Non-Professional breakdown to other retail brokers.

<sup>25</sup> See U.S. Securities and Exchange Commission, Strategic Plan, Fiscal Years 2018–2022, available at [https://www.sec.gov/files/SEC\\_Strategic\\_Plan\\_FY18-FY22\\_FINAL\\_0.pdf](https://www.sec.gov/files/SEC_Strategic_Plan_FY18-FY22_FINAL_0.pdf).

<sup>23</sup> See Regulation NMS Adopting Release, *supra* note 19, at 37503.

<sup>24</sup> Broker dealers with an Enterprise license are required to report total user populations but not

Exchange does not believe that this limitation makes the fees inequitable, unfairly discriminatory, or otherwise contrary to the purposes of the Act. The Program is designed to ensure that small retail brokers have access to Exchange data at a modest cost, and therefore contains an eligibility cutoff based on the number of Non-Professional Users that would receive Cboe One Summary Feed Data. The retail broker clients identified by the Exchange provide data from the Exchange or its affiliates to an average of more than 160,000 Non-Professional Users, with a small handful of large retail brokers operating pursuant to an Enterprise license accounting for about 95% of those Non-Professional Users.<sup>26</sup> Many retail broker clients, however, have significantly smaller Non-Professional User populations, with retail brokers that are not operating pursuant to an Enterprise license providing data from the Exchange or its affiliates to an average of 8,845 Non-Professional Users. The 5,000 Non-Professional User threshold would therefore ensure that the benefits of the Program flow to small retail brokers, as intended, and not larger firms that already benefit from the current fee structure.

Large broker-dealers and/or vendors that distribute the Exchange's data products to a sizeable number of investors benefit from the current fee structure, which includes lower subscriber fees and Enterprise licenses. Due to lower subscriber fees, distributors that provide Cboe One Summary Feed Data to more than 5,000 Non-Professional Data Users already enjoy cost savings compared to competitor products. The Program would therefore ensure that small retail brokers that distribute top of book data to their retail investor customers could also benefit from reduced pricing, and would aid in increasing the competitiveness of the Exchange's data products for this key segment of the market.

The table below illustrates the impact of the proposed pricing on firms that qualify for the Program, both compared to the Exchange's current pricing, and compared to the fees charged for a competitor product, *i.e.*, Nasdaq Basic. As shown, Cboe One Summary Feed Data provided pursuant to the Program would be cheaper than Nasdaq Basic for firms with more than 1,200 Non-Professional Users, and the benefits of the pricing structure would continue to

scale up to firms with 5,000 Non-Professional Users. After 5,000 Non-Professional Users the firm would no longer be eligible for the Small Retail Broker Distribution Program but would already enjoy significant cost savings compared to Nasdaq Basic under the current pricing structure. The Exchange therefore believes that the Program would allow the Exchange to better compete with competitors for smaller firms that currently pay a lower fee under, for example, the Nasdaq Basic pricing model, while also ensuring that larger firms continue to receive attractive pricing that is already cheaper than top of book data offered by the main competitor product. The Exchange believes this supplemental information further validates its assessment that the proposed fee reduction is reasonable, equitable, and not unfairly discriminatory. Without the proposed fee reduction, small retail brokers that would otherwise qualify for the reduced fees proposed would be subject to either higher fees for accessing Exchange top of book data, or may switch to competitor offerings that are also less cost effective, but at current fees levels, cheaper than the current Cboe One Summary fee.

Small Retail Broker Distribution Program					
	1,200			Nasdaq Basic	Difference vs. Nasdaq Basic
Product	Non-Professional User Qty	Standard Model Total Fee	SRBP Total Fee	Total Fee	Total Fee
Cboe One Summary	1,200	\$ 6,000.00	\$ 3,850.00	\$3,850	0.00
BZX Top	1,200	\$ 2,500.00	\$ 2,500.00	\$3,850	1350.00
	3,350			Nasdaq Basic	Difference vs. Nasdaq Basic
Product	Non-Professional User Qty	Standard Model Total Fee	SRBP Total Fee	Total Fee	Total Fee
Cboe One Summary	3,350	\$ 6,000.00	\$ 3,850.00	\$6,000	2150.00
BZX Top	3,350	\$ 2,500.00	\$ 2,500.00	\$6,000	3500.00
	7,500			Nasdaq Basic	Difference vs. Nasdaq Basic
Product	Non-Professional User Qty	Standard Model Total Fee	SRBP Total Fee	Total Fee	Total Fee
Cboe One Summary	7,500	\$ 6,000.00	\$ 3,850.00	\$10,150	4150.00
BZX Top	7,500	\$ 2,500.00	\$ 2,500.00	\$10,150	7650.00

<sup>26</sup> As explained, broker dealers with an Enterprise license are required to report total user populations but not whether each user is a Professional or Non-

Professional User. See supra note 24. To perform this analysis, the Exchange therefore assumed that retail brokers qualifying for the enterprise cap had

a similar breakdown of Professional/Non-Professional Users as retail brokers that reported this information.

### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange operates in a highly competitive environment, and its ability to price these data products is constrained by: (i) Competition among exchanges that offer similar data products to their customers; and (ii) the existence of inexpensive real-time consolidated data disseminated by the SIPs. Top of book data is disseminated by both the SIPs and the thirteen equities exchanges. There are therefore a number of alternative products available to market participants and investors. In this competitive environment potential subscribers are free to choose which competing product to purchase to satisfy their need for market information. Often, the choice comes down to price, as broker-dealers or vendors look to purchase the cheapest top of book data product, or quality, as market participants seek to purchase data that represents significant market liquidity. In order to better compete for this segment of the market, the Exchange is proposing to reduce the cost of top of book data provided by small retail brokers to their retail investor clients. The Exchange believes that this would facilitate greater access to such data, ultimately benefiting the retail investors that are provided access to such market data.

The Exchange does not believe that this price reduction would cause any unnecessary or inappropriate burden on intermarket competition as other exchanges and data vendors are free to lower their prices to better compete with the Exchange's offering. Indeed, as explained in the basis section of this proposed rule change, the Exchange's decision to lower its distribution and consolidation fees for small retail brokers is itself a competitive response to different fee structures available on competing markets. The Exchange therefore believes that the proposed rule change is pro-competitive as it seeks to offer pricing incentives to customers to better position the Exchange as it competes to attract additional market data subscribers. The Exchange also believes that the proposed reduction in fees for small retail brokers would not cause any unnecessary or inappropriate burden on intramarket competition.

Although the proposed fee discount would be largely limited to small retail broker subscribers, larger broker-dealers and vendors can already purchase top of book data from the Exchange at prices that represent a significant cost savings when compared to competitor products that combine higher subscriber fees with lower fees for distribution. In light of the benefits already provided to this group of subscribers, the Exchange believes that additional discounts to small retail brokers would increase rather than decrease competition among broker-dealers that participate on the Exchange. Furthermore, as discussed earlier in this proposed rule change, the Exchange believes that offering pricing benefits to brokers that represent retail investors facilitates the Commission's mission of protecting ordinary investors, and is therefore consistent with the Act.

### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>27</sup> and paragraph (f) of Rule 19b-4<sup>28</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

<sup>27</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>28</sup> 17 CFR 240.19b-4(f).

### *Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CboeBZX-2019-101 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-CboeBZX-2019-101. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet 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-CboeBZX-2019-101 and should be submitted on or before January 6, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>29</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. 2019-26990 Filed 12-13-19; 8:45 am]

**BILLING CODE 8011-01-P**

<sup>29</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–87707; File No. SR–CboeEDGX–2019–072]

### Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Maximum Composite Width Check of the Opening Rotation as Provided in Subparagraph (e)(1) of Exchange Rule 21.7

December 10, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b–4 thereunder,<sup>2</sup> notice is hereby given that on December 4, 2019, Cboe EDGX Exchange, Inc. (the “Exchange” or “EDGX”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>3</sup> and Rule 19b–4(f)(6) thereunder.<sup>4</sup> 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

Cboe EDGX Exchange, Inc. (the “Exchange” or “EDGX”) proposes to amend the Maximum Composite Width Check of the opening rotation as provided in subparagraph (e)(1) of Exchange Rule 21.7. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website ([http://markets.cboe.com/us/options/regulation/rule\\_filings/edgx/](http://markets.cboe.com/us/options/regulation/rule_filings/edgx/)), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the

places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

#### A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

Exchange Rule 21.7 sets forth the Exchange’s opening auction process. Paragraph (e) of the Rule provides the opening rotation process, during which the System will determine whether the Composite Market<sup>5</sup> for a series is not wider than a maximum width, will determine the opening price, and open the series. Subparagraph (e)(1) provides that the System will determine whether the Composite Market for a series is not wider than a maximum width, as follows:

- If the Composite Width<sup>6</sup> of a series is less than or equal to the Maximum Composite Width,<sup>7</sup> the series is eligible to open (and the System determines the Opening Price).<sup>8</sup>
- If the Composite Width of a series is greater than the Maximum Composite Width, but there are no non-M Capacity<sup>9</sup> market orders or buy (sell) limit orders with prices higher (lower) than the Composite Bid (Offer) and there are no locked or crossed orders or quotes, the series is eligible to open (and

<sup>5</sup> The term “Composite Market” means the market for a series comprised of (1) the higher of the then-current best appointed Market-Maker bulk message bid on the Exchange and the ABB (if there is an ABB) and (2) the lower of the then-current best appointed Market-Maker bulk message offer on the Exchange and the ABO (if there is an ABO). The term “Composite Bid (Offer)” means the bid (offer) used to determine the Composite Market. See Exchange Rule 21.7(a).

<sup>6</sup> The term “Composite Width” means the width of the Composite Market (*i.e.*, the width between the Composite Bid and the Composite Offer) of a series. See Exchange Rule 21.7(a).

<sup>7</sup> The term “Maximum Composite Width” means the amount that the Composite Width of a series may generally not be greater than for the series to open (subject to certain exceptions set forth in subparagraph (e)(1)). The Exchange determines this amount on a class and Composite Bid basis, which amount the Exchange may modify during the opening auction process (which modifications the Exchange disseminates to all subscribers to the Exchange’s data feeds that deliver opening auction updates). See Exchange Rule 21.7(a).

<sup>8</sup> See Exchange Rule 21.7(e)(1)(A).

<sup>9</sup> Capacity M is used for orders for the account of a Market-Maker (with an appointment in the class), thus “non-M Capacity” orders refer to orders entered for the accounts of non-Market-Makers (*e.g.*, Customer or Firm accounts). See U.S. Options Binary Order Entry Specifications, at 28 (definition of Capacity), available at [http://cdn.cboe.com/resources/membership/US\\_Options\\_BOE\\_Specification.pdf](http://cdn.cboe.com/resources/membership/US_Options_BOE_Specification.pdf).

the System determines the Opening Price).<sup>10</sup>

- If neither of the conditions above are satisfied for a series, or if the Composite Market of a series is crossed, the series is ineligible to open. The Queuing Period<sup>11</sup> for the series continues (including the dissemination of opening auction updates) until one of the above conditions for the series is satisfied, or the Exchange opens the series pursuant to paragraph (h).<sup>12</sup>

The Exchange implemented the price protection measure of subparagraph (e)(1)(B) in order to conservatively protect non-M capacity orders from executing in the Opening Auction Process at an extreme price. While it is possible for Market-Makers to submit orders to the Exchange at an extreme price, the Exchange believes there is less risk of a Market-Maker inputting an order at an extreme price given that Market-Makers are generally responsible for pricing the market. The following example shows the application of the Maximum Composite Width check provided for in subparagraph (e)(1)(B) and the type of extreme trade price for which the check is intended to limit.

#### Example #1

Suppose the Maximum Composite Width for a class is 1.00, and the Composite Market is 5.00 × 20.00 comprised of an appointed Market-Maker bulk message bid of 5.00 and an appointed Market-Maker bulk message offer of 20.00. There is a non-M capacity limit order to buy for 18.00 in the Queuing Book. Prior to the open, the Exchange does not know the market value of the option series; however, assume that the intrinsic value of the option series is 6.00. In this case, the series would not be eligible to open because the width of the Composite Market is greater than the Maximum Composite Width, and there is a non-M Capacity order at a price inside of the Composite Market. If the Exchange permitted the option series to open in this circumstance, the non-M capacity limit order may execute in the Opening Auction Process at its limit price, which the Exchange would consider an extreme price given that the intrinsic value of the option series is 6.00. Therefore, subparagraph (e)(1)(B) is designed to protect the non-M capacity order from executing at such an extreme

<sup>10</sup> See Exchange Rule 21.7(e)(1)(B).

<sup>11</sup> The term “Queuing Period” means the time period prior to the initiation of an opening rotation during which the System accepts orders and quotes in the Queuing Book for participation in the opening rotation for the applicable trading session. See Exchange Rule 21.7(a).

<sup>12</sup> See Exchange Rule 21.7(e)(1)(C).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b–4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>4</sup> 17 CFR 240.19b–4(f)(6).

price by not opening the option series in such a scenario.

However, in certain instances where the Composite Market is wide, the Exchange believes the conditions of subparagraph (e)(1)(B) may be overly conservative and unnecessarily prevent the opening of a series when the risk of execution at the open at an extreme price is minimal. The following example shows the application of the Maximum Composite Width check provided for in subparagraph (e)(1)(B) and the type of non-extreme trade price for which the check will limit.

#### Example #2

Suppose the Maximum Composite Width for a class is 1.00, and the Composite Market is  $5.00 \times 7.00$  comprised of an appointed Market-Maker bulk message bid of 5.00 and an appointed Market-Maker bulk message offer of 7.00. There is a non-M capacity limit order to buy for 5.75 in the Queuing Book.<sup>13</sup> Prior to the open, the Exchange does not know the market value of the option series; however, assume that the intrinsic value of the option series is 5.75. In this case, the series would not be eligible to open because the width of the Composite Market is greater than the Maximum Composite Width, and there is a non-M Capacity order at a price inside of the Composite Market.

As demonstrated in Example #2, subparagraph (e)(1)(B) provides no circumstance under which a non-M capacity order may improve the Composite Market when the Composite Width is greater than the Maximum Composite Width that would allow the Exchange to open the series, even when such non-M capacity order is not entered at an extreme limit price. Given this, the Exchange proposes to amend subparagraph (e)(1)(B) to allow the Exchange to open a series if the Composite Width is greater than the Maximum Composite Width and there are non-M Capacity limit orders at a price better than the Composite Bid (Offer) in certain circumstances. Specifically, the proposed amendment will allow the Exchange to open a series

if the Composite Width of a series is greater than the Maximum Composite Width, but there are no non-M Capacity market orders or buy (sell) limit orders with prices higher (lower) than the Composite Market midpoint and there are no locked or crossed orders or quotes. Thus, under proposed subparagraph (e)(1)(B), the Exchange would allow the option series to open in Example #2 above as the non-M capacity limit bid was entered at a price lower than the Composite Market midpoint. The proposed amendment would continue to limit the risk of a non-M capacity order executing at an extreme price in Example #1 as the non-M capacity limit bid was entered at a price higher than the Composite Market midpoint.

The Exchange believes the proposed amendment strikes a reasonable balance between protecting non-M capacity orders from executing at extreme prices and encouraging the submission of non-M capacity orders at prices that improve the Composite Market, which will allow the Exchange to open series earlier and also allow for more trading opportunities on the Exchange throughout the trading day. The Exchange believes the proposed amendment is reasonable, as it will allow the Exchange to open series on a less restrictive basis and potentially earlier, while still limiting the risk of a non-M capacity order executing at an extreme price on the open. If the width of the Composite Market (which the Exchange believes represents the prices most reflective of the market, as it is comprised of the better of Market-Maker bulk messages on the Exchange or any away market quotes) is no greater than the Maximum Composite Width, the Exchange will open the series because there is minimal risk of execution at an extreme price. Further, the Exchange notes that there are other price protections available to limit the risk of executions at an extreme price (*e.g.*, drill-through protection).<sup>14</sup> However, if the Composite Width is greater than the Maximum Composite Width but there are no non-M Capacity bids (offers) higher (lower) than the midpoint of the Composite Market (and thus better than the best Composite Bid (Offer) but still not marketable at a price at which the Exchange would open), there is minimal risk of an order executing at an extreme price on the open. Because the risk that the Maximum Composite Width Check

is intended to address is limited in this situation and also because any such orders would be subject to other price protections to further limit this risk, and that the Exchange believes such minimal risk is outweighed by the benefits of additional trading opportunities by opening these series earlier, the Exchange believes it is appropriate to open a series in either of these conditions. Therefore, if neither the (1) Composite Width of a series is less than or equal to the Maximum Composite Width, nor (2) if the Composite Width of a series is greater than the Maximum Composite Width, but there are no non-M Capacity<sup>15</sup> market orders or buy (sell) limit orders with prices higher (lower) than the Composite Market midpoint and there are no locked or crossed orders or quotes, the Exchange continues to believe there may be higher risk that orders would execute at an extreme price if the series opened, and therefore the Exchange will continue to not open a series.

#### 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>16</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>17</sup> requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>18</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes proposed Rule 21.7(e) will protect investors, because it

<sup>15</sup> Capacity M is used for orders for the account of a Market-Maker (with an appointment in the class), thus "non-M Capacity" orders refer to orders entered for the accounts of non-Market-Makers (*e.g.*, Customer or Firm accounts). See Exchange Rule 16.1.

<sup>16</sup> 15 U.S.C. 78f(b).

<sup>17</sup> 15 U.S.C. 78f(b)(5).

<sup>18</sup> *Id.*

<sup>13</sup> The term "Queuing Book" means the book into which Users may submit orders and quotes (and onto which Good-til-Cancelled ("GTC") and Good-til-Date ("GTD") orders remaining on the Book from the previous trading session or trading day, as applicable, are entered) during the Queuing Period for participation in the applicable opening rotation. Orders and quotes on the Queuing Book may not execute until the opening rotation. The Queuing Book for the Global Trading Hours ("GTH") opening auction process may be referred to as the "GTH Queuing Book," and the Queuing Book for the Regular Trading Hours ("RTH") opening auction process may be referred to as the "RTH Queuing Book." See Exchange Rule 21.7(a).

<sup>14</sup> The Exchange notes that drill-through protection is designed to limit a marketable non-bulk message bid (offer) from executing a certain amount higher (lower) than the National Best Offer (National Best Bid) or the Opening Collar. See Exchange Rule 21.17(a)(4).

will continue to limit the risk of execution of orders at extreme prices at the open in a manner similar to the existing Rule. The Exchange also believes the proposed amendment will benefit market participants as it may encourage the submission of orders at prices that improve the Composite Market in the Opening Auction Process on the Exchange, and allow the Exchange to open series earlier, which may also allow for more trading opportunities on the Exchange throughout the trading day.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed amendment will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, because it will apply to orders and quotes of all market participants in the same manner. Further, the proposed amendment would allow trading in options series to open sooner, which would benefit all market participants in these series. The Exchange notes that the protections of Rule 21.7(e)(1)(B) are not applied to Market-Maker orders because the Exchange believes there is less risk of a Market-Maker inputting an order at an extreme price given that Market-Makers are generally responsible for pricing the market.

The Exchange does not believe that the proposed rule change to amend the Maximum Composite Width Check of the opening rotation will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, because the proposed rule change only impacts the conditions under which a series will open on the Exchange. The proposed amendment may increase participation in the Opening Auction Process and further allow more series to open on the Exchange to the benefit of all Exchange Trading Permit Holders [sic].

The Exchange believes the proposed rule change may enhance intermarket competition by encouraging the submission of orders at improved prices in the Opening Auction Process and allowing more series to open on the Exchange in a more timely manner. Further, the proposed amendment will continue to limit the risk of orders executing at extreme prices at the open in a similar manner as set forth under current Rule 21.7(e).

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange neither solicited nor received comments on the proposed rule change.

#### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the 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<sup>19</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>20</sup>

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act<sup>21</sup> normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)<sup>22</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative upon filing. As noted above, the Exchange believes the Maximum Composite Width Check will continue to limit the risk of executions at extreme prices, and executions will be subject to other price protections on the Exchange. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing so that the benefits of this proposed rule change can be realized immediately.<sup>23</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the

<sup>19</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>20</sup> 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.

<sup>21</sup> 17 CFR 240.19b-4(f)(6).

<sup>22</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>23</sup> For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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](mailto:rule-comments@sec.gov). Please include File Number SR-CboeEDGX-2019-072 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-CboeEDGX-2019-072. 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-CboeEDGX-2019-072 and should be submitted on or before January 6, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>24</sup>

**J. Matthew DeLesDernier,**  
Assistant Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-87705; File No. SR-C2-2019-026]

### Self-Regulatory Organizations; Cboe C2 Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Maximum Composite Width Check of the Opening Rotation as Provided in Subparagraph (e)(1) of Exchange Rule 6.11

December 10, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 4, 2019, Cboe C2 Exchange, Inc. (the “Exchange” or “C2”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder.<sup>4</sup> 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

Cboe C2 Exchange, Inc. (the “Exchange” or “C2”) proposes to amend the Maximum Composite Width Check of the opening rotation as provided in subparagraph (e)(1) of Exchange Rule 6.11. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website ([http://markets.cboe.com/us/options/regulation/rule\\_filings/ctwo/](http://markets.cboe.com/us/options/regulation/rule_filings/ctwo/)), at the Exchange’s Office of the

Secretary, and at the Commission’s Public Reference Room.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

##### A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

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

###### 2. Purpose

Exchange Rule 6.11 sets forth the Exchange’s opening auction process. Paragraph (e) of the Rule provides the opening rotation process, during which the System will determine whether the Composite Market<sup>5</sup> for a series is not wider than a maximum width, will determine the opening price, and open the series. Subparagraph (e)(1) provides that the System will determine whether the Composite Market for a series is not wider than a maximum width, as follows:

<sup>5</sup> The term “Composite Market” means the market for a series comprised of (1) the higher of the then-current best appointed Market-Maker bulk message bid on the Exchange and the ABB (if there is an ABB) and (2) the lower of the then-current best appointed Market-Maker bulk message offer on the Exchange and the ABO (if there is an ABO). The term “Composite Bid (Offer)” means the bid (offer) used to determine the Composite Market. See Exchange Rule 6.11(a).

- If the Composite Width<sup>6</sup> of a series is less than or equal to the Maximum Composite Width,<sup>7</sup> the series is eligible to open (and the System determines the Opening Price).<sup>8</sup>

- If the Composite Width of a series is greater than the Maximum Composite Width, but there are no non-M Capacity<sup>9</sup> market orders or buy (sell) limit orders with prices higher (lower) than the Composite Bid (Offer) and there are no locked or crossed orders or quotes, the series is eligible to open (and the System determines the Opening Price).<sup>10</sup>

- If neither of the conditions above are satisfied for a series, or if the Composite Market of a series is crossed, the series is ineligible to open. The Queuing Period<sup>11</sup> for the series continues (including the dissemination of opening auction updates) until one of the above conditions for the series is satisfied, or the Exchange opens the series pursuant to paragraph (h).<sup>12</sup>

The Exchange implemented the price protection measure of subparagraph (e)(1)(B) in order to conservatively protect non-M capacity orders from executing in the Opening Auction Process at an extreme price. While it is possible for Market-Makers to submit orders to the Exchange at an extreme price, the Exchange believes there is less risk of a Market-Maker inputting an order at an extreme price given that Market-Makers are generally responsible for pricing the market. The following example shows the application of the Maximum Composite Width check provided for in subparagraph (e)(1)(B)

<sup>6</sup> The term “Composite Width” means the width of the Composite Market (*i.e.*, the width between the Composite Bid and the Composite Offer) of a series. See Exchange Rule 6.11(a).

<sup>7</sup> The term “Maximum Composite Width” means the amount that the Composite Width of a series may generally not be greater than for the series to open (subject to certain exceptions set forth in subparagraph (e)(1)). The Exchange determines this amount on a class and Composite Bid basis, which amount the Exchange may modify during the opening auction process (which modifications the Exchange disseminates to all subscribers to the Exchange’s data feeds that deliver opening auction updates). See Exchange Rule 6.11(a).

<sup>8</sup> See Exchange Rule 6.11(e)(1)(A).

<sup>9</sup> Capacity M is used for orders for the account of a Market-Maker (with an appointment in the class), thus “non-M Capacity” orders refer to orders entered for the accounts of non-Market-Makers (*e.g.*, Customer or Firm accounts). See U.S. Options Binary Order Entry Specifications, at 28 (definition of Capacity), available at [http://cdn.cboe.com/resources/membership/US\\_Options\\_BOE\\_Specification.pdf](http://cdn.cboe.com/resources/membership/US_Options_BOE_Specification.pdf).

<sup>10</sup> See Exchange Rule 6.11(e)(1)(B).

<sup>11</sup> The term “Queuing Period” means the time period prior to the initiation of an opening rotation during which the System accepts orders and quotes in the Queuing Book for participation in the opening rotation for the applicable trading session. See Exchange Rule 6.11(a).

<sup>12</sup> See Exchange Rule 6.11(e)(1)(C).

<sup>24</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

and the type of extreme trade price for which the check is intended to limit.

#### Example #1

Suppose the Maximum Composite Width for a class is 1.00, and the Composite Market is 5.00 x 20.00 comprised of an appointed Market-Maker bulk message bid of 5.00 and an appointed Market-Maker bulk message offer of 20.00. There is a non-M capacity limit order to buy for 18.00 in the Queuing Book. Prior to the open, the Exchange does not know the market value of the option series; however, assume that the intrinsic value of the option series is 6.00. In this case, the series would not be eligible to open because the width of the Composite Market is greater than the Maximum Composite Width, and there is a non-M Capacity order at a price inside of the Composite Market. If the Exchange permitted the option series to open in this circumstance, the non-M capacity limit order may execute in the Opening Auction Process at its limit price, which the Exchange would consider an extreme price given that the intrinsic value of the option series is 6.00. Therefore, subparagraph (e)(1)(B) is designed to protect the non-M capacity order from executing at such an extreme price by not opening the option series in such a scenario.

However, in certain instances where the Composite Market is wide, the Exchange believes the conditions of subparagraph (e)(1)(B) may be overly conservative and unnecessarily prevent the opening of a series when the risk of execution at the open at an extreme price is minimal. The following example shows the application of the Maximum Composite Width check provided for in subparagraph (e)(1)(B) and the type of non-extreme trade price for which the check will limit.

#### Example #2

Suppose the Maximum Composite Width for a class is 1.00, and the Composite Market is 5.00 x 7.00 comprised of an appointed Market-Maker bulk message bid of 5.00 and an appointed Market-Maker bulk message offer of 7.00. There is a non-M capacity limit order to buy for 5.75 in the Queuing Book.<sup>13</sup> Prior to the open, the

Exchange does not know the market value of the option series; however, assume that the intrinsic value of the option series is 5.75. In this case, the series would not be eligible to open because the width of the Composite Market is greater than the Maximum Composite Width, and there is a non-M Capacity order at a price inside of the Composite Market.

As demonstrated in Example #2, subparagraph (e)(1)(B) provides no circumstance under which a non-M capacity order may improve the Composite Market when the Composite Width is greater than the Maximum Composite Width that would allow the Exchange to open the series, even when such non-M capacity order is not entered at an extreme limit price. Given this, the Exchange proposes to amend subparagraph (e)(1)(B) to allow the Exchange to open a series if the Composite Width is greater than the Maximum Composite Width and there are non-M Capacity limit orders at a price better than the Composite Bid (Offer) in certain circumstances. Specifically, the proposed amendment will allow the Exchange to open a series if the Composite Width of a series is greater than the Maximum Composite Width, but there are no non-M Capacity market orders or buy (sell) limit orders with prices higher (lower) than the Composite Market midpoint and there are no locked or crossed orders or quotes. Thus, under proposed subparagraph (e)(1)(B), the Exchange would allow the option series to open in Example #2 above as the non-M capacity limit bid was entered at a price lower than the Composite Market midpoint. The proposed amendment would continue to limit the risk of a non-M capacity order executing at an extreme price in Example #1 as the non-M capacity limit bid was entered at a price higher than the Composite Market midpoint.

The Exchange believes the proposed amendment strikes a reasonable balance between protecting non-M capacity orders from executing at extreme prices and encouraging the submission of non-M capacity orders at prices that improve the Composite Market, which will allow the Exchange to open series earlier and also allow for more trading opportunities on the Exchange throughout the trading day. The Exchange believes the proposed amendment is reasonable, as it will allow the Exchange to open series on a

“GTH Queuing Book,” and the Queuing Book for the Regular Trading Hours (“RTH”) opening auction process may be referred to as the “RTH Queuing Book.” See Exchange Rule 6.11(a).

less restrictive basis and potentially earlier, while still limiting the risk of a non-M capacity order executing at an extreme price on the open. If the width of the Composite Market (which the Exchange believes represents the prices most reflective of the market, as it is comprised of the better of Market-Maker bulk messages on the Exchange or any away market quotes) is no greater than the Maximum Composite Width, the Exchange will open the series because there is minimal risk of execution at an extreme price. Further, the Exchange notes that there are other price protections available to limit the risk of executions at an extreme price (e.g., drill-through protection).<sup>14</sup> However, if the Composite Width is greater than the Maximum Composite Width but there are no non-M Capacity bids (offers) higher (lower) than the midpoint of the Composite Market (and thus better than the best Composite Bid (Offer) but still not marketable at a price at which the Exchange would open), there is minimal risk of an order executing at an extreme price on the open. Because the risk that the Maximum Composite Width Check is intended to address is limited in this situation and also because any such orders would be subject to other price protections to further limit this risk, and that the Exchange believes such minimal risk is outweighed by the benefits of additional trading opportunities by opening these series earlier, the Exchange believes it is appropriate to open a series in either of these conditions. Therefore, if neither the (1) Composite Width of a series is less than or equal to the Maximum Composite Width, nor (2) if the Composite Width of a series is greater than the Maximum Composite Width, but there are no non-M Capacity<sup>15</sup> market orders or buy (sell) limit orders with prices higher (lower) than the Composite Market midpoint and there are no locked or crossed orders or quotes, the Exchange continues to believe there may be higher risk that orders would execute at an extreme price if the series opened, and therefore the Exchange will continue to not open a series.

<sup>14</sup> The Exchange notes that drill-through protection is designed to limit a marketable non-bulk message bid (offer) from executing a certain amount higher (lower) than the National Best Offer (National Best Bid) or the Opening Collar. See Exchange Rule 6.14(a)(4).

<sup>15</sup> Capacity M is used for orders for the account of a Market-Maker (with an appointment in the class), thus “non-M Capacity” orders refer to orders entered for the accounts of non-Market-Makers (e.g., Customer or Firm accounts). See Exchange Rule 1.1.

<sup>13</sup> The term “Queuing Book” means the book into which Users may submit orders and quotes (and onto which Good-til-Cancelled (“GTC”) and Good-til-Date (“GTD”) orders remaining on the Book from the previous trading session or trading day, as applicable, are entered) during the Queuing Period for participation in the applicable opening rotation. Orders and quotes on the Queuing Book may not execute until the opening rotation. The Queuing Book for the Global Trading Hours (“GTH”) opening auction process may be referred to as the

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>16</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>17</sup> requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>18</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes proposed Rule 6.11(e) will protect investors, because it will continue to limit the risk of execution of orders at extreme prices at the open in a manner similar to the existing Rule. The Exchange also believes the proposed amendment will benefit market participants as it may encourage the submission of orders at prices that improve the Composite Market in the Opening Auction Process on the Exchange, and allow the Exchange to open series earlier, which may also allow for more trading opportunities on the Exchange throughout the trading day.

### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed amendment will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, because it will apply to orders and quotes of all market participants in the same manner. Further, the proposed amendment would allow trading in options series to open sooner, which would benefit all market participants in

these series. The Exchange notes that the protections of Rule 6.11(e)(1)(B) are not applied to Market-Maker orders because the Exchange believes there is less risk of a Market-Maker inputting an order at an extreme price given that Market-Makers are generally responsible for pricing the market.

The Exchange does not believe that the proposed rule change to amend the Maximum Composite Width Check of the opening rotation will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, because the proposed rule change only impacts the conditions under which a series will open on the Exchange. The proposed amendment may increase participation in the Opening Auction Process and further allow more series to open on the Exchange to the benefit of all Exchange Trading Permit Holders.

The Exchange believes the proposed rule change may enhance intermarket competition by encouraging the submission of orders at improved prices in the Opening Auction Process and allowing more series to open on the Exchange in a more timely manner. Further, the proposed amendment will continue to limit the risk of orders executing at extreme prices at the open in a similar manner as set forth under current Rule 6.11(e).

### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange neither solicited nor received comments on the proposed rule change.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the 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<sup>19</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>20</sup>

<sup>19</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>20</sup> 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.

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act<sup>21</sup> normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)<sup>22</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative upon filing. The Exchange believes that the proposed rule change may encourage submission of orders at improved prices in the Opening Auction Process on the Exchange and allow the Exchange to open series earlier, which will allow for more trading opportunities on the Exchange throughout the trading day. In addition, as noted above, the Exchange believes the Maximum Composite Width Check will continue to limit the risk of executions at extreme prices, and executions will be subject to other price protections on the Exchange. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing so that the benefits of this proposed rule change can be realized immediately.<sup>23</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is 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

<sup>21</sup> 17 CFR 240.19b-4(f)(6).

<sup>22</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>23</sup> For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>16</sup> 15 U.S.C. 78f(b).

<sup>17</sup> 15 U.S.C. 78f(b)(5).

<sup>18</sup> *Id.*

• Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-C2-2019-026 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-C2-2019-026. 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-C2-2019-026 and should be submitted on or before January 6, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>24</sup>

**J. Matthew DeLesDernier,**  
*Assistant Secretary.*

[FR Doc. 2019-26992 Filed 12-13-19; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meetings

**FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT:** 84 FR 60134, November 7, 2019.

<sup>24</sup> 17 CFR 200.30-3(a)(12).

**PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING:** Wednesday, December 18, 2019.

**CHANGES IN THE MEETING:** The following additional matters will be considered during the Open Meeting on Wednesday, December 18, 2019:

- Whether to adopt rules under Section 15F(i)(2) of the Securities Exchange Act of 1934 that would require security-based swap dealers and major security-based swap participants to comply with certain risk mitigation techniques with respect to portfolios of uncleared security-based swaps;

- whether to adopt certain rule amendments and guidance regarding the cross-border application of certain security-based swap requirements under the Securities Exchange Act of 1934 that were added by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act;

- whether to adopt an order designating certain jurisdictions as “listed jurisdictions” for purposes of one of the rule amendments noted above;

- whether to propose Rule 13q-1 and an amendment to Form SD under the Securities Exchange Act of 1934 to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to disclosure of payments by resource extraction issuers; and

- whether to propose amendments to the definition of “accredited investor” in the Commission's rules that are intended to update and improve the definition in order to identify more effectively investors that do not need the protections of registration under the Securities Act of 1933.

**CONTACT PERSON FOR MORE INFORMATION:** For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551-5400.

Dated: December 11, 2019.

**Eduardo A. Aleman,**  
*Deputy Secretary.*

[FR Doc. 2019-27111 Filed 12-12-19; 11:15 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-87706; File No. SR-CBOE-2019-115]

### Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Maximum Composite Width Check of the Opening Rotation as Provided in Subparagraph (e)(1) of Exchange Rule 5.31

December 10, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 4, 2019, Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder.<sup>4</sup> 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

Cboe Exchange, Inc. (the “Exchange” or “Cboe”) proposes to amend the Maximum Composite Width Check of the opening rotation as provided in subparagraph (e)(1) of Exchange Rule 5.31. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (<http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

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

Exchange Rule 5.31 sets forth the Exchange's opening auction process. Paragraph (e) of the Rule provides the opening rotation process, during which the System will determine whether the Composite Market<sup>5</sup> for a series is not wider than a maximum width, will determine the opening price, and open the series. Subparagraph (e)(1) provides that the System will determine whether the Composite Market for a series is not wider than a maximum width, as follows:

- If the Composite Width<sup>6</sup> of a series is less than or equal to the Maximum Composite Width,<sup>7</sup> the series is eligible to open (and the System determines the Opening Price).<sup>8</sup>
- If the Composite Width of a series is greater than the Maximum Composite Width, but there are no non-M Capacity<sup>9</sup> market orders or buy (sell) limit orders with prices higher (lower) than the Composite Bid (Offer) and there are no locked or crossed orders or quotes, the series is eligible to open (and

<sup>5</sup> The term "Composite Market" means the market for a series comprised of (1) the higher of the then-current best appointed Market-Maker bulk message bid on the Exchange and the ABB (if there is an ABB) and (2) the lower of the then-current best appointed Market-Maker bulk message offer on the Exchange and the ABO (if there is an ABO). The term "Composite Bid (Offer)" means the bid (offer) used to determine the Composite Market. See Exchange Rule 5.31(a).

<sup>6</sup> The term "Composite Width" means the width of the Composite Market (*i.e.*, the width between the Composite Bid and the Composite Offer) of a series. See Exchange Rule 5.31(a).

<sup>7</sup> The term "Maximum Composite Width" means the amount that the Composite Width of a series may generally not be greater than for the series to open (subject to certain exceptions set forth in subparagraph (e)(1)). The Exchange determines this amount on a class and Composite Bid basis, which amount the Exchange may modify during the opening auction process (which modifications the Exchange disseminates to all subscribers to the Exchange's data feeds that deliver opening auction updates). See Exchange Rule 5.31(a).

<sup>8</sup> See Exchange Rule 5.31(e)(1)(A).

<sup>9</sup> Capacity M is used for orders for the account of a Market-Maker (with an appointment in the class), thus "non-M Capacity" orders refer to orders entered for the accounts of non-Market-Makers (*e.g.*, Customer or Firm accounts). See U.S. Options Binary Order Entry Specifications, at 28 (definition of Capacity), available at [http://cdn.cboe.com/resources/membership/US\\_Options\\_BOE\\_Specification.pdf](http://cdn.cboe.com/resources/membership/US_Options_BOE_Specification.pdf).

the System determines the Opening Price).<sup>10</sup>

- If neither of the conditions above are satisfied for a series, or if the Composite Market of a series is crossed, the series is ineligible to open. The Queuing Period<sup>11</sup> for the series continues (including the dissemination of opening auction updates) until one of the above conditions for the series is satisfied, or the Exchange opens the series pursuant to paragraph (h).<sup>12</sup>

The Exchange implemented the price protection measure of subparagraph (e)(1)(B) in order to conservatively protect non-M capacity orders from executing in the Opening Auction Process at an extreme price. While it is possible for Market-Makers to submit orders to the Exchange at an extreme price, the Exchange believes there is less risk of a Market-Maker inputting an order at an extreme price given that Market-Makers are generally responsible for pricing the market. The following example shows the application of the Maximum Composite Width check provided for in subparagraph (e)(1)(B) and the type of extreme trade price for which the check is intended to limit.

Example #1

Suppose the Maximum Composite Width for a class is 1.00, and the Composite Market is 5.00 × 20.00 comprised of an appointed Market-Maker bulk message bid of 5.00 and an appointed Market-Maker bulk message offer of 20.00. There is a non-M capacity limit order to buy for 18.00 in the Queuing Book. Prior to the open, the Exchange does not know the market value of the option series; however, assume that the intrinsic value of the option series is 6.00. In this case, the series would not be eligible to open because the width of the Composite Market is greater than the Maximum Composite Width, and there is a non-M Capacity order at a price inside of the Composite Market. If the Exchange permitted the option series to open in this circumstance, the non-M capacity limit order may execute in the Opening Auction Process at its limit price, which the Exchange would consider an extreme price given that the intrinsic value of the option series is 6.00. Therefore, subparagraph (e)(1)(B) is designed to protect the non-M capacity order from executing at such an extreme

<sup>10</sup> See Exchange Rule 5.31(e)(1)(B).

<sup>11</sup> The term "Queuing Period" means the time period prior to the initiation of an opening rotation during which the System accepts orders and quotes in the Queuing Book for participation in the opening rotation for the applicable trading session. See Exchange Rule 5.31(a).

<sup>12</sup> See Exchange Rule 5.31(e)(1)(C).

price by not opening the option series in such a scenario.

However, in certain instances where the Composite Market is wide, the Exchange believes the conditions of subparagraph (e)(1)(B) may be overly conservative and unnecessarily prevent the opening of a series when the risk of execution at the open at an extreme price is minimal. The following example shows the application of the Maximum Composite Width check provided for in subparagraph (e)(1)(B) and the type of non-extreme trade price for which the check will limit.

Example #2

Suppose the Maximum Composite Width for a class is 1.00, and the Composite Market is 5.00 × 7.00 comprised of an appointed Market-Maker bulk message bid of 5.00 and an appointed Market-Maker bulk message offer of 7.00. There is a non-M capacity limit order to buy for 5.75 in the Queuing Book.<sup>13</sup> Prior to the open, the Exchange does not know the market value of the option series; however, assume that the intrinsic value of the option series is 5.75. In this case, the series would not be eligible to open because the width of the Composite Market is greater than the Maximum Composite Width, and there is a non-M Capacity order at a price inside of the Composite Market.

As demonstrated in Example #2, subparagraph (e)(1)(B) provides no circumstance under which a non-M capacity order may improve the Composite Market when the Composite Width is greater than the Maximum Composite Width that would allow the Exchange to open the series, even when such non-M capacity order is not entered at an extreme limit price. Given this, the Exchange proposes to amend subparagraph (e)(1)(B) to allow the Exchange to open a series if the Composite Width is greater than the Maximum Composite Width and there are non-M Capacity limit orders at a price better than the Composite Bid (Offer) in certain circumstances. Specifically, the proposed amendment will allow the Exchange to open a series

<sup>13</sup> The term "Queuing Book" means the book into which Users may submit orders and quotes (and onto which Good-till-Cancelled ("GTC") and Good-till-Date ("GTD") orders remaining on the Book from the previous trading session or trading day, as applicable, are entered) during the Queuing Period for participation in the applicable opening rotation. Orders and quotes on the Queuing Book may not execute until the opening rotation. The Queuing Book for the Global Trading Hours ("GTH") opening auction process may be referred to as the "GTH Queuing Book," and the Queuing Book for the Regular Trading Hours ("RTH") opening auction process may be referred to as the "RTH Queuing Book." See Exchange Rule 5.31(a).

if the Composite Width of a series is greater than the Maximum Composite Width, but there are no non-M Capacity market orders or buy (sell) limit orders with prices higher (lower) than the Composite Market midpoint and there are no locked or crossed orders or quotes. Thus, under proposed subparagraph (e)(1)(B), the Exchange would allow the option series to open in Example #2 above as the non-M capacity limit bid was entered at a price lower than the Composite Market midpoint. The proposed amendment would continue to limit the risk of a non-M capacity order executing at an extreme price in Example #1 as the non-M capacity limit bid was entered at a price higher than the Composite Market midpoint.

The Exchange believes the proposed amendment strikes a reasonable balance between protecting non-M capacity orders from executing at extreme prices and encouraging the submission of non-M capacity orders at prices that improve the Composite Market, which will allow the Exchange to open series earlier and also allow for more trading opportunities on the Exchange throughout the trading day. The Exchange believes the proposed amendment is reasonable, as it will allow the Exchange to open series on a less restrictive basis and potentially earlier, while still limiting the risk of a non-M capacity order executing at an extreme price on the open. If the width of the Composite Market (which the Exchange believes represents the prices most reflective of the market, as it is comprised of the better of Market-Maker bulk messages on the Exchange or any away market quotes) is no greater than the Maximum Composite Width, the Exchange will open the series because there is minimal risk of execution at an extreme price. Further, the Exchange notes that there are other price protections available to limit the risk of executions at an extreme price (*e.g.*, drill-through protection).<sup>14</sup> However, if the Composite Width is greater than the Maximum Composite Width but there are no non-M Capacity bids (offers) higher (lower) than the midpoint of the Composite Market (and thus better than the best Composite Bid (Offer) but still not marketable at a price at which the Exchange would open), there is minimal risk of an order executing at an extreme price on the open. Because the risk that the Maximum Composite Width Check

is intended to address is limited in this situation and also because any such orders would be subject to other price protections to further limit this risk, and that the Exchange believes such minimal risk is outweighed by the benefits of additional trading opportunities by opening these series earlier, the Exchange believes it is appropriate to open a series in either of these conditions. Therefore, if neither the (1) Composite Width of a series is less than or equal to the Maximum Composite Width, nor (2) if the Composite Width of a series is greater than the Maximum Composite Width, but there are no non-M Capacity<sup>15</sup> market orders or buy (sell) limit orders with prices higher (lower) than the Composite Market midpoint and there are no locked or crossed orders or quotes, the Exchange continues to believe there may be higher risk that orders would execute at an extreme price if the series opened, and therefore the Exchange will continue to not open a series.

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>16</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>17</sup> requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>18</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes proposed Rule 5.31(e) will protect investors, because it will continue to limit the risk of

execution of orders at extreme prices at the open in a manner similar to the existing Rule. The Exchange also believes the proposed amendment will benefit market participants as it may encourage the submission of orders at prices that improve the Composite Market in the Opening Auction Process on the Exchange, and allow the Exchange to open series earlier, which may also allow for more trading opportunities on the Exchange throughout the trading day.

## B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed amendment will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, because it will apply to orders and quotes of all market participants in the same manner. Further, the proposed amendment would allow trading in options series to open sooner, which would benefit all market participants in these series. The Exchange notes that the protections of Rule 5.31(e)(1)(B) are not applied to Market-Maker orders because the Exchange believes there is less risk of a Market-Maker inputting an order at an extreme price given that Market-Makers are generally responsible for pricing the market.

The Exchange does not believe that the proposed rule change to amend the Maximum Composite Width Check of the opening rotation will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, because the proposed rule change only impacts the conditions under which a series will open on the Exchange. The proposed amendment may increase participation in the Opening Auction Process and further allow more series to open on the Exchange to the benefit of all Exchange Trading Permit Holders.

The Exchange believes the proposed rule change may enhance intermarket competition by encouraging the submission of orders at improved prices in the Opening Auction Process and allowing more series to open on the Exchange in a more timely manner. Further, the proposed amendment will continue to limit the risk of orders executing at extreme prices at the open in a similar manner as set forth under current Rule 5.31(e).

<sup>14</sup> The Exchange notes that drill-through protection is designed to limit a marketable non-bulk message bid (offer) from executing a certain amount higher (lower) than the National Best Offer (National Best Bid) or the Opening Collar. See Exchange Rule 5.34(a)(4).

<sup>15</sup> Capacity M is used for orders for the account of a Market-Maker (with an appointment in the class), thus "non-M Capacity" orders refer to orders entered for the accounts of non-Market-Makers (*e.g.*, Customer or Firm accounts). See Exchange Rule 1.1.

<sup>16</sup> 15 U.S.C. 78f(b).

<sup>17</sup> 15 U.S.C. 78f(b)(5).

<sup>18</sup> *Id.*

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange neither solicited nor received comments on the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the 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<sup>19</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>20</sup>

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act<sup>21</sup> normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)<sup>22</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative upon filing. The Exchange believes that the proposed rule change may encourage submission of orders at improved prices in the Opening Auction Process on the Exchange and allow the Exchange to open series earlier, which will allow for more trading opportunities on the Exchange throughout the trading day. In addition, as noted above, the Exchange believes the Maximum Composite Width Check will continue to limit the risk of executions at extreme prices, and executions will be subject to other price protections on the Exchange. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing so that the benefits of this proposed rule change can be realized immediately.<sup>23</sup>

<sup>19</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>20</sup> 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.

<sup>21</sup> 17 CFR 240.19b-4(f)(6).

<sup>22</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>23</sup> For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on

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](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2019-115 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-CBOE-2019-115. 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

efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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-CBOE-2019-115 and should be submitted on or before January 6, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>24</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2019-26983 Filed 12-13-19; 8:45 am]

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-87709; File No. SR-CboeEDGA-2019-021]

**Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Introduce a Small Retail Broker Distribution Program**

December 10, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 27, 2019, Cboe EDGA Exchange, Inc. ("Exchange" or "EDGA") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the 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**

Cboe EDGA Exchange, Inc. ("EDGA" or the "Exchange") is filing with the Securities and Exchange Commission (the "Commission") a proposed rule change to introduce a Small Retail Broker Distribution Program. The text of the proposed changes to the fee schedule are enclosed [sic] as Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website ([http://markets.cboe.com/us/equities/regulation/rule\\_filings/edga/](http://markets.cboe.com/us/equities/regulation/rule_filings/edga/)), at the Exchange's Office of the

<sup>24</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

Secretary, and at the Commission's Public Reference Room.

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

#### 1. Purpose

The purpose of the proposed rule change is to introduce a pricing program that would allow small retail brokers that purchase top of book market data from the Exchange to benefit from discounted fees for access to such market data. The Small Retail Broker Distribution Program (the "Program") would reduce the distribution and consolidation fees paid by small broker-dealers that operate a retail business. In turn, the Program may increase retail investor access to real-time U.S. equity quote and trade information, and allow the Exchange to better compete for this business with competitors that offer similar optional products. The Exchange initially filed to introduce the Program on August 1, 2019 ("Initial Proposal") to further ensure that retail investors served by smaller firms have cost effective access to its market data products, and as part of its ongoing efforts to improve the retail investor experience in the public markets. The Initial Proposal was published in the **Federal Register** on August 20, 2019,<sup>3</sup> and the Commission received no comment letters on the Initial Proposal. The Program remained in effect until the fee change was temporarily suspended pursuant to a suspension order (the "Initial Suspension Order").<sup>4</sup> The Initial Suspension Order also instituted proceedings to determine whether to approve or disapprove the

<sup>3</sup> See Securities Exchange Act Release No. 86676 (August 14, 2019), 84 FR 43218 (August 20, 2019) (SR-CboeEDGA-2019-013).

<sup>4</sup> See Securities Exchange Act Release No. 87165 (September 30, 2019), 84 FR 53205 (October 4, 2019) (SR-CboeEDGA-2019-013).

Initial Proposal.<sup>5</sup> On October 1, 2019, the Exchange re-filed its proposed rule change with additional information about the basis for the proposed fee change ("Second Proposal"), which as noted above is designed to facilitate retail investor access to reasonably priced market data. The Second Proposal was published in the **Federal Register** on October 15, 2019,<sup>6</sup> and the Commission received no commenter letters on the Second Proposal. The Program again remained in effect until the fee change was temporarily suspended pursuant to a suspension order (the "Second Suspension Order").<sup>7</sup> The Second Suspension Order also instituted proceedings to determine whether to approve or disapprove the Second Proposal.<sup>8</sup>

#### Current Fees

The Cboe One Summary Feed is a top of book data feed that provides real-time U.S. equity quote and trade information to investors based on equity orders submitted to the Exchange and its affiliated equities exchanges—*i.e.*, Cboe EDGX Exchange, Inc., Cboe BZX Exchange, Inc., and Cboe BYX Exchange, Inc. Specifically, the Cboe One Summary Feed is a data feed that contains the aggregate best bid and offer of all displayed orders for securities traded on the Exchange and its affiliated exchanges. The Cboe One Summary Feed also contains the individual last sale information for the Exchange and each of its affiliated exchanges, and consolidated volume for all listed equity securities. The fee for external distribution of the Cboe One Summary Feed is \$5,000 per month, and external distributors are also liable for a Data Consolidation Fee of \$1,000 per month, and User fees equal to \$10 per month for each Professional User, and \$0.25 per month for each Non-Professional User.<sup>9</sup>

#### Small Retail Broker Eligibility Requirements

The Exchange proposes to introduce a Program that would reduce costs for small retail brokers that provide top of book data to their clients. In order to be

<sup>5</sup> *Id.*

<sup>6</sup> See Securities Exchange Act Release No. 87294 (October 11, 2019), 84 FR 55638 (October 17, 2019) (SR-CboeEDGA-2019-015).

<sup>7</sup> See Securities Exchange Act Release No. 87634 (November 26, 2019) (SR-CboeEDGA-2019-015) (**Federal Register** publication pending).

<sup>8</sup> *Id.*

<sup>9</sup> The Exchange also offers an Enterprise license for the Cboe One Summary Feed at a cost of \$50,000 per month. An Enterprise license permits distribution to an unlimited number of Professional and Non-Professional Users, keeping costs down for firms that provide access to a large number of subscribers.

approved for the Small Retail Broker Distribution Program, Distributors would have to provide Cboe One Summary Feed Data to a limited number of clients with which the firm has established a brokerage relationship, and would have to provide such data primarily to Non-Professional Data Users. Specifically, distributors would have to attest that they meet the following criteria: (1) Distributor is a broker-dealer distributing Cboe One Summary Feed Data to Non-Professional Data Users with whom the broker-dealer has a brokerage relationship; (2) At least 90% of the Distributor's total Data User population must consist of Non-Professional Data Users, inclusive of those not receiving Cboe One Summary Feed Data; and (3) Distributor distributes Cboe One Summary Feed Data to no more than 5,000 Non-Professional Data Users.

These proposed requirements for participating in the Program are designed to ensure that the benefits provided by the Program inure to the benefit of small retail brokers that provide Cboe One Summary Feed Data to a limited number of subscribers. As explained later in this filing, distributors that provide Cboe One Summary Feed Data to a larger number of subscribers can benefit from the current pricing structure through scale, due to subscriber fees that are significantly lower than those charged by the Exchange's competitors, and an Enterprise license that caps the total fees to be paid by firms that distribute market data to a sizeable customer base. The Exchange believes that offering similarly attractive pricing to small retail brokers, including regional firms both inside and outside of the U.S. that may not have the same established client base as the larger retail brokers, would make the Exchange's data a more competitive alternative for those firms, and would help ensure that such information is widely available to a larger number of retail investors globally. The Program would also be available to retail brokers more generally, regardless of size, that wish to trial the Cboe One Summary Feed with a limited number of subscribers before potentially expanding distribution to additional clients, potentially further increasing the accessibility of the Exchange's market data to retail investors. The Program would be exclusive to the Cboe One Summary Feed, which is a top of book offering, as retail investors typically do not need or use depth of book data to facilitate their equity investments, and their brokers

typically do purchase such market data on their behalf.

#### Discounted Fees

Distributors that participate in the Program would be liable for lower distribution and consolidation fees for access to the Cboe One Summary Data Feed.<sup>10</sup> The distribution fee charged for the Cboe One Summary Feed would be lowered by 30% from the current \$5,000 per month to \$3,500 per month for distributors that meet the requirements of the Program. In addition, the Data Consolidation Fee charged for the Cboe One Summary Feed would be lowered by 65% from the current \$1,000 per month to \$350 per month. User fees for any Professional or Non-Professional Users that access Cboe One Summary Feed data from a distributor that participates in the Program would remain at their current levels as the current subscriber charges are already among the most competitive in the industry.<sup>11</sup>

The Exchange believes that these fees, which represent a significant cost savings for small retail brokers, would help ensure that retail investors continue to have fair and efficient access to U.S. equity market data. While retail investors normally pay a fixed commission when buying or selling equities, and do not typically pay separate fees for market data, the Exchange believes that the proposed reduction in fees would make the Exchange's data more competitive with other available alternatives, and may encourage retail brokers to make such data more readily available to their clients. In sum, the Exchange believes that the proposed fee reductions may facilitate more cost effective access to top of book data that is purchased on a voluntary basis by retail brokers and provided to their retail investor clients.

#### Market Background

The market for top of book data is highly competitive as national securities exchanges compete both with each other and with the securities information processors ("SIPs") to provide efficient, reliable, and low cost data to a wide range of investors and market participants. In fact, Regulation NMS

requires all U.S. equities exchanges to provide their best bids and offers, and executed transactions, to the two registered SIPs for dissemination to the public. Top of book data is therefore widely available to investors today at a relatively modest cost. National securities exchanges may also disseminate their own top of book data, but no rule or regulation of the Commission requires market participants to purchase top of book data from an exchange.<sup>12</sup> The Cboe One Summary Feed therefore competes with the SIP and with similar products offered by other national securities exchanges that offer their own competing top of book products. In fact, there are ten competing top of book products offered by other national securities exchanges today, not counting products offered by the Exchange's affiliates.<sup>13</sup>

The purpose of the proposed rule change is to further increase the competitiveness of the Exchange's top of book market data products compared to competitor offerings that may currently be cheaper for firms with a limited subscriber base that do not yet have the scale to take advantage of the lower subscriber fees offered by the Exchange. In turn, the Exchange believes that this change may benefit market participants and investors by spurring additional competition and increasing the accessibility of the Exchange's top of book data.

As explained, the Exchange filed the Initial Proposal to introduce the Program in August in order to provide an attractive pricing option for small retail brokers. Although that filing was ultimately suspended by the Commission, and a Second Proposal filed and withdrawn [sic], the Exchange believes that its experience in offering the Program while it has been in effect reflect the competitive nature of the market for the creation and distribution of top of book data. Specifically, after the Exchange reduced the fees charged to small retail brokers under the Initial Proposal and Second Proposal, it successfully onboarded two new customers due to the attractive pricing.<sup>14</sup> These customers are now able

to offer high quality and cost effective data to their retail investor clients. The Exchange has also been discussing the Program with a handful of additional prospective clients that are interested in providing top of book data to retail investors. Without the proposed pricing discounts, the Exchange believes that those customers and prospective customers may not be interested in purchasing top of book data from the Exchange, and would instead purchase such data from other national securities exchanges or the SIPs, potentially at a higher cost than would be available pursuant to the Program. The Program has therefore already been successful in increasing competition for such market data, and continued operation of the Program would serve to both reduce fees for such customers and to provide alternatives to data and pricing offered by competitors. Ultimately, the Exchange believes that it is critical that it be allowed to compete by offering attractive pricing to customers as increasing the availability of such products ensures continued competition with alternative offerings. Such competition may be constrained when competitors are impeded from offering alternative and cost effective solutions to customers.

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,<sup>15</sup> in general, and furthers the objectives of Section 6(b)(4),<sup>16</sup> in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other recipients of Exchange data.

The Exchange also believes that the proposed rule change is consistent with Section 11(A) of the Act.<sup>17</sup> Specifically, the proposed rule change supports (i) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets, and (ii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. In addition, the proposed rule change is consistent with Rule 603 of Regulation NMS,<sup>18</sup> which provides that any national securities exchange that distributes information with respect to quotations for or transactions in an

[markets.cboe.com/us/equities/market\\_data/products/spotlight/](https://markets.cboe.com/us/equities/market_data/products/spotlight/). The second customer will begin participating in the Program on December 1, 2019.

<sup>15</sup> 15 U.S.C. 78f.

<sup>16</sup> 15 U.S.C. 78f(b)(4).

<sup>17</sup> 15 U.S.C. 78k-1.

<sup>18</sup> See 17 CFR 242.603.

<sup>10</sup> New external distributors of the Cboe One Summary Feed are not currently charged external distributor fees for their first month of service. This would continue to be the case for external distributors that participate in the Program.

<sup>11</sup> By comparison, The Nasdaq Stock Market LLC ("Nasdaq") charges a subscriber fee for Nasdaq Basic that adds up to \$26 per month for Professional Subscribers and \$1 per month for Non-Professional Subscribers (Tapes A, B, and C). See Nasdaq Equity Rules, Equity 7, Pricing Schedule, Section 147(b)(1).

<sup>12</sup> By contrast, Rule 603(c) of Regulation NMS (the "Vendor Display Rule") effectively requires that SIP data or some other consolidated display be utilized in any context in which a trading or order-routing decision can be implemented.

<sup>13</sup> Competing top of book products include, Nasdaq Basic, BX Basic, PSX Basic, NYSE BQT, NYSE BBO/Trades, NYSE Arca BBO/Trades, NYSE American BBO/Trades, NYSE Chicago BBO/Trades, and IEX TOPS.

<sup>14</sup> See e.g., Cboe Innovation Spotlight, "dough—The commission-free online broker with premium content and insights," available at <https://>

NMS stock do so on terms that are not unreasonably discriminatory.

In adopting Regulation NMS, the Commission granted SROs and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes that the proposed fee change would further broaden the availability of U.S. equity market data to investors, and in particular retail investors, consistent with the principles of Regulation NMS.

The Exchange operates in a highly competitive environment. Indeed, there are thirteen registered national securities exchanges that trade U.S. equities and offer associated top of book market data products to their customers. The national securities exchanges also compete with the SIPs for market data customers. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>19</sup> The proposed fee change is a result of the competitive environment, as the Exchange seeks to amend its fees to attract additional subscribers for its proprietary top of book data offerings.

The proposed fee change would reduce fees charged to small retail brokers that provide access to the Cboe One Summary Feed. The Cboe One Summary Feed is a competitively-priced alternative to top of book data disseminated by SIPs, or similar data disseminated by other national securities exchanges.<sup>20</sup> It provides subscribers with consolidated top of book quotes and trades from four Cboe U.S. equities markets, which together account for about 17% of consolidated U.S. equities trading volume.<sup>21</sup> The Cboe One Summary Feed is purchased by a wide variety of market participants and vendors, including data platforms, websites, fintech firms, buy-side

investors, retail brokers, regional banks, and securities firms inside and outside of the U.S. that desire low cost, high quality, real-time U.S. equity market data. By providing lower cost access to U.S. equity market data, the Cboe One Summary Feed benefits a wide range of investors that participate in the national market system. Reducing fees for broker-dealers that represent retail investors and that may have more limited resources than some of their larger competitors would further increase access to such data and facilitate a competitive market for U.S. equity securities, consistent with the goals of the Act.

While the Exchange is not required to make any data, including top of book data, available through its proprietary market data platform, the Exchange believes that making such data available increases investor choice, and contributes to a fair and competitive market. Specifically, making such data publicly available through proprietary data feeds allows investors to choose alternative, potentially less costly, market data based on their business needs. While some market participants that desire a consolidated display choose the SIP for their top of book data needs, and in some cases are effectively required to do so under the Vendor Display Rule, others may prefer to purchase data directly from one or more national securities exchanges. For example, a buy-side investor may choose to purchase the Cboe One Summary Feed, or a similar product from another exchange, in order to perform investment analysis. The Cboe One Summary Feed represents quotes from four highly liquid equities markets. As a result, the Cboe One Summary Feed is within 1% of the national best bid and offer approximately 98% of the time,<sup>22</sup> and therefore serves as a valuable reference for investors that do not require a consolidated display that contains quotations for all U.S. equities exchanges. Making alternative products available to market participants ultimately ensures increased competition in the marketplace, and constrains the ability of exchanges to charge supracompetitive fees. In the event that a market participant views one exchange's top of book data fees as more or less attractive than the competition they can and frequently do switch between competing products. In fact, the competitiveness of the market for such top of book data products is one of the primary factors animating this proposed rule change, which is

designed to allow the Exchange to further compete for this business.

Indeed, the Exchange has already successfully onboarded two new Distributors that have decided to purchase Cboe One Summary Data from the Exchange rather than purchasing top of book data from a competitor exchange. In addition, the Exchange is in discussions with a handful of other Distributors that are interested in procuring market data from the Exchange due to the attractive pricing offered pursuant to the Program. Distributors can discontinue use at any time and for any reason, including due to an assessment of the reasonableness of fees charged. Further, firms have a wide variety of alternative market data products from which to choose, such as similar proprietary data products offered by other national securities exchanges. Making the Exchange's top of book data available at a lower cost, ultimately serves the interests of retail investors that rely on the public markets. The Exchange understands that the Commission is interested in ensuring that retail investors are appropriately served in the U.S. equities market. The Exchange agrees that it is important to ensure that our markets continue to serve the needs of ordinary investors, and the Program is consistent with this goal.

The Exchange believes that the proposed fees are reasonable as they represent a significant cost reduction for smaller, primarily regional, retail brokers that provide top of book data from EDGA and its affiliated equities exchanges to their retail investor clients. The market for top of book data is intensely competitive due to the availability of substitutable products that can be purchased either from other national securities exchanges, or from registered SIPs that make such top of book data publicly available to investors at a modest cost. The proposed fee reduction is being made to make the Exchange's fees more competitive with such offerings for this segment of market participants, thereby increasing the availability of the Exchange's data products, and expanding the options available to firms making data purchasing decisions based on their business needs. The Exchange believes that this is consistent with the principles enshrined in Regulation NMS to “promote the wide availability of market data and to allocate revenues to SROs that produce the most useful data for investors.”<sup>23</sup>

<sup>19</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

<sup>20</sup> See e.g., supra note 11 (discussing Nasdaq Basic).

<sup>21</sup> Id.

<sup>22</sup> See [https://markets.cboe.com/us/equities/market\\_data\\_services/cboe\\_one/](https://markets.cboe.com/us/equities/market_data_services/cboe_one/).

<sup>23</sup> See Regulation NMS Adopting Release, supra note 19, at 37503.

Today, the Cboe One Summary Feed is among the most competitively priced top of book offerings in the industry due to modest subscriber fees, and a lower Enterprise cap, both of which keep fees at a relatively modest level for larger firms that provide market data to a sizeable number of Professional or Non-Professional Users. Distributors with a smaller user base, however, may choose to use competitor products that have a lower distribution fee and higher subscriber fees. The Program would help the Exchange compete for this segment of the market, and may broaden the reach of the Exchange's data products by providing an additional low cost alternative to competitor products for small retail brokers. While such firms may already utilize similar market data products from other sources, the Exchange believes that offering its own data to small retail brokers at lower distribution and data consolidation costs has the potential to increase choice for market participants, and ultimately increase the data available to retail investors when coupled with the Exchange's lower subscriber fees.

The Exchange also believes that the proposed fees are equitable and not unfairly discriminatory as the proposed fee structure is designed to decrease the price and increase the availability of U.S. equities market data to retail investors. The Program is designed to reduce the cost of top of book market data for broker-dealers that provide such data to Non-Professional Data User clients that make up a significant majority of the distributor's total subscriber population. While there is no "exact science" to choosing one eligibility threshold compared to another, the Exchange believes that having significantly more Non-Professional Data Users than Professional Data User across a firm's entire business, *i.e.*, not limited exclusively to Data Users that are provided access to the Exchange's data products, is indicative of a broker-dealer that is primarily and actively engaged in the business of serving retail investors.

This understanding is confirmed by an analysis conducted by the Exchange on the user population of its retail broker clients that purchase market data from the Exchange and its affiliated exchanges. When the Exchange initially filed to introduce the Program, it included a simple majority requirement—*i.e.*, more than 50% of the broker dealer's user population would have to be Non-Professional Users. The Exchange's experience to date has been that this requirement has been sufficient to ensure that the benefits of the Program go to retail brokers, and indeed

each of the current customers that participate in or are soon to participate in the Program have been focused on providing trading services to ordinary investors. Based on additional analysis, however, the Exchange believes that this threshold can be safely increased to require at least 90% Non-Professional Users, as proposed today, without limiting the benefits provided to broker dealers that primarily serve retail investors. To perform its analysis, the Exchange reviewed user populations for each broker dealer that it identified as primarily engaged in serving retail investors (*i.e.*, retail brokers), and for which the Exchange has reported usage broken down into Professional and Non-Professional Users.<sup>24</sup> This analysis showed that each retail broker identified currently provides market data from the Exchange or its affiliates to at least 90% Non-Professional Users, with the Professional/Non-Professional breakdown ranging from 90.9% Non-Professional Users on the low end to 100% Non-Professional Users on the high end.

As such, even with the higher threshold proposed, the Program would be broadly available to a wide range of retail brokers that either purchase the Cboe One Summary Feed today, or that may choose to switch from competing products due to the potential cost savings. In addition to the subscribers that are participating and are soon to participate in the Program, a number of distributors that currently purchase top of book data from one of the four Cboe U.S. equities exchanges, and many more prospective customers, could benefit from the Program. Each of these current or prospective retail broker customers would receive the same benefits in terms of reduced distribution and consolidation fees based on the product that they purchase from the Exchange.

The Commission has long stressed the need to ensure that the equities markets are structured in a way that meets the needs of ordinary investors. For example, the Commission's strategic plan for fiscal years 2018–2022 touts "focus on the long-term interests of our Main Street investors" as the Commission's number one strategic goal.<sup>25</sup> The Program would be

<sup>24</sup> Broker dealers with an Enterprise license are required to report total user populations but not whether each user is a Professional or Non-Professional User. As a result, the Exchange has excluded those firms from this portion of its analysis. That said, the Exchange believes those firms may have a similar Professional/Non-Professional breakdown to other retail brokers.

<sup>25</sup> See U.S. Securities and Exchange Commission, Strategic Plan, Fiscal Years 2018–2022, available at [https://www.sec.gov/files/SEC\\_Strategic\\_Plan\\_FY18-FY22\\_FINAL\\_0.pdf](https://www.sec.gov/files/SEC_Strategic_Plan_FY18-FY22_FINAL_0.pdf).

consistent with the Commission's stated goal of improving the retail investor experience in the public markets. Furthermore, national securities exchanges commonly charge reduced fees and offer market structure benefits to retail investors, and the Commission has consistently held that such incentives are consistent with the Act. The Exchange believes that the Program is consistent with longstanding precedent indicating that it is consistent with the Act to provide reasonable incentives to retail investors that rely on the public markets for their investment needs.

In addition, while the Program would be effectively limited to smaller firms that distribute data to no more than 5,000 Non-Professional Data Users, the Exchange does not believe that this limitation makes the fees inequitable, unfairly discriminatory, or otherwise contrary to the purposes of the Act. The Program is designed to ensure that small retail brokers have access to Exchange data at a modest cost, and therefore contains an eligibility cutoff based on the number of Non-Professional Users that would receive Cboe One Summary Feed Data. The retail broker clients identified by the Exchange provide data from the Exchange or its affiliates to an average of more than 160,000 Non-Professional Users, with a small handful of large retail brokers operating pursuant to an Enterprise license accounting for about 95% of those Non-Professional Users.<sup>26</sup> Many retail broker clients, however, have significantly smaller Non-Professional User populations, with retail brokers that are not operating pursuant to an Enterprise license providing data from the Exchange or its affiliates to an average of 8,845 Non-Professional Users. The 5,000 Non-Professional User threshold would therefore ensure that the benefits of the Program flow to small retail brokers, as intended, and not larger firms that already benefit from the current fee structure.

Large broker-dealers and/or vendors that distribute the Exchange's data products to a sizeable number of investors benefit from the current fee structure, which includes lower subscriber fees and Enterprise licenses. Due to lower subscriber fees, distributors that provide Cboe One

<sup>26</sup> As explained, broker dealers with an Enterprise license are required to report total user populations but not whether each user is a Professional or Non-Professional User. See *supra* note 24. To perform this analysis, the Exchange therefore assumed that retail brokers qualifying for the enterprise cap had a similar breakdown of Professional/Non-Professional Users as retail brokers that reported this information.

Summary Feed Data to more than 5,000 Non-Professional Data Users already enjoy cost savings compared to competitor products. The Program would therefore ensure that small retail brokers that distribute top of book data to their retail investor customers could also benefit from reduced pricing, and would aid in increasing the competitiveness of the Exchange's data products for this key segment of the market.

The table below illustrates the impact of the proposed pricing on firms that qualify for the Program, both compared to the Exchange's current pricing, and compared to the fees charged for a competitor product, *i.e.*, Nasdaq Basic. As shown, Cboe One Summary Feed

Data provided pursuant to the Program would be cheaper than Nasdaq Basic for firms with more than 1,200 Non-Professional Users, and the benefits of the pricing structure would continue to scale up to firms with 5,000 Non-Professional Users. After 5,000 Non-Professional Users the firm would no longer be eligible for the Small Retail Broker Distribution Program but would already enjoy significant cost savings compared to Nasdaq Basic under the current pricing structure. The Exchange therefore believes that the Program would allow the Exchange to better compete with competitors for smaller firms that currently pay a lower fee under, for example, the Nasdaq Basic pricing model, while also ensuring that

larger firms continue to receive attractive pricing that is already cheaper than top of book data offered by the main competitor product. The Exchange believes this supplemental information further validates its assessment that the proposed fee reduction is reasonable, equitable, and not unfairly discriminatory. Without the proposed fee reduction, small retail brokers that would otherwise qualify for the reduced fees proposed would be subject to either higher fees for accessing Exchange top of book data, or may switch to competitor offerings that are also less cost effective, but at current fees levels, cheaper than the current Cboe One Summary fee.

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		1,200			
Product	Non-Professional User Qty	Standard Model Total Fee	SRBP Total Fee	Nasdaq Basic Total Fee	Difference vs. Nasdaq Basic Total Fee
Cboe One Summary	1,200	\$ 6,000.00	\$ 3,850.00	\$3,850	0.00
EDGA Top	1,200	\$ 30.00	\$ 30.00	\$3,850	3820.00

		3,350			
Product	Non-Professional User Qty	Standard Model Total Fee	SRBP Total Fee	Nasdaq Basic Total Fee	Difference vs. Nasdaq Basic Total Fee
Cboe One Summary	3,350	\$ 6,000.00	\$ 3,850.00	\$6,000	2150.00
EDGA Top	3,350	\$ 83.75	\$ 83.75	\$6,000	5916.25

		7,500			
Product	Non-Professional User Qty	Standard Model Total Fee	SRBP Total Fee	Nasdaq Basic Total Fee	Difference vs. Nasdaq Basic Total Fee
Cboe One Summary	7,500	\$ 6,000.00	\$ 3,850.00	\$10,150	4150.00
EDGA Top	7,500	\$ 187.50	\$ 187.50	\$10,150	9962.50

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*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange operates in a highly competitive environment, and its ability to price these data products is constrained by: (i) Competition among exchanges that offer similar data products to their customers; and (ii) the existence of inexpensive real-time consolidated data disseminated by the SIPs. Top of book data is disseminated by both the SIPs and the thirteen equities exchanges. There are therefore a number of alternative products available to market participants and investors. In this competitive environment potential subscribers are free to choose which competing product to purchase to satisfy their need for market information. Often, the choice comes down to price, as broker-dealers or vendors look to purchase the cheapest top of book data product, or quality, as market participants seek to purchase data that represents significant market liquidity. In order to better compete for this segment of the market, the Exchange is proposing to reduce the cost of top of book data provided by small retail brokers to their retail investor clients. The Exchange believes that this would facilitate greater access to such data, ultimately benefiting the retail investors that are provided access to such market data.

The Exchange does not believe that this price reduction would cause any unnecessary or inappropriate burden on intermarket competition as other exchanges and data vendors are free to lower their prices to better compete with the Exchange's offering. Indeed, as explained in the basis section of this proposed rule change, the Exchange's decision to lower its distribution and consolidation fees for small retail brokers is itself a competitive response to different fee structures available on competing markets. The Exchange therefore believes that the proposed rule change is pro-competitive as it seeks to offer pricing incentives to customers to better position the Exchange as it competes to attract additional market data subscribers. The Exchange also believes that the proposed reduction in fees for small retail brokers would not cause any unnecessary or inappropriate burden on intramarket competition.

Although the proposed fee discount would be largely limited to small retail broker subscribers, larger broker-dealers and vendors can already purchase top of book data from the Exchange at prices that represent a significant cost savings when compared to competitor products that combine higher subscriber fees with lower fees for distribution. In light of the benefits already provided to this group of subscribers, the Exchange believes that additional discounts to small retail brokers would increase rather than decrease competition among broker-dealers that participate on the Exchange. Furthermore, as discussed earlier in this proposed rule change, the Exchange believes that offering pricing benefits to brokers that represent retail investors facilitates the Commission's mission of protecting ordinary investors, and is therefore consistent with the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>27</sup> and paragraph (f) of Rule 19b-4<sup>28</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

<sup>27</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>28</sup> 17 CFR 240.19b-4(f).

*Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CboeEDGA-2019-021 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-CboeEDGA-2019-021. 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-CboeEDGA-2019-021 and should be submitted on or before January 6, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>29</sup>

**Jill M. Peterson,**  
*Assistant Secretary.*

[FR Doc. 2019-26988 Filed 12-13-19; 8:45 am]

**BILLING CODE 8011-01-P**

<sup>29</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-87713; File No. SR-CboeBYX-2019-023]

### Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Introduce a Small Retail Broker Distribution Program

December 10, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 27, 2019, Cboe BYX Exchange, Inc. (“Exchange” or “BYX”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Cboe BYX Exchange, Inc. (“BYX” or the “Exchange”) is filing with the Securities and Exchange Commission (the “Commission”) a proposed rule change to introduce a Small Retail Broker Distribution Program. The text of the proposed changes to the fee schedule are enclosed [sic] as Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website ([http://markets.cboe.com/us/equities/regulation/rule\\_filings/byx/](http://markets.cboe.com/us/equities/regulation/rule_filings/byx/)), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

#### A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

The purpose of the proposed rule change is to introduce a pricing program that would allow small retail brokers that purchase top of book market data from the Exchange to benefit from discounted fees for access to such market data. The Small Retail Broker Distribution Program (the “Program”) would reduce the distribution and consolidation fees paid by small broker-dealers that operate a retail business. In turn, the Program may increase retail investor access to real-time U.S. equity quote and trade information, and allow the Exchange to better compete for this business with competitors that offer similar optional products. The Exchange initially filed to introduce the Program on August 1, 2019 (“Initial Proposal”) to further ensure that retail investors served by smaller firms have cost effective access to its market data products, and as part of its ongoing efforts to improve the retail investor experience in the public markets. The Initial Proposal was published in the **Federal Register** on August 20, 2019,<sup>3</sup> and the Commission received no comment letters on the Initial Proposal. The Program remained in effect until the fee change was temporarily suspended pursuant to a suspension order (the “Initial Suspension Order”).<sup>4</sup> The Initial Suspension Order also instituted proceedings to determine whether to approve or disapprove the Initial Proposal.<sup>5</sup> On October 1, 2019, the Exchange re-filed its proposed rule change with additional information about the basis for the proposed fee change (“Second Proposal”), which as noted above is designed to facilitate retail investor access to reasonably priced market data. The Second Proposal was published in the **Federal Register** on October 15, 2019,<sup>6</sup> and the Commission received no commenter letters on the Second Proposal. The Program again remained in effect until the fee change was temporarily suspended pursuant to a suspension order (the “Second Suspension

Order”).<sup>7</sup> The Second Suspension Order also instituted proceedings to determine whether to approve or disapprove the Second Proposal.<sup>8</sup>

##### Current Fees

Today, the Exchange offers two top of book data feeds that provide real-time U.S. equity quote and trade information to investors. First, the Exchange offers the BYX Top Feed, which is an uncompressed data feed that offers top of book quotations and execution information based on equity orders entered into the System. The fee for external distribution of BYX Top data is \$1,000 per month, and external distributors are also liable for a fee of \$1 per month for each Professional User, and \$0.025 per month for each Non-Professional User.

Second, the Exchange offers the Cboe One Summary Feed, which offers similar information based on equity orders submitted to the Exchange and its affiliated equities exchanges—*i.e.*, Cboe BZX Exchange, Inc., Cboe EDGX Exchange, Inc., and Cboe EDGA Exchange, Inc. Specifically, the Cboe One Summary Feed is a data feed that contains the aggregate best bid and offer of all displayed orders for securities traded on the Exchange and its affiliated exchanges. The Cboe One Summary Feed also contains the individual last sale information for the Exchange and each of its affiliated exchanges, and consolidated volume for all listed equity securities. The fee for external distribution of the Cboe One Summary Feed is \$5,000 per month, and external distributors are also liable for a Data Consolidation Fee of \$1,000 per month, and User fees equal to \$10 per month for each Professional User, and \$0.25 per month for each Non-Professional User.<sup>9</sup>

##### Small Retail Broker Eligibility Requirements

The Exchange proposes to introduce a Program that would reduce costs for small retail brokers that provide top of book data to their clients. In order to be approved for the Small Retail Broker Distribution Program, Distributors would have to provide either the BYX Top Feed or Cboe One Summary Feed

<sup>7</sup> See Securities Exchange Act Release No. 87631 (November 26, 2019) (SR-CboeBYX-2019-015) (**Federal Register** publication pending).

<sup>8</sup> *Id.*

<sup>9</sup> The Exchange also offers an Enterprise license for the BYX Top and Cboe One Summary Feeds. An Enterprise license permits distribution to an unlimited number of Professional and Non-Professional Users, keeping costs down for firms that provide access to a large number of subscribers. An Enterprise license is \$10,000 per month for the BYX Top Feed, and \$50,000 per month for the Cboe One Summary Feed.

<sup>3</sup> See Securities Exchange Act Release No. 86670 (August 14, 2019), 84 FR 43207 (August 20, 2019) (SR-CboeBYX-2019-012).

<sup>4</sup> See Securities Exchange Act Release No. 87166 (September 30, 2019), 84 FR 53197 (October 4, 2019) (SR-CboeBYX-2019-012).

<sup>5</sup> *Id.*

<sup>6</sup> See Securities Exchange Act Release No. 87305 (October 15, 2019), 84 FR 56210 (October 21, 2019) (SR-CboeBYX-2019-015).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

(“BYX Equities Exchange Data”) to a limited number of clients with which the firm has established a brokerage relationship, and would have to provide such data primarily to Non-Professional Data Users. Specifically, distributors would have to attest that they meet the following criteria: (1) Distributor is a broker-dealer distributing BYX Equities Exchange Data to Non-Professional Data Users with whom the broker-dealer has a brokerage relationship; (2) At least 90% of the Distributor’s total Data User population must consist of Non-Professional Data Users, inclusive of those not receiving BYX Equities Exchange Data; and (3) Distributor distributes BYX Equities Exchange Data to no more than 5,000 Non-Professional Data Users.<sup>10</sup>

These proposed requirements for participating in the Program are designed to ensure that the benefits provided by the Program inure to the benefit of small retail brokers that provide BYX Equities Exchange Data to a limited number of subscribers. As explained later in this filing, distributors that provide BYX Equities Exchange Data to a larger number of subscribers can benefit from the current pricing structure through scale, due to subscriber fees that are significantly lower than those charged by the Exchange’s competitors, and an Enterprise license that caps the total fees to be paid by firms that distribute market data to a sizeable customer base. The Exchange believes that offering similarly attractive pricing to small retail brokers, including regional firms both inside and outside of the U.S. that may not have the same established client base as the larger retail brokers, would make the Exchange’s data a more competitive alternative for those firms, and would help ensure that such information is widely available to a larger number of retail investors globally. The Program would also be available to retail brokers more generally, regardless of size, that wish to trial the Exchange’s top of book products with a limited number of subscribers before potentially expanding distribution to additional clients, potentially further increasing the accessibility of the Exchange’s market data to retail investors. The Program would be exclusive to the Exchange’s top of book offerings as retail investors

<sup>10</sup> Distributors would have to meet these requirements for whichever product they would like to distribute pursuant to the Program. For example, a distributor that distributes Cboe One Summary Feed data pursuant to the Program, would be limited to distributing the Cboe One Summary Feed to no more than 5,000 Non-Professional Data Users.

typically do not need or use depth of book data to facilitate their equity investments, and their brokers typically do purchase such market data on their behalf.

#### Discounted Fees

Distributors that participate in the Program would be liable for lower distribution fees for access to the BYX Top Feed, and lower distribution and consolidation fees for access to the Cboe One Summary Data Feed.<sup>11</sup> First, the distribution fee charged for BYX Top would be lowered by 75% from the current \$1,000 per month to \$250 per month for distributors that meet the requirements of the Program. Second, the distribution fee charged to these distributors for the Cboe One Summary Feed would be lowered by 30% from the current \$5,000 per month to \$3,500 per month. Finally, the Data Consolidation Fee charged for the Cboe One Summary Feed would be lowered by 65% from the current \$1,000 per month to \$350 per month. User fees for any Professional or Non-Professional Users that access BYX Top or Cboe One Summary Feed data from a distributor that participates in the Program would remain at their current levels as the current subscriber charges are already among the most competitive in the industry.<sup>12</sup>

The Exchange believes that these fees, which represent a significant cost savings for small retail brokers, would help ensure that retail investors continue to have fair and efficient access to U.S. equity market data. While retail investors normally pay a fixed commission when buying or selling equities, and do not typically pay separate fees for market data, the Exchange believes that the proposed reduction in fees would make the Exchange’s data more competitive with other available alternatives, and may encourage retail brokers to make such data more readily available to their clients. In sum, the Exchange believes that the proposed fee reductions may facilitate more cost effective access to top of book data that is purchased on a voluntary basis by retail brokers and provided to their retail investor clients.

<sup>11</sup> New external distributors of the BYX Top Feed or Cboe One Summary Feed are not currently charged external distributor fees for their first month of service. This would continue to be the case for external distributors that participate in the Program.

<sup>12</sup> By comparison, The Nasdaq Stock Market LLC (“Nasdaq”) charges a subscriber fee for Nasdaq Basic that adds up to \$26 per month for Professional Subscribers and \$1 per month for Non-Professional Subscribers (Tapes A, B, and C). See Nasdaq Equity Rules, Equity 7, Pricing Schedule, Section 147(b)(1).

#### Market Background

The market for top of book data is highly competitive as national securities exchanges compete both with each other and with the securities information processors (“SIPs”) to provide efficient, reliable, and low cost data to a wide range of investors and market participants. In fact, Regulation NMS requires all U.S. equities exchanges to provide their best bids and offers, and executed transactions, to the two registered SIPs for dissemination to the public. Top of book data is therefore widely available to investors today at a relatively modest cost. National securities exchanges may also disseminate their own top of book data, but no rule or regulation of the Commission requires market participants to purchase top of book data from an exchange.<sup>13</sup> The BYX Top Feed and Cboe One Summary Feed therefore compete with the SIP and with similar products offered by other national securities exchanges that offer their own competing top of book products. In fact, there are ten competing top of book products offered by other national securities exchanges today, not counting products offered by the Exchange’s affiliates.<sup>14</sup>

The purpose of the proposed rule change is to further increase the competitiveness of the Exchange’s top of book market data products compared to competitor offerings that may currently be cheaper for firms with a limited subscriber base that do not yet have the scale to take advantage of the lower subscriber fees offered by the Exchange. In turn, the Exchange believes that this change may benefit market participants and investors by spurring additional competition and increasing the accessibility of the Exchange’s top of book data.

As explained, the Exchange filed the Initial Proposal to introduce the Program in August in order to provide an attractive pricing option for small retail brokers. Although that filing was ultimately suspended by the Commission, and a Second Proposal filed and withdrawn [sic], the Exchange believes that its experience in offering the Program while it has been in effect reflect the competitive nature of the market for the creation and distribution

<sup>13</sup> By contrast, Rule 603(c) of Regulation NMS (the “Vendor Display Rule”) effectively requires that SIP data or some other consolidated display be utilized in any context in which a trading or order-routing decision can be implemented.

<sup>14</sup> Competing top of book products include, Nasdaq Basic, BX Basic, PSX Basic, NYSE BQT, NYSE BBO/Trades, NYSE Arca BBO/Trades, NYSE American BBO/Trades, NYSE Chicago BBO/Trades, and IEX TOPS.

of top of book data. Specifically, after the Exchange reduced the fees charged to small retail brokers under the Initial Proposal and Second Proposal, it successfully onboarded two new customers due to the attractive pricing.<sup>15</sup> These customers are now able to offer high quality and cost effective data to their retail investor clients. The Exchange has also been discussing the Program with a handful of additional prospective clients that are interested in providing top of book data to retail investors. Without the proposed pricing discounts, the Exchange believes that those customers and prospective customers may not be interested in purchasing top of book data from the Exchange, and would instead purchase such data from other national securities exchanges or the SIPs, potentially at a higher cost than would be available pursuant to the Program. The Program has therefore already been successful in increasing competition for such market data, and continued operation of the Program would serve to both reduce fees for such customers and to provide alternatives to data and pricing offered by competitors. Ultimately, the Exchange believes that it is critical that it be allowed to compete by offering attractive pricing to customers as increasing the availability of such products ensures continued competition with alternative offerings. Such competition may be constrained when competitors are impeded from offering alternative and cost effective solutions to customers.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,<sup>16</sup> in general, and furthers the objectives of Section 6(b)(4),<sup>17</sup> in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other recipients of Exchange data.

The Exchange also believes that the proposed rule change is consistent with Section 11(A) of the Act.<sup>18</sup> Specifically, the proposed rule change supports (i) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets, and (ii)

the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. In addition, the proposed rule change is consistent with Rule 603 of Regulation NMS,<sup>19</sup> which provides that any national securities exchange that distributes information with respect to quotations for or transactions in an NMS stock do so on terms that are not unreasonably discriminatory.

In adopting Regulation NMS, the Commission granted SROs and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes that the proposed fee change would further broaden the availability of U.S. equity market data to investors, and in particular retail investors, consistent with the principles of Regulation NMS.

The Exchange operates in a highly competitive environment. Indeed, there are thirteen registered national securities exchanges that trade U.S. equities and offer associated top of book market data products to their customers. The national securities exchanges also compete with the SIPs for market data customers. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>20</sup> The proposed fee change is a result of the competitive environment, as the Exchange seeks to amend its fees to attract additional subscribers for its proprietary top of book data offerings.

The proposed fee change would reduce fees charged to small retail brokers that provide access to two top of book data products: The BYX Top Feed and the Cboe One Summary Feed. The BYX Top Feed provides top of book quotations and transactions executed on the Exchange, and provides a valuable window into the market for securities traded on a market that accounts for

about 4% of U.S. equity market volume today.<sup>21</sup> The Cboe One Summary Feed is a competitively-priced alternative to top of book data disseminated by SIPs, or similar data disseminated by other national securities exchanges.<sup>22</sup> It provides subscribers with consolidated top of book quotes and trades from four Cboe U.S. equities markets, which together account for about 17% of consolidated U.S. equities trading volume.<sup>23</sup> Together, these products are purchased by a wide variety of market participants and vendors, including data platforms, websites, fintech firms, buy-side investors, retail brokers, regional banks, and securities firms inside and outside of the U.S. that desire low cost, high quality, real-time U.S. equity market data. By providing lower cost access to U.S. equity market data, the BYX Top and Cboe One Summary Feeds benefit a wide range of investors that participate in the national market system. Reducing fees for broker-dealers that represent retail investors and that may have more limited resources than some of their larger competitors would further increase access to such data and facilitate a competitive market for U.S. equity securities, consistent with the goals of the Act.

While the Exchange is not required to make any data, including top of book data, available through its proprietary market data platform, the Exchange believes that making such data available increases investor choice, and contributes to a fair and competitive market. Specifically, making such data publicly available through proprietary data feeds allows investors to choose alternative, potentially less costly, market data based on their business needs. While some market participants that desire a consolidated display choose the SIP for their top of book data needs, and in some cases are effectively required to do so under the Vendor Display Rule, others may prefer to purchase data directly from one or more national securities exchanges. For example, a buy-side investor may choose to purchase the Cboe One Summary Feed, or a similar product from another exchange, in order to perform investment analysis. The Cboe One Summary Feed represents quotes from four highly liquid equities markets. As a result, the Cboe One Summary Feed is within 1% of the national best bid and offer approximately 98% of the

<sup>15</sup> See e.g., Cboe Innovation Spotlight, “dough—The commission-free online broker with premium content and insights,” available at [https://markets.cboe.com/us/equities/market\\_data\\_products/spotlight/](https://markets.cboe.com/us/equities/market_data_products/spotlight/). The second customer will begin participating in the Program on December 1, 2019.

<sup>16</sup> 15 U.S.C. 78f.

<sup>17</sup> 15 U.S.C. 78f(b)(4).

<sup>18</sup> 15 U.S.C. 78k-1.

<sup>19</sup> See 17 CFR 242.603.

<sup>20</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

<sup>21</sup> See [https://markets.cboe.com/us/equities/market\\_share/](https://markets.cboe.com/us/equities/market_share/).

<sup>22</sup> See e.g., supra note 12 (discussing Nasdaq Basic).

<sup>23</sup> *Id.*

time,<sup>24</sup> and therefore serves as a valuable reference for investors that do not require a consolidated display that contains quotations for all U.S. equities exchanges. Making alternative products available to market participants ultimately ensures increased competition in the marketplace, and constrains the ability of exchanges to charge supracompetitive fees. In the event that a market participant views one exchanges top of book data fees as more or less attractive than the competition they can and frequently do switch between competing products. In fact, the competitiveness of the market for such top of book data products is one of the primary factors animating this proposed rule change, which is designed to allow the Exchange to further compete for this business.

Indeed, the Exchange has already successfully onboarded two new Distributors that have decided to purchase Cboe One Summary Data from the Exchange rather than purchasing top of book data from a competitor exchange. In addition, the Exchange is in discussions with a handful of other Distributors that are interested in procuring market data from the Exchange due to the attractive pricing offered pursuant to the Program. Distributors can discontinue use at any time and for any reason, including due to an assessment of the reasonableness of fees charged. Further, firms have a wide variety of alternative market data products from which to choose, such as similar proprietary data products offered by other national securities exchanges. Making the Exchange's top of book data available at a lower cost, ultimately serves the interests of retail investors that rely on the public markets. The Exchange understands that the Commission is interested in ensuring that retail investors are appropriately served in the U.S. equities market. The Exchange agrees that it is important to ensure that our markets continue to serve the needs of ordinary investors, and the Program is consistent with this goal.

The Exchange believes that the proposed fees are reasonable as they represent a significant cost reduction for smaller, primarily regional, retail brokers that provide top of book data from BYX and its affiliated equities exchanges to their retail investor clients. The market for top of book data is intensely competitive due to the availability of substitutable products that can be purchased either from other national securities exchanges, or from

registered SIPs that make such top of book data publicly available to investors at a modest cost. The proposed fee reduction is being made to make the Exchange's fees more competitive with such offerings for this segment of market participants, thereby increasing the availability of the Exchange's data products, and expanding the options available to firms making data purchasing decisions based on their business needs. The Exchange believes that this is consistent with the principles enshrined in Regulation NMS to "promote the wide availability of market data and to allocate revenues to SROs that produce the most useful data for investors."<sup>25</sup>

Today, the Exchange's top of book market data products are among the most competitively priced in the industry due to modest subscriber fees, and a lower Enterprise cap, both of which keep fees at a relatively modest level for larger firms that provide market data to a sizeable number of Professional or Non-Professional Users. Distributors with a smaller user base, however, may choose to use competitor products that have a lower distribution fee and higher subscriber fees. The Program would help the Exchange compete for this segment of the market, and may broaden the reach of the Exchange's data products by providing an additional low cost alternative to competitor products for small retail brokers. While such firms may already utilize similar market data products from other sources, the Exchange believes that offering its own data to small retail brokers at lower distribution and data consolidation costs has the potential to increase choice for market participants, and ultimately increase the data available to retail investors when coupled with the Exchange's lower subscriber fees.

The Exchange also believes that the proposed fees are equitable and not unfairly discriminatory as the proposed fee structure is designed to decrease the price and increase the availability of U.S. equities market data to retail investors. The Program is designed to reduce the cost of top of book market data for broker-dealers that provide such data to Non-Professional Data User clients that make up a significant majority of the distributor's total subscriber population. While there is no "exact science" to choosing one eligibility threshold compared to another, the Exchange believes that having significantly more Non-Professional Data Users than

Professional Data User across a firm's entire business, *i.e.*, not limited exclusively to Data Users that are provided access to the Exchange's data products, is indicative of a broker-dealer that is primarily and actively engaged in the business of serving retail investors.

This understanding is confirmed by an analysis conducted by the Exchange on the user population of its retail broker clients that purchase market data from the Exchange and its affiliated exchanges. When the Exchange initially filed to introduce the Program, it included a simple majority requirement—*i.e.*, more than 50% of the broker dealer's user population would have to be Non-Professional Users. The Exchange's experience to date has been that this requirement has been sufficient to ensure that the benefits of the Program go to retail brokers, and indeed each of the current customers that participate in or are soon to participate in the Program have been focused on providing trading services to ordinary investors. Based on additional analysis, however, the Exchange believes that this threshold can be safely increased to require at least 90% Non-Professional Users, as proposed today, without limiting the benefits provided to broker dealers that primarily serve retail investors. To perform its analysis, the Exchange reviewed user populations for each broker dealer that it identified as primarily engaged in serving retail investors (*i.e.*, retail brokers), and for which the Exchange has reported usage broken down into Professional and Non-Professional Users.<sup>26</sup> This analysis showed that each retail broker identified currently provides market data from the Exchange or its affiliates to at least 90% Non-Professional Users, with the Professional/Non-Professional breakdown ranging from 90.9% Non-Professional Users on the low end to 100% Non-Professional Users on the high end.

As such, even with the higher threshold proposed, the Program would be broadly available to a wide range of retail brokers that either purchase BYX Equities Exchange Data today, or that may choose to switch from competing products due to the potential cost savings. In addition to the subscribers that are participating and are soon to participate in the Program, a number of distributors that currently purchase top

<sup>26</sup> Broker dealers with an Enterprise license are required to report total user populations but not whether each user is a Professional or Non-Professional User. As a result, the Exchange has excluded those firms from this portion of its analysis. That said, the Exchange believes those firms may have a similar Professional/Non-Professional breakdown to other retail brokers.

<sup>24</sup> See [https://markets.cboe.com/us/equities/market\\_data\\_services/cboe\\_one/](https://markets.cboe.com/us/equities/market_data_services/cboe_one/).

<sup>25</sup> See Regulation NMS Adopting Release, *supra* note 20, at 37503.

of book data from one of the four Cboe U.S. equities exchanges, and many more prospective customers, could benefit from the Program. Each of these current or prospective retail broker customers would receive the same benefits in terms of reduced distribution and consolidation fees based on the product that they purchase from the Exchange.

The Commission has long stressed the need to ensure that the equities markets are structured in a way that meets the needs of ordinary investors. For example, the Commission's strategic plan for fiscal years 2018–2022 touts "focus on the long-term interests of our Main Street investors" as the Commission's number one strategic goal.<sup>27</sup> The Program would be consistent with the Commission's stated goal of improving the retail investor experience in the public markets. Furthermore, national securities exchanges commonly charge reduced fees and offer market structure benefits to retail investors, and the Commission has consistently held that such incentives are consistent with the Act. The Exchange believes that the Program is consistent with longstanding precedent indicating that it is consistent with the Act to provide reasonable incentives to retail investors that rely on the public markets for their investment needs.

In addition, while the Program would be effectively limited to smaller firms that distribute data to no more than 5,000 Non-Professional Data Users, the Exchange does not believe that this limitation makes the fees inequitable, unfairly discriminatory, or otherwise contrary to the purposes of the Act. The Program is designed to ensure that small retail brokers have access to Exchange data at a modest cost, and therefore contains an eligibility cutoff based on

the number of Non-Professional Users that would receive BYX Equities Exchange Data. The retail broker clients identified by the Exchange provide data from the Exchange or its affiliates to an average of more than 160,000 Non-Professional Users, with a small handful of large retail brokers operating pursuant to an Enterprise license accounting for about 95% of those Non-Professional Users.<sup>28</sup> Many retail broker clients, however, have significantly smaller Non-Professional User populations, with retail brokers that are not operating pursuant to an Enterprise license providing data from the Exchange or its affiliates to an average of 8,845 Non-Professional Users. The 5,000 Non-Professional User threshold would therefore ensure that the benefits of the Program flow to small retail brokers, as intended, and not larger firms that already benefit from the current fee structure.

Large broker-dealers and/or vendors that distribute the Exchange's data products to a sizeable number of investors benefit from the current fee structure, which includes lower subscriber fees and Enterprise licenses. Due to lower subscriber fees, distributors that provide BYX Equities Exchange Data to more than 5,000 Non-Professional Data Users already enjoy cost savings compared to competitor products. The Program would therefore ensure that small retail brokers that distribute top of book data to their retail investor customers could also benefit from reduced pricing, and would aid in increasing the competitiveness of the Exchange's data products for this key segment of the market.

<sup>28</sup> As explained, broker dealers with an Enterprise license are required to report total user populations but not whether each user is a Professional or Non-Professional User. See *supra* note 26. To perform this analysis, the Exchange therefore assumed that retail brokers qualifying for the enterprise cap had a similar breakdown of Professional/Non-Professional Users as retail brokers that reported this information.

The table below illustrates the impact of the proposed pricing on firms that qualify for the Program, both compared to the Exchange's current pricing, and compared to the fees charged for a competitor product, *i.e.*, Nasdaq Basic. As shown, Cboe One Summary Feed Data provided pursuant to the Program would be cheaper than Nasdaq Basic for firms with more than 1,200 Non-Professional Users, and the benefits of the pricing structure would continue to scale up to firms with 5,000 Non-Professional Users. Further, BYX Top Data, which is already subject to a lower distribution fee than Nasdaq Basic, would become even more cost effective. After 5,000 Non-Professional Users the firm would no longer be eligible for the Small Retail Broker Distribution Program but would already enjoy significant cost savings compared to Nasdaq Basic under the current pricing structure. The Exchange therefore believes that the Program would allow the Exchange to better compete with competitors for smaller firms that currently pay a lower fee under, for example, the Nasdaq Basic pricing model, while also ensuring that larger firms continue to receive attractive pricing that is already cheaper than top of book data offered by the main competitor product. The Exchange believes this supplemental information further validates its assessment that the proposed fee reduction is reasonable, equitable, and not unfairly discriminatory. Without the proposed fee reduction, small retail brokers that would otherwise qualify for the reduced fees proposed would be subject to either higher fees for accessing Exchange top of book data, or may switch to competitor offerings that are also less cost effective, but at current fees levels, cheaper than the current Cboe One Summary fee.

**BILLING CODE 8011-01-P**

<sup>27</sup> See U.S. Securities and Exchange Commission, Strategic Plan, Fiscal Years 2018–2022, available at [https://www.sec.gov/files/SEC\\_Strategic\\_Plan\\_FY18-FY22\\_FINAL\\_0.pdf](https://www.sec.gov/files/SEC_Strategic_Plan_FY18-FY22_FINAL_0.pdf).

		1,200		Nasdaq Basic		Difference vs. Nasdaq Basic	
Product	Non-Professional User Qty	Standard Model Total Fee	SRBP Total Fee	Total Fee	Total Fee	Total Fee	Total Fee
Cboe One Summary	1,200	\$ 6,000.00	\$ 3,850.00	\$3,850	\$3,850	0.00	0.00
BYX Top	1,200	\$ 1,000.00	\$ 250.00	\$3,850	\$3,850	3600.00	3600.00

		3,350		Nasdaq Basic		Difference vs. Nasdaq Basic	
Product	Non-Professional User Qty	Standard Model Total Fee	SRBP Total Fee	Total Fee	Total Fee	Total Fee	Total Fee
Cboe One Summary	3,350	\$ 6,000.00	\$ 3,850.00	\$6,000	\$6,000	2150.00	2150.00
BYX Top	3,350	\$ 1,000.00	\$ 250.00	\$6,000	\$6,000	5750.00	5750.00

		7,500		Nasdaq Basic		Difference vs. Nasdaq Basic	
Product	Non-Professional User Qty	Standard Model Total Fee	SRBP Total Fee	Total Fee	Total Fee	Total Fee	Total Fee
Cboe One Summary	7,500	\$ 6,000.00	\$ 3,850.00	\$10,150	\$10,150	4150.00	4150.00
BYX Top	7,500	\$ 1,000.00	\$ 250.00	\$10,150	\$10,150	9900.00	9900.00

## BILLING CODE 8011-01-C

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange operates in a highly competitive environment, and its ability to price these data products is constrained by: (i) Competition among exchanges that offer similar data products to their customers; and (ii) the existence of inexpensive real-time consolidated data disseminated by the SIPs. Top of book data is disseminated by both the SIPs and the thirteen equities exchanges. There are therefore a number of alternative products available to market participants and investors. In this competitive environment potential subscribers are

free to choose which competing product to purchase to satisfy their need for market information. Often, the choice comes down to price, as broker-dealers or vendors look to purchase the cheapest top of book data product, or quality, as market participants seek to purchase data that represents significant market liquidity. In order to better compete for this segment of the market, the Exchange is proposing to reduce the cost of top of book data provided by small retail brokers to their retail investor clients. The Exchange believes that this would facilitate greater access to such data, ultimately benefiting the retail investors that are provided access to such market data.

The Exchange does not believe that this price reduction would cause any unnecessary or inappropriate burden on intermarket competition as other exchanges and data vendors are free to lower their prices to better compete

with the Exchange's offering. Indeed, as explained in the basis section of this proposed rule change, the Exchange's decision to lower its distribution and consolidation fees for small retail brokers is itself a competitive response to different fee structures available on competing markets. The Exchange therefore believes that the proposed rule change is pro-competitive as it seeks to offer pricing incentives to customers to better position the Exchange as it competes to attract additional market data subscribers. The Exchange also believes that the proposed reduction in fees for small retail brokers would not cause any unnecessary or inappropriate burden on intramarket competition. Although the proposed fee discount would be largely limited to small retail broker subscribers, larger broker-dealers and vendors can already purchase top of book data from the Exchange at prices that represent a significant cost savings

when compared to competitor products that combine higher subscriber fees with lower fees for distribution. In light of the benefits already provided to this group of subscribers, the Exchange believes that additional discounts to small retail brokers would increase rather than decrease competition among broker-dealers that participate on the Exchange. Furthermore, as discussed earlier in this proposed rule change, the Exchange believes that offering pricing benefits to brokers that represent retail investors facilitates the Commission's mission of protecting ordinary investors, and is therefore consistent with the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>29</sup> and paragraph (f) of Rule 19b-4<sup>30</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CboeBYX-2019-023 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-CboeBYX-2019-023. 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-CboeBYX-2019-023 and should be submitted on or before January 6, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>31</sup>

Jill M. Peterson,

*Assistant Secretary.*

[FR Doc. 2019-26991 Filed 12-13-19; 8:45 am]

**BILLING CODE 8011-01-P**

**SMALL BUSINESS ADMINISTRATION**

**[Disaster Declaration #16162 and #16163; Florida Disaster Number FL-00146]**

**Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the State of Florida**

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 1.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Florida (FEMA-4468-DR), dated 10/21/2019.

*Incident:* Hurricane Dorian.

*Incident Period:* 08/28/2019 through 09/09/2019.

**DATES:** Issued on 12/09/2019.

*Physical Loan Application Deadline Date:* 12/20/2019.

*Economic Injury (EIDL) Loan Application Deadline Date:* 07/21/2020.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205-6734.

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Florida, dated 10/21/2019, is hereby amended to include the following areas as adversely affected by the disaster.

*Primary Counties:* Broward, Volusia.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

**James Rivera,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 2019-27056 Filed 12-13-19; 8:45 am]

**BILLING CODE 8026-03-P**

**SMALL BUSINESS ADMINISTRATION**

**[Disaster Declaration #16151 and #16152; North Carolina Disaster Number NC-00112]**

**Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the State of North Carolina**

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 2.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of North Carolina (FEMA-4465-DR), dated 10/04/2019.

*Incident:* Hurricane Dorian.

*Incident Period:* 09/01/2019 through 09/09/2019.

**DATES:** Issued on 12/09/2019.

*Physical Loan Application Deadline Date:* 12/03/2019.

*Economic Injury (EIDL) Loan Application Deadline Date:* 07/06/2020.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

<sup>29</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>30</sup> 17 CFR 240.19b-4(f).

<sup>31</sup> 17 CFR 200.30-3(a)(12).

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205-6734.

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of North Carolina, dated 10/04/2019, is hereby amended to include the following areas as adversely affected by the disaster.

*Primary Counties:* Bladen, Chowan.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

**James Rivera,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 2019-27057 Filed 12-13-19; 8:45 am]

**BILLING CODE 8026-03-P**

**SOCIAL SECURITY ADMINISTRATION**

[Docket No. SSA-2019-0025]

**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 Department of Homeland Security (DHS).

This computer matching agreement sets forth the terms, conditions, and safeguards under which DHS will disclose information to SSA in order to identify aliens who leave the United States voluntarily and aliens who are removed from the United States. These aliens may be subject to suspension of payments or nonpayment of benefits or both, and recovery of overpayments. SSA will use DHS data to determine if suspension of payments, nonpayments of benefits, or recovery of overpayments, is applicable.

**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 19, 2020, or once a minimum of 30 days after publication of this notice have 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 this street address.

**FOR FURTHER INFORMATION CONTACT:** Interested parties may submit general questions about the matching program to Norma Followell, Supervisory Team Lead, Office of Privacy and Disclosure, Office of the General Counsel, Social Security Administration, Room, G-401 WHR, 6401 Security Boulevard, Baltimore, MD 21235-6401, 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 DHS.

**Authority for Conducting the Matching Program**

The legal authority for the disclosures under this agreement are 42 United States Code (U.S.C.) 402(n), 1382(f), 1382c(a)(1), and 1383(e)(1)(B) and (f), and 8 U.S.C. 1611 and 1612.

Section 1631(e)(1)(B) of the Social Security Act (Act) (42 U.S.C. 1383(e)(1)(B)) requires SSA to verify declarations of applicants for and recipients of Supplemental Security Income (SSI) payments before making a determination of eligibility or payment amount. Section 1631(f) of the Act (42 U.S.C. 1383(f)) requires Federal agencies to provide SSA with information necessary to verify SSI eligibility, benefit amounts and to verify other information related to these determinations. Section 202(n)(1) of the Act (42 U.S.C. 402(n)) requires the Secretary of Homeland Security to notify the Commissioner of Social Security when certain individuals are removed from the United States under sections 212(a)(6)(A) and 237(a) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(6)(A) or 1227(a)).

*A. Aliens Who Leave the United States, Without Regard to Immigration Proceedings*

Resident aliens eligible for SSI may receive payments for any month in which they reside in the United States. For purposes of SSI, the United States means, geographically, the 50 States, the District of Columbia, and the Northern Mariana Islands. 20 CFR 416.1603(c).

Under section 1611(f) of the Act, an individual is ineligible for SSI benefits for any month during all of which he or she is outside the United States. 42 U.S.C. 1382(f)(1) and 20 CFR 416.1327. Section 1611(f) of the Act further states that if an individual is absent from the United States for 30 consecutive days, SSA will treat the individual as remaining outside the United States until he or she has been in the United States for a period of 30 consecutive days.

*B. Aliens Who Are Removed, Voluntarily Depart, or Voluntarily Return to Their Home Country From the United States*

The Social Security Protection Act of 2004, Public Law (Pub. L.) No. 108-203, amended the Act to expand the number of individuals who are subject to nonpayment of Social Security benefits. Thus, section 202(n)(1)(A) of the Act (42 U.S.C. 402(n)(1)(A)) prohibits payment of retirement or disability insurance benefits to number holders (NH) who have been removed from the United States on certain grounds specified under section 237(a) or section 212(a)(6)(A) of the INA (8 U.S.C. 1182(a)(6)(A), 1227(a)). SSA will not pay monthly retirement or disability benefits to such NHs for the month after the month in which the Secretary of Homeland Security notifies SSA of the NH's removal or before the month in which the NH is subsequently lawfully admitted to the United States for permanent residence.

Section 202(n)(1)(B) of the Act (42 U.S.C. 402(n)(1)(B)) prohibits payment of auxiliary or survivor benefits to certain individuals who are entitled to such benefits on the record of a NH who has been removed from the United States on certain grounds as specified in the above paragraph. Nonpayment of benefits is applicable for any month such auxiliary or survivor beneficiary is not a citizen of the United States and is outside the United States for any part of the month. Benefits cannot be initiated (or resumed) to such auxiliary or survivor beneficiaries who are otherwise subject to nonpayment under these provisions until the removed NH has been subsequently lawfully admitted for permanent residence to the United States.

In addition, certain individuals may be subject to suspension of their SSI payments under section 1614(a)(1)(B)(i) of the Act (42 U.S.C. 1382c(a)(1)(B)(i)), which provides, in part, that an SSI recipient must be a resident of the United States. Further, if an SSI recipient is not a United States citizen, 8 U.S.C. 1611 and 1612 provide that an

alien who is not a qualified alien within the statutory definitions applicable to those sections is ineligible for SSI benefits, and an alien who is a qualified alien may have limited eligibility.

#### **Purpose(s)**

This matching program establishes the conditions under which DHS will disclose information to SSA in order to identify aliens who leave the United States voluntarily and aliens who are removed from the United States. These aliens may be subject to suspension of payments, nonpayments of benefits or both, or recovery of overpayments. SSA will use DHS data to determine if suspension of payments, nonpayment of benefits, or recovery of overpayments is applicable.

#### **Categories of Individuals**

The individuals whose information is involved in this matching program are:

Aliens who leave the United States voluntarily and are subject to suspension or non-payment of SSI.

Aliens who are removed from the United States, voluntarily depart, or voluntarily return to their home country from the United States, and are subject to nonpayment of retirement or disability insurance benefits (RSDI). In addition, certain individuals may be subject to suspension of their SSI payments if they are not residents of the United States. If an SSI recipient is not a qualified alien within the statutory definitions, they are ineligible for SSI benefits. An alien who is a qualified alien may have limited eligibility.

#### **Categories of Records**

##### *Aliens Who Leave the United States Voluntarily*

The data elements furnished by the DHS/U.S. Citizenship and Immigration Service's (USCIS) Benefits Information System (BIS) are the alien's name, SSN, date of birth (DOB), Alien Registration Number ("A" number), date of departure, and expected length of stay. To verify the SSN, SSA will match BIS data against the names, DOB, and SSNs in SSA's Enumeration System. SSA will store and match verified SSNs against the same elements in the SSR files.

##### *Aliens Who Are Removed From the United States*

The data elements furnished from DHS/U.S. Immigration and Customs Enforcement's (ICE) Enforcement Integrated Database (EID) are the individual's name and alias (if any), Social Security number (SSN) (if available), DOB, country of birth, country to which removed, date of

removal, the final removal charge code, and DHS' "A" number.

To verify the SSN, SSA will match EID data against records in its Enumeration System. SSA matches the verified SSNs against the existing Master Beneficiary Record (MBR) and SSR records to locate removals (and their dependents or survivors, if any) who have already claimed and are currently receiving RSDI, SSI benefits, or both. SSA will retain the data verified through this matching program on the MBR and SSR, to be associated with future claims activity.

#### **System(s) of Records**

##### *Aliens Who Leave the United States Voluntarily (SSI)*

DHS will disclose to SSA information from the BIS system of records, DHS/USCIS-007, 81 FR 72069 (October 19, 2016). DHS will electronically format the BIS data for transmission to SSA. BIS data is comprised of data collected from USCIS immigration systems. USCIS data used to accomplish this matching agreement currently comes from the CLAIMS 3 database.

SSA will match the DHS information with SSA's systems of records: Master Files of Social Security Number (SSN) Holders and SSN Applications (Enumeration System), 60-0058, last fully published on December 29, 2010 (75 FR 82121), and amended on July 5, 2013 (78 FR 40542), February 13, 2014 (79 FR 8780), July 3, 2018 (83 FR 31250-51), and November 1, 2018 (83 FR 54969).

In addition, SSA will match the DHS information with the Supplemental Security Income Record and Special Veterans Benefits, 60-0103, last fully published on January 11, 2006 (71 FR 1830), and amended on December 10, 2007 (72 FR 69723), July 3, 2018 (83 FR 31250-51), and November 1, 2018 (83 FR 54969).

##### *Aliens Who Are Removed From the United States (RSDI and SSI)*

DHS will retrieve information on removed aliens from the DHS/ICE database known as the EID and electronically format it for transmission to SSA, and as covered by DHS/ICE-011—Criminal Arrest Records and Immigration Enforcement Records (CARIER), published October 19, 2016 (81 FR 72080), to the extent that those records pertain to individuals under the Privacy Act or covered persons under the Judicial Redress Act of 2015 (5 U.S.C. 552a, note).

The SSA systems of records used in the match are the Master Files of Social

Security Number (SSN) Holders and SSN Applications (Enumeration System), 60-0058, last fully published on December 29, 2010 (75 FR 82121), and amended on July 5, 2013 (78 FR 40542), February 13, 2014 (79 FR 8780), July 3, 2018 (83 FR 31250-51), and November 1, 2018 (83 FR 54969).

The Supplemental Security Income Record and Special Veterans Benefits (SSR), 60-0103, last fully published on January 11, 2006 (71 FR 1830), and amended on December 10, 2007 (72 FR 69723), July 3, 2018 (83 FR 31250-51), and November 1, 2018 (83 FR 54969)

The Master Beneficiary Record (MBR), 60-0090, last fully published on January 11, 2006 (71 FR 1826), and amended on December 10, 2007 (72 FR 69723), July 5, 2013 (78 FR 40542), July 3, 2018 (83 FR 31250-51), and November 1, 2018 (83 FR 54969).

The Prisoner Update Processing System (PUPS), 60-0269, last fully published on March 8, 1999 (64 FR 11076), and amended on December 10, 2007 (72 FR 69723), July 5, 2013 (78 FR 40542), and November 1, 2018 (83 FR 54969).

The Unverified Prisoner System (UPS) is a subsystem of PUPS. UPS users perform a manual search of fallout cases where the Enumeration and Verification System is unable to locate an SSN for an alien who has been removed. Under a separate and existing Interagency Agreement (IAA) between SSA and DHS, SSA has automated access to the DHS Systematic Alien Verification for Entitlements (SAVE) program, DHS-USCIS-004, 81 FR 78619 (November 8, 2016) that utilizes the Verification Information System to confirm naturalized and derived citizenship and immigration status. SSA will use the automated access to the SAVE program to verify current immigration status of aliens where the immediate EID match or any future claims activity indicate that an alien has been removed. The parties do not consider this verification as a separate match subject to the provisions of the Computer Matching and Privacy Protection Act (Pub. L. 100-503); the parties will conduct such verifications in compliance with the terms of the aforementioned IAA.

The systems of records involved in this computer matching program have routine uses permitting the disclosures needed to conduct this match.

[FR Doc. 2019-27010 Filed 12-13-19; 8:45 am]

**BILLING CODE 4191-02-P**

**DEPARTMENT OF TRANSPORTATION****Federal Highway Administration****Notice of Final Federal Agency Actions on Proposed Highway in California**

**AGENCY:** Federal Highway Administration (FHWA), Department of Transportation (DOT).

**ACTION:** Notice of limitation on claims for judicial review of actions by the California Department of Transportation (Caltrans).

**SUMMARY:** The FHWA, on behalf of Caltrans, is issuing this notice to announce actions taken by Caltrans, that are final. The actions relate to a proposed highway project, on State Route 12 between postmiles 20.57 and 26.41 near the town of Rio Vista in the County of Solano, State of California. Those actions grant licenses, permits, and approvals for the project.

**DATES:** By this notice, the FHWA, on behalf of Caltrans, is advising the public of final agency actions subject to 23 U.S.C. 139(j)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before May 14, 2020. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

**FOR FURTHER INFORMATION CONTACT:** For Caltrans: Zach Gifford, Senior Environmental Planner, California Department of Transportation, 111 Grand Avenue, Oakland, CA 94612. Office hours: Monday through Friday 8:00 a.m.–4:30 p.m. Contact information: [zachary.gifford@dot.ca.gov](mailto:zachary.gifford@dot.ca.gov), 510–286–5610. For FHWA, contact David Tedrick at (916) 498–5024 or email [david.tedrick@dot.gov](mailto:david.tedrick@dot.gov).

**SUPPLEMENTARY INFORMATION:** Effective July 1, 2007, the FHWA assigned, and Caltrans assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Notice is hereby given that Caltrans has taken final agency actions subject to 23 U.S.C. 139(j)(1) by issuing licenses, permits, and approvals for the following highway project in the State of California: Caltrans proposes to rehabilitate State Route 12 from postmile 20.57 to 26.41 in Solano County near the town of Rio Vista. Anticipated work includes repairing roadway pavement cracking and upgrading non-standard shoulders, travel lanes, vertical sight distances, cross slopes, and drainage systems. Additionally, the project will address flooding issues and upgrade the American with Disabilities (ADA)

facilities. All work will improve ride quality, enhance safety, and extend the service life of the pavement. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Final Environmental Assessment (FEA) and Finding of No Significant Impact (FONSI) for the project, approved on October 4, 2019, and in other documents in the Caltrans' project records. The FEA, FONSI, and other project records are available by contacting Caltrans at the addresses provided above. The Caltrans FEA and FONSI can be viewed and downloaded from the project website at <https://dot.ca.gov/caltrans-near-me/district-4/d4-popular-links/d4-environmental-docs>.

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. *General:* National Environmental Policy Act (NEPA) [42 U.S.C. 4321–4351]; Federal-Aid Highway Act [23 U.S.C. 109 and 23 U.S.C. 128].

2. *Air:* Clean Air Act [42 U.S.C. 7401–7671(q)].

3. *Wildlife:* Endangered Species Act [16 U.S.C. 1531–1544 and Section 1536]; Fish and Wildlife Coordination Act [16 U.S.C. 661–667(d)]; Migratory Bird Treaty Act [16 U.S.C. 703–712].

4. *Historic and Cultural Resources:* Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470(f) *et seq.*]; Historic Sites Act of 1935 [16 U.S.C. 461–467].

5. *Wetlands and Water Resources:* Clean Water Act (Section 404 and Section 401) [33 U.S.C. 1251–1377]; Safe Drinking Water Act (SDWA) [42 U.S.C. 300(f)–300(j)(6)].

6. *Social and Economic:* Civil Rights Act of 1964 [42 U.S.C. 2000(d)–2000(d)(1)].

7. *Health:* Resource Conservation and Recovery Act [42 U.S.C. 6901 *et seq.*]; Comprehensive Environmental Response, Compensation, and Liability Act [42 U.S.C. 9601 *et seq.*]; Atomic Energy Act [42 U.S.C. 2011–2259]; Toxic Substance Control Act [15 U.S.C. 2601–2629]; Community Environmental Response Facilitation Act; Occupational Safety and Health Act [29 U.S.C. 651]; Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C. 136].

8. *Executive Orders:* E.O. 12088 Federal Compliance with Pollution Control Standards; E.O. 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; E.O. 13112 Invasive Species; E.O. 11988 Floodplain Management.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

**Authority:** 23 U.S.C. 139(j)(1).

Issued on: December 9, 2019.

**Tashia J. Clemons,**

*Director, Planning and Environment, Federal Highway Administration, California Division.*

[FR Doc. 2019–27023 Filed 12–13–19; 8:45 am]

**BILLING CODE 4910-RY-P**

**DEPARTMENT OF TRANSPORTATION****Federal Highway Administration****Environmental Impact Statement (EIS): Erie County**

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Rescinded notice of intent (NOI).

**SUMMARY:** The FHWA is issuing this rescinded notice to advise the public that FHWA will not be preparing and issuing an Environmental Impact Statement (EIS) on a proposal to replace the former South Michigan Avenue Bridge in the City of Buffalo, Erie County, New York [New York State Department of Transportation (NYSDOT) Project Identification Number (PIN) 5758.17]. The NOI to prepare an EIS was published in the **Federal Register** on April 13, 2009.

**FOR FURTHER INFORMATION CONTACT:** Frank Cirillo, Regional Director, New York State Department of Transportation, 100 Seneca Street, Buffalo, New York 14203, Telephone: (716) 847–3238; or Richard Marquis, Division Administrator, Federal Highway Administration, New York Division, Leo W. O'Brien Federal Building, 7th Floor, 11A Clinton Avenue, Albany, New York 12207, Telephone: (518) 431–8897.

**SUPPLEMENTARY INFORMATION:** The FHWA, in cooperation with the NYSDOT and the Erie Canal Harbor Development Corporation (ECHDC), previously intended to prepare an EIS to evaluate the effects of a proposal to replace the former South Michigan Avenue Bridge in the City of Buffalo, Erie County, New York. The proposed improvements involved constructing a transportation facility that would provide a direct link from the inner harbor to the outer harbor area while maintaining adequate waterway access for recreational and commercial watercrafts. The Final Scoping Report (March 2010) states “the purpose of this project is to directly and efficiently connect the New Downtown and the Outer Harbor area with a multi-modal (pedestrian, bicyclist, and motorized traffic) transportation facility over the Buffalo River and/or City Ship Canal in the City of Buffalo.” As stated in the

original NOI, alternatives under consideration included: (1) Taking no action; (2) replacing the South Michigan Avenue Bridge on existing alignment; and (3) constructing a new bridge on new alignment across the Buffalo River and/or City Ship Canal. Several potential locations for the facility were considered within a 1.5-mile corridor extending from the mouth of the Buffalo River (in the vicinity of the Erie Basin Marina) to the southern navigation limit of the City Ship Canal (west of the existing Ohio Street Bridge).

Subsequent to publication of the March 2010 Final Scoping Report and upon progression of preliminary design and environmental review, it has been determined that sufficient funding is not available to progress a project that would meet the stated project purpose and address identified needs. Due to funding constraints, the Project cannot progress as originally envisioned. Thus, it has been determined that the Project must be terminated. Termination of this project does not preclude such work from being conducted in the future as an independent project, or as part of a larger independent action. Should the State or locality seek to undertake similar work in the future, work will be viewed and deemed as an independent action from that described above and will be required to undergo appropriate Federal and/or state environmental review.

Comments and questions concerning the proposed action should be directed to the FHWA contact person at the address provided above.

**Richard Marquis,**

*New York Division Administrator, Albany, New York.*

[FR Doc. 2019-27020 Filed 12-13-19; 8:45 am]

**BILLING CODE 4910-RY-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

[Docket No. FRA-2019-0004-N-21]

#### Proposed Agency Information Collection Activities; Comment Request

**AGENCY:** Federal Railroad Administration (FRA), U.S. Department of Transportation (DOT).

**ACTION:** Notice of information collection; request for comment.

**SUMMARY:** Under the Paperwork Reduction Act of 1995 (PRA) and its implementing regulations, this notice announces that FRA is forwarding the Information Collection Requests (ICRs)

abstracted below to the Office of Management and Budget (OMB) for review and comment. The ICRs describe the information collections and their expected burden. On October 2, 2019, FRA published a notice providing a 60-day period for public comment on the ICRs.

**DATES:** Interested persons are invited to submit comments on or before January 15, 2020.

**ADDRESSES:** Submit written comments on the ICRs to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503, Attention: FRA Desk Officer. Comments may also be sent via email to OMB at the following address: [oir\\_submissions@omb.eop.gov](mailto:oir-submissions@omb.eop.gov).

**FOR FURTHER INFORMATION CONTACT:** Ms. Hodan Wells, Information Collection Clearance Officer, Office of Railroad Safety, Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590 (telephone: (202) 493-0440) or Ms. Kim Toone, Information Collection Clearance Officer, Office of Information Technology, Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590 (telephone: (202) 493-6132).

**SUPPLEMENTARY INFORMATION:** The PRA, 44 U.S.C. 3501-3520, and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. See 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. On October 2, 2019, FRA published a 60-day notice in the **Federal Register** soliciting public comment on the ICRs for which it is now seeking OMB approval. See 84 FR 52588. FRA received one comment from the Brotherhood of Railroad Signalmen (BRS), the collective bargaining representative for approximately 10,000 signal employees. BRS supports the information collection activities of both ICRs, considering them necessary to FRA's regulatory duties and public safety responsibilities. BRS urges FRA to continue to collect this information, noting that the information provided from these activities can help guide FRA in solving issues related to warning system failures at crossings and highway-rail grade crossing accidents.

Before OMB decides whether to approve these proposed collections of information, it must provide 30-days' notice for public comment. Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is

published. 44 U.S.C. 3507(b)-(c); 5 CFR 1320.10(b) and 1320.12(d); see also 60 FR 44978, 44983, Aug. 29, 1995. OMB believes the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect.

Comments are invited on the following ICRs regarding: (1) Whether the information collection activities are necessary for FRA to properly execute its functions, including whether the information will have practical utility; (2) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (3) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (4) ways to minimize the burden of information collection activities on the public, including the use of automated collection techniques or other forms of information technology.

The summaries below describe the ICRs that FRA will submit for OMB clearance as the PRA requires:

**Title:** Grade Crossing Signal System Safety Regulations.

**OMB Control Number:** 2130-0534.

**Abstract:** FRA believes that highway-rail grade crossing (grade crossing) accidents resulting from warning system failures can be reduced. Accordingly, FRA's regulations require railroads to take specific responses in the event of an activation failure. An activation failure is defined as when a grade crossing warning system fails to indicate the approach of a train at least 20 seconds prior to the train's arrival at the crossing or to indicate the presence of a train occupying the crossing. Specifically, railroads must report to FRA every impact between on-track railroad equipment and an automobile, bus, truck, motorcycle, bicycle, farm vehicle, or pedestrian at a highway-rail grade crossing involving a crossing warning system activation failure. Notification must be provided to the National Response Center within 24 hours of occurrence at the stipulated toll-free telephone number. Additionally, railroads must report to FRA within 15 days of each activation failure of a highway-rail grade warning system. Form FRA F 6180.83, "Highway-Rail Grade Crossing Warning

System Activation Failure Report,”<sup>1</sup> must be used for this purpose and completed using the instructions printed on the form. With this information, FRA can identify the causes of activation failures and investigate them to determine whether periodic maintenance, inspection, and testing standards are effective.

*Type of Request:* Extension with change (revised estimates) of a currently approved collection.

*Affected Public:* Businesses (railroads).

*Form(s):* FRA F 6180.83.

*Respondent Universe:* 746 railroads.

*Frequency of Submission:* On occasion/monthly.

*Total Estimated Annual Responses:* 60,252.

*Total Estimated Annual Burden:* 5,042 hours.

*Total Estimated Annual Burden Hour Dollar Cost Equivalent:* \$342,863.

*Title:* Alleged Violation Reporting Form.

*OMB Control Number:* 2130-0590.

*Abstract:* The Alleged Violation Reporting Form is a response to section 307(b) of the Rail Safety Improvement Act of 2008, which requires FRA to “provide a mechanism for the public to submit written reports of potential violations of Federal railroad safety and hazardous materials transportation laws, regulations, and orders to the Federal Railroad Administration.” The Alleged Violation Reporting Form allows the general public to submit alleged violations directly to FRA. The form allows FRA to collect information necessary to investigate the alleged violation and to follow up with the submitting party. FRA may share the information collected with partnering State departments of transportation and law enforcement agencies.

*Type of Request:* Extension with change (revised estimates) of a currently approved collection.

*Affected Public:* General public.

*Form(s):* FRA F 6180.151.

*Respondent Universe:*<sup>2</sup> 570 individuals.

*Frequency of Submission:* On occasion.

*Total Estimated Annual Responses:* 570.

*Total Estimated Annual Burden:* 48 hours.

*Total Estimated Annual Burden Hour Dollar Cost Equivalent:* \$1,296.

Under 44 U.S.C. 3507(a) and 5 CFR 1320.5(b) and 1320.8(b)(3)(vi), FRA

informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

**Authority:** 44 U.S.C. 3501-3520.

**Brett A. Jortland,**

*Acting Chief Counsel.*

[FR Doc. 2019-26995 Filed 12-13-19; 8:45 am]

**BILLING CODE 4910-06-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

[FTA Docket No. FTA 2019-0026]

#### Agency Information Collection Activity Under OMB Review

**AGENCY:** Federal Transit Administration, DOT.

**ACTION:** Notice of request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Requirements (ICRs) abstracted below have been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICR describe the nature of the information collection and their expected burdens.

**DATES:** Comments must be submitted on or before January 15, 2020.

**ADDRESSES:** All written comments must refer to the docket number that appears at the top of this document and be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW Washington, DC 20503, Attention: FTA Desk Officer. Alternatively, comments may be sent via email to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, at the following address: [oira\\_submissions@omb.eop.gov](mailto:oira_submissions@omb.eop.gov).

*Comments are Invited On:* Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is best assured of having its full effect if OMB receives it

within 30 days of publication of this notice in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Tia Swain, Office of Administration, Management Planning Division, 1200 New Jersey Avenue SE, Mail Stop TAD-10, Washington, DC 20590 (202) 366-0354 or [tia.swain@dot.gov](mailto:tia.swain@dot.gov).

**SUPPLEMENTARY INFORMATION:** The Paperwork Reduction Act of 1995 (PRA), Public Law 104-13, Section 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501-3520), and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. 44 U.S.C. 3506, 3507; 5 CFR 1320.5, 1320.8(d)(1), 1320.12. On October 18, 2019, FTA published a 60-day notice (84 FR 56012) in the **Federal Register** soliciting comments on the ICR that the agency was seeking OMB approval. FTA received no comments after issuing this 60-day notice. Accordingly, DOT announces that these information collection activities have been re-evaluated and certified under 5 CFR 1320.5(a) and forwarded to OMB for review and approval pursuant to 5 CFR 1320.12(c).

Before OMB decides whether to approve these proposed collections of information, it must provide 30 days for public comment. 44 U.S.C. 3507(b); 5 CFR 1320.12(d). Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507(b)-(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983, Aug. 29, 1995. OMB believes that the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect. 5 CFR 1320.12(c); *see also* 60 FR 44983, Aug. 29, 1995.

The summaries below describe the nature of the information collection requirements (ICRs) and the expected burden. The requirements are being submitted for clearance by OMB as required by the PRA.

*Title:* 49 U.S.C. Section 5307 Urbanized Area Formula Program.

*OMB Control Number:* 2132-0502.

*Type of Request:* Renewal of a previously approved information collection.

*Abstract:* The Urbanized Area (UZA) Formula Funding program (49 U.S.C.

<sup>1</sup> FRA makes a technical correction to the title of Form FRA F 6180.83 in this notice.

<sup>2</sup> After an internal agency review, FRA updated the respondent universe estimate.

5307) makes federal resources available to urbanized areas and to governors for transit capital and operating assistance in urbanized areas and for transportation-related planning. An urbanized area is an incorporated area with a population of 50,000 or more that is designated as such by the U.S. Department of Commerce, Bureau of the Census. Funding is made available to designated recipients that are public bodies with the legal authority to receive and dispense federal funds. Governors, responsible local officials and publicly owned operators of transit services shall designate a recipient to apply for, receive, and dispense funds for urbanized areas. The governor or governor's designee acts as the designated recipient for urbanized areas between 50,000 and 200,000. For urbanized areas with 200,000 in population and over, funds are apportioned and flow directly to a designated recipient selected locally to apply for and receive Federal funds. For urbanized areas under 200,000 in population, the funds are apportioned to the governor of each state for distribution. Eligible activities include: Planning, engineering, design and evaluation of transit projects and other technical transportation-related studies; capital investments in bus and bus-related activities such as replacement, overhaul and rebuilding of buses, crime prevention and security equipment and construction of maintenance and passenger facilities; and capital investments in new and existing fixed guideway systems including rolling stock, overhaul and rebuilding of vehicles, track, signals, communications, and computer hardware and software. In addition, associated transit improvements and certain expenses associated with mobility management programs are eligible under the program. All preventive maintenance and some Americans with Disabilities Act complementary paratransit service costs are considered capital costs. This information collection includes a decrease in burden due to the reduced reporting requirement for projects under two million in large UZAs. FTA has eliminated quarterly reporting requirements for any grant under the two-million-dollar threshold.

*Respondents:* State or local governmental entities that operates a public transportation service.

*Estimated Annual Number of Respondents:* 1,560.

*Estimated Total Annual Burden:* 114,008.

*Frequency:* Annually.

**Nadine Pembleton,**

*Director Office of Management Planning.*

[FR Doc. 2019-26984 Filed 12-13-19; 8:45 am]

**BILLING CODE 4910-57-P**

## DEPARTMENT OF TRANSPORTATION

[Docket No. DOT-OST-2003-15962]

### Request for Comments of a Reinstatement With Changes of a Previously Approved Information Collection: Procedures and Evidence Rules for Air Carrier Authority Applications

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Request (ICR) abstracted below is being forwarded to the Office of Management and Budget (OMB) for review and comments. A **Federal Register** Notice with a 60-day comment period soliciting comments on the following information collection was published on October 1, 2019 [Vol. 84, No. 190, Page 52173]. No comments were received.

**DATES:** Comments must be submitted on or before January 15, 2020.

**FOR FURTHER INFORMATION CONTACT:** Barbara Snoden, (202) 366-4834, Office of Aviation Analysis, Office of the Secretary, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590.

#### SUPPLEMENTARY INFORMATION:

*OMB Control Number:* 2106-0023.

*Title:* Procedures and Evidence Rules for Air Carrier Authority Applications: 14 CFR part 201—Air Carrier Authority under Subtitle VII of Title 49 of the United States Code—(Amended); 14 CFR part 204—Data to Support Fitness Determinations; 14 CFR part 291—Cargo Operations in Interstate Air Transportation.

*Type of Request:* Reinstatement with Changes of a Previously Approved Information Collection.

*Abstract:* To determine the fitness of persons seeking authority to engage in air transportation, the Department collects information from them about their ownership, citizenship, managerial competence, operating proposal, financial condition, and compliance history. The specific information to be filed by respondents is set forth in 14 CFR parts 201 and 204.

*Affected Public:* Persons seeking initial or continuing authority to engage

in air transportation of persons, property, and/or mail.

*Estimated Number of Respondents:* 76.

*Frequency of Collection:* Occasional.

*Estimated Number of Responses:* 228.

*Estimated Total Burden per*

*Respondent:* 45 hours.

*Estimated Total Burden on*

*Respondents:* 8,250 hours.

**ADDRESSES:** Send comments regarding the burden estimate, including suggestions for reducing the burden, to the Office of Management and Budget, Attention: Desk Officer for the Office of the Secretary of Transportation, 725 17th Street NW, Washington, DC 20503.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (b) the accuracy of the Department's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

**Authority:** The Paperwork reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1:48.

Issued in Washington, DC, on December 10, 2019.

**Lauralyn J. Remo,**

*Chief, Air Carrier Fitness Division, Office of Aviation Analysis.*

[FR Doc. 2019-27008 Filed 12-13-19; 8:45 am]

**BILLING CODE 4910-9X-P**

## DEPARTMENT OF TRANSPORTATION

[Docket No. DOT-OST-2004-16951]

### Request for Comments of a Reinstatement With Change of a Previously Approved Information Collection: Aircraft Accident Liability Insurance

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Request (ICR) abstracted below is being forwarded to the Office of Management and Budget (OMB) for review and comments. A **Federal Register** Notice with a 60-day comment period soliciting comments on the following information collection was published on October 2, 2019 [Vol. 84,

No. 190, Page 52172]. No comments were received.

**DATES:** Comments must be submitted on or before January 15, 2020.

**ADDRESSES:** Send comments regarding the burden estimate, including suggestions for reducing the burden, to the Office of Management and Budget, Attention: Desk Officer for the Office of the Secretary of Transportation, 725 17th Street NW, Washington, DC 20503.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

**FOR FURTHER INFORMATION CONTACT:** Barbara Snoden, (202) 366-4834, Office of Aviation Analysis, Office of the Secretary, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

*Title:* Aircraft Accident Liability Insurance.

*OMB Control Number:* 2106-0030.

*Type of Request:* Reinstatement with changes of a previously approved collection.

*Abstract:* 49 U.S.C. 41112 provides that an air carrier may not be issued or continue to hold air carrier authority unless it has filed with DOT evidence that it possesses insurance in accordance with DOT regulations. 14 CFR part 205 establishes procedures for filing evidence of liability insurance for air carriers, and contains the minimum requirements for air carrier accident liability insurance to protect the public from losses, and directs that certificates evidencing appropriate coverage must be filed with the Department. This insurance information is submitted to DOT using OST Form 6410 (U.S. air carriers) or OST Form 6411 (foreign air carriers).

DOT expects to receive approximately 2,051 filed insurance certificates from U.S. air carriers and approximately 457 filed certificates from foreign air carriers. DOT expects to receive approximately 2,728 amended certificates each year from U.S. air carriers and approximately 608 amended filings from foreign air carriers. Total respondents expected is

approximately 2,508. Further, DOT expects filers of certificates to take 30 minutes to complete the form and approximately 15 minutes (for approximately 5 percent of respondents) to prepare amendments to the form. Thus, the total annual burden is expected to be 875 hours.

*Affected Public:* U.S. and foreign air carriers.

*Number of Respondents:* 2,508.

*Frequency:* On occasion.

*Number of Responses:* 3,336.

*Total Annual Burden:* 875 hours.

**Authority:** The Paperwork Reduction Act of 1995; 14 CFR part 205.

Issued in Washington, DC, on December 10, 2019.

**Lauralyn J. Remo,**

*Chief, Air Carrier Fitness, Office of Aviation Analysis.*

[FR Doc. 2019-27006 Filed 12-13-19; 8:45 am]

**BILLING CODE 4910-9X-P**

**DEPARTMENT OF TRANSPORTATION**

[Docket No. DOT-OST-2003-15623]

**Request for Comments of a Reinstatement With Change of a Previously Approved in Information Collection: Use and Change of Names for Air Carriers, Foreign Air Carriers, and Commuter Air Carriers**

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request (ICR) abstracted below is being forwarded to the Office of Management and Budget (OMB) for review and comments. A **Federal Register** Notice with a 60-day comment period soliciting comments on the following information collection was published on October 1, 2019 [Vol. 84, No. 190, Page 52173]. No comments were received.

**DATES:** Comments must be submitted on or before January 15, 2020.

**FOR FURTHER INFORMATION CONTACT:** Barbara Snoden, (202) 366-4834, Office of Aviation Analysis, Office of the Secretary, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 2106-0043.

*Title:* Use and Change of Names of Air Carriers, Foreign Air Carriers, and Commuter Air Carriers, 14 CFR part 215.

*Type of Request:* Reinstatement with changes of a previously approved collection.

*Abstract:* In accordance with the procedures set forth in 14 CFR part 215, before a holder of certificated, foreign, or commuter air carrier authority may hold itself out to the public in any particular name or trade name, it must register that name or trade name with the Department, and notify all other certificated, foreign, and commuter air carriers that have registered the same name or similar name(s) of the intended name registration.

DOT expects to receive approximately 12 requests from persons to use or change the name or trade name in which they hold themselves out to the public as an air carrier or foreign air carrier. Total respondents expected is approximately 12. Further, DOT expects responders to take 5 hours to complete the form and to prepare amendments to the form. Thus, the total annual burden is expected to be 60 hours.

*Affected Public:* U.S. and Foreign Air Carriers.

*Number of Respondents:* 12.

*Frequency:* On occasion.

*Number of Responses:* None.

*Total Annual Burden:* 60 hours.

**ADDRESSES:** Send comments regarding the burden estimate, including suggestions for reducing the burden, to the Office of Management and Budget, Attention: Desk Officer for the Office of the Secretary of Transportation, 725 17th Street NW, Washington, DC 20503.

Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

**Authority:** The Paperwork Reduction Act of 1995; 14 CFR part 215.

Issued in Washington, DC, on December 10, 2019.

**Lauralyn J. Remo,**

*Chief, Air Carrier Fitness Division, Office of Aviation Analysis.*

[FR Doc. 2019-27007 Filed 12-13-19; 8:45 am]

**BILLING CODE 4910-9X-P**

**DEPARTMENT OF THE TREASURY****Office of the Comptroller of the Currency****Agency Information Collection Activities: Information Collection Renewal; Submission for OMB Review; Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies and Diversity Self-Assessment Template for OCC-Regulated Entities**

**AGENCY:** Office of the Comptroller of the Currency (OCC), Treasury.

**ACTION:** Notice and request for comment.

**SUMMARY:** The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995 (PRA). The OCC may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC is soliciting comment on the renewal of its information collection titled “Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies and Diversity Self-Assessment Template for OCC-Regulated Entities.” The OCC also is giving notice that it has sent the collection to OMB for review.

**DATES:** Comments must be submitted on or before January 15, 2020.

**ADDRESSES:** Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email:* [prainfo@occ.treas.gov](mailto:prainfo@occ.treas.gov).
- *Mail:* Chief Counsel’s Office,

Attention: Comment Processing, 1557–0334, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

- *Fax:* (571) 465–4326.

*Instructions:* You must include “OCC” as the agency name and “1557–0334” in your comment. In general, the OCC will publish comments on [www.reginfo.gov](http://www.reginfo.gov) without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any

information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Additionally, please send a copy of your comments by mail to: OCC Desk Officer, 1557–0334, U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503 or by email to [oira\\_submission@omb.eop.gov](mailto:oira_submission@omb.eop.gov).

You may review comments and other related materials that pertain to this information collection<sup>1</sup> following the close of the 30-day comment period for this notice by any of the following methods:

- *Viewing Comments Electronically:* Go to [www.reginfo.gov](http://www.reginfo.gov). Click on the “Information Collection Review” tab. Underneath the “Currently under Review” section heading, from the drop-down menu select “Department of Treasury” and then click “submit.” This information collection can be located by searching by OMB control number “1557–0334” or “Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies and Diversity Self-Assessment Template for OCC-Regulated Entities.” Upon finding the appropriate information collection, click on the related “ICR Reference Number.” On the next screen, select “View Supporting Statement and Other Documents” and then click on the link to any comment listed at the bottom of the screen.

- For assistance in navigating [www.reginfo.gov](http://www.reginfo.gov), please contact the Regulatory Information Service Center at (202) 482–7340.

- *Viewing Comments Personally:* You may personally inspect comments at the OCC, 400 7th Street SW, Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect comments.

**FOR FURTHER INFORMATION CONTACT:** Shaquita Merritt, Clearance Officer, (202) 649–5490 or, for persons who are deaf or hearing impaired, TTY, (202) 649–5597, Chief Counsel’s Office, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, mail stop 9W–11, Washington, DC 20219.

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501 *et seq.*), certain

<sup>1</sup> On September 4, 2019, the OCC published a 60-day notice for this information collection, 84 FR 46604.

Federal agencies must obtain approval from OMB for each collection of information that they conduct or sponsor. “Collection of information” is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. The OCC asks that OMB extend its approval of the collection of information described in this document.

*Title:* Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies and Diversity Self-Assessment Template for OCC-Regulated Entities.

*OMB Control No.:* 1557–0334.

*Description:* This information collection covers standards, pursuant to which certain entities regulated by the OCC voluntarily self-assess their diversity policies and practices, and a template to assist with the self-assessment. The template (1) asks for general information about a respondent; (2) includes questions about certain standards and solicits comments about the successes and challenges of a respondent’s diversity program; (3) asks for a description of current practices for the self-assessment standards; (4) seeks additional diversity data; and (5) provides an opportunity for a respondent to provide other information regarding or comment on the self-assessment of its diversity policies and practices.

The OCC may use information submitted to monitor progress and trends in the financial services industry regarding diversity and inclusion in employment and contracting activities and to identify and highlight diversity and inclusion policies and practices that have been successful. The OCC will continue to reach out to the entities it regulates and other interested parties to discuss diversity and inclusion in the financial services industry and share leading practices. The OCC may also publish information disclosed by an entity, such as leading practices, in any form that does not identify the specific entity or individual or disclose confidential business information. Finally, if an OCC-regulated entity submits confidential commercial information that is both customarily and actually treated as private by the entity, the entity can designate the information as such, in which case the OCC will treat the self-assessment information as private to the extent permitted by law, including the Freedom of Information Act, 5 U.S.C. 552, *et seq.*

*Type of Review:* Regular.

*Affected Public:* Businesses or other for-profit.

*Burden Estimates:*  
*Number of Respondents:* 110.  
*Estimated Annual Burden for Standards and Template:* 8 hours.  
*Total Annual Burden:* 880 hours.  
*Frequency of Response:* Annual.

*Comments:* On September 4, 2019, the OCC issued a notice for 60 days of comment concerning this collection, 84 FR 46604. No comments were received. Comments continue to be invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the information collection burden;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: December 10, 2019.

**Theodore J. Dowd,**

*Deputy Chief Counsel, Office of the Comptroller of the Currency.*

[FR Doc. 2019-27051 Filed 12-13-19; 8:45 am]

**BILLING CODE 4810-33-P**

## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

#### Notice of OFAC Sanctions Actions

**AGENCY:** Office of Foreign Assets Control, Treasury.

**ACTION:** Notice.

**SUMMARY:** The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (the SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

**DATES:** See **SUPPLEMENTARY INFORMATION** section.

**FOR FURTHER INFORMATION CONTACT:** OFAC: Associate Director for Global Targeting, tel.: 202-622-2420; Assistant Director for Sanctions Compliance &

Evaluation, tel.: 202-622-2490; Assistant Director for Licensing, tel.: 202-622-2480; or Assistant Director for Regulatory Affairs, tel.: 202-622-4855.

#### **SUPPLEMENTARY INFORMATION:**

##### **Electronic Availability**

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's website (<https://www.treasury.gov/ofac>).

##### **Notice of OFAC Action(s)**

On December 10, 2019, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

##### *Individuals*

1. AUNG, Aung, Burma; DOB 1973; Gender Male (individual) [GLOMAG].

Designated pursuant to section 1(a)(ii)(C)(1) of Executive Order 13818 of December 20, 2017, "Blocking the Property of Persons Involved in Serious Human Rights Abuse or Corruption," 82 FR 60839, 3 CFR, 2017 Comp., p. 399, (E.O. 13818) for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure.

2. OO, Than, Burma; DOB 12 Oct 1973; Gender Male (individual) [GLOMAG].

Designated pursuant to section 1(a)(ii)(C)(1) of E.O. 13818 for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure.

3. HLAING, Min Aung, Burma; DOB 1956; Gender Male (individual) [GLOMAG].

Designated pursuant to section 1(a)(ii)(C)(1) of E.O. 13818 for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure.

4. WIN, Soe, Burma; DOB 01 Mar 1960; Gender Male (individual) [GLOMAG].

Designated pursuant to section 1(a)(ii)(C)(1) of E.O. 13818 for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure.

5. ANWAR, Rao (a.k.a. AHMED, Rao Anwar; a.k.a. KHAN, Anwar Ahmed; a.k.a. KHAN, Anwar Ahmed), Pakistan; DOB 01 Jan 1959; POB Karachi, Pakistan; nationality Pakistan; Gender Male; Passport MU-4112252 (Pakistan) issued 27 May 2014 expires 26 May 2019 (individual) [GLOMAG].

Designated pursuant to section 1(a)(ii)(A) of E.O. 13818 for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse.

6. KOCNER, Marian, Slovakia; DOB 17 May 1963; POB Ruzomberok, Slovakia; nationality Slovakia; Gender Male; Passport 4305176196 (Slovakia) expires 31 Mar 2025 (individual) [GLOMAG].

Designated pursuant to section 1(a)(ii)(A) of E.O. 13818 for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse.

7. AL-WARFALLI, Mahmud (a.k.a. AL-WERFALLI, Mahmoud; a.k.a. AL-WERFALLI, Mahmoud Mustafa Busayf), Benghazi, Libya; DOB 1978; nationality Libya; Gender Male (individual) [GLOMAG].

Designated pursuant to section 1(a)(ii)(A) of E.O. 13818 for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse.

8. BALUKU, Musa (a.k.a. BALUKU, Seka; a.k.a. KAJUJU, Mzee), Congo, Democratic Republic of the; DOB 1976; alt. DOB 1975 to 1976; POB Kasese District, Rwenzururu Sub-Region, Western Uganda; nationality Uganda; Gender Male (individual) [GLOMAG].

Designated pursuant to section 1(a)(ii)(C)(1) of E.O. 13818 for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure.

9. KASADHA, Amisi (a.k.a. KASAADA, Muzamil; a.k.a. KASADA, Kasadha; a.k.a. KIRBAKI, Muzamir; a.k.a. KIRIBAKI, Muzamir; a.k.a. "Kalume"; a.k.a. "Karume"), Congo, Democratic Republic of the; DOB 1975 to 1981; POB Iganga District, Busoga Region, Uganda; nationality Uganda; Gender Male (individual) [GLOMAG].

Designated pursuant to section 1(a)(iii)(A)(3) of E.O. 13818 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, an entity that has engaged in, or whose members have engaged in, serious human rights abuse.

10. KIBIRIGE, Amigo (a.k.a. AMIGO, Mzee; a.k.a. AMIGO, Simba; a.k.a. KIBIRGE, Amigo; a.k.a. MUHAMMAND, Kibirige), Congo, Democratic Republic of the; DOB 1975 to 1979; POB Masaka District, Central Region, Uganda; nationality Uganda; Gender Male (individual) [GLOMAG].

Designated pursuant to section 1(a)(iii)(A)(3) of E.O. 13818 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, an entity that has engaged in, or whose members have engaged in, serious human rights abuse.

11. LUMISA, Muhammed (a.k.a. LUMISA, Muhamad; a.k.a. "KATO, L."; a.k.a. "LUMINSA"; a.k.a. "LUMWISA"; a.k.a. "Mukade"; a.k.a. "Mukake"), Congo, Democratic Republic of the; DOB 1959; alt. DOB 1959 to 1965; POB Kampala District,

Central Region, Uganda; nationality Uganda; Gender Male (individual) [GLOMAG].

Designated pursuant to section 1(a)(iii)(A)(3) of E.O. 13818 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, an entity that has engaged in, or whose members have engaged in, serious human rights abuse.

12. MUHAMMAD, Kayiira (a.k.a. KAYIRA, Muhammad Mzee; a.k.a. MAHAMMAD, Kayiira; a.k.a. MUHAMADI, Kahira; a.k.a. "Kaida"; a.k.a. "Karida"; a.k.a. "Ogundipe"), Congo, Democratic Republic of the; DOB 1963 to 1969; POB Kampala District, Central Region, Uganda; nationality Uganda; Gender Male (individual) [GLOMAG].

Designated pursuant to section 1(a)(iii)(A)(3) of E.O. 13818 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, an entity that has engaged in, or whose members have engaged in, serious human rights abuse.

13. SEGUJJA, Elias (a.k.a. SUGUJA, Fezza; a.k.a. "Faiza"; a.k.a. "Feeza"; a.k.a. "Mulalo"), Congo, Democratic Republic of the; DOB 1969 to 1971; POB Kampala District, Central Region, Uganda; nationality Uganda; Gender Male (individual) [GLOMAG].

Designated pursuant to section 1(a)(iii)(A)(3) of E.O. 13818 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, an entity that has engaged in, or whose members have engaged in, serious human rights abuse.

14. GARANG, Angelo Kuot, Juba, South Sudan; DOB 12 Mar 1983; nationality South Sudan; Gender Male (individual) [GLOMAG].

Designated pursuant to section 1(a)(ii)(A) of E.O. 13818 for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse.

15. KUAIJEN, Michael (a.k.a. KUAIJIAN, Michael; a.k.a. KUAIJEN DUER MAYOK, Michael), Nairobi, Kenya; DOB 01 Jan 1979; nationality South Sudan; Gender Male (individual) [GLOMAG].

Designated pursuant to section 1(a)(ii)(A) of E.O. 13818 for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse.

16. LAM, John Top (a.k.a. TUT, John Top Lam), Nairobi 248-00100, Kenya; DOB 12 Sep 1979; POB Ayod, South Sudan; nationality South Sudan; Gender Male; Passport R00339720 (South Sudan) issued 21 Mar 2016 expires 21 Mar 2021; National ID No. 000119903 (South Sudan) (individual) [GLOMAG].

Designated pursuant to section 1(a)(ii)(A) of E.O. 13818 for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse.

17. MUORWEL, Malual Dhal (a.k.a. MUORWEL MALUAL, Malual Dhal), Luri, South Sudan; DOB 01 Jan 1975; nationality South Sudan; Gender Male (individual) [GLOMAG].

Designated pursuant to section 1(a)(ii)(A) of E.O. 13818 for being a foreign person who is responsible for or complicit in, or has directly or indirectly engaged in, serious human rights abuse.

18. THIONGKOL, Abud Stephen (a.k.a. KOL, Abud Stephen Thiong), South Sudan; DOB 23 Feb 1962; Gender Male (individual) [GLOMAG].

Designated pursuant to section 1(a)(ii)(C)(1) of E.O. 13818 for being a foreign person who is or has been a leader or official of an entity, including any government entity, that has engaged in, or whose members have engaged in, serious human rights abuse relating to the leader's or official's tenure.

#### Entities

1. HOTEL HOLDING, S.R.O., Bratislava, Slovakia; Tax ID No. 2023153495 (Slovakia); Registration Number 45946892 (Slovakia) [GLOMAG] (Linked To: KOCNER, Marian).

Designated pursuant to section 1(a)(iii)(B) of E.O. 13818 for being owned or controlled by, or for having acted or purported to act for or on behalf of, directly or indirectly, KOCNER, Marian, a person whose property and interests in property are blocked pursuant to E.O. 13818.

2. INTERNATIONAL INVESTMENT DEVELOPMENT HOLDING A.S. (f.k.a. R.E.N.T.A.L A.S.), Bratislava, Slovakia; Tax ID No. 2022037809 (Slovakia); Registration Number 35875551 (Slovakia) [GLOMAG] (Linked To: KOCNER, Marian).

Designated pursuant to section 1(a)(iii)(B) of E.O. 13818 for being owned or controlled by, or for having acted or purported to act for or on behalf of, directly or indirectly, KOCNER, Marian, a person whose property and interests in property are blocked pursuant to E.O. 13818.

3. INTERNATIONAL INVESTMENT HOTELS HOLDINGS A.S. (a.k.a. RENTA A.S.), Bratislava, Slovakia; Tax ID No. 2021969268 (Slovakia); Registration Number 35873990 (Slovakia) [GLOMAG] (Linked To: KOCNER, Marian).

Designated pursuant to section 1(a)(iii)(B) of E.O. 13818 for being owned or controlled by, or for having acted or purported to act for or on behalf of, directly or indirectly, KOCNER, Marian, a person whose property and interests in property are blocked pursuant to E.O. 13818.

4. SPRAVA A INKASO POHLADAVOK, S.R.O. (f.k.a. SPRAVA SLUZIEB DONOVALLY S.R.O.), Bratislava, Slovakia; Tax ID No. 2022942592 (Slovakia) [GLOMAG] (Linked To: KOCNER, Marian).

Designated pursuant to section 1(a)(iii)(B) of E.O. 13818 for being owned or controlled by, or for having acted or purported to act for or on behalf of, directly or indirectly, KOCNER, Marian, a person whose property and interests in property are blocked pursuant to E.O. 13818.

5. SPRAVA A INKASO ZMENIEK, S.R.O., Bratislava, Slovakia; Tax ID No. 2120543876 (Slovakia); Registration Number 50335839 (Slovakia) [GLOMAG] (Linked To: KOCNER, Marian).

Designated pursuant to section 1(a)(iii)(B) of E.O. 13818 for being owned or controlled by, or for having acted or purported to act for

or on behalf of, directly or indirectly, KOCNER, Marian, a person whose property and interests in property are blocked pursuant to E.O. 13818.

6. TRANZ-TEL, A.S. (f.k.a. NORAM—AZD, A.S.), Krizna 47, Bratislava 1—Mestska Cast Ruzinov, Bratislava 81107, Slovakia; Tax ID No. 202141989 (Slovakia); Registration Number 35720514 (Slovakia) [GLOMAG] (Linked To: KOCNER, Marian).

Designated pursuant to section 1(a)(iii)(B) of E.O. 13818 for being owned or controlled by, or for having acted or purported to act for or on behalf of, directly or indirectly, KOCNER, Marian, a person whose property and interests in property are blocked pursuant to E.O. 13818.

Dated: December 10, 2019.

**Andrea Gacki,**

*Director, Office of Foreign Assets Control.*

[FR Doc. 2019-26957 Filed 12-13-19; 8:45 am]

**BILLING CODE 4810-AL-P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### Proposed Collection; Comment Request for Form Project

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning return of excise tax on undistributed income of real estate investment trusts.

**DATES:** Written comments should be received on or before February 14, 2020 to be assured of consideration.

**ADDRESSES:** Direct all written comments to Dr. Philippe Thomas, Internal Revenue Service, Room 6529, 1111 Constitution Avenue NW, Washington, DC 20224.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the form should be directed to Kerry Dennis, at (202) 317-5751 or Internal Revenue Service, Room 6529, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet, at [Kerry.Dennis@irs.gov](mailto:Kerry.Dennis@irs.gov).

**SUPPLEMENTARY INFORMATION:**  
*Title:* Return of Excise Tax on Undistributed Income of Real Estate Investment Trusts.

*OMB Number:* 1545-1013.

*Form Number:* Form 8612.

*Abstract:* Form 8612 is used by real estate investment trusts to compute and pay the excise tax on undistributed income imposed under section 4981 of the Internal Revenue Code. The IRS uses the information to verify that the correct amount of tax has been reported.

*Current Actions:* There are no changes being made to the form at this time.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations.

*Estimated Number of Respondents:* 20.

*Estimated Time per Respondent:* 9 hours, 48 minutes.

*Estimated Total Annual Burden Hours:* 196 hours.

The following paragraph applies to all of the collections of information covered by this notice.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 21, 2019.

**Philippe Thomas,**

*Supervisor Tax Analyst.*

[FR Doc. 2019-27029 Filed 12-13-19; 8:45 am]

**BILLING CODE 4830-01-P**

## DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0261]

### Agency Information Collection Activity: Application for Refund of Educational Contributions

**AGENCY:** Veterans Benefits Administration; Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Benefits Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before January 15, 2020.

**ADDRESSES:** Submit written comments on the collection of information through [www.Regulations.gov](http://www.Regulations.gov), or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW, Washington, DC 20503 or sent through electronic mail to [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov). Please refer to "OMB Control No. 2900-0261" in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Danny S. Green at (202) 421-1354.

**SUPPLEMENTARY INFORMATION:**

*Authority:* PL 94-502 and Chapter 32, title 38 U.S.C.

*Title:* Application for Refund of Educational Contributions, VA Form 22-5281.

*OMB Control Number:* 2900-0261.

*Type of Review:* Revision of a currently approved collection.

*Abstract:* Veterans and Servicemembers complete VA Form 22-5281 to request a refund of their contributions to the Post-Vietnam Veterans Education Program. Contributions made into the Post-Vietnam Veterans Education Program may be refunded only after the participant has disenrolled from the program. Request for refund of contribution prior to discharge or release from active duty will be refunded on the date of the participant's discharge or release from active duty or within 60 days of receipt of notice by the Secretary of the participant's discharge or disenrollment. Refunds may be made earlier in instances of

hardship or other good reasons. Participants who stop their enrollment from the program after discharge or release from active duty, contributions will be refunded within 60 days of the receipt of their application.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 84 FR 195 on October 8, 2019, pages 53836 and 53837.

*Affected Public:* Individuals or Households.

*Estimated Annual Burden:* 35,000 hours.

*Estimated Average Burden per Respondent:* 6 minutes.

*Frequency of Response:* One time.

*Estimated Number of Respondents:* 350,000.

By direction of the Secretary.

**Danny S. Green,**

*VA Interim Clearance Officer, Office of Quality, Performance and Risk, Department of Veterans Affairs.*

[FR Doc. 2019-26958 Filed 12-13-19; 8:45 am]

**BILLING CODE 8320-01-P**

## DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0853]

### Agency Information Collection Activity: Application for Approval of a Program in a Foreign Country

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before February 14, 2020.

**ADDRESSES:** Submit written comments on the collection of information through Federal Docket Management System

(FDMS) at [www.Regulations.gov](http://www.Regulations.gov) or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to [nancy.kessinger@va.gov](mailto:nancy.kessinger@va.gov). Please refer to "OMB Control No. 2900-0853" in any correspondence. During the comment period, comments may be viewed online through the FDMS.

**FOR FURTHER INFORMATION CONTACT:**

Danny S. Green at (202) 421-1354.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites

comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

*Authority:* Title 38 CFR 21.4260.

*Title:* Application For Approval Of A Program In A Foreign Country (VA Form 22-0976).

*OMB Control Number:* 2900-0853.

*Type of Review:* Revision of a currently approved collection.

*Abstract:* VA will use the information collected to determine if a program in a foreign country is approvable under CFR 21.4260. In order for a review and decision to be made, the VA needs supporting information from the foreign educational institution.

*Affected Public:* Educational Institutions.

*Estimated Annual Burden:* 338 hours.

*Estimated Average Burden per*

*Respondent:* 20 minutes.

*Frequency of Response:* Once.

*Estimated Number of Respondents:* 1,014.

By direction of the Secretary.

**Danny S. Green,**

*Interim VA Clearance Officer, Office of Quality, Performance and Risk, Department of Veterans Affairs.*

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Part II

## Securities and Exchange Commission

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17 CFR Parts 200, 240, and 249

Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers; Final Rule

**SECURITIES AND EXCHANGE COMMISSION****17 CFR Parts 200, 240, and 249**

[Release No. 34–87005; File No. S7–05–14]

RIN 3235–AL45

**Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants, and Broker-Dealers**

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

**SUMMARY:** In accordance with the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), the Securities and Exchange Commission (“Commission”), pursuant to the Securities Exchange Act of 1934 (“Exchange Act”), is adopting recordkeeping, reporting, and notification requirements applicable to security-based swap dealers (“SBSDs”) and major security-based swap participants (“MSBSPs”), securities count requirements applicable to certain SBSDs, and additional recordkeeping requirements applicable to broker-dealers to account for their security-based swap and swap activities. The Commission also is making substituted compliance available with respect to recordkeeping, reporting, and notification requirements under Section 15F of the Exchange Act and the rules thereunder.

**DATES:***Effective date:* February 14, 2020.*Compliance date:* The compliance dates are discussed in section III.B. of this release.**FOR FURTHER INFORMATION CONTACT:**

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**I. Background**

Title VII of the Dodd-Frank Act (“Title VII”) established a new regulatory framework for the U.S. over-the-counter (“OTC”) derivatives markets.<sup>1</sup> Section 764 of the Dodd-Frank Act added Section 15F to the Exchange Act.<sup>2</sup> Section 15F(f)(2) provides that the Commission shall adopt rules governing reporting and recordkeeping for SBSDs and MSBSPs. Section 15F(f)(1)(A)

<sup>1</sup> See Public Law 111–203, 701 through 774. The Dodd-Frank Act assigns primary responsibility for the oversight of the U.S. OTC derivatives markets to the Commission and the Commodity Futures Trading Commission (“CFTC”). The Commission has oversight authority with respect to a “security-based swap” as defined in Section 3(a)(68) of the Exchange Act (15 U.S.C. 78c(a)(68)), including to implement a registration and oversight program for a “security-based swap dealer” as defined in Section 3(a)(71) and a “major security-based swap participant” as defined in Section 3(a)(67). The CFTC has oversight authority with respect to a “swap” as defined in Section 1(a)(47) of the Commodity Exchange Act (“CEA”) (7 U.S.C. 1(a)(47)), including to implement a registration and oversight program for a “swap dealer” as defined in Section 1(a)(49) of the CEA (7 U.S.C. 1(a)(49)) and a “major swap participant” as defined in Section 1(a)(33) of the CEA (7 U.S.C. 1(a)(33)). The Commission and the CFTC jointly have adopted rules to further define these terms. See *Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement;” Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, Exchange Act Release No. 67453 (July 18, 2012), 77 FR 48208 (Aug. 13, 2012); *Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant,”* Exchange Act Release No. 66868 (Apr. 27, 2012), 77 FR 30596 (May 23, 2012).

<sup>2</sup> 15 U.S.C. 78o–10 (“Section 15F of the Exchange Act” or “Section 15F”).

provides that SBSBs and MSBSPs shall make such reports as are required by the Commission, by rule or regulation, regarding the transactions and positions and financial condition of the SBSB or MSBSP. Section 15F(f)(1)(B)(ii) provides that SBSBs and MSBSPs without a prudential regulator<sup>3</sup> (respectively, “nonbank SBSBs” and “nonbank MSBSPs”) shall keep books and records in such form and manner and for such period as may be prescribed by the Commission by rule or regulation.<sup>4</sup> Section 15F(f)(1)(B)(i) provides that SBSBs and MSBSPs for which there is a prudential regulator (respectively, “bank SBSBs” and “bank MSBSPs”) shall keep books and records of all activities related to their business as an SBSB or MSBSP in such form and manner and for such period as may be prescribed by the Commission by rule or regulation. Section 15F(g) of the Exchange Act requires SBSBs and MSBSPs to maintain daily trading records with respect to security-based swaps and provides that the Commission shall adopt rules governing daily trading records for SBSBs and MSBSPs. Finally, Section 15F(i)(2) of the Exchange Act provides that the Commission shall adopt rules governing documentation standards for SBSBs and MSBSPs.

Section 17(a)(1) of the Exchange Act provides the Commission with authority to adopt rules requiring broker-dealers—which would include broker-dealer SBSBs and MSBSPs—to make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.<sup>5</sup> The

<sup>3</sup> The term “prudential regulator” is defined in Section 1(a)(39) of the CEA (7 U.S.C. 1(a)(39)) and that definition is incorporated by reference in Section 3(a)(74) of the Exchange Act. Pursuant to the definition, the Board of Governors of the Federal Reserve System (“Federal Reserve”), the Office of the Comptroller of the Currency (“OCC”), the Federal Deposit Insurance Corporation (“FDIC”), the Farm Credit Administration, or the Federal Housing Finance Agency (collectively, the “prudential regulators”) is the “prudential regulator” of an SBSB, MSBSP, swap dealer, or major swap participant if the entity is directly supervised by that agency.

<sup>4</sup> A nonbank SBSB or MSBSP could be dually registered with the Commission as a broker-dealer (respectively, a “broker-dealer SBSB” or “broker-dealer MSBSP”) or registered with the Commission only as an SBSB or MSBSP (respectively, a “stand-alone SBSB” or “stand-alone MSBSP”). Any of these registrants or a bank SBSB or bank MSBSP also could register with the CFTC as a futures commission merchant (“FCM”), swap dealer, or major swap participant.

<sup>5</sup> See 15 U.S.C. 78q(a)(1) (“Section 17 of the Exchange Act” or “Section 17”). Section 771 of the

Commission anticipates that a number of broker-dealers will register as SBSBs.<sup>6</sup> The Commission expects that some broker-dealers that are not registered as SBSBs or MSBSPs (“stand-alone broker-dealers”) nonetheless will engage in security-based swap and swap activities.<sup>7</sup>

In April 2014, the Commission proposed recordkeeping, reporting, and notification requirements applicable to SBSBs and MSBSPs, securities count requirements applicable to certain SBSBs, and additional recordkeeping requirements applicable to broker-dealers to account for their security-based swap and swap activities.<sup>8</sup> The proposed requirements were modeled on existing broker-dealer requirements.<sup>9</sup> The Commission received a number of comments in response to these proposals.<sup>10</sup> Separately, the Commission proposed rules governing the cross-border treatment of recordkeeping and reporting requirements with respect to SBSBs and MSBSPs.<sup>11</sup> The Commission received comments in response to these cross-border proposals as well.<sup>12</sup> The Commission carefully considered the comments received on the proposals described above and, as discussed below, made modifications in light of

Dodd-Frank Act states that unless otherwise provided by its terms, Subtitle B of Title VII (relating to the regulation of the security-based swap markets) does not divest any appropriate Federal banking agency, the Commission, the CFTC, or any other Federal or State agency, of any authority derived from any other provision of applicable law.

<sup>6</sup> While it is anticipated that some broker-dealers and banks will register as SBSBs in order to engage in security-based swap activities, it is unclear whether broker-dealers or banks will register as MSBSPs.

<sup>7</sup> In this release, the term “broker-dealer” includes an OTC derivatives dealer unless otherwise noted. See 17 CFR 240.3b–12 (defining the term “OTC derivatives dealer”). Consequently, the terms “stand-alone broker-dealer,” “broker-dealer SBSB,” and “broker-dealer MSBSP” include entities that are OTC derivatives dealers unless otherwise noted.

<sup>8</sup> See *Recordkeeping and Reporting Proposing Release; Capital Rule for Certain Security-Based Swap Dealers*, Exchange Act Release No. 71958 (Apr. 17, 2014), 79 FR 25194 (May 2, 2014) (“*Recordkeeping and Reporting Proposing Release*”).

<sup>9</sup> See *id.* at 25196–97 (providing the rationale for modeling the proposed requirements on the relevant broker-dealer requirements).

<sup>10</sup> The comment letters are available at <https://www.sec.gov/comments/s7-05-14/s70514.shtml>.

<sup>11</sup> See *Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants*, Exchange Act Release No. 69490 (May 1, 2013), 78 FR 30968 (May 23, 2013) (“*Cross-Border Proposing Release*”).

<sup>12</sup> The comment letters are available at <https://www.sec.gov/comments/s7-02-13/s70213.shtml>.

the comments in crafting final rules and amendments.

In this document, the Commission is amending certain existing rules and adopting new rules. In particular, the Commission is amending existing rules 17 CFR 240.17a–3 (“Rule 17a–3”), 17 CFR 240.17a–4 (“Rule 17a–4”), 17 CFR 240.17a–5 (“Rule 17a–5”), and 17 CFR 240.17a–11 (“Rule 17a–11”), and adopting new rules 17 CFR 240.18a–5 (“Rule 18a–5”), 17 CFR 240.18a–6 (“Rule 18a–6”), 17 CFR 240.18a–7 (“Rule 18a–7”), 17 CFR 240.18a–8 (“Rule 18a–8”), and 17 CFR 240.18a–9 (“Rule 18a–9”). The amendments and new rules establish recordkeeping, reporting, and notification requirements for SBSBs and MSBSPs and securities count requirements for stand-alone SBSBs (collectively “recordkeeping and reporting requirements”). The amendments to Rules 17a–3 and 17a–4 also establish additional recordkeeping requirements applicable to stand-alone broker-dealers to the extent they engage in security-based swap or swap activities. The Commission also is adopting largely technical amendments to Rules 17a–3, 17a–4, 17a–5, and 17a–11 as well as a conforming amendment to existing rule 17 CFR 240.17a–12 (“Rule 17a–12”).<sup>13</sup> Further, the Commission is adopting amendments to Parts II and III of the Financial and Operational Combined Uniform Single Report (“FOCUS Report”),<sup>14</sup> and adopting Part IIC of the FOCUS Report. Part II of the FOCUS Report, as amended, and Part IIC of the FOCUS Report, as adopted, will be used by registrants to report financial and operational information. Part III of the FOCUS Report will accompany the annual reports that certain of the registrants will file. The Commission also is amending existing rule 17 CFR 240.3a71–6 (“Rule 3a71–6”) with respect to the cross-border application of the recordkeeping and reporting rules and the availability of substituted compliance.

On June 21, 2019, the Commission adopted, among other requirements, capital and margin requirements for nonbank SBSBs and MSBSPs and segregation requirements for SBSBs.<sup>15</sup>

<sup>13</sup> The amendments to Rule 17a–12 replace the phrase “Part IIB” with the phrase “Part II” each time it appears in the rule, thereby requiring OTC derivatives dealers to file FOCUS Report Part II, as amended, instead of FOCUS Report Part IIB.

<sup>14</sup> The FOCUS Report is also known as Form X–17A–5.

<sup>15</sup> 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 (Jun. 21,

As discussed below, these capital, margin, and segregation requirements are integrated into the recordkeeping and reporting requirements being adopted in this document. Moreover, at the same time that the Commission adopted the capital, margin, and segregation requirements, the Commission adopted an alternative compliance mechanism (17 CFR 240.18a-10 “Rule 18a-10”).<sup>16</sup> The Commission is amending Rule 18a-10 in this document to incorporate recordkeeping and reporting requirements into its provisions. The Commission also is amending an SBSB capital rule (17 CFR 240.18a-1 “Rule 18a-1”).

The Commission staff consulted with staff from the prudential regulators and the CFTC in drafting these final rules and amendments.<sup>17</sup> In addition, relevant CFTC rules were considered as part of this rulemaking effort.<sup>18</sup>

## II. Final Rules and Rule Amendments

### A. Recordkeeping

#### 1. Introduction

The Commission is adopting a recordkeeping program for SBSBs and MSBSPs under Sections 15F and 17(a) of the Exchange Act that is modeled on the recordkeeping requirements for broker-dealers as set forth in Rules 17a-3 and 17a-4. Under this recordkeeping program, broker-dealer SBSBs and MSBSPs—as broker-dealers—will be subject to Rules 17a-3 and 17a-4.<sup>19</sup> The

2019), 84 FR 43872 (Aug. 22, 2019) (“*Capital, Margin, and Segregation Adopting Release*”).

<sup>16</sup> See *Capital, Margin, and Segregation Adopting Release* at 43943–46.

<sup>17</sup> See Section 712(a)(2) of the Dodd-Frank Act.

<sup>18</sup> The CFTC has adopted recordkeeping and reporting rules for swap dealers and major swap participants. See *Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants*, 77 FR 20128 (Apr. 3, 2012).

<sup>19</sup> A commenter requested clarification as to whether an OTC derivatives dealer dually registered as an SBSB or MSBSP would be subject to Rules 17a-3 and 17a-4, as amended, or Rules 18a-5 and 18a-6. An OTC derivatives dealer dually registered as an SBSB or MSBSP is subject to Rules 17a-3 and 17a-4 (rather than Rules 18a-5 and 18a-6). The undesignated introductory paragraphs to Rules 17a-3, 17a-4, 18a-5, and 18a-6 have been modified to clarify this application of the rules. In addition, as explained further below, an OTC derivatives dealer dually registered as an SBSB will be subject to Rules 18a-1, 18a-4, 18a-7, 18a-8, and 17a-13 rather than 15c3-1, 15c3-3, 17a-5, 17a-11, and Rules 18a-9. As a result, the Commission has made the following conforming modifications to Rules 17a-3, 17a-4, 18a-7, and 18a-8: (1) Where Rules 17a-3 and 17a-4 refer to Rules 17a-5 or 17a-12, the Commission has added references to Rule 18a-7; (2) where Rules 17a-3 and 17a-4 refer to Rule 15c3-1, the Commission has added references to Rule

Commission is adopting amendments to these rules to implement the recordkeeping requirements mandated under the Dodd-Frank Act with respect to broker-dealer SBSBs and MSBSPs and to account for the security-based swap and swap activities of stand-alone broker-dealers.

Stand-alone and bank SBSBs and MSBSPs will be subject to Rules 18a-5 and 18a-6, which are modeled on Rules 17a-3 and 17a-4, respectively, as amended. Rules 18a-5 and 18a-6 do not include a parallel requirement for every requirement in Rules 17a-3 and 17a-4 because some of the requirements in Rules 17a-3 and 17a-4 relate to activities that are either not expected or not permitted to be conducted by stand-alone and bank SBSBs and MSBSPs. Further, the recordkeeping requirements applicable to bank SBSBs and MSBSPs are more limited in scope because: (1) The Commission’s authority under Section 15F(f)(1)(B)(i) of the Exchange Act is tied to activities related to the conduct of the firm’s business as an SBSB or MSBSP; (2) bank SBSBs and MSBSPs are subject to recordkeeping requirements applicable to banks with respect to their banking activities; and (3) the prudential regulators—rather than the Commission—are responsible for capital, margin, and other prudential requirements applicable to bank SBSBs and MSBSPs. For these reasons, the recordkeeping requirements for bank SBSBs and MSBSPs are tailored more specifically to their security-based swap activities as an SBSB or MSBSP.

#### 2. Records To Be Made and Kept Current

The Commission is adopting amendments to Rule 17a-3 to account for the security-based swap and swap activities of broker-dealers, including broker-dealer SBSBs and MSBSPs.<sup>20</sup> The Commission is adopting Rule 18a-5—which is modeled on Rule 17a-3, as amended—to require stand-alone and bank SBSBs and MSBSPs to make and keep current certain records.<sup>21</sup> As stated above, Rule 18a-5 does not include a parallel requirement for every

18a-1, if appropriate; and (3) where Rules 17a-3 and 17a-4 refer to Rule 15c3-3, the Commission has added references to Rule 18a-4.

<sup>20</sup> Broker-dealer SBSBs and MSBSPs are required to make and keep current all the records required to be made and kept current by broker-dealers under Rule 17a-3, as amended, plus the additional records required specifically of an SBSB or MSBSP.

<sup>21</sup> See Rule 18a-5, as adopted. Paragraphs (a) and (b) of Rule 18a-5 now read “make and keep current” instead of “make and keep” as proposed, to clarify the implicit requirement that a firm’s records should be current. This language is consistent with Rule 17a-3, as amended, on which Rule 18a-5 is modeled.

requirement in Rule 17a-3.<sup>22</sup> Paragraph (a) of Rule 18a-5 contains one set of recordkeeping requirements applicable to stand-alone SBSBs and MSBSPs, and paragraph (b) of Rule 18a-5 contains a separate set of recordkeeping requirements applicable to bank SBSBs and MSBSPs that are more limited in scope.

A commenter urged the Commission to harmonize its recordkeeping requirements for SBSBs and MSBSPs with the CFTC’s final recordkeeping requirements for swap dealers and major swap participants to the maximum extent possible, with the goal of permitting firms to utilize a single recordkeeping system for swap and security-based swap transactions and positions.<sup>23</sup> As discussed in more detail below in section II.E.1. of this release, in response to the comment and to promote harmonization with CFTC requirements, the Commission is adopting a limited alternative compliance mechanism in Rules 17a-3 and 18a-5.<sup>24</sup> In particular, an SBSB or MSBSP that also is registered with the CFTC as a swap dealer or major swap participant may comply with the recordkeeping requirements of the CEA and the rules thereunder in lieu of the requirements (discussed below) to make and keep current trade blotters, customer account ledgers, and stock records solely with respect to information required to be included in those records regarding security-based swap transactions and positions if the SBSB or MSBSP meets certain conditions. The conditions include,

<sup>22</sup> The Commission did not propose to include in Rule 18a-5 requirements that would parallel those set forth in paragraphs (a)(4), (13) through (16), (19), and (20) of Rule 17a-3. See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25200, n. 67.

<sup>23</sup> See Letter from Mary Kay Scucci, Managing Director, Securities Industry and Financial Markets Association (Sept. 5, 2014) (“SIFMA 9/5/2014 Letter”).

<sup>24</sup> See paragraph (b) of Rule 17a-3, as amended; paragraph (c) of Rule 18a-5, as adopted. As discussed in more detail below in section II.E.2. of this release, the Commission also is amending Rule 18a-10. Rule 18a-10 establishes a full alternative compliance mechanism that will permit certain stand-alone SBSBs that are registered as swap dealers and that predominantly engage in a swaps business to elect to comply with the capital, margin, and segregation requirements of the CEA and the CFTC’s rules in lieu of complying with the capital, margin, and segregation requirements of the Commission’s rules. The Commission is amending Rule 18a-10 in this document to permit firms that will operate under Rule 18a-10 to elect to comply with the recordkeeping and reporting requirements of the CEA and the CFTC’s rules in lieu of complying with Rules 18a-5, 18a-6, 18a-7, 18a-8, and 18a-9. Consequently, a stand-alone SBSB that qualifies to use the full alternative compliance mechanism of Rule 18a-10 can comply with the recordkeeping requirements of the CEA and the CFTC’s rules in lieu of complying with the requirements of Rule 18a-5.

among other things, that the SBSB or MSBSP preserves all of the data elements necessary to create a trade blotter, customer account ledger, or stock record reflecting security-based swap and swap transactions and positions and upon request promptly furnishes to representatives of the Commission such a trade blotter, customer account ledger, or stock record that includes security-based swap and swap transactions and positions in the format required by Rule 17a-3 or 18a-5, as applicable. This provision will permit an SBSB or MSBSP that also is registered with the CFTC as a swap dealer or major swap participant to maintain a single recordkeeping system for security-based swap and swap transactions and positions in accordance with the CFTC's rules with respect to these required records.

Rules 17a-3 and 18a-5 require broker-dealers, SBSBs, and MSBSPs to make and keep current daily trading records, ledger accounts, a securities record, memoranda of brokerage orders, and/or memoranda of proprietary trades that include certain data elements with respect to security-based swap transactions.<sup>25</sup> The data elements are: (1) The type of security-based swap; (2) the reference security, index, or obligor; (3) the date and time of execution; (4) the effective date; (5) the scheduled termination date; (6) the notional amount(s) and the currenc(ies) in which the notional amount(s) is expressed; (7) the unique transaction identifier; and (8) the counterparty's unique identification code (collectively, the "transaction data elements").<sup>26</sup>

As proposed, the counterparty's unique identification code data element was the unique counterparty identifier.<sup>27</sup> Commenters suggested that the Commission replace the requirement to record the unique counterparty identifier with a requirement to record the counterparty's legal entity identifier ("LEI").<sup>28</sup> One commenter further stated that the Commission should allow firms to use different counterparty identifiers for internal purposes provided that they are able to translate their internal

counterparty identifiers into the standard LEI convention.<sup>29</sup>

For the sake of consistency with previously adopted Commission rules, the Commission is replacing the requirement to record the unique counterparty identifier throughout Rule 17a-3, as amended, and Rule 18a-5, as adopted, with a requirement to use the counterparty's unique identification code ("UIC"), as defined in Regulation SBSR.<sup>30</sup> In particular, Regulation SBSR requires market participants—including broker-dealers, SBSBs, and MSBSPs—to report certain data elements to security-based swap data repositories ("SDRs"). One of the required data elements is a UIC, which Rule 900 of Regulation SBSR defines as "a unique identification code assigned to a person, unit of a person, product, or transaction."<sup>31</sup> SDRs must use UICs assigned by an internationally recognized standards-setting system ("IRSS") if an IRSS has been recognized by the Commission and issues that type of UIC.<sup>32</sup> In the release adopting Regulation SBSR, the Commission recognized the Global Legal Entity Identifier System ("GLEIS")—which is responsible for issuing LEIs—as an IRSS that satisfies the requirements of Rule 903 of Regulation SBSR.<sup>33</sup> Under Rule 903, if an IRSS recognized by the Commission has assigned a UIC to a person, unit of a person, or product, each SDR must employ that UIC for reporting purposes under Regulation SBSR, and SDR participants must obtain such UICs for use under Regulation SBSR. Although a firm may use different counterparty identifiers for internal purposes, the firm's records compiled pursuant to the recordkeeping rules being adopted in this document must record the counterparty's UIC. To date, LEIs are the only specific type of UIC that must be used under Regulation SBSR.<sup>34</sup>

In addition to that modification, the final requirements modify the transaction data elements by replacing the data elements "the termination or maturity date" and "the notional

amount" with the data elements "the scheduled termination date" and "the notional amount(s) and the currenc(ies) in which the notional amount(s) is expressed", respectively. This aligns the terminology identifying the data elements with the terminology used in Regulation SBSR.<sup>35</sup>

The Commission stated when proposing the recordkeeping requirements that "[w]here a data element that would need to be documented in the daily trading records of security-based swap transactions under the proposed amendments to Rule 17a-3 or proposed Rule 18a-5 is substantively the same as a data element that would need to be reported under proposed Rule 901, the Commission preliminarily believes that the type of information that would need to be documented in the daily trading records could be the same data element reported under proposed Rule 901."<sup>36</sup> The following data element requirements being adopted in this document use the same terminology as Rule 901 of Regulation SBSR: (1) The date and time of execution; (2) the effective date; (3) the scheduled termination date; and (4) the notional amount(s) and the currenc(ies) in which the notional amount(s) is expressed. The Commission clarifies that for these data elements registrants may record the same information provided pursuant to the requirements of Rule 901 to satisfy the related requirements of Rules 17a-3, as amended, and 18a-5, as adopted.

Finally, a commenter urged the Commission to provide firms with the flexibility to keep the proposed required trade blotters, general ledgers, ledgers for customer accounts, and stock record (discussed below) in various formats without mandating a particular format as long as all required information is kept and accessible to the Commission.<sup>37</sup> For example, with respect to the stock record, the commenter urged the Commission to provide SBSBs and MSBSPs flexibility in the manner in which they create records for security-based swap transactions and not mandate a detailed specified format (particularly with respect to tracking collateral received and pledged), provided that all required information is recorded and retained and can be pulled together upon request to create something that recognizably

<sup>25</sup> See paragraphs (a)(1) and (3), (a)(5)(ii), (a)(6)(ii), and (a)(7)(ii) of Rule 17a-3, as amended; paragraphs (a)(1) and (3), (a)(4)(ii), (a)(5), (b)(1) and (2), (b)(3)(ii), and (b)(4) and (5) of Rule 18a-5, as adopted.

<sup>26</sup> See paragraphs (a)(1) and (3), (a)(5)(ii), and (a)(6) of Rule 17a-3, as amended; paragraphs (a)(1) and (3) through (5) and (b)(1) through (5) of Rule 18a-5, as adopted.

<sup>27</sup> See, e.g., *Recordkeeping and Reporting Proposing Release*, 79 FR at 25201.

<sup>28</sup> See SIFMA 9/5/2014 Letter; Letter from Senator Carl Levin, Chairman of Permanent Subcommittee on Investigations, U.S. Senate (July 3, 2014) ("Levin Letter").

<sup>29</sup> See SIFMA 9/5/2014 Letter.

<sup>30</sup> 17 CFR 242.900–242.909. See *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information*, Exchange Act Release No. 74244 (Feb. 11, 2015), 80 FR 14563 at 14631–14632 (Mar. 19, 2015).

<sup>31</sup> See 17 CFR 242.900(qq).

<sup>32</sup> See 17 CFR 242.903 ("Rule 903").

<sup>33</sup> See *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information*, 80 FR at 14631–32.

<sup>34</sup> While the Commission to date has only recognized the GLEIS as an IRSS, the rules being adopted in this document do not preclude the use of UICs issued by any other organization that is recognized as an IRSS in the future.

<sup>35</sup> See 17 CFR 242.901 ("Rule 901"); *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information*, Exchange Act Release No. 78321 (July 14, 2016), 81 FR 53545 (Aug. 12, 2016).

<sup>36</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25201.

<sup>37</sup> See SIFMA 9/5/2014 Letter.

would be a record of the firm's security-based swap transactions.

These types of records are fundamental business records that a prudent company should make and retain in the ordinary course to document and track, among other things, its operations, financial account balances and transactions, asset and liability accounts, and custodial positions. The daily creation of these records builds an historical audit trail that can be used to reconstruct the sequence of transactions and changes in balances and positions, and to reconcile with third-party accounts. Having the records in place also can assist a firm account for transactions, balances, and positions if data feeds or other information systems that feed into the records are disrupted. Moreover, broker-dealers have been required to make and retain these types of records for their securities business and transactions for many years, and the Commission does not believe that doing so imposes a great burden. Further, based on staff experience, the Commission believes that creating a daily record of this information will facilitate the prompt production of the materials necessary for examinations and the oversight of broker-dealers, SBSBs, and MSBSPs. For these reasons, as discussed below, the Commission is adopting the requirements substantially as proposed. However, except for the general ledger, the firm can utilize the limited alternative compliance mechanism with respect to these records as they pertain to security-based swap and swap transactions and positions if the conditions of the limited alternative compliance mechanism are met.<sup>38</sup>

#### a. Amendments to Rule 17a-3 and New Rule 18a-5

##### Undesignated Introductory Paragraph

The Commission proposed adding an undesignated introductory paragraph to Rule 17a-3 explaining that the rule applies to a broker-dealer, including a broker-dealer dually registered with the Commission as an SBSB or MSBSP.<sup>39</sup> The paragraph further explained that an SBSB or MSBSP that is not dually registered as a broker-dealer (*i.e.*, a stand-alone SBSB or MSBSP, or bank SBSB or MSBSP) is subject to the books and records requirements in proposed Rule 18a-5. Similarly, proposed Rule

<sup>38</sup> Certain stand-alone SBSBs may qualify to use the full alternative compliance mechanism of Rule 18a-10, in which case they may comply with the recordkeeping requirements of the CEA and the CFTC's rules in lieu of complying with the requirements of Rule 18a-5.

<sup>39</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25201.

18a-5 included an undesignated introductory paragraph explaining that the rule applies to an SBSB or MSBSP that is not dually registered as a broker-dealer and that a broker-dealer that is dually registered as an SBSB or MSBSP is subject to the books and records requirements in Rule 17a-3. The Commission received no comments on the proposed undesignated introductory paragraphs and is adopting them with non-substantive modifications to clarify which rule (17a-3 or 18a-5) applies to a given type of entity.<sup>40</sup>

##### Trade Blotters

Paragraph (a)(1) of Rule 17a-3 requires broker-dealers to make and keep current trade blotters (or other records of original entry) containing an itemized daily record of all transactions in securities, all receipts and deliveries of securities, all receipts and disbursements of cash, and all other debits and credits. The Commission proposed to amend this paragraph to require that the trade blotters of broker-dealers, including broker-dealer SBSBs and MSBSPs, contain specific information about security-based swaps, including by recording specific transaction data elements.<sup>41</sup> The Commission proposed to include parallel trade blotter requirements in Rule 18a-5 to apply to stand-alone and bank SBSBs and MSBSPs.

As discussed above, a commenter urged the Commission to provide firms with the flexibility to keep the proposed trade blotters in various formats without mandating a particular format as long as all required information is kept and accessible to the Commission.<sup>42</sup> For the reasons discussed above, the Commission does not believe this would be appropriate. However, the Commission clarifies that a firm can create two separate trade blotters (one for security-based swaps and one for other types of positions). Moreover, as discussed in more detail below in section II.E.1. of this release, to promote harmonization with CFTC requirements and increase flexibility, an SBSB or MSBSP that is also registered as a swap dealer or major swap participant may opt to use the limited alternative compliance mechanism with respect to these records as they pertain to security-based swap and swap transactions and positions.<sup>43</sup> For these reasons, the

<sup>40</sup> See undesignated introductory paragraph of Rule 17a-3, as amended; undesignated introductory paragraph of Rule 18a-5, as adopted.

<sup>41</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25201.

<sup>42</sup> See SIFMA 9/5/2014 Letter.

<sup>43</sup> See paragraph (b) of Rule 17a-3, as amended; paragraph (c) of Rule 18a-5, as adopted.

Commission is adopting the trade blotter requirements substantially as proposed.<sup>44</sup>

##### General Ledger

Paragraph (a)(2) of Rule 17a-3 requires broker-dealers, including broker-dealer SBSBs and MSBSPs, to make and keep current ledgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts. These records reflect the overall financial condition of the broker-dealer and in the Commission's view can incorporate security-based swap activities without the need for a clarifying amendment. The Commission proposed a parallel provision in Rule 18a-5 requiring stand-alone SBSBs and MSBSPs to make and keep current the same types of general ledgers.<sup>45</sup>

As discussed above, a commenter urged the Commission to provide firms with the flexibility to keep the proposed general ledger in various formats as long as all required information is kept and accessible to the Commission.<sup>46</sup> For the reasons discussed above, the Commission does not believe this would be appropriate. Moreover, as discussed above, the Commission does not believe it would be appropriate to apply the limited alternative compliance mechanism for this record because the information that must be recorded in a general ledger is broader than security-based swap information.<sup>47</sup> For this reason, the Commission is adopting the general ledger requirement as proposed.<sup>48</sup>

##### Ledgers for Customer and Non-Customer Accounts

Paragraph (a)(3) of Rule 17a-3 requires broker-dealers to make and keep current certain ledger accounts (or other records) relating to securities and

<sup>44</sup> See paragraph (a)(1) of Rule 17a-3, as amended; paragraphs (a)(1) and (b)(1) of Rule 18a-5, as adopted. These paragraphs require that the trade blotters (or other records of original entry) include the following transaction data elements: (1) The type of security-based swap; (2) the reference security, index, or obligor; (3) the date and time of execution; (4) the effective date; (5) the scheduled termination date; (6) the notional amount(s) and the currency(ies) in which the notional amount(s) is expressed; (7) the unique transaction identifier; and (8) the counterparty's UIC. As discussed above, these data elements were modified from the proposal to require the counterparty's UIC and to conform to Rule 901.

<sup>45</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25201-02.

<sup>46</sup> See SIFMA 9/5/2014 Letter.

<sup>47</sup> However, a stand-alone SBSB that qualifies to use the full alternative compliance mechanism of Rule 18a-10 may comply with the recordkeeping requirements of the CEA and the CFTC's rules in lieu of complying with the requirements of Rule 18a-5.

<sup>48</sup> See paragraph (a)(2) of Rule 18a-5, as adopted.

commodities transactions in customer and non-customer cash and margin accounts. The Commission proposed to amend this paragraph to require that broker-dealers, including broker-dealer SBSBs and MSBSPs, make and keep current ledger accounts (or other records) that record specific security-based swap transaction data elements.<sup>49</sup> The Commission proposed in Rule 18a-5 that stand-alone SBSBs and MSBSPs be required to make and keep current the same types of ledgers (or other records). However, the proposed rule text did not refer to “cash and margin accounts” because these types of accounts involve activities that may not be undertaken by stand-alone SBSBs and MSBSPs because they are not registered as broker-dealers. The Commission proposed in Rule 18a-5 that bank SBSBs and MSBSPs make and keep current ledger accounts (or other records) relating to securities and commodity transactions, but only with respect to their security-based swap customers and non-customers.

As discussed above, a commenter urged the Commission to provide firms with the flexibility to keep the proposed ledgers for customer accounts in various formats as long as all required information is kept and accessible to the Commission.<sup>50</sup> For the reasons discussed above, the Commission does not believe this would be appropriate. However, as discussed in more detail below in section II.E.1. of this release, to promote harmonization with CFTC requirements and provide additional flexibility, an SBSB or MSBSP that is also registered as a swap dealer or major swap participant may opt to use the limited alternative compliance mechanism with respect to these ledgers as they pertain to security-based swap and swap transactions and positions.<sup>51</sup> For these reasons, the Commission is adopting the ledger account requirements substantially as proposed.<sup>52</sup>

<sup>49</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25202.

<sup>50</sup> See SIFMA 9/5/2014 Letter.

<sup>51</sup> See paragraph (b) of Rule 17a-3, as amended; paragraph (c) of Rule 18a-5, as adopted. Moreover, a stand-alone SBSB that qualifies to use the full alternative compliance mechanism of Rule 18a-10 may comply with the recordkeeping requirements of the CEA and the CFTC’s rules in lieu of complying with the requirements of Rule 18a-5.

<sup>52</sup> See paragraph (a)(3) of Rule 17a-3, as amended; paragraphs (a)(3) and (b)(2) of Rule 18a-5, as adopted. These paragraphs require that the ledgers include the following transaction data elements: (1) The type of security-based swap; (2) the reference security, index, or obligor; (3) the date and time of execution; (4) the effective date; (5) the scheduled termination date; (6) the notional amount(s) and the currency(ies) in which the notional amount(s) is expressed; (7) the unique transaction identifier; and

#### Stock Record

Paragraph (a)(5) of Rule 17a-3 requires broker-dealers to make and keep current a securities record (also referred to as a “stock record”). This is a record of the broker-dealer’s custody and movement of securities. The “long” side of the record accounts for the broker-dealer’s responsibility as a custodian of securities and shows, for example, the securities the firm has received from customers and securities owned by the broker-dealer. The “short” side of the record shows where the securities are located, such as at a securities depository. The Commission proposed to amend this paragraph to require that the securities record of broker-dealers, including broker-dealer SBSBs and MSBSPs, specifically account for security-based swap activity by reflecting separately for each security-based swap certain of the transaction data elements and other information.<sup>53</sup> In addition, the Commission proposed parallel securities record requirements in Rule 18a-5 for stand-alone and bank SBSBs and MSBSPs. However, the requirements for bank SBSBs and MSBSPs were limited to positions related to their business as an SBSB or MSBSP.

As discussed above, a commenter urged the Commission to provide firms with the flexibility to keep the proposed stock record in various formats as long as all required information is kept and accessible to the Commission.<sup>54</sup> For the reasons discussed above, the Commission does not believe this would be appropriate. However, as discussed in more detail below in section II.E.1. of this release, to promote harmonization with CFTC requirements and increase flexibility, an SBSB or MSBSP that is also registered as a swap dealer or major swap participant may opt to use the limited alternative compliance mechanism with respect to the stock record as it pertains to security-based swap and swap transactions and positions.<sup>55</sup> The Commission also clarifies that the requirement as adopted does not necessarily require the use of two separate stock records (*i.e.*, one for

(8) the counterparty’s UIC. As discussed above, these data elements were modified from the proposal to require the counterparty’s UIC and to conform to Rule 901.

<sup>53</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25202.

<sup>54</sup> See SIFMA 9/5/2014 Letter.

<sup>55</sup> See paragraph (b) of Rule 17a-3, as amended; paragraph (c) of Rule 18a-5, as adopted. Moreover, a stand-alone SBSB that qualifies to use the full alternative compliance mechanism of Rule 18a-10 may comply with the recordkeeping requirements of the CEA and the CFTC’s rules in lieu of complying with the requirements of Rule 18a-5.

securities and one for security-based swaps); instead, a broker-dealer SBSB may elect to use a single stock record that incorporates all of its securities customers, including security-based swap customers.

A commenter stated that the Commission should replace the terms “long” and “short” in the proposed requirements with “bought” and “sold,” respectively.<sup>56</sup> The commenter explained that the former two terms were “not really applicable” to security-based swaps. The Commission agrees and the final amendment and rule use the terms “bought” and “sold.” For the reasons discussed above, the Commission is adopting the stock record requirements with this modification but otherwise substantially as proposed.<sup>57</sup>

#### Memoranda of Brokerage Orders

Paragraph (a)(6) of Rule 17a-3 requires broker-dealers to make and keep current a memorandum of each brokerage order, and of any other instruction, given or received for the purchase or sale of a security. The memorandum must show the terms and conditions of each brokerage order. The Commission proposed to amend this paragraph to require broker-dealers, including broker-dealer SBSBs and MSBSPs, to make and keep current a memorandum of each brokerage order given or received for the purchase or sale of a security-based swap.<sup>58</sup> Further, the rule required that certain of the security-based swap transaction data elements be documented in the memorandum. The Commission proposed a parallel provision in Rule 18a-5 for bank SBSBs and MSBSPs. The Commission did not propose a parallel provision for stand-alone SBSBs and MSBSPs because these registrants are not permitted to engage in the business of effecting brokerage orders in security-based swaps without registering as a broker-dealer or a bank.<sup>59</sup>

<sup>56</sup> See SIFMA 9/5/2014 Letter.

<sup>57</sup> See paragraph (a)(5)(ii) of Rule 17a-3, as amended; paragraphs (a)(4) and (b)(3) of Rule 18a-5, as adopted. These paragraphs require a securities record or ledger reflecting separately for each security-based swap the following transaction data elements: (1) The reference security, index, or obligor; (2) the unique transaction identifier; and (3) the counterparty’s UIC. As discussed above, these data elements were modified from the proposal to require the counterparty’s UIC and to conform to Rule 901. The broker-dealer stock record requirement for securities other than security-based swaps that pre-existed these amendments is being preserved in paragraph (a)(5)(i) of Rule 17a-3, as amended.

<sup>58</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25202-03.

<sup>59</sup> Generally, persons engaged in brokerage activities are required to register as brokers under

A commenter expressed general support for the proposed requirements but asked the Commission to confirm that the order ticket requirement only applies when there are in fact orders received for execution (*i.e.*, where the orders are potentially executed on a security-based swap execution facility), and not where there is a negotiation that results in a transaction without any executable order or other instruction given.<sup>60</sup> Furthermore, the commenter also asked the Commission to confirm that no order ticket needs to be created by the broker-dealer or its affiliated SBSB when a registered broker-dealer acts as an agent in connection with negotiated transactions between an affiliated SBSB and its customers without any executable order being received. In response, the Commission clarifies that the firm must receive an executable order or other instruction to trigger the memorandum requirement (*i.e.*, an order or instruction that the broker-dealer, SBSB, or MSBSP has agreed to execute on behalf of the counterparty). Consequently, preliminary negotiations or responding to questions about a potential transaction alone do not trigger the recordkeeping requirement. For these reasons, the Commission is adopting these requirements substantially as proposed.<sup>61</sup>

#### Memoranda of Proprietary Orders

Paragraph (a)(7) of Rule 17a-3 requires broker-dealers to make and keep current a memorandum of each purchase and sale for the account of the broker-dealer. Generally, this paragraph

Section 15 of the Exchange Act. However, Section 3(a)(4) of the Exchange Act permits banks to engage in certain limited securities brokerage activities. See also 17 CFR 247.100-781 (joint Commission and the Federal Reserve rules establishing further exemptions permitting banks to engage in certain securities brokerage activities without registering as a broker-dealer). Consequently, a bank SBSB or MSBSP may act as a broker or agent in a security-based swap transaction. In such instances, the brokerage order record requirements of paragraph (b)(4) of Rule 18a-5 would apply.

<sup>60</sup> See SIFMA 9/5/2014 Letter.

<sup>61</sup> See paragraph (a)(6)(ii) of Rule 17a-3, as amended; paragraph (b)(4) of Rule 18a-5, as adopted. These paragraphs require that the memorandum include the following security-based swap transaction data elements: (1) The type of security-based swap; (2) the reference security, index, or obligor; (3) the date and time of execution; (4) the effective date; (5) the scheduled termination date; (6) the notional amount(s) and the currenc(ies) in which the notional amount(s) is expressed; (7) the unique transaction identifier; and (8) the counterparty's UIC. As discussed above, these data elements were modified from the proposals to require the counterparty's UIC and to conform to Rule 901. The broker-dealer memorandum requirement for securities other than security-based swaps that pre-existed these amendments is being preserved in paragraph (a)(6)(i) of Rule 17a-3, as amended.

requires broker-dealers to document the terms of securities transactions where they are acting as a dealer or otherwise trading for their own account. The Commission proposed to amend this paragraph to require the terms of security-based swap transactions to be documented as well.<sup>62</sup> In addition, the Commission proposed parallel memorandum requirements in Rule 18a-5 for stand-alone and bank SBSBs and MSBSPs, but only with respect to security-based swap transactions. The Commission received no comment that specifically addressed these proposed requirements and is adopting them substantially as proposed.<sup>63</sup>

#### Confirmations

Paragraph (a)(8) of Rule 17a-3 requires broker-dealers to keep copies of all trade confirmations. In addition, the Commission has adopted rules that require SBSBs and MSBSPs to provide trade acknowledgments containing the details of a security-based swap transaction within prescribed timeframes and to establish, maintain, and enforce written policies and procedures that are reasonably designed to obtain prompt verification of the terms of the trade acknowledgments.<sup>64</sup> In particular, Rule 15Fi-2 requires SBSBs and MSBSPs to promptly verify the accuracy of, or otherwise dispute with their counterparties, the terms of trade acknowledgments they receive.

The Commission proposed to amend paragraph (a)(8) of Rule 17a-3 to require that broker-dealers, including broker-dealer SBSBs and MSBSPs, make and keep current copies of the security-based swap trade acknowledgments and verifications made pursuant to Rule 15Fi-2.<sup>65</sup> The Commission also

<sup>62</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25203-04.

<sup>63</sup> See paragraph (a)(7)(ii) of Rule 17a-3, as amended; paragraphs (a)(5) and (b)(4) of Rule 18a-5, as adopted. These paragraphs require that the memorandum include the following security-based swap transaction data elements: (1) The type of security-based swap; (2) the reference security, index, or obligor; (3) the date and time of execution; (4) the effective date; (5) the scheduled termination date; (6) the notional amount(s) and the currenc(ies) in which the notional amount(s) is expressed; (7) the unique transaction identifier; and (8) the counterparty's UIC. As discussed above, these data elements were modified from the proposals to require the counterparty's UIC and to conform to Rule 901. The broker-dealer memorandum requirement for securities (other than security-based swaps) that pre-existed these amendments is being preserved in paragraph (a)(7)(i) of Rule 17a-3, as amended.

<sup>64</sup> See 17 CFR 240.15Fi-2 ("Rule 15Fi-2"); see also *Trade Acknowledgment and Verification of Security-Based Swap Transactions*, Exchange Act Release No. 78011 (June 8, 2016), 81 FR 39807 (June 17, 2016).

<sup>65</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25204.

proposed in Rule 18a-5 that stand-alone SBSBs and MSBSPs make and keep current copies of: (1) Confirmations of all purchases or sales of securities that are not security-based swaps; and (2) security-based swap trade acknowledgments and verifications made pursuant to Rule 15Fi-2. The Commission further proposed parallel confirmation requirements in Rule 18a-5 for bank SBSBs and MSBSPs. However, the requirement to make and keep current copies of confirmations of all purchases and sales of securities that are not security-based swaps would be limited to transactions that related to their business as an SBSB or MSBSP.

A commenter stated that the Commission should not require a bank SBSB or MSBSP to make and keep current copies of all confirmations of all purchases and sales of securities (other than security-based swaps) or, in the alternative, the Commission should narrowly interpret when securities transactions are "related to the business" of a bank as an SBSB or MSBSP.<sup>66</sup> The Commission disagrees that confirmations should not be made for transactions when the security is not a security-based swap. A confirmation of any securities transaction that occurs within a security-based swap account will assist examiners in reviewing all the activities in the account and whether the firm is acting in accordance with applicable securities laws. The Commission notes, however, that a bank SBSB or MSBSP must make and keep current copies of confirmations relating to transactions in securities, other than security-based swaps, only if the transaction relates to its business as an SBSB or MSBSP. Consequently, the final requirements do not apply to a security transaction that relates solely to the bank acting as a bank and not as an SBSB or MSBSP. For these reasons, the Commission is adopting the requirements as proposed.<sup>67</sup>

#### Accountholder Information

Paragraph (a)(9) of Rule 17a-3 requires broker-dealers to make a record for each securities accountholder that contains certain information about the person. The Commission proposed to amend this paragraph to require broker-dealers, including broker-dealer SBSBs and MSBSPs, to record certain information with respect to security-

<sup>66</sup> See SIFMA 9/5/2014 Letter.

<sup>67</sup> See paragraph (a)(8)(ii) of Rule 17a-3, as amended; paragraphs (a)(6) and (b)(6) of Rule 18a-5, as adopted. The broker-dealer confirmation requirement for securities other than security-based swaps that pre-existed these amendments is being preserved in paragraph (a)(8)(i) of Rule 17a-3, as amended.

based swap accountholders.<sup>68</sup> The Commission proposed parallel requirements in Rule 18a–5 for stand-alone and bank SBSBs and MSBSPs with respect to recording the information about security-based swap accountholders.

A commenter stated that it is not common practice in the swaps market to obtain signatures of persons authorized to transact business on behalf of a counterparty in a swap account and recommended instead that broker-dealers, SBSBs, and MSBSPs be permitted to satisfy this requirement by establishing policies and procedures relating to counterparty trade authorization.<sup>69</sup> It is a prudent business practice for financial institutions to formalize relationships with their counterparties and to take orders from individuals only if they are authorized to enter into transactions on behalf of the counterparty. This provides greater legal certainty in terms of enforcing the rights of the financial institution and its counterparty. Obtaining the signatures of persons authorized to transact on behalf of the counterparty is one way to promote these objectives, but the Commission agrees with the commenter that it is not the only way. Maintaining a record of persons authorized to transact on behalf of the counterparty such as a copy of a corporate resolution granting the person such authority is another way. Consequently, the Commission is modifying the text of the final rules so that the means of establishing a record of the authorization of each person to whom the counterparty has granted authority to transact business in the security-based swap account are not limited to obtaining signatures of such persons. In particular, the final rules provide that, for each security-based swap account, the broker-dealer, SBSB, or MSBSP must make and retain a record of the authorization of each person the counterparty has granted authority to transact business in the security-based swap account. This record could be, for example, a signature of the person, a copy of the corporate resolution of the counterparty granting the person authority to trade on its behalf, or a communication from the counterparty identifying the person as having been granted authority to act on its behalf. In addition to promoting the objectives described above, this record will assist Commission staff in examining whether

a given transaction has been appropriately authorized.

Another commenter raised concerns about disclosures to the Commission regarding clients, associated persons, or other such persons arising from confidentiality requirements under the local laws of certain non-U.S. jurisdictions.<sup>70</sup> The Commission understands that some foreign laws and regulations may limit or prevent disclosure of customer information to the Commission. These types of restrictions may include privacy laws, which generally restrict disclosure of certain identifying information about a natural person or entity, and so-called “blocking statutes” (including secrecy laws) that prevent the disclosure of information relating to third parties and/or foreign governments. In response, the Commission notes that it has proposed in a separate release additional provisions that are designed to address concerns about the cross-border application of certain requirements that will be or have been proposed to be applicable to SBSBs and MSBSPs.<sup>71</sup> For the foregoing reasons, the Commission is adopting the accountholder requirements with the modifications discussed above.<sup>72</sup>

#### Options Positions

Paragraph (a)(10) of Rule 17a–3 requires broker-dealers to make and keep current a record of all options positions. The Commission did not propose to amend this paragraph to account for security-based swaps. In addition, because the records required under this paragraph are not specific to security-based swaps, the Commission did not propose to include an analogous provision applicable to bank SBSBs and MSBSPs. However, in order to facilitate the monitoring of the financial condition of stand-alone SBSBs and MSBSPs, the Commission proposed a

parallel provision in Rule 18a–5 applicable to these entities.<sup>73</sup> One commenter expressed support for this proposed requirement.<sup>74</sup> The Commission is adopting the options position recordkeeping requirement as proposed.<sup>75</sup>

#### Trial Balances and Computation of Net Capital

Paragraph (a)(11) of Rule 17a–3 requires broker-dealers, including broker-dealer SBSBs and MSBSPs, to make and keep current a record of the proof of money balances of all ledger accounts in the form of trial balances and certain records relating to the computation of aggregate indebtedness and net capital under the broker-dealer net capital rule.<sup>76</sup> The Commission did not propose that bank SBSBs and MSBSPs make similar records as the prudential regulators administer the capital requirements applicable to these entities.<sup>77</sup> The Commission did propose a parallel requirement in Rule 18a–5 for stand-alone SBSBs and MSBSPs to facilitate the review and monitoring of their financial condition and their compliance with the regulatory capital requirements in proposed Rules 18a–1 and 18a–2, respectively.<sup>78</sup> One commenter noted the importance of including recordkeeping and reporting requirements with respect to trial balances and the computation of net capital.<sup>79</sup> The Commission has adopted capital requirements for stand-alone SBSBs and MSBSPs in Rules 18a–1 and 18a–2, respectively.<sup>80</sup> Consequently, the Commission is adopting the trial balances and computation of net capital recordkeeping requirement for stand-alone SBSBs and MSBSPs as proposed.<sup>81</sup>

<sup>73</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25204–05.

<sup>74</sup> See SIFMA 9/5/2014 Letter.

<sup>75</sup> See paragraph (a)(8) of Rule 18a–5, as adopted.

<sup>76</sup> The broker-dealer net capital rule is codified at 17 CFR 240.15c3–1 (“Rule 15c3–1”).

<sup>77</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25205.

<sup>78</sup> See *Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers, Exchange Act Release No. 68071 (Oct. 18, 2012)*, 77 FR 70241, 70217–57 (Nov. 23, 2012) (“*Capital, Margin, and Segregation Proposing Release*”) (proposing Rules 18a–1 and 18a–2).

<sup>79</sup> See SIFMA 9/5/2014 Letter. The commenter also made substantive recommendations concerning the proposed net capital requirements for SBSBs and MSBSPs that are beyond the scope of this release.

<sup>80</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43879–908.

<sup>81</sup> See paragraph (a)(9) of Rule 18a–5, as adopted.

<sup>68</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25204.

<sup>69</sup> See SIFMA 9/5/2014 Letter.

<sup>70</sup> See SIFMA 9/5/2014 Letter; Letter from Institute of International Bankers and Securities Industry and Financial Markets Association (June 21, 2018) (“IIB/SIFMA 6/21/2018 Letter”).

<sup>71</sup> See *Proposed Rule Amendments and Guidance Addressing Cross-Border Application of Certain Security-Based Swap Requirements*, Exchange Act Release No. 85823 (May 10, 2019), 84 FR 24206 (May 14, 2019) (“*Cross-Border Application Proposing Release*”).

<sup>72</sup> See paragraph (a)(8)(iv) of Rule 17a–3, as amended; paragraphs (a)(7) and (b)(7) of Rule 18a–5, as adopted. These paragraphs require that SBSBs and MSBSPs record for each security-based swap account the counterparty’s UIC, along with other information. For the reasons discussed above, the “unique counterparty identifier” transaction data element in the proposed requirement was replaced with the counterparty’s UIC. The broker-dealer accountholder requirement for securities other than security-based swaps that pre-existed these amendments is being preserved in paragraphs (a)(1)(i) through (iii) of Rule 17a–3, as amended.

## Associated Persons

Paragraph (a)(12) of Rule 17a-3 requires broker-dealers, including broker-dealer SBSBs and MSBSPs, to make and keep current a questionnaire or application for employment for each associated person that contains information about the associated person (the “questionnaire requirement”) as well other information about associated persons. The Commission proposed parallel requirements in Rule 18a-5 for stand-alone and bank SBSBs and MSBSPs.<sup>82</sup> Further, the Commission proposed to amend the definition of “associated person” in Rule 17a-3 to include in the definition a person associated with an SBSB or MSBSP as defined in Section 3(a)(70) of the Exchange Act. The Commission proposed a parallel definition in Rule 18a-5. However, the proposed Rule 18a-5 definition was more limited as applied to bank SBSBs and MSBSPs in that it covered persons whose activities relate to the conduct of the bank’s business as an SBSB or MSBSP.

Commenters requested that the Commission limit the proposed questionnaire requirement for stand-alone and bank SBSBs and MSBSPs to associated persons who effect or are involved in effecting security-based swaps on the firm’s behalf.<sup>83</sup> The Commission agrees with the comments. The questionnaire requirement, as proposed, was designed to provide a basis for assessing compliance with Section 15F(b)(6) of the Exchange Act and a related rule thereunder.<sup>84</sup> Both the statute and the rule (Rule 15Fb6-2) apply to associated persons who effect or are involved in effecting security-based swaps on behalf of the SBSB or MSBSP.<sup>85</sup> Accordingly, the Commission

<sup>82</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25205.

<sup>83</sup> See, e.g., SIFMA 9/5/2014 Letter; IIB/SIFMA 6/21/2018 Letter.

<sup>84</sup> See 17 CFR 15Fb6-2 (“Rule 15Fb6-2”).

<sup>85</sup> Section 15F(b)(6) of the Exchange Act provides that it shall be unlawful for an SBSB or MSBSP to permit any associated person of the SBSB or MSBSP who is subject to a statutory disqualification to effect or be involved in effecting security-based swaps on its behalf, if the SBSB or MSBSP knows, or in the exercise of reasonable care should have known, of the statutory disqualification, except to the extent otherwise provided by rule, regulation, or order of the Commission. Rule 15Fb6-2: (1) Prohibits an SBSB or MSBSP from acting as an SBSB or MSBSP unless it has certified electronically that it neither knows, nor in the exercise of reasonable care should have known, that any person associated with the SBSB or MSBSP “who effects or is involved in effecting security-based swaps on behalf of the [SBSB] or [MSBSP] is subject to a statutory disqualification”; and (2) requires the Chief Compliance Officer (or his or her designee) of the SBSB or MSBSP to review and sign the questionnaire or application for employment executed by every associated person

is narrowing the scope of the questionnaire requirement in Rule 18a-5 for stand-alone and bank SBSBs and MSBSPs so that it applies only with respect to associated persons who effect or are involved in effecting security-based swaps on the firm’s behalf.<sup>86</sup>

A commenter also requested that the Commission modify the proposal for foreign SBSBs and MSBSPs so that the questionnaire requirement does not apply to associated persons who effect or are involved in effecting security-based swap transactions with non-U.S. persons or foreign branches.<sup>87</sup> As noted above, the questionnaire requirement is intended to support the substantive prohibition in Section 15F(b)(6) of the Exchange Act and the related certification and background check requirements in Rule 15Fb6-2. The Commission recognizes, however, as noted by the commenters, that there may be situations in which an SBSB or MSBSP is prohibited by applicable non-U.S. law from receiving, creating, or maintaining records with respect to certain of the information that needs to be recorded pursuant to the questionnaire requirement. Consequently, the Commission has proposed in a separate release additional provisions in Rule 18a-5 that would address situations where the law of a non-U.S. jurisdiction in which an associated person is employed or located may prohibit a stand-alone or bank SBSB or MSBSP from receiving, or creating or maintaining a record of, any of the information mandated by the questionnaire requirement.<sup>88</sup>

Finally, for the sake of clarity, the Commission emphasizes that these associated person recordkeeping requirements apply to natural persons and not to legal entities that may be associated persons. For the reasons

who is a natural person and who effects or is involved in effecting security-based swaps on the SBSB’s or MSBSP’s behalf, and that this questionnaire or application shall serve as the basis for a background check of the associated person to verify that the person is not subject to a statutory disqualification.

<sup>86</sup> See paragraphs (a)(10)(i) and (b)(8)(i) of Rule 18a-5, as adopted. The Commission is also modifying paragraph (b)(8)(i) of Rule 18a-5 as proposed to eliminate the phrase “whose activities relate to the business of the security-based swap dealer or major security-based swap participant.” As discussed above, the Commission proposed this limitation on the scope of the questionnaire or application for employment to address bank SBSBs and MSBSPs. This limitation is no longer necessary in light of the final rule’s limitation to an associated person “who effects or is involved in effecting security-based swaps on the security-based swap dealer’s or major security-based swap participant’s behalf.”

<sup>87</sup> See SIFMA 9/5/2014 Letter.

<sup>88</sup> See *Cross-Border Application Proposing Release*, 84 FR at 24206.

stated above, the Commission is adopting the associated person recordkeeping requirements with the modifications discussed above.<sup>89</sup>

## Liquidity Stress Test

In 2012, the Commission proposed liquidity stress test requirements for entities that are or would be authorized to use internal models to compute net capital; namely, certain stand-alone broker-dealers (“ANC broker-dealers”) as well as certain broker-dealer and stand-alone SBSBs.<sup>90</sup> Consequently, the Commission proposed that these entities be required to make and keep current certain records relating to the liquidity stress test requirements, if applicable.<sup>91</sup> The Commission has deferred consideration of the proposed liquidity stress test requirements.<sup>92</sup> Accordingly, the Commission is deferring consideration of the related recordkeeping requirements.<sup>93</sup>

## Account Equity and Margin Calculations

The Commission proposed to amend Rule 17a-3 to require broker-dealer SBSBs and MSBSPs to make and keep current a record of the daily calculations that would be required under the proposed margin rule for non-cleared security-based swaps—Rule 18a-3.<sup>94</sup> The Commission proposed a parallel requirement in Rule 18a-5 for stand-alone SBSBs and MSBSPs. A commenter expressed support for the proposal<sup>95</sup> and the Commission has adopted Rule 18a-3 requiring the daily calculations.<sup>96</sup> For the reasons discussed in the proposing release, the

<sup>89</sup> See paragraphs (a)(10) and (b)(8) of Rule 18a-5, as adopted.

<sup>90</sup> See *Capital, Margin, and Segregation Proposing Release*, 77 FR at 70252-54.

<sup>91</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25205-06.

<sup>92</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43874.

<sup>93</sup> Paragraph (a)(24) of Rule 17a-3, as proposed; paragraph (a)(11) of Rule 18a-5, as proposed. The proposed recordkeeping requirements would have been set forth in these paragraphs. Since the publication of the recordkeeping and reporting proposing release, a new paragraph (a)(24) has been adopted by the Commission. See *Form CRS Relationship Summary: Amendments to Form ADV*, Exchange Act Release No. 86032 (June 5, 2019), 84 FR 33492, (July 12, 2019); 17 CFR 240.17a-3(a)(24). Paragraph (a)(11) of Rule 18a-5 is being designated as “[Reserved].”

<sup>94</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25206-07. See also *Capital, Margin, and Segregation Proposing Release*, 77 FR at 70261-63 (proposing Rule 18a-3, requiring, among other things, that nonbank SBSBs perform two daily calculations for each security-based swap account (the equity in the account and a margin amount) and nonbank MSBSPs to perform one daily calculation (the equity in the account)).

<sup>95</sup> See SIFMA 9/5/2014 Letter.

<sup>96</sup> *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43909-17.

Commission is adopting daily calculation recordkeeping requirements substantially as proposed.<sup>97</sup>

#### Possession or Control Requirements

The Commission proposed to amend Rule 17a-3 to require broker-dealer SBSBs to make and keep current a record of compliance with the possession or control requirements in the proposed segregation rule for SBSBs—Rule 18a-4.<sup>98</sup> The Commission proposed a parallel requirement in Rule 18a-5 for stand-alone SBSBs. A commenter supported the proposal<sup>99</sup> and the Commission has adopted Rule 18a-4 prescribing possession or control requirements.<sup>100</sup> For the reasons discussed in the proposing release, the Commission is adopting the security-based swap possession or control recordkeeping requirements substantially as proposed.<sup>101</sup>

#### Customer Reserve Account Requirements

The Commission proposed to amend Rule 17a-3 to require broker-dealer SBSBs to make and keep current a record of security-based swap reserve account computations pursuant to proposed Rule 18a-4.<sup>102</sup> The Commission proposed a parallel requirement in Rule 18a-5 for stand-alone SBSBs. A commenter expressed support for the proposal<sup>103</sup> and the Commission has amended Rule 15c3-3

and adopted Rule 18a-4 to prescribe security-based swap reserve account requirements.<sup>104</sup> For the reasons discussed in the proposing release, the Commission is adopting the security-based swap customer reserve account recordkeeping requirements substantially as proposed.<sup>105</sup>

#### Unverified Transactions

It is prudent practice for counterparties to promptly confirm the terms of executed OTC derivatives transactions.<sup>106</sup> The Commission adopted Rule 15Fi-2 to promote this practice. As discussed above, Rule 15Fi-2 requires, among other things, that SBSBs and MSBSPs provide trade acknowledgments containing the details of security-based swap transactions and promptly verify the accuracy of, or otherwise dispute with their counterparties, the terms of trade acknowledgments they receive. To promote compliance with then proposed Rule 15Fi-2 and the risk management practices of SBSBs and MSBSPs, the Commission proposed to amend Rule 17a-3 and include parallel provisions in Rule 18a-5 that would require these entities to make and keep current a record of each security-based swap trade acknowledgment that is not verified within five business days of execution.<sup>107</sup> While the Commission did not prescribe a timeframe for security-based swap trade acknowledgments to be verified, paragraph (e) of Rule 15Fi-2 requires procedures reasonably designed to obtain “prompt verification.”

A commenter urged the Commission not to establish a rigid threshold of five business days and suggested that the Commission “enter into a constructive dialogue with interested constituencies to establish best practices for trade verification.”<sup>108</sup> The requirement to make a record of security-based swap trade acknowledgments not verified within five business days is not intended to establish a maximum timeframe within which verification

should be obtained pursuant to Rule 15Fi-2. Instead, it is designed to require SBSBs and MSBSPs to make a record of the transactions that have gone unverified for a significant length of time, as the delay in obtaining verification may indicate, for example, the existence of a disagreement with the counterparty as to the terms of the transaction. The Commission believes that five business days represents an appropriate amount of time to wait before requiring a record to be made. This timeframe is designed to strike an appropriate balance in terms of a time period that is not too short and would capture information that is not relevant to Rule 15Fi-2 or that is too long and would not promote compliance with Rule 15Fi-2. For these reasons, the Commission is adopting the unverified transaction recordkeeping requirements substantially as proposed.<sup>109</sup>

Finally, the Commission has previously noted that in complying with the trade acknowledgement and verification requirements, policies and procedures reasonably designed to ensure prompt verification of a transaction may include policies and procedures under which an SBSB or MSBSP relies on its counterparty’s negative affirmation to the terms of a trade acknowledgment. The Commission has stated that those policies and procedures generally should require the SBSB or MSBSP to document its counterparty’s agreement to rely on negative affirmation.<sup>110</sup> As such, transactions verified by negative affirmation do not need to be recorded as unverified under Rules 17a-3 and 18a-5.

#### Records Relating to Business Conduct Standards

The Commission has adopted rules to establish business conduct and chief compliance officer requirements for SBSBs and MSBSPs.<sup>111</sup> The

<sup>97</sup> See paragraph (a)(25) of Rule 17a-3, as amended; paragraph (a)(12) of Rule 18a-5, as adopted. As proposed, these paragraphs referred to the “amount of equity” in the account and the “margin amount.” Rule 18a-3, as adopted, refers instead to the “current exposure” and “initial margin amount.” Consequently, the paragraphs of the recordkeeping rules as adopted refer to the “current exposure” and “initial margin amount.”

<sup>98</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25207. See also *Capital, Margin, and Segregation Proposing Release*, 77 FR at 70278-82 (proposing Rule 18a-4 requiring, among other things, that SBSBs maintain possession or control over excess securities collateral).

<sup>99</sup> See SIFMA 9/5/2014 Letter.

<sup>100</sup> *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43930-44.

<sup>101</sup> See paragraph (a)(26) of Rule 17a-3, as amended; paragraphs (a)(13) and (b)(9) of Rule 18a-5, as adopted. The Commission proposed that Rule 18a-4 apply to all SBSBs, but in response to comment adopted security-based swap segregation requirements for broker-dealers, including broker-dealer SBSBs, in the broker-dealer segregation rule, which is codified at 17 CFR 240.15c3-3 (“Rule 15c3-3”). As a result, the Commission is modifying the cross references in paragraph (a)(26) of Rule 17a-3 to reflect the placement of the customer protection requirements for broker-dealer SBSBs in paragraph (p) of Rule 15c3-3 rather than in paragraph (b) of Rule 18a-4 as proposed. Paragraphs (a)(13) and (b)(9) of Rule 18a-5, as adopted, which apply to stand-alone and bank SBSBs, respectively, are not affected by this change.

<sup>102</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25207-08.

<sup>103</sup> See SIFMA 9/5/2014 Letter.

<sup>104</sup> *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43938-42.

<sup>105</sup> See paragraph (a)(27) of Rule 17a-3, as amended; paragraphs (a)(14) and (b)(10) of Rule 18a-5, as adopted. Because the segregation requirements were codified in Rules 15c3-3 and 18a-4, the Commission is modifying the cross references in new paragraph (a)(27) of Rule 17a-3 to new paragraph (p) of Rule 15c3-3 rather than in paragraph (b) of new Rule 18a-4 as proposed. Paragraphs (a)(14) and (b)(10) of Rule 18a-5 are not affected by this change.

<sup>106</sup> See *Trade Acknowledgment and Verification of Security-Based Swap Transactions*, 81 FR at 39807.

<sup>107</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25208.

<sup>108</sup> See SIFMA 9/5/2014 Letter.

<sup>109</sup> See paragraph (a)(28) of Rule 17a-3, as amended; paragraphs (a)(15) and (b)(11) of Rule 18a-5, as adopted. For the reasons discussed above, the Commission modified the proposed rule text in these paragraphs to replace the requirement to record the “unique counterparty identifier” with the counterparty’s UIC. See paragraph (a)(28) of Rule 17a-3, as proposed to be amended; paragraphs (a)(15) and (b)(11) of Rule 18a-5, as proposed to be adopted.

<sup>110</sup> See *Trade Acknowledgment and Verification of Security-Based Swap Transactions*, 81 FR at 39820.

<sup>111</sup> See 17 CFR 240.15Fh-1 (“Rule 15Fh-1”); 17 CFR 240.15Fh-2 (“Rule 15Fh-2”); 17 CFR 240.15Fh-3 (“Rule 15Fh-3”); 17 CFR 240.15Fh-4 (“Rule 15Fh-4”); 17 CFR 240.15Fh-5 (“Rule 15Fh-5”); 17 CFR 240.15Fh-6 (“Rule 15Fh-6”); 17 CFR 240.15Fk-1 (“Rule 15Fk-1”). See also *Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap*

requirements in these rules address (among other things):

- Verification of the status of the counterparty;
- Certain disclosures related to the daily mark and its calculation;
- Disclosures regarding material incentives, conflicts of interest, material risks, and characteristics of the security-based swap, and certain clearing rights;
- Certain “know your counterparty” and suitability obligations for SBSBs;
- Supervisory requirements, including written policies and procedures;
- Certain requirements regarding interactions with special entities;
- Provisions intended to prevent SBSBs from engaging in certain “pay to play” activities; and
- Certain minimum requirements relating to chief compliance officers.

To promote compliance with these then-proposed requirements, the Commission proposed to amend Rule 17a-3 and include parallel provisions in Rule 18a-5 that would require all SBSBs to make and keep current a record that demonstrates their compliance with Rule 15Fh-6 (regarding political contributions by certain SBSBs).<sup>112</sup> In addition, the Commission proposed to amend Rule 17a-3 and include parallel provisions in Rule 18a-5 to require that all SBSBs and MSBSPs make and keep current a record that demonstrates their compliance with Rules 15Fh-1 through 15Fh-5 and Rule 15Fk-1, as applicable.<sup>113</sup> These recordkeeping requirements would require covered firms to keep supporting documents evidencing their compliance with the business conduct and chief compliance officer requirements; a mere attestation of compliance would not be sufficient. To the extent that the rules require providing or receiving written disclosures or written representations, the SBSB or MSBSP would be required to retain a copy of the disclosures or representations.

A commenter asked the Commission to confirm that the proposed requirements would not create additional recordkeeping obligations with respect to the business conduct

standards,<sup>114</sup> particularly with respect to the requirements relating to compliance with such requirements.<sup>115</sup> The commenter also generally stated that the Commission should not adopt additional recordkeeping rules relating to the pay-to-play provisions set forth in the Commission’s business conduct release.<sup>116</sup>

In response to the commenter’s concern, the Commission notes that the proposed recordkeeping requirements were not intended to add additional substantive business conduct or pay-to-play requirements. The relevant substantive requirements are prescribed in the business conduct and pay-to-play rules; the recordkeeping requirements are designed to require records of compliance with those already existing substantive requirements. The Commission acknowledges, however, that they would impose new requirements to *document* a registrant’s compliance with several of the substantive business conduct and pay-to-play requirements as well as new requirements to provide written documentation where the business conduct and pay-to-play rules allowed for oral disclosure. These proposed documentation requirements were designed to assist Commission examiners in reviewing compliance with the business conduct and pay-to-play requirements, and the anticipated additional burdens they will impose on registrants are discussed below in Sections IV and V. For these reasons, the Commission is adopting the business conduct standards recordkeeping requirements substantially as proposed.<sup>117</sup>

<sup>114</sup> See *Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 76 FR 42396.

<sup>115</sup> See SIFMA 9/5/2014 Letter.

<sup>116</sup> See *id.* See also *Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 81 FR 29960.

<sup>117</sup> See paragraph (a)(30) of Rule 17a-3, as amended; paragraphs (a)(17) and (b)(13) of Rule 18a-5, as adopted. For the sake of clarity, the rules as adopted require “[a] record documenting” compliance with the business conduct standards, as opposed to “[a] record that demonstrates” such compliance as proposed. In addition, because Rule 15Fh-6 applies only to SBSBs, and not to MSBSPs, the Commission is removing the proposed reference to MSBSPs in paragraphs (a)(16) and (b)(12) of Rule 18a-5. On October 31, 2018, it issued a statement setting forth the Commission’s position that, for a period of five years from the Registration Compliance Date for SBSBs and MSBSPs (as defined in *Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 80 FR at 48988 and discussed below in section III.B. of this release), certain actions with respect to specific provisions of the business conduct standards will not provide a basis for a Commission enforcement action. See *Commission Statement on Certain Provisions of Business Conduct Standards for Security-Based Swap*

b. Additional Amendments to Rule 17a-3 and Modifications to Rule 18a-5

The Commission proposed several amendments to Rule 17a-3 to eliminate obsolete text, improve readability, and modernize terminology. The Commission received no comments addressing these proposed amendments and, as discussed below, is adopting them substantially as proposed.

Reference is made throughout Rule 17a-3 to “members” of a national securities exchange as a distinct class of registrant in addition to “brokers” and “dealers.” The Commission proposed to remove these references to “members” given that the rule applies to brokers-dealers, which would include members of a national securities exchange that are brokers-dealers.<sup>118</sup> The rule being adopted does not remove these references to “members” to avoid confusion as to whether their removal resulted in a substantive change to the rule.

The Commission is adopting a global change to replace the word “shall” in the rule with the word “must” or “will” where appropriate.<sup>119</sup> Similarly, when defining terms, the Commission is replacing the phrase “shall mean” with the word “means.”<sup>120</sup> The Commission is also adopting certain stylistic, corrective, and punctuation amendments to improve the rule’s readability.<sup>121</sup> The Commission is

*Dealers and Major Security-Based Swap Participants*, Exchange Act Release No. 84511 (Oct. 31, 2018), 83 FR 55486 (Nov. 6, 2018) (“*Statement on Business Conduct Standards*”). To the extent SBSBs and MSBSPs rely on the statement, the Commission encourages them to maintain records of the written representations described in the statement until such time as the statement is no longer in force.

<sup>118</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25209.

<sup>119</sup> The amendments replace the word “shall” with the word “must” or “will” in the following paragraphs of Rule 17a-3, as amended: (a) Introductory text, (a)(6)(i)(A), (a)(7)(i), (a)(10) and (11), (a)(12)(i), (a)(16)(ii), (a)(17)(i), (a)(18)(i), (a)(19)(i), (b), (d), (e), and (f).

<sup>120</sup> The amendments replace the phrase “shall mean” with the word “means” in the following paragraphs of Rule 17a-3, as amended: (a)(6)(i)(A) and (a)(16)(ii)(A) and (B).

<sup>121</sup> The Commission is adopting the following stylistic and corrective changes to Rule 17a-3, as amended: (1) Adding to paragraph (a)(1) the phrase “such securities were”; (2) adding to paragraph (a)(4)(vi) the word “and” after the semicolon; (3) replacing the word “of” with the word “or” in paragraph (a)(5), resulting in the phrase “for its account or for the account of its customers or partners”; (4) replacing the phrase “purchase or sale of securities” with the phrase “purchase or sale of a security” in the first sentence of paragraph (a)(6)(i); (5) replacing the word “and” with the word “or” in paragraph (a)(7), resulting in the phrase “A memorandum of each purchase or sale”; (6) replacing the phrase “in respect of” with the phrase “with respect to” in paragraph (a)(9); (7) adding the phrase “, as applicable:” After the word

*Participants*, Exchange Act Release No. 77617 (Apr. 14, 2016), 81 FR 29960 (May 13, 2016).

<sup>112</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25208.

<sup>113</sup> Paragraph (b)(2) of Rule 15Fk-1 requires chief compliance officers of SBSBs and MSBSPs to take reasonable steps to ensure that the registrant establishes, maintains, and reviews written policies and procedures reasonably designed to achieve compliance with the Exchange Act and the rules and regulations thereunder relating to its business as an SBSB or MSBSP.

simplifying the text in paragraph (a) of Rule 17a-3 to state that Rule 17a-3 applies to “every broker or dealer,” since the newly adopted undesignated introductory paragraph already provides sufficient detail as to the types of registrants to which the rule applies.<sup>122</sup> In recognition of the fact that broker-dealers may execute orders for non-customers, the Commission is amending paragraph (a)(6) of Rule 17a-3 to specify that a broker-dealer must maintain a copy of the customer’s or non-customer’s subscription agreement.<sup>123</sup>

The Commission is restructuring paragraph (a)(11) of Rule 17a-3 to eliminate paragraphs (a)(11)(i) and (ii).<sup>124</sup> Under these amendments, the text formerly located in paragraph (a)(11)(i) of Rule 17a-3 is set forth in the second sentence of paragraph (a)(11) of Rule 17a-3, as amended, and the text of paragraph (a)(11)(ii) has been deleted from the rule. The Commission proposed to amend the “Provided, however” paragraph in paragraph (a)(12) of Rule 17a-3 that follows paragraph (a)(12)(i)(H) by replacing the list of entities enumerated in the paragraph with the term “a self-

regulatory organization.”<sup>125</sup> The Commission is amending the paragraph substantially as proposed but adding the phrase “a registered national securities association or a registered national securities exchange” rather than the term “a self-regulatory organization” in order to more accurately reflect the nature of the entities listed in the paragraph prior to these amendments. The Commission is also redesignating this paragraph as paragraph (a)(12)(i)(I) of Rule 17a-3.

As discussed in more detail in section II.E.1. of this release, the Commission is adopting a limited alternative compliance mechanism in Rules 17a-3 and 18a-5.<sup>126</sup> The provisions of the limited alternative compliance mechanism are in paragraph (b) of Rule 17a-3 and in paragraph (c) of Rule 18a-5. As a result, the Commission is redesignating paragraphs (b) through (g) of Rule 17a-5 as paragraphs (c) through (g) and is redesignating proposed paragraph (c) of Rule 18a-5 as paragraph (d).

The Commission also is amending paragraph (b) of Rule 17a-3 (and, as mentioned above, is redesignating it as paragraph (c)). Paragraph (b)(1) was designed to avoid duplication so that an introducing broker-dealer will not be required to make and keep current the same records that would customarily be made by the firm’s clearing broker-dealer. However, the language in paragraph (b)(1) beginning with the phrase “Provided, That” is outdated insofar as it references a capital standard that has been superseded, and the Commission is deleting it accordingly. In revising paragraph (b)(1), the intent of the provision—to avoid the duplicative creation of records related to transactions introduced by one broker or dealer and cleared by a different broker or dealer—remains the same. However, the Commission is eliminating the outdated capital standard reference.<sup>127</sup> The Commission is also deleting paragraph (b)(2), as it would be

redundant of paragraph (b) of Rule 17a-3, as amended.

The Commission is deleting paragraphs (c) and (d) of Rule 17a-3. Paragraph (c) references instruments such as U.S. Defense Savings Stamps and U.S. Defense Savings Bonds that are no longer widely circulated and thus a specific carve-out for these instruments from the general rule set forth in paragraph (a) of Rule 17a-3 is no longer appropriate.<sup>128</sup> Paragraph (d) provides a *de minimis* exception from paragraph (a) of Rule 17a-3 for any cash transaction of \$100 or less involving only subscription rights or warrants which by their terms expire within 90 days after their issuance. This exception was adopted in 1953 to reduce the burden and expense of making accounting entries for these transactions. The burden associated with these accounting entries is no longer significant in light of the technological advances in recordkeeping systems since 1953.<sup>129</sup> In addition, the removal of this exception will affect only a small number of transactions. As a consequence of the removal of paragraphs (c) and (d) from Rule 17a-3, paragraphs (e), (f), (g), and (h) are being redesignated as paragraphs (d), (e), (f), and (g), respectively.

Paragraph (e) of Rule 17a-3 references Municipal Securities Rulemaking Board (“MSRB”) Rule G-8 and states that compliance with that rule will be deemed to be compliance with this section. The Commission is adding the phrase “or any successor rule” to the reference to Rule G-8 so that the reference does not become superseded over time.

The Commission also made a number of non-substantive modifications to the text of Rule 18a-5 in addition to the modifications discussed above in section II.A.2.a. of this release.<sup>130</sup>

<sup>128</sup> The Defense Savings Bond initiated by the U.S. Treasury and the U.S. Defense Savings Stamps introduced by the U.S. Postal Service were measures to finance the U.S. effort in World Wars I and II. The bonds matured in 10 years from the date of issuance. The Defense Savings Bonds were replaced by Series E savings bonds, which ceased to be issued as of June 1980. Today, these instruments are not widely held and are valued more as collectibles than for their face value. See information available at [www.treasurydirect.gov](http://www.treasurydirect.gov).

<sup>129</sup> See *Preservation of Records and Reports of Certain Stabilizing Activities*, 18 FR 2879 (May 19, 1953) (“It has been pointed out to the Commission that the accounting entries appropriate in the case of the usual securities transaction are unnecessarily burdensome and expensive as to these rights transactions because of the small sums involved and because in many cases there is no continuing relationship between the customer and the firm”).

<sup>130</sup> In particular, the Commission made the following changes to Rule 18a-5, as adopted: (1) Removing “such” from the phrase “Each such

“indicating” in paragraph (a)(9); (8) including the word “and” between the second-to-last and last subparagraphs of paragraph (a)(9) (instead of after every subparagraph); (9) replacing cross-reference in paragraph (a)(12) to “paragraph (h)(4)” with a cross-reference to “paragraph (f)(4)” due to the proposed deletion of two paragraphs; (10) amending paragraph (a)(12)(i)(G) to refer to a “broker or dealer” instead of a “broker-dealer”; (11) replacing the superfluous “or” with a comma in the phrase “wrongful taking of property or bribery” in paragraph (a)(12)(i)(G); (12) clarifying in paragraph (a)(1) that the unit and aggregate purchase or sale price, if any includes the financial terms for security-based swaps; (13) replacing “,” with “;” after the phrase “a notation of that entry” in paragraph (a)(6)(i)(A) for consistency with 17 CFR 240.17a-3(a)(6)(i)(A) and paragraph (b)(4) of Rule 18a-5, as adopted; (14) replacing “In the case of” with “For each” in paragraph (a)(9)(iv) for consistency with paragraphs (a)(7) and (b)(7) of Rule 18a-5, as adopted; (15) adding quotation marks around the term “associated person” in paragraph (a)(12)(i) for consistency with paragraph (a)(12)(i) of Rule 17a-3 and paragraphs (a)(10)(i) and (b)(8)(i) of Rule 18a-5, as adopted; (16) replacing “or any broker or dealer” with “, or any broker, dealer, security-based swap dealer or major security-based swap participant” in paragraph (a)(12)(i)(F) for consistency with paragraphs (a)(10)(i)(F) and (b)(8)(i)(F) of Rule 18a-5, as adopted; (17) adding “, or” after the phrase “wrongful taking of property” in paragraph (a)(12)(i)(G) for consistency with paragraph (a)(12)(i)(G) of Rule 17a-3 and paragraphs (a)(10)(i)(G) and (b)(8)(i)(G) of Rule 18a-5, as adopted; (18) replacing “17 CFR 240.17a-3” with “this section” in paragraph (b)(v); and (19) replacing “§§ 240.17a-3 and 17a-4” with “this section and § 240.17a-4” in paragraph (b).

<sup>122</sup> See undesignated introductory paragraph of Rule 17a-3, as amended.

<sup>123</sup> See paragraph (a)(6) of Rule 17a-3, as amended.

<sup>124</sup> See paragraph (a)(11) of Rule 17a-3, as amended.

<sup>125</sup> See paragraph (a)(12) of Rule 17a-3, as amended.

<sup>126</sup> See paragraph (b) of Rule 17a-3, as amended; paragraph (c) of Rule 18a-5, as adopted.

<sup>127</sup> Paragraph (c) of Rule 17a-3, as amended, provides that a broker or dealer registered pursuant to Section 15 of the Act, that introduces accounts on a fully-disclosed basis, is not required to make or keep such records of transactions cleared for such broker or dealer as are made and kept by a clearing broker or dealer pursuant to the requirements of §§ 240.17a-3 and 240.17a-4. Nothing herein will be deemed to relieve such broker or dealer from the responsibility that such books and records be accurately maintained and preserved as specified in §§ 240.17a-3 and 240.17a-4.

security-based swap dealer” in paragraph (a) for consistency with paragraph (b) of Rule 18a–5, as adopted; (2) replacing “if any contract price” with “if any (including the financial terms for security-based swaps)” in paragraph (a)(1) for consistency with paragraph (b)(1) of Rule 18a–5, as adopted; (3) adding “such securities were” before the phrase “purchase or received or to whom sold or delivered” in paragraphs (a)(1) and (b)(1) for consistency with paragraph (a)(1) of Rule 17a–3, as amended; (4) replacing “purchase or sale” with “transactions” in the third sentence of paragraphs (a)(1) and (b)(1) for consistency with paragraph (a)(1) of Rule 17a–3, as amended; (5) replacing “the termination or maturity date” with “the scheduled termination date” in paragraphs (a)(1), (3), and (5) and (b)(1), (2), and (4) for consistency with paragraph (a)(1) of Rule 17a–3, as amended; (6) replacing the phrase “the notional amount” with “the notional amount(s) and the currency(ies) in which the notional amount(s) is expressed” in paragraphs (a)(1), (3), and (5) and (b)(1), (2), and (4) for consistency with paragraph (a)(1) of Rule 17a–3, as amended; (7) adding “counterparty’s” before the phrase “legal entity identifier” in paragraphs (a)(1), (3), (5), and (b)(1), (2), (4), and (11) for consistency with paragraph (a)(1) of Rule 17a–3, as amended; (8) removing “,” after “expense” in paragraph (a)(2) for consistency with paragraph (a)(2) of Rule 17a–3, as amended; (9) adding “(including security-based swaps) after the phrase “deliveries of securities” in paragraphs (a)(3) and (b)(2) for consistency with paragraph (a)(3) of Rule 17a–3, as amended; (10) replacing “,” with “;” after the phrase “all other debits and credits to such account” in paragraph (a)(3) for consistency with paragraph (a)(3) of Rule 17a–3, as amended; (11) replacing “in the case of security-based swap” with “for a security-based swap” in paragraph (a)(3) for consistency with paragraph (a)(3) of Rule 17a–3, as amended, and paragraph (b)(2) of Rule 18a–5, as adopted; (12) removing “ledger accounts (or other records) itemizing separately,” in paragraph (a)(3) for consistency with paragraph (a)(3) of Rule 17a–3, as amended, and paragraph (b)(2) of Rule 18a–5, as adopted; (13) replacing “subject” with “subjects” in paragraph (a)(4)(i) for consistency with paragraph (a)(5)(i) of Rule 17a–3, as amended, and paragraph (b)(3)(i) of Rule 18a–5, as adopted; (14) adding “for” before the phrase “the account of its customers” in paragraph (a)(4)(i) for consistency with paragraph (a)(5)(i) of Rule 17a–3, as amended, and paragraph (b)(3)(i) of Rule 18a–5, as adopted; (15) replacing “locations” with “location” in paragraph (a)(4)(i) for consistency with paragraph (a)(5)(i) of Rule 17a–3, as amended, and paragraph (b)(3)(i) of Rule 18a–5, as adopted; (16) removing the “,” after the phrase “in all cases” in paragraph (a)(4)(i) for consistency with paragraph (a)(5)(i) of Rule 17a–3, as amended, and paragraph (b)(3)(i) of Rule 18a–5, as adopted; (17) replacing “§ 240.15Fi–1” with “§ 240.15Fi–2” in paragraphs (a)(6) and (15) and (b)(11) to reflect a change in reference; (18) replacing “security-based swap dealer, major security-based swap participant” with “security-based swap dealer or major security-based swap participant” in paragraphs (a)(10)(ii) and (b)(8)(ii) for grammatical correctness and internal consistency; (19) removing “,” after “§ 240.15Fh–5” in paragraph (a)(17) for consistency with paragraph (a)(30) of Rule 17a–3, as amended, and paragraph (b)(13) of Rule 18a–5, as adopted; (20) replacing “a security-based swap dealer or a major security based swap participant” with “such” in paragraph (b)(1) for clarity; (21) replacing “if any (includes the contract price for security-based swaps)” with “(if any, including the financial terms for security-based swaps)” in paragraph (b)(1) for consistency with paragraph (a)(1) of Rule 17a–3, as amended; (22) replacing “and in addition, for security-based swaps” with “and in addition, for a security-based swap” in paragraph (b)(2) for consistency with paragraph (a)(3) of Rule 17a–3, as amended, and paragraph (a)(3) of Rule 18a–5, as adopted; (23)

### 3. Record Maintenance and Preservation Requirements

Rule 17a–4 requires a broker-dealer to preserve certain types of records if it makes or receives them. The rule also prescribes the time period that these records and the records required to be made and kept current under Rule 17a–3 must be preserved and the manner in which they must be preserved. The Commission is adopting amendments to Rule 17a–4 that are designed to account for the security-based swap activities of broker-dealers, including broker-dealer SBSDs and MSBSPs.<sup>131</sup> The Commission also is adopting a number of largely technical amendments to Rule 17a–4. The Commission is adopting Rule 18a–6—which is modeled on Rule 17a–4, as amended—to establish record maintenance and preservation requirements for stand-alone and bank SBSDs and MSBSPs. Rule 18a–6 does not include a parallel requirement for every requirement in Rule 17a–4.<sup>132</sup> In addition, the recordkeeping requirements in Rule 18a–6 applicable to bank SBSDs and MSBSPs are more limited in scope than the requirements in the rule applicable to stand-alone SBSDs and MSBSPs.

replacing “the time of cancellation, if applicable” with “the time of execution or cancellation” in paragraph (b)(4) for consistency with paragraph (a)(6)(i)(A) in Rule 17a–3, as adopted; (24) changing the fourth sentence in paragraph (b)(4) to read “An order entered pursuant to the exercise of discretionary authority by the security-based swap dealer or major security-based swap participant, or associated person thereof, must be so designated.” for consistency with paragraph (a)(6)(i)(A) in Rule 17a–3, as adopted; (25) adding a citation to 15 U.S.C. 78c(a)(70) to paragraph (c)(1) for internal consistency; (26) replacing “The term, as to a person supervised by a prudential regulator,” in paragraph (c)(2) with “The term *associated person*, as to an entity supervised by a prudential regulator” to clarify that the term referenced in the paragraph is “associated person”; (27) adding parentheses around the phrase “if any, including the financial terms for security-based swaps” in paragraph (b)(1) for consistency with paragraph (a)(1) of Rule 17a–3, as amended; (28) replacing “will” with “does” in paragraph (b)(4) of Rule 17a–3, as amended, for consistency with Section 3(a)(70) of the Exchange Act; and (29) consolidating paragraphs (a)(19) and (b)(15) and designating it paragraph (c) and redesignating paragraph (c) as paragraph (d).

<sup>131</sup> Broker-dealer SBSDs and MSBSPs are subject to all the record maintenance and preservation requirements applicable to broker-dealers under Rule 17a–4, as amended, plus the additional requirements specifically applicable only to SBSDs and MSBSPs.

<sup>132</sup> The Commission did not propose to include in Rule 18a–6 requirements that would parallel the requirements in paragraphs (b)(11), (g), (h), (k), and (l) of Rule 17a–4, as amended. These requirements relate to activities that would not be relevant to stand-alone SBSDs or MSBSPs. Other requirements in Rule 17a–4, as amended, not included as parallel requirements in Rule 18a–6, as adopted, are discussed below.

### a. Rule 17a–4 and Rule 18a–6

#### Undesignated Introductory Paragraph

The Commission proposed adding an undesignated introductory paragraph to Rule 17a–4 explaining that the rule applies to a broker-dealer, including a broker-dealer SBSD or MSBSP, while a stand-alone or bank SBSD or MSBSP is subject to Rule 18a–6.<sup>133</sup> Similarly, the Commission proposed an undesignated introductory paragraph to Rule 18a–6 explaining that the rule would apply to a stand-alone or bank SBSD or MSBSP, while a broker-dealer SBSD or MSBSP is subject to Rule 17a–4. The Commission received no comments on the proposed undesignated introductory paragraphs to Rules 17a–4 and 18a–6 and is adopting them with non-substantive modifications to clarify which rule (17a–4 or 18a–6) applies to a given type of entity.<sup>134</sup>

#### Six Year Preservation Requirement for Certain Rule 17a–3 and Rule 18a–5 Records

Paragraph (a) of Rule 17a–4 provides that brokers-dealers subject to Rule 17a–3 must preserve for a period of not less than six years, the first two years in an easily accessible place, certain categories of records required to be made and kept current under Rule 17a–3 (the “six year preservation requirement”).<sup>135</sup> Consequently, under this existing requirement, broker-dealer SBSDs and MSBSPs are required to preserve for six years the same categories of records as stand-alone broker-dealers. As discussed above, paragraphs (a) and (b) of Rule 18a–5 contain certain recordkeeping requirements that parallel existing requirements in Rule 17a–3, as amended. Under these parallel requirements, stand-alone and bank SBSDs and MSBSPs must make and keep current certain categories of records that broker-dealers must maintain pursuant to the six year preservation requirement in Rule 17a–4. Consequently, as proposed, paragraphs (a)(1) and (2) of Rule 18a–6 would require that these categories of records must be preserved for a period of not less than six years, the first two years in an easily accessible place.<sup>136</sup> The Commission received no comments on

<sup>133</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25211.

<sup>134</sup> See undesignated introductory paragraph of Rule 17a–4, as amended; undesignated introductory paragraph of Rule 18a–6, as adopted.

<sup>135</sup> Specifically, the six-year preservation requirement applies to records required under paragraphs (a)(1) through (3), (5), (21), and (22) of Rule 17a–3, as amended.

<sup>136</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25211–12.

paragraphs (a)(1) and (2) of proposed Rule 18a–6 and is adopting them as proposed.<sup>137</sup>

#### Three Year Preservation Requirement for Certain Rule 17a–3 and Rule 18a–5 Records

Paragraph (b)(1) of Rule 17a–4 provides that broker-dealers subject to Rule 17a–3 must preserve for at least three years, the first two years in an easily accessible place, certain records required to be made and kept current under Rule 17a–3 (the “three year preservation requirement”).<sup>138</sup> The Commission did not propose to amend or change any of the existing cross-references to Rule 17a–3 in paragraph (b)(1) of Rule 17a–4. The Commission did, however, propose adding cross-references to certain new paragraphs that are being added to Rule 17a–3 to address security-based swap activities of broker-dealers, including broker-dealer SBSBs and MSBSPs.<sup>139</sup> As discussed above, paragraphs (a) and (b) of Rule 18a–5 require stand-alone and bank SBSBs and MSBSPs make and keep current certain categories of records that broker-dealers must maintain pursuant to the three year preservation requirement, as amended to incorporate the new records relating to security-based swap activities. Consequently, as proposed, paragraphs (b)(1) and (2) of Rule 18a–6 would similarly require that these categories of records be preserved for a period of not less than three years, the first two years in an easily accessible place. The Commission received no comments on these proposed preservation requirements and is adopting them substantially as proposed.<sup>140</sup>

<sup>137</sup> See paragraphs (a)(1) and (2) of Rule 18a–6, as adopted.

<sup>138</sup> Specifically, paragraph (b)(1) of Rule 17a–4 applies the three-year preservation requirement to the records required to be made and kept current under paragraphs (a)(4), (6) through (10), (16), and (18) through (20) and (e) of Rule 17a–3, as amended. Prior to these amendments, Rule 17a–4 did not cross-reference paragraph (a)(11) of Rule 17a–3. The Commission is correcting this omission by adding a cross reference to paragraph (a)(11) of Rule 17a–3 in paragraph (b)(1) of Rule 17a–4, as amended. This requires broker-dealers to preserve these records for three years, the first two years in an easily accessible place. Based on staff experience, the Commission believes that broker-dealers have been preserving these records in a manner consistent with this requirement.

<sup>139</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25212.

<sup>140</sup> See paragraph (b)(1) of Rule 17a–4, as amended; paragraphs (b)(1) and (2) of Rule 18a–6, as adopted. The Commission is adopting the following stylistic and corrective changes: (1) Removing the reference to paragraph (a)(24) of Rule 17a–3 since that paragraph is not being adopted as proposed; (2) replacing “made pursuant to paragraphs § 240.18a–5(a)(1), (a)(2), (a)(3), and (a)(4)” with “made pursuant to § 240.18a–5(a)(1)

#### Three Year Preservation Requirement for Certain Other Records

Paragraphs (b)(2) through (13) of Rule 17a–4 also provide that a broker-dealer subject to Rule 17a–3 must preserve for a period of not less than three years, the first two years in an easily accessible place, other categories of records if the broker-dealer makes or receives the record. These are not categories of records a broker-dealer is required to make and keep current under Rule 17a–3 but rather types of records that a broker-dealer may make or receive in the ordinary course of business. As discussed in more detail below, the Commission proposed to amend certain of the provisions in paragraphs (b)(2) through (13) of Rule 17a–4 to account for security-based swaps and to require that broker-dealers, including broker-dealer SBSBs and MSBSPs, preserve certain additional records related to security-based swap activities.<sup>141</sup> Further, as discussed below, the Commission proposed requirements in paragraph (b) of Rule 18a–6 that would require stand-alone and bank SBSBs and MSBSPs to preserve similar records.

In addition, the categories of records identified in paragraphs (b)(3) through (5) and (7) of Rule 17a–4 must be retained only if they relate to the broker-dealer’s *business as such* (i.e., business as a broker-dealer). Security-based swap activities of a broker-dealer that is not registered as an SBSB or MSBSP are part of the broker-dealer’s business as such for the purposes of Rule 17a–4 just like activities relating to other types of securities. In the case of a broker-dealer SBSB or MSBSP, the Commission proposed to amend Rule 17a–4 to clarify that the business as such of these

through (4)” in paragraph (a)(1) of Rule 18a–6, as adopted, for grammatical correctness; (3) replacing “made pursuant to paragraphs § 240.18a–5(b)(1), (b)(2), and (b)(3)” with “made pursuant to § 240.18a–5(b)(1) through (3)” in paragraph (a)(2) of Rule 18a–6, as adopted, for grammatical correctness; (4) replacing “;” with “.” for each paragraph in Rule 18a–6, as adopted, for internal consistency; (5) removing “as applicable” in paragraph (b)(1)(viii) of Rule 18a–6, as adopted, as it is not necessary since only Part II is referenced in Rule 18a–6, as adopted; (6) replacing “security-based swap customers” with “non-security-based swap customers” in paragraph (b)(1)(viii)(B) of Rule 18a–6, as adopted, to correct an error and for consistency with paragraph (b)(8)(ii) of Rule 17a–4, as amended; (7) removing “,” after “cost” in paragraph (b)(1)(viii)(H) of Rule 18a–6, as adopted, for consistency with paragraph (b)(8)(ix) of Rule 17a–4, as amended; (8) removing “;” after “and” in paragraph (b)(1)(viii)(N) of Rule 18a–6, as adopted, for consistency with paragraph (b)(8)(xvi) of Rule 17a–4, as amended; (9) removing “Records which contain” in paragraph (b)(2)(v) of Rule 18a–6, as adopted, for clarity; and (10) replacing “;” and “,” with “.” in paragraph (b)(2)(vii) of Rule 18a–6, as adopted, for internal consistency.

<sup>141</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25212–13.

entities would include the firm’s business as an SBSB or MSBSP.<sup>142</sup> The Commission received no comment on the proposed definition and is adopting it substantially as proposed.<sup>143</sup>

#### Bank Records

Paragraph (b)(2) of Rule 17a–4 requires a broker-dealer, including a broker-dealer SBSB or MSBSP, to preserve all check books, bank statements, cancelled checks, and cash reconciliations. The Commission did not propose to amend this paragraph to specifically account for security-based swaps. However, the Commission did propose a parallel requirement in Rule 18a–6 applicable to stand-alone SBSBs and MSBSPs.<sup>144</sup> The Commission received no comments on this proposed bank record preservation requirement and is adopting it as proposed.<sup>145</sup>

#### Bills

Paragraph (b)(3) of Rule 17a–4 requires a broker-dealer, including a broker-dealer SBSB or MSBSP, to preserve all bills receivable or payable, paid or unpaid, relating to the business of the broker-dealer. The Commission proposed a parallel requirement in Rule 18a–6 that would require stand-alone SBSBs and MSBSPs to preserve these types of bills.<sup>146</sup> The Commission received no comments on this proposed bill preservation requirement and is adopting it as proposed.<sup>147</sup>

#### Communications

Paragraph (b)(4) of Rule 17a–4 requires a broker-dealer, including a broker-dealer SBSB or MSBSP, to preserve originals of all communications received and copies of all communications sent (and any approvals thereof) by the broker-dealer (including inter-office memoranda and communications) relating to its business as such, including all communications which are subject to the rules of a self-regulatory organization (“SRO”) of which the broker-dealer is a member regarding communications with the

<sup>142</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25213.

<sup>143</sup> See paragraph (m)(5) of Rule 17a–4, as amended. The definition as adopted is shorter than proposed to improve clarity and now reads: “[t]he term *business as such* includes security-based swap activity.”

<sup>144</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25213.

<sup>145</sup> See paragraph (b)(1)(ii) of Rule 18a–6, as adopted.

<sup>146</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25213.

<sup>147</sup> See paragraph (b)(1)(iii) of Rule 18a–6, as adopted.

public.<sup>148</sup> The term “communications,” as used in paragraph (b)(4) of Rule 17a–4, includes all electronic communications (e.g., emails and instant messages).<sup>149</sup> Communications related to security-based swap activities would be communications relating to the business as such of a broker-dealer, including a broker-dealer SBSB and MSBSP.

The Commission had not previously interpreted the term “communications” to include telephonic communications. However, Section 15F(g)(1) of the Exchange Act provides that each registered SBSB and MSBSP shall maintain daily trading records of the security-based swaps of the registered SBSB or MSBSP and all related records (including related cash or forward transactions) and recorded communications, including electronic mail, instant messages, and *recordings of telephone calls*, for such period as may be required by the Commission by rule or regulation. Therefore, to implement Section 15F(g)(1) of the Exchange Act, the Commission proposed amendments to the preservation requirement in paragraph (b)(4) of Rule 17a–4 to require recordings of telephone calls required to be maintained pursuant to Section 15F(g)(1) of the Exchange Act.<sup>150</sup> Under this requirement, a broker-dealer SBSB or MSBSP would be required to preserve for three years telephone calls that it records to the extent the recordings are required to be maintained pursuant to Section 15F(g)(1). The Commission proposed communication preservation requirements for stand-alone and bank SBSBs and MSBSPs that would parallel those in Rule 17a–4, as proposed to be amended, to further implement Section 15F(g)(1). The provision applicable to bank SBSBs and MSBSPs would limit the requirement to communications that relate to the business of an SBSB or MSBSP.

<sup>148</sup> Paragraph (b)(4) of Rule 17a–4 further provides that the term *communications* as used in the paragraph includes sales scripts.

<sup>149</sup> See, e.g., *Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information: Additional Examples Under the Securities Act of 1933, Securities Exchange Act of 1934, and Investment Company Act of 1940*, Exchange Act Release No. 37182 (May 9, 1996), 61 FR 24644 (May 15, 1996), at n. 32; *Reporting Requirements for Brokers or Dealers Under the Securities Exchange Act of 1934*, Exchange Act Release No. 38245 (Feb. 5, 1997), 62 FR 6469 (Feb. 12, 1997); *Books and Records Requirements for Brokers and Dealers Under the Securities Exchange Act of 1934*, Exchange Act Release No. 44992 (Oct. 26, 2001), 66 FR 55818, 55825 (Nov. 2, 2001).

<sup>150</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25213–14.

The Commission emphasizes that the Section 15(g)(1) of the Exchange Act and the new rules requiring the *retention* of telephone calls do not establish requirements to *record* telephone calls. Instead, the rules require firms to retain recordings of telephone calls that are within the scope of Section 15(g)(1) of the Exchange Act. Thus, if the firm records a telephone call voluntarily or for some other reason, it will need to retain the recording if the call falls within the scope of Section 15(g)(1) of the Exchange Act. However, a firm’s decision not to record a telephone call that falls within the scope of Section 15(g)(1) of the Exchange Act will not implicate these new retention requirements.

A commenter urged the Commission to apply a one-year retention requirement as was adopted by the CFTC with respect to retaining recordings of telephone calls.<sup>151</sup> In response, the Commission notes that applying the three-year retention requirement to these recordings is designed to allow staff examiners access to records they may need to review the past activities of SBSBs and MSBSPs, given that examinations are conducted using a risk-based program. In addition, the Commission believes that a three-year retention period will benefit counterparties in that it will preserve information that may help support them if, for example, a dispute arises about a transaction with an SBSB or MSBSP. A three-year retention period also is consistent with the retention period applicable to the vast majority of broker-dealer records, as compared to a one year period. Further, although the CFTC requires registrants to make and keep records of *all* oral communications pertaining to pre-execution trade information, including telephone calls, the Commission’s record retention rule applies only to *recordings* of telephone calls, *i.e.*, those voluntarily made by the registrant.<sup>152</sup> The Commission is adopting the communications preservation requirements as proposed.<sup>153</sup>

<sup>151</sup> See SIFMA 9/5/2014 Letter.

<sup>152</sup> See 17 CFR 23.202(a)(1) (requiring CFTC-registered swap dealers and major swap participants to “make and keep pre-execution trade information, including, at a minimum, records of all oral and written communications provided or received concerning quotes, solicitations, bids, offers, instructions, trading, and prices, that lead to the execution of a swap, whether communicated by telephone . . .”).

<sup>153</sup> See paragraph (b)(4) of Rule 17a–4, as amended; paragraphs (b)(1)(iv) and (b)(2)(ii) of Rule 18a–6, as adopted.

#### Trial Balances

Paragraph (b)(5) of Rule 17a–4 requires a broker-dealer, including a broker-dealer SBSB or MSBSP, to preserve all trial balances, computations of aggregate indebtedness and net capital (and working papers in connection therewith), financial statements, branch office reconciliations, and internal audit working papers relating to the firm’s business as a broker-dealer. The Commission proposed including a parallel requirement in Rule 18a–6 applicable to stand-alone SBSBs and MSBSPs.<sup>154</sup> In contrast to Rule 17a–4, the provision in Rule 18a–6, as proposed, did not refer to computations of “aggregate indebtedness” because the proposed capital rules for stand-alone SBSBs and MSBSPs—Rules 18a–1 and 18a–2, respectively—did not include such a calculation.<sup>155</sup> Further, to account for the capital standard for stand-alone MSBSPs, the proposed requirement referred to tangible net worth.<sup>156</sup> The Commission received no comments on the proposal and adopted Rules 18a–1 and 18a–2.<sup>157</sup> Consequently, the Commission is adopting the trial balance preservation requirements as proposed.<sup>158</sup>

#### Account Documents

Paragraph (b)(6) of Rule 17a–4 requires a broker-dealer, including a broker-dealer SBSB or MSBSP, to preserve all guarantees of accounts and all powers of attorney and other evidence of the granting of any discretionary authority given in respect of any account as well as copies of resolutions empowering an agent to act on behalf of a corporation. The Commission proposed parallel requirements in Rule 18a–6 for stand-alone and bank SBSBs and MSBSPs to preserve similar types of records, but only with respect to security-based swap accounts.<sup>159</sup> For example, bank SBSBs and MSBSPs would not be required to maintain these records with respect to accounts involving exclusively banking related services. The Commission received no comments on the proposed account documentation

<sup>154</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25214.

<sup>155</sup> See *Capital, Margin, and Segregation Proposing Release*, 77 FR at 70221–29.

<sup>156</sup> See *Capital, Margin, and Segregation Proposing Release*, 77 FR at 70256–57. A broker-dealer MSBSP is subject to the net capital requirements in Rule 15c3–1.

<sup>157</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 44052–68.

<sup>158</sup> See paragraph (b)(1)(v) of Rule 18a–6, as adopted.

<sup>159</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25214.

preservation requirements and is adopting them as proposed.<sup>160</sup>

#### Written Agreements

Paragraph (b)(7) of Rule 17a-4 requires a broker-dealer, including a broker-dealer SBSB or MSBSP, to preserve all written agreements (or copies thereof) entered into by the firm relating to its business as such, including agreements with respect to any account. The Commission proposed to amend this paragraph to require the preservation of written agreements with respect to a security-based swap customer or non-customer—including governing documents or any document establishing the terms and conditions of security-based swaps of the customer or non-customer—with the account records of the customer or non-customer.<sup>161</sup> The Commission proposed parallel requirements in Rule 18a-6 for stand-alone and bank SBSBs and MSBSPs. The provision applicable to bank SBSBs and MSBSPs would limit the preservation requirement to written agreements relating to the registrant's business as an SBSB or MSBSP. The Commission received no comments on the proposed written agreement preservation requirements and is adopting them substantially as proposed.<sup>162</sup>

#### Information Supporting Financial Reports

Paragraphs (b)(8)(i) through (xv) of Rule 17a-4 require a broker-dealer, including a broker-dealer SBSB or MSBSP, to preserve records containing various types of information that support amounts included in the broker-dealer's FOCUS Report prepared as of

<sup>160</sup> See paragraphs (b)(1)(vi) and (b)(2)(iii) of Rule 18a-6, as adopted.

<sup>161</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25214.

<sup>162</sup> See paragraph (b)(7) of Rule 17a-4, as amended; paragraphs (b)(1)(vii) and (b)(2)(iv) of Rule 18a-6, as adopted. The Commission is adopting the following stylistic and corrective changes: (1) Replacing “;” with “.” for each paragraph in Rule 18a-6 for internal consistency; (2) removing “as applicable” in paragraph (b)(1)(viii) of Rule 18a-6, as adopted, as it is not necessary since only Part II is referenced in Rule 18a-6, as adopted; (3) replacing “security-based swap customers” with “non-security-based swap customers” in paragraph (b)(1)(viii)(B) of Rule 18a-6, as adopted, to correct an error and for consistency with paragraph (b)(8)(ii) of Rule 17a-4, as amended; (4) removing “,” after “cost” in paragraph (b)(1)(viii)(H) of Rule 18a-6, as adopted, for consistency with paragraph (b)(8)(ix) of Rule 17a-4, as amended; (5) removing “;” after “and” in paragraph (b)(1)(viii)(N) of Rule 18a-6, as adopted, for consistency with paragraph (b)(8)(xvi) of Rule 17a-4, as amended; (6) removing “Records which contain” in paragraph (b)(2)(v) of Rule 18a-6, as adopted, for clarity; (7) replacing “; and” with “.” in paragraph (b)(2)(vii) of Rule 18a-6, as adopted, for internal consistency.

the broker-dealer's audit date and amounts in the annual audited financial statements the broker-dealer is required to file under Rule 17a-5 or 17a-12, as applicable. The paragraphs specifically identify the types of supporting information that must be preserved, including money balances, securities positions (which will include security-based swap positions), futures positions, commodity positions, and options positions, among other things.

The Commission proposed to: (1) Amend certain of these paragraphs to require the preservation of the same type of supporting information required of commodity positions, but for swap positions; (2) add a paragraph to require a broker-dealer SBSBs to preserve records that contain detail relating to the calculation of the risk margin amount under the proposed SBSB capital rules; and (3) add a new paragraph to require broker-dealer SBSBs to preserve records containing detail relating to the possession or control requirements in the proposed SBSB segregation rule.<sup>163</sup> The Commission proposed requirements in Rule 18a-6 for stand-alone SBSBs and MSBSPs that paralleled the requirements in paragraphs (b)(8)(i) through (xv) of Rule 17a-4, as proposed to be amended. Finally, the Commission proposed that bank SBSBs preserve records containing detail relating to the possession or control requirements in the proposed SBSB segregation rule (but not any of the other preservation requirements). The Commission received no comments on these proposals and has adopted the SBSB capital rules requiring a risk margin amount calculation and the SBSB segregation rules prescribing a possession or control requirement.<sup>164</sup> Consequently, the Commission is adopting the information supporting financial statement preservation requirements substantially as proposed.<sup>165</sup>

<sup>163</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25214–16. See *Capital, Margin, and Segregation Proposing Release*, 77 FR at 70221–24, 70278–82 (discussing the proposed risk margin amount and possession or control requirements respectively).

<sup>164</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43883–86 (risk margin amount calculation), 43935–38 (possession or control requirement).

<sup>165</sup> See paragraph (b)(8) of Rule 17a-4, as amended; paragraphs (b)(1)(vii) and (b)(2)(v) of Rule 18a-6, as adopted. The adopted rule text modifies the proposed rule text in the following non-substantive ways. The Commission proposed to amend paragraph (b)(8) of Rule 17a-4 to add a reference to proposed Form SBS in the introductory text after references to certain parts of the FOCUS Report. It is no longer necessary to include this cross-reference, because as discussed below, the

#### Rule 15c3-4 Risk Management Records

OTC derivatives dealers and ANC broker-dealers are subject to risk management requirements.<sup>166</sup> In particular, Rule 15c3-4 requires these broker-dealers to establish, document, and maintain a system of internal risk management controls to assist in managing the risks associated with the firm's business activities, including market, credit, leverage, liquidity, legal, and operational risks. The rule also requires periodic reviews (which may be performed by internal audit staff) and annual reviews (which must be conducted by independent public accountants) of the firm's risk management systems. Paragraph (b)(10) of Rule 17a-4 requires broker-dealers subject to Rule 15c3-4 to preserve the records required to be made under the rule and the results of the periodic reviews required to be conducted under the rule.

The Commission proposed that nonbank SBSBs and MSBSPs be required to comply with Rule 15c3-4.<sup>167</sup> Broker-dealer SBSBs will be subject to paragraph (b)(10) of Rule 17a-4. The Commission proposed a parallel provision in Rule 18a-6 to require nonbank SBSBs and MSBSPs to preserve the same types of records relating to Rule 15c3-4.<sup>168</sup> The Commission did not propose that bank SBSBs and MSBSPs comply with Rule 15c3-4<sup>169</sup> and thus did not propose a

Commission is revising Part II and adopting Part IIC of the FOCUS Report instead of adopting Form SBS. However, non-substantive changes in connection with those revisions are being made to improve the clarity of paragraph (b)(8); namely, references to the parts of Form X-17A-5 now read “Part II or Part IIA of Form X-17A-5 (§ 249.617 of this chapter)” to improve readability, and the word “audited” is being removed from the phrase “annual audited financial statements” for consistency with Rules 17a-5 and 18a-7. Paragraph (b)(1)(viii) of Rule 18a-6, as adopted, reflects the following technical changes from paragraph (b)(1)(viii) of Rule 18a-6, as proposed to be adopted: (1) Paragraph (b)(1)(viii) references “Part II of Form X-17A-5 (§ 249.617 of this chapter)” instead of “Part II of Form X-17A-5 (§ 249.617 of this chapter), as applicable,” because there is no need to reference “as applicable” when only one part of Form X-17A-5 is being referenced; (2) paragraph (b)(1)(viii)(B) refers to “non-security-based swap customers” instead of “security-based swap customers” for consistency with paragraph (b)(8)(ii) of Rule 17a-4, as amended; (3) paragraph (b)(1)(viii)(H) no longer includes a comma after the word “cost” for consistency with paragraph (b)(8)(ix) of Rule 17a-4, as amended; and (4) paragraph (b)(1)(viii)(N) no longer includes a semicolon after the word “and” for consistency with paragraph (b)(8)(xvi), as amended.

<sup>166</sup> See 17 CFR 240.15c3-4 (“Rule 15c3-4”).

<sup>167</sup> See *Capital, Margin, and Segregation Proposing Release*, 77 FR at 70250–51, 70256–57.

<sup>168</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25216.

<sup>169</sup> See Section 15F(d)(2)(A) of the Exchange Act (providing that the Commission may not prescribe

parallel record preservation requirement for these entities. The Commission received no comments on these proposals and has adopted the requirement that nonbank SBSBs and MSBSPs comply with Rule 15c3-4.<sup>170</sup> Consequently, the Commission is adopting the risk management records preservation requirements as proposed.<sup>171</sup>

#### Credit Risk Determinations

Paragraph (c)(4)(vi)(A) of § 240.15c3-1e (appendix E to Rule 15c3-1) requires an ANC broker-dealer to make and keep current a record of the basis of its internal credit assessments of counterparties for purposes of the credit risk charges it must take as part of its net capital computation. Paragraph (b)(12) of Rule 17a-4 requires an ANC broker-dealer to preserve these records. A broker-dealer SBSB approved to use models to compute net capital will be subject to the recordkeeping provision in paragraph (c)(4)(vi)(A) of appendix E to Rule 15c3-1 and the corresponding record preservation requirement in paragraph (b)(12) of Rule 17a-4. The proposed capital rule for SBSBs included a parallel provision requiring a stand-alone SBSB approved to use models to make and keep current the same type of record of the basis of its internal credit assessments of counterparties.<sup>172</sup> Therefore, the Commission proposed a parallel corresponding record preservation requirement in Rule 18a-6 for such a stand-alone SBSB.<sup>173</sup> The Commission received no comments on the proposal and adopted the requirement in the capital rule for stand-alone SBSBs to make and keep current these records.<sup>174</sup> Consequently, the Commission is adopting the credit risk determination preservation record requirement as proposed.<sup>175</sup>

#### Regulation SBSR

As discussed above, the Commission has adopted Regulation SBSR, which assigns the duty to report a security-based swap transaction to a registered

rules imposing prudential requirements on SBSBs and MSBSPs for which there is a prudential regulator).

<sup>170</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43906-07.

<sup>171</sup> See paragraph (b)(1)(ix) of Rule 18a-6, as adopted.

<sup>172</sup> See *Capital, Margin, and Segregation Proposing Release*, 77 FR at 70340.

<sup>173</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25216-17.

<sup>174</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 44060; paragraph (e)(2)(iii)(F)(2) of Rule 18a-1.

<sup>175</sup> See paragraph (b)(1)(x) of Rule 18a-6, as adopted.

SDR.<sup>176</sup> The Commission proposed to amend paragraph (b)(14) of Rule 17a-4 to require that broker-dealers, including broker-dealer SBSBs and MSBSPs, preserve the information they are required to submit to a registered SDR under Regulation SBSR.<sup>177</sup> In addition, the Commission proposed to include parallel preservation requirements in Rule 18a-6 for stand-alone and bank SBSBs. The Commission received no comments on the proposed Regulation SBSR record preservation requirements and is adopting them as proposed.<sup>178</sup>

#### Records Relating to Business Conduct Standards

As discussed above, the Commission has adopted Rules 15Fh-1 through 15Fh-6 and Rule 15Fk-1. These rules require, among other things, that SBSBs and MSBSPs make certain disclosures, provide certain notices, and make other records. The Commission proposed to amend paragraph (b) of Rule 17a-4 to add a requirement that broker-dealer SBSBs and MSBSPs preserve copies of documents, communications, and notices related to the business conduct and chief compliance officer requirements in Rules 15Fh-1 through 15Fh-6 and Rule 15Fk-1.<sup>179</sup> In addition, the Commission proposed to adopt parallel record preservation requirements in Rule 18a-6 for stand-alone and bank SBSBs and MSBSPs. The Commission received no comments on the proposed business conduct record preservation requirements and is adopting them as proposed.<sup>180</sup>

Section 15F(h)(4)(C) of the Exchange Act imposes duties on SBSBs that act as advisors to special entities. Paragraph (a) of Rule 15Fh-2 defines what it means to *act as an advisor to a special entity*. If an SBSB is acting in this capacity, Section 15F(h)(4)(C) and paragraph (b) of Rule 15Fh-4 require the SBSB to make reasonable efforts to obtain such information as it considers necessary to make a reasonable determination that a security-based swap or trading strategy involving a security-based swap is in the best interests of the special entity. Section

<sup>176</sup> See *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information*, 80 FR 14567; *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information*, 81 FR 53546.

<sup>177</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25217.

<sup>178</sup> See paragraph (b)(14) of Rule 17a-4, as amended; paragraphs (b)(1)(xi) and (b)(2)(vi) of Rule 18a-6, as adopted.

<sup>179</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25217.

<sup>180</sup> See paragraph (b)(15) of Rule 17a-4, as amended; paragraphs (b)(1)(xii) and (b)(2)(vii) of Rule 18a-6, as adopted.

15F(h)(5)(A) and paragraph (a) of Rule 15Fh-5 require an SBSB or MSBSP that is acting as a counterparty to a special entity to have a reasonable basis to believe that the special entity has a “qualified independent representative,” as that term is defined in the rule. The Commission proposed to amend paragraph (b) of Rule 17a-4 to add a requirement that broker-dealer SBSBs and MSBSPs preserve records relating to the determinations made pursuant to Section 15F(h)(4)(C) and Section 15F(h)(5)(A) of the Exchange Act.<sup>181</sup> In addition, the Commission proposed parallel record preservation requirements in Rule 18a-6 for stand-alone and bank SBSBs. The Commission received no comments on the proposed special entity advisor record preservation requirements and is adopting them as proposed.<sup>182</sup>

#### Corporate Documents

Paragraph (d) of Rule 17a-4 requires broker-dealers to preserve during the life of the enterprise corporate documents such as articles of incorporation, minute books, and stock certificate books. It also requires broker-dealers to preserve during the life of the enterprise registration and licensing information such as all Forms BD, Forms BDW, and licenses or other documentation showing registration with a securities regulatory authority. The Commission proposed to amend paragraph (d) of Rule 17a-4 to add references to proposed Form SBSE-BD and proposed Form SBSE-W.<sup>183</sup> These were the registration and withdrawal of registration forms, respectively, the Commission proposed for broker-dealer SBSBs and MSBSPs.<sup>184</sup> The

<sup>181</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25218. As noted above in section II.A.2.a. of this release, on October 31, 2018, the Commission issued a statement, which set forth the Commission’s position that, for a period of five years from the Registration Compliance Date for SBSBs and MSBSPs (as defined in *Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 80 FR at 48988 and discussed below in section III.B. of this release), certain actions with respect to specific provisions of the business conduct standards will not provide a basis for a Commission enforcement action. See *Statement on Business Conduct Standards*, 83 FR at 55486. To the extent SBSBs and MSBSPs rely on the statement, the Commission encourages them to maintain records of the written representations described in the statement until such time as the statement is no longer in force.

<sup>182</sup> See paragraph (b)(16) of Rule 17a-4, as amended; paragraphs (b)(1)(xiii) and (b)(2)(viii) of Rule 18a-6, as adopted.

<sup>183</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25218.

<sup>184</sup> See *Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants*, Exchange Act Release No. 65543 (Oct. 12, 2011), 76 FR 65784 (Oct. 24, 2011); see also *Cross-Border Proposing Release*, 78 FR 30968.

Commission proposed a parallel requirement in Rule 18a-6 for stand-alone and bank SBSBs and MSBSBs, except that rule text referred to the registration forms these entities would use (*i.e.*, Forms SBSE and SBSE-A, respectively) rather than Form SBSE-BD.<sup>185</sup>

The Commission received no comments on these proposals and has adopted the forms.<sup>186</sup> However, to correct an inadvertent omission, they now also require preservation of Form SBSE-C (17 CFR 249.1600c).<sup>187</sup> The registration rule for SBSBs and MSBSBs requires firms applying to register as an SBSB or MSBSB to file Form SBSE-C (which contains two separate certifications) in addition to Forms SBSE, SBSE-A, and/or SBSE-BD.<sup>188</sup> For these reasons, the Commission is adopting the corporate document preservation requirements with the modifications discussed above.<sup>189</sup>

#### Associated Persons

As discussed above, paragraph (a)(12) of Rule 17a-3 requires a broker-dealer, including a broker-dealer SBSB or MSBSB, to make and keep current records of information about associated persons, and the Commission is adopting parallel requirements in Rule 18a-5 to require a stand-alone or bank SBSB or MSBSB to make and keep current the same types of records.<sup>190</sup> Paragraph (e)(1) of Rule 17a-4 requires broker-dealers to maintain and preserve

<sup>185</sup> Paragraph (m)(3) of Rule 17a-4, as amended, defines the term “securities regulatory authority” to have the meaning set forth in paragraph (f)(3) of Rule 17a-3, as amended. Paragraph (h)(1) of Rule 18a-6, as adopted, defines the term “securities regulatory authority” in the same way as that term is defined in paragraph (f)(3) of Rule 17a-3, as amended. The Commission proposed to amend the definition of “securities regulatory authority” to include the CFTC and a prudential regulator to the extent the prudential regulator oversees entity’s security-based swap activities. The Commission believes the better approach is to specifically reference the CFTC and the prudential regulator in a given recordkeeping provision where the inclusion of a reference to the CFTC or prudential regulator is appropriate given the type of registrant and the nature of the records. As a result, the Commission is adding references to the CFTC to paragraph (d) of Rule 17a-4, as amended, and a reference to the CFTC to paragraph (c) of Rule 18a-6, as adopted.

<sup>186</sup> See *Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants*, Exchange Act Release No. 75611 (Aug. 5, 2015), 80 FR 48963 (Aug. 14, 2015).

<sup>187</sup> The paragraphs as adopted contain updated cross-references to the CFR citations for Form SBSE, Form SBSE-A, Form SBSE-BD, and Form SBE-W (*i.e.*, 17 CFR 249.1600, 17 CFR 249.1600a, 17 CFR 249.1600b, and 17 CFR 249.1601, respectively).

<sup>188</sup> See 17 CFR 240.15Fb2-1(a).

<sup>189</sup> See paragraph (d) of Rule 17a-4, as amended; paragraph (c) of Rule 18a-6, as adopted.

<sup>190</sup> See paragraphs (a)(10) and (b)(8) of Rule 18a-5, as adopted.

the associated person’s records in an easily accessible place until at least three years after the associated person’s employment and any other connection with the broker-dealer has terminated. The Commission proposed to include a parallel requirement in Rule 18a-6 for stand-alone and bank SBSBs and MSBSBs to maintain and preserve their records about associated persons.<sup>191</sup> The Commission received no comments on these proposed associated persons record preservation requirements and is adopting them as proposed.<sup>192</sup>

#### Regulatory Authority Reports

Paragraph (e)(6) of Rule 17a-4 requires a broker-dealer, including a broker-dealer SBSB or MSBSB, to maintain and preserve in an easily accessible place each report that a securities regulatory authority has requested or required the firm to make and furnish to it pursuant to an order of settlement, and each regulatory exam report until three years after the date of the report.<sup>193</sup> The Commission proposed parallel record preservation requirements in Rule 18a-6 for stand-alone SBSBs and MSBSBs to maintain and preserve the same types of reports until three years after the date of the report.<sup>194</sup> The Commission proposed a parallel requirement in Rule 18a-6 for bank SBSBs and MSBSBs but only if the reports relate to security-based swap activities. The Commission received no comments on these proposed regulatory authority reports preservation requirements and is adopting them as proposed.<sup>195</sup>

<sup>191</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25218.

<sup>192</sup> See paragraph (d)(1) of Rule 18a-6, as adopted. Paragraph (h)(2) of Rule 18a-6, as adopted, defines the term “associated person” to have the same meaning as that term is defined in paragraph (c) of Rule 18a-5, as adopted.

<sup>193</sup> As discussed earlier, paragraph (m)(3) of Rule 17a-4 defines the term “securities regulatory authority” to have the meaning set forth in paragraph (f)(3) of Rule 17a-3, as amended. The Commission proposed to amend the definition of “securities regulatory authority” to include the CFTC and a prudential regulator to the extent the prudential regulator oversees security-based swap activities. The Commission believes the better approach is to specifically identify the CFTC and prudential regulator in a given recordkeeping provision where the inclusion of a reference to the CFTC or prudential regulator is appropriate given the type of registrant and the nature of the records. See paragraph (f)(3) of Rule 17a-3, as amended. As a result, the Commission is amending paragraph (e)(6) of Rule 17a-4 by adding references to reports requested or required by the CFTC.

<sup>194</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25218-19.

<sup>195</sup> See paragraphs (d)(2)(i) and (ii) of Rule 18a-6, as adopted. The Commission is replacing the term “regulatory authority” with the term “securities regulatory authority” in paragraphs (d)(2)(i) and (ii) of Rule 18a-6, as adopted.

Paragraph (h)(1) of Rule 18a-6, as adopted, defines

Compliance, Supervisory, and Procedures Manuals

Paragraph (e)(7) of Rule 17a-4 requires a broker-dealer, including a broker-dealer SBSB or MSBSB, to maintain and preserve in an easily accessible place each compliance, supervisory, and procedures manual, including any updates, modifications, and revisions, describing the policies and practices of the broker-dealer with respect to compliance with applicable laws and rules and supervision of the activities of each natural person associated with the broker-dealer until three years after the termination of the use of the manual. The Commission proposed a parallel requirement in Rule 18a-6 for stand-alone SBSBs and MSBSBs to maintain and preserve the same types of compliance, supervisory, and procedures manuals for the same period of time.<sup>196</sup> The Commission proposed a parallel requirement in Rule 18a-6 for bank SBSBs and MSBSBs but only if the manuals involve compliance with applicable laws and rules relating to security-based swap activities. The Commission received no comments on these proposed compliance, supervisory, and procedures manual preservation requirements and is adopting them as proposed.<sup>197</sup>

#### Electronic Storage

Paragraph (f) of Rule 17a-4 provides that the records a broker-dealer, including a broker-dealer SBSB or MSBSB, is required to maintain and preserve under Rules 17a-3 and 17a-4 may be immediately produced or reproduced on micrographic media or by means of electronic storage media and be maintained and preserved for the required time in that form. The use of

the term securities regulatory authority in the same way as that term is defined in paragraph (f)(3) of Rule 17a-3, as amended. As noted above, the Commission proposed to amend the definition of the term “securities regulatory authority” cross-referenced in paragraph (f)(3) of Rule 17a-3 to include the CFTC and prudential regulators but is declining to do so. In lieu of amending the definition of the term “securities regulatory authority,” the Commission is adding references to reports requested or required by the CFTC to paragraph (d)(2)(i) of Rule 18a-6, as adopted, and to reports requested or required by the CFTC or the prudential regulators to paragraph (d)(2)(ii) of Rule 18a-6, as adopted. The Commission staff consulted with staff from the prudential regulators and the CFTC in drafting the final rules discussed in this release, including paragraph (d)(2)(ii) of Rule 18a-6 (applicable to bank SBSBs and MSBSBs). The Commission recognizes that a bank SBSB or MSBSB may need to notify its prudential regulator(s) before furnishing (pursuant to paragraph (g) of Rule 18a-6) certain records identified in paragraph (d)(2)(ii) of Rule 18a-6.

<sup>196</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25219.

<sup>197</sup> See paragraphs (d)(3)(i) and (ii) of Rule 18a-6, as adopted.

electronic storage media is subject to certain conditions, including that the media must preserve the records exclusively in a manner that is non-rewriteable and non-erasable (also known as a write once, read many or “WORM”).<sup>198</sup> The Commission proposed including a parallel record maintenance and preservation requirement in Rule 18a–6, but only with respect to electronic storage media.<sup>199</sup> The Commission believes that SBSBs and MSBSPs that are not dually registered as broker-dealers would not use micrographic media to maintain and preserve records because electronic storage media is more technologically advanced and offers greater flexibility in managing records.<sup>200</sup>

The Commission received comments that its electronic storage requirements for SBSBs and MSBSPs, including for broker-dealers dually registered as SBSBs, should not mandate that the records be preserved exclusively in a WORM format.<sup>201</sup> One commenter further urged the Commission, in any event, “not to expand the WORM requirement to SBSBs at this time.”<sup>202</sup> The Commission also received comment requesting that it act on a rule petition filed by several organizations in November 2017 and harmonize its final rule with the CFTC’s corresponding requirements, which were recently modified to eliminate a similar WORM requirement.<sup>203</sup>

The Commission’s electronic record storage requirements in Rule 17a–4 are based on the “importance for recordkeeping of ready access, reliability, and permanence of records.”<sup>204</sup> The Commission has described the recordkeeping requirements in Rules 17a–3 and 17a–4 as “integral to the Commission’s investor protection function because the preserved records are the primary means of monitoring compliance with applicable securities laws, including antifraud provisions and financial

responsibility standards.”<sup>205</sup> Any modification to the electronic storage requirements in Rule 17a–4 may raise issues that are distinct from those raised by stand-alone and bank SBSBs and MSBSPs. Accordingly, the Commission believes that any change to these requirements should be addressed in a separate regulatory initiative in which the Commission intends to consider electronic storage media issues.

However, the Commission is clarifying that the WORM requirement does not mandate the use of a specific type of media. In particular, the Commission issued guidance in 2003 to clarify that the WORM requirement can be met using an “electronic storage system that prevents the overwriting, erasing or otherwise altering of a record during its required retention period through the use of integrated hardware and software control codes.”<sup>206</sup> This statement in the release—because it refers to “hardware” control codes—has raised questions as to whether an electronic storage system that relies exclusively on software coding to meet the WORM requirement is permitted under the rule. The Commission is clarifying that a software solution that prevents the overwriting, erasing, or otherwise altering of a record during its required retention period would meet the requirements of the rule. For example, the rule does not require the use of a specific medium such as optical disk, CD–ROM, or magnetic tape to meet the WORM requirement.

The Commission recognizes that the entities that may register as stand-alone or bank SBSBs or MSBSPs may have existing electronic storage systems that do not meet the WORM requirement and therefore could incur substantial costs in building a recordkeeping system that meets this requirement. For these reasons, the Commission is modifying Rule 18a–6 to eliminate the requirement that the electronic storage system preserve the records exclusively in a non-rewriteable and non-erasable format (*i.e.*, a WORM format).<sup>207</sup> In connection with this modification, the Commission is eliminating the proposed requirement that the stand-alone or bank SBSB or MSBSP notify the Commission at least 90 days before using electronic storage media other than optical disk technology because this provision is no longer relevant given the absence of the WORM

requirement in the rule as adopted.<sup>208</sup> The Commission also is modifying the proposed rule text by replacing the phrase “electronic storage media” throughout paragraph (e) of Rule 18a–6, as adopted, with the phrase “electronic storage system” to further clarify that the final rule does not require the use of a particular storage *media* such as optical disk or CD–ROM (as is the case with Rule 17a–4, as noted above).<sup>209</sup>

The Commission is modifying the provision of the rule that required the original and duplicate units of the storage media to be serialized and time-dated to clarify that this must be done *if applicable* (*i.e.*, if the firm uses a storage media such as optical disk or CD–ROM).<sup>210</sup> The Commission also is modifying the provision of the rule that required the firm to have available facilities for immediate, easily readable projection or productions of electronic storage media *images* and for producing easily readable *images*; the final rule instead provides that the facilities can be for the projection or production of images or *records* that are maintained on the electronic storage system.<sup>211</sup> This modification is designed to accommodate electronic storage systems that do not use optical disk or CD–ROM media. Further, the Commission is modifying the provision of the rule that required the firm to be ready at all times to immediately provide an *facsimile enlargement* which the staff of the Commission may request; the final rule requires instead that the firm must be ready at all times to immediately provide *in a readable format any record or index stored on the electronic storage system* which the staff of the Commission may request.<sup>212</sup>

The elimination of the WORM requirement as the exclusive means of storing records electronically will provide flexibility to stand-alone and bank SBSBs and MSBSPs in terms of establishing and maintaining electronic storage systems and will eliminate a potential conflict with the requirements of the CFTC. However, eliminating the WORM requirement does not change the

<sup>198</sup> See paragraph (f)(2)(ii)(A) of Rule 17a–4.

<sup>199</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25219.

<sup>200</sup> The Commission believes that most broker-dealers use electronic storage media rather than micrographic media for the same reasons.

<sup>201</sup> See, *e.g.*, SIFMA 9/5/2014 Letter; Letter from Walt L. Lukken, President and Chief Executive Officer, Futures Industry Association (Nov. 29, 2018) (“FIA Letter”).

<sup>202</sup> See, *e.g.*, SIFMA 9/5/2014 Letter.

<sup>203</sup> See FIA Letter. The CFTC modified CEA Rule 1.31 to remove its WORM requirement in May 2017. See *Recordkeeping*, 82 FR 24479 (May 30, 2017).

<sup>204</sup> See *Reporting Requirements for Brokers or Dealers Under the Securities Exchange Act of 1934*, Exchange Act Release No. 38245 (Jan. 31, 1997), 62 FR 6469 (Feb. 12, 1997).

<sup>205</sup> *Electronic Storage of Broker-Dealer Records*, Exchange Act Release No. 47806 (May 7, 2003), 68 FR 25281 (May 12, 2003).

<sup>206</sup> *Electronic Storage of Broker-Dealer Records*, 68 FR 25282.

<sup>207</sup> This requirement was in paragraph (e)(2)(ii)(A) of Rule 18a–6, as proposed.

<sup>208</sup> This requirement was in paragraph (e)(2)(i) of Rule 18a–6, as proposed.

<sup>209</sup> See paragraph (e) of Rule 18a–6, as adopted. The Commission also is deleting the phrase “on any medium acceptable under § 240.18a–6” from paragraph (e)(3)(iii) of Rule 18a–6. In addition, the Commission is also replacing throughout paragraph (e) references to information placed “on” electric storage systems with references to information placed “in” such systems.

<sup>210</sup> See paragraph (e)(2)(ii) of Rule 18a–6, as adopted.

<sup>211</sup> See paragraph (e)(3)(i) of Rule 18a–6, as adopted.

<sup>212</sup> See paragraph (e)(3)(ii) of Rule 18a–6, as adopted.

underlying requirements in Rules 18a–5 and 18a–6 that stand-alone and bank SBSBs and MSBSPs make and keep certain records, preserve those and other records for required time periods, and furnish promptly legible, true, complete, and current copies of records to a representative of the Commission. A firm's obligation to comply with these requirements is the same irrespective of whether it stores records in paper form or electronically and, therefore, a firm that elects to store records electronically should keep these obligations in mind in designing, implementing, and maintaining an electronic storage system.

The Commission also is modifying the final rule to eliminate the proposed provision that required at least one third party to have access to and the ability to download information from the electronic storage media and for that third party to execute an undertaking that the third party would provide the Commission with the information necessary download information from the electronic storage media.<sup>213</sup> This provision was designed to facilitate the Commission's access to electronically stored records. A commenter stated that this requirement (along with the WORM requirement) was "outdated in light of the changed technological environment."<sup>214</sup> The commenter further stated that it requires broker-dealers to provide third-party access to firm systems and client information, which "needlessly exposes firms to data leakage and cybersecurity threats." As noted above, the Commission believes that any change to the broker-dealer electronic storage provisions should be addressed in a separate regulatory initiative where the Commission intends to consider electronic storage media issues in a broader context, including with respect to other market participants. Accordingly, for the purposes of Rule 18a–6, the Commission believes it is appropriate not to adopt the proposed requirement.

Finally, paragraph (e)(3)(v) of Rule 18a–6, as proposed, would require firms that use an electronic storage system to have an audit system providing for accountability regarding the inputting of records to the electronic storage system and inputting of any changes made to every original and duplicate record.<sup>215</sup> This provision was modeled on the audit system requirement prescribed in paragraph (f)(3)(v) of Rule 17a–4. A

commenter stated that firms report substantial difficulty assessing whether they have complied with the audit system requirement of Rule 17a–4.<sup>216</sup>

The Commission explained the audit system requirement when it adopted the electronic storage provisions of Rule 17a–4.<sup>217</sup> In particular, the Commission stated that the rule requires an audit system to be utilized only when records required to be maintained under Rule 17a–4 are being entered or when any additions to existing records are made.<sup>218</sup> Consequently, an audit record is not required when a record is accessed but cannot be altered by the reader.<sup>219</sup> The Commission further stated that, although it was not specifying the contents of each audit system, data automatically or otherwise stored (in the computer or in hard copy) regarding inputting of records and changes to existing records will be part of that system.<sup>220</sup> The Commission envisioned that the identities of individuals actually inputting records and making particular changes, and the identity of documents changed and the identity of new documents created, are the kind of information that automatically would be collected pursuant to the audit system requirements.<sup>221</sup>

In addition, as part of the 2003 guidance with respect to the WORM requirement, the Commission stated that the audit system would need to provide accountability regarding the length of time records are stored in a non-rewriteable and nonerasable manner.<sup>222</sup> The Commission further stated that this should include senior management level approval of how the system is configured to store records for their required retention periods in a non-rewriteable and nonerasable manner.<sup>223</sup>

The audit system requirements of Rule 18a–6 are modeled on the existing requirements of Rule 17a–4. Consequently, firms can rely on the Commission's description of the Rule 17a–4 requirements—as set forth above—for the purposes of Rule 18a–6.

For the foregoing reasons, the Commission is adopting the electronic

storage requirements with the modifications discussed above.<sup>224</sup>

#### Prompt Production of Records

Paragraph (i) of Rule 17a–4 applies when a broker-dealer, including a broker-dealer SBSB or MSBSP, uses a third party to prepare or maintain the records required to be maintained and preserved pursuant to Rules 17a–3 and 17a–4. It requires the third party to file an undertaking with the Commission stating, among other things, that the records are the property of the broker-dealer and will be promptly furnished to the Commission or its designee. Paragraph (j) of Rule 17a–4 requires a broker-dealer, including a broker-dealer SBSB or MSBSP, to furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the broker-dealer that are required to be preserved under Rule 17a–4, or any other records of the broker-dealer subject to examination under Section 17(b) of the Exchange Act that are requested by the

<sup>224</sup> See paragraph (e) of Rule 18a–6, as adopted.

The Commission is also making the following non-substantive changes to paragraph (e) of Rule 18a–6, as adopted: (1) Inserting the word "an" before the phrase "electronic storage system," replacing the phrase "as defined in this section" with the phrase "as defined in this paragraph (e)," and replacing the word "meet" with the word "meets" in the introductory paragraph; (2) replacing the phrase "any digital storage medium or system" with "any digital storage system" in paragraph (e)(1); (3) inserting the word "an" before the phrase "electronic storage system," and deleting the phrase "comply with the following instructions" in paragraph (e)(2); (4) deleting the phrase "to any system acceptable under this paragraph (e) as required by the Commission," and adding the phrase "into a readable format" between the words "download" and "indexes" in paragraph (e)(2)(iii); (5) deleting the proposed text of paragraphs (e)(2)(i), (e)(2)(ii) introductory text, and (e)(2)(ii)(A) and renumbering proposed paragraphs (e)(2)(ii)(B) through (D) as paragraphs (e)(2)(i) through (iii), respectively; (6) inserting the word "an" before the phrase "electronic storage system" in paragraph (e)(3); (7) replacing the phrase "to provide, and immediately provide," with the phrase "to immediately provide" in paragraph (e)(3)(ii); (8) deleting the comma after the word "original," replacing the phrase "the record" with the phrase "a record," and adding the phrase "the electronic storage system on" between the words "on" and "any" in paragraph (e)(3)(iii); (9) replacing the word "media" with the word "storage" in paragraph (e)(3)(iv); (10) deleting the phrase "The security-based swap dealer or major security-based swap participant must," capitalizing the word "Have," and adding the word "the" before the phrase "electronic storage system" in paragraph (e)(3)(v); and (11) replacing the words "media" or "medium" with the word "system," deleting the phrase "to any acceptable system under this section," replacing the phrase "to any medium acceptable under § 240.18a–6" with "to a readable format," and replacing the phrase "upon being provided with the appropriate electronic storage" with the phrase "upon being provided with access to the appropriate electronic storage" in paragraph (e)(3)(vii).

<sup>216</sup> See FIA Letter.

<sup>217</sup> See *Reporting Requirements for Brokers or Dealers Under the Securities Exchange Act of 1934*, Exchange Act Release No. 38245 (Feb. 5, 1997), 62 FR 6469 (Feb. 12, 1997).

<sup>218</sup> *Id.* at 6471.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 6473.

<sup>221</sup> *Id.*

<sup>222</sup> *Electronic Storage of Broker-Dealer Records*, 68 FR 25283.

<sup>223</sup> *Id.*

<sup>213</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25313.

<sup>214</sup> See FIA Letter.

<sup>215</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25312.

representative of the Commission.<sup>225</sup> The Commission proposed including parallel requirements in Rule 18a–6 for stand-alone and bank SBSBs and MSBSPs.<sup>226</sup> The proposed requirement for these entities to promptly produce records referenced Section 15F of the Exchange Act (rather than Section 17(b)).<sup>227</sup> The Commission received no comments on these proposed prompt production requirements and is adopting them as proposed.<sup>228</sup>

#### b. Additional Amendments to Rule 17a–4 and Modifications to Rule 18a–6

The Commission proposed several amendments to Rule 17a–4 to eliminate obsolete text, improve readability, and modernize terminology.<sup>229</sup> Reference is made throughout Rule 17a–4 to “members” of a national securities exchange as a distinct class of registrant in addition to broker-dealers. The Commission proposed to remove these references to “members” given that the rule applies to brokers-dealers, which would include members of a national securities exchange that are brokers-dealers. The rule being adopted in this document does not remove these references to “members” to avoid confusion as to whether their removal resulted in a substantive change to the rule.

The Commission proposed a second global change that would replace the phrase “Every broker and dealer” with

<sup>225</sup> Section 17(b) of the Exchange Act provides, among other things, that all records of a broker-dealer are subject at any time, or from time to time, to such reasonable, periodic, special, or other examinations by representatives of the Commission and the appropriate regulatory agency of the broker-dealer as the Commission or the appropriate regulatory agency deems necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.

<sup>226</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25219–20.

<sup>227</sup> Section 15F(f)(1)(C) of the Exchange Act provides that SBSBs and MSBSPs shall keep books and records described in sections 15F(f)(1)(B)(i) and (ii) open to inspection and examination by any representative of the Commission. In addition, Section 15F(j) imposes duties on SBSBs and MSBSPs with respect to monitoring of trading, risk management procedures, disclosing information to the Commission and the prudential regulators, obtaining information, conflicts of interest, and antitrust considerations. With respect to disclosing information, Section 15F(j)(3) provides that an SBSB and MSBSP shall disclose to the Commission and to the prudential regulator for the SBSB or MSBSP, as applicable, information concerning: (1) Terms and conditions of its security-based swaps; (2) security-based swap trading operations, mechanisms, and practices; (3) financial integrity protections relating to security-based swaps; and (4) other information relevant to its trading in security-based swaps.

<sup>228</sup> See paragraphs (f) and (g) of Rule 18a–6, as adopted.

<sup>229</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25220–21.

“Every broker or dealer.”<sup>230</sup> The Commission also proposed a global change to replace the use of the word “shall” in the rule with the word “must” or “will” where appropriate.<sup>231</sup> In paragraph (m) of Rule 17a–4, the Commission proposed to replace the words “shall have” with the word “has.”<sup>232</sup> The Commission also proposed certain stylistic, corrective, and punctuation amendments to improve the readability of Rule 17a–4.<sup>233</sup>

Further, as discussed above, the Commission is eliminating the requirements in current paragraphs (c) and (d) of Rule 17a–3 and, as a consequence, current paragraphs (e) through (h) have been redesignated as paragraphs (d) through (g), respectively. The Commission proposed to amend Rule 17a–4 to make corresponding changes to cross-references to these paragraphs of Rule 17a–3.

The Commission proposed amendments to paragraph (b)(8) of Rule 17a–4 that would replace the phrase

<sup>230</sup> The amendments replace the phrase “Every broker and dealer” with the phrase “Every broker or dealer” in the following paragraphs of Rule 17a–4 as proposed to be amended: (a) through (e) and (j).

<sup>231</sup> The amendments replace the word “shall” with the word “must” or “will” in the following paragraphs of Rule 17a–4: (a), (b) introductory text, (b)(11), (c), (d), (e) introductory text, (e)(8), (f)(2) and (3), (g), (i), (j), (k)(1), and (l).

<sup>232</sup> The amendments replace the phrase “shall have” with the word “has” in the following paragraphs of Rule 17a–4: (m)(1) through (4).

<sup>233</sup> The Commission is adopting the following stylistic and corrective changes to Rule 17a–4: (1) In paragraph (a), replacing the phrases “paragraphs §” and “paragraph §” with the symbols “§§” and “§”, respectively; (2) adding the word “and” between phrase “money balance” and the word “position” in paragraph (b)(8)(i) for consistency with paragraph (b)(8)(ii); (3) replacing the phrase “§ 242.901 *et seq.* of this chapter” with the phrase “§§ 242.901 through 242.909 of this chapter” in paragraph (b)(14); (4) replacing the phrase “out of the money options” with the phrase “out-of-the-money options” in paragraph (b)(8)(ix); (5) replacing the phrase “paragraph (a)(12) of § 240.17a–3” with the phrase “§ 240.17a–3(a)(12)” in paragraph (e)(1); (6) replacing the phrase “paragraph (a)(13) of § 240.17a–3” with the phrase “§ 240.17a–3(a)(13)” in paragraph (e)(2); (7) replacing the phrase “paragraph (a)(15) of § 240.17a–3” with the phrase “§ 240.17a–3(a)(15)” in paragraph (e)(3); (8) replacing the phrase “for the life” with the phrase “during the life” in paragraph (e)(3); (9) replacing the phrase “paragraph (a)(14) of § 240.17a–13” with “§ 240.17a–13(a)(14)” in paragraph (e)(4); (10) replacing the phrase “this paragraph” with the phrase “this section” in paragraph (f); (11) replacing the phrase “each index” with the phrase “the index” in paragraph (f)(3)(iv)(B); (12) replacing the phrase “the self-regulatory organizations” with the phrase “any self-regulatory organization” in paragraph (f)(3)(vi); (13) replacing the phrase “Rule 17a–4” with the phrase “§ 240.17a–4” in paragraph (f)(3)(vii); and (14) in paragraph (g), replacing the phrase “section 15 of the Securities Exchange Act of 1934 as amended (48 Stat. 895, 49 Stat. 1377; 15 U.S.C. 78o)” with the phrase “section 15 of the Act (15 U.S.C. 78o).”

“annual audited financial statements” with the phrase “the annual financial statements” to reflect the broader range of documents required by Rule 17a–5. Due to the addition of paragraphs (b)(8)(xiv) and (xvi) to Rule 17a–4, as discussed above, the Commission proposed to redesignate paragraphs (b)(8)(xiv) and (xv) as paragraphs (b)(8)(xv) and (xvii), respectively.

The Commission proposed amendments to paragraph (h) of Rule 17a–4 that would add, after the phrase “Rule G–9 of the Municipal Securities Rulemaking Board,” the phrase “or any successor rule” to address the possibility of a future change in how the MSRB’s rules are designated.

The Commission received no comments on these proposed amendments and is adopting them substantially as proposed, with the modification discussed above about retaining references to “members.”<sup>234</sup> The Commission is also making certain non-substantive modifications to Rule 18a–6 as proposed in addition to those discussed above.<sup>235</sup>

<sup>234</sup> See Rule 17a–4, as amended. In addition to the differences discussed above between Rule 17a–4, as proposed to be amended, and Rule 17a–4, as amended, the Commission is adopting the following non-substantive changes to Rule 17a–4: (1) Removing the phrase “including a broker or dealer also registered as a security-based swap dealer or major security based swap participant under Section 15F(b) of the Act (15 U.S.C. 78x–8(b))” from the undesignated introductory paragraph for clarity; (2) removing “on the schedule” in paragraph (b)(8)(xiii) for clarity; (3) removing “or Form SBS” in paragraph (b)(8)(xiii) as it is no longer applicable; (4) adding “security-based swap” before the phrase “possession or control requirements” in paragraph (b)(8)(xiv) for clarity; (5) correcting references from § 240.18a–4 to § 240.15c3–3 in paragraph (b)(8)(xiv); (6) replacing “on Form SBS” with “in Part II of Form X–17A–5”; and (7) replacing “;” with “,” in paragraphs (b)(14) and (15) for internal consistency.

<sup>235</sup> See Rule 18a–6, as adopted. In particular, the non-substantive modifications to Rule 18a–6 are: (1) Replacing “record maintenance and preservation requirements” with “books and records requirements” in the undesignated introductory paragraph for internal consistency; (2) replacing “;” with “,” for each paragraph in Rule 18a–6 for internal consistency; (3) replacing “records required for corporation or partnerships,” all Forms SBSE (§ 249.617 of this chapter), Forms SBSE–A, Forms SBSE–W (§ 249.617 of this chapter),” with “records required for corporations or partnerships,” all Forms SBSE (§ 249.617 of this chapter), all Forms SBSE–A, all Forms SBSE–W (§ 249.617 of this chapter),” in paragraph (c) for consistency with paragraph (d) of Rule 17a–4, as amended; (4) pluralize “production” to “productions” in paragraph (e)(3)(i) for consistency with paragraph (f)(3)(i) of Rule 17a–4, as amended; (5) removing quotation marks around “the undersigned” in paragraph (e)(3)(vii) for consistency with paragraph (f)(3)(vii) of Rule 17a–4, as amended; (6) removing “under the Act” from paragraph (e)(3)(vii) for consistency with paragraph (f)(3)(vii) of Rule 17a–4, as amended; (7) adding “by the registrant” after the phrase “arrangements for the downloading of any record required to be maintained and preserved” in paragraph (e)(3)(vii) for consistency with paragraph (f)(3)(vii) of Rule 17a–4, as amended; (8) replacing

## B. Reporting

### 1. Introduction

The Commission in this document is establishing a reporting program for SBSBs and MSBSPs under Sections 15F and 17(a) of the Exchange Act that is modeled on the reporting program for broker-dealers in Rule 17a-5. Rule 17a-5 has two main elements: (1) A requirement that broker-dealers file periodic unaudited reports about their financial and operational condition using the FOCUS Report form; and (2) a requirement that broker-dealers annually file financial statements and certain reports, as well as reports covering those statements and reports prepared by an independent public accountant registered with the Public Company Accounting Oversight Board ("PCAOB") in accordance with PCAOB standards. The Commission proposed to amend Rule 17a-5 to account for the security-based swap activities of stand-alone broker-dealers and to establish a reporting regime for broker-dealer SBSBs and MSBSPs.<sup>236</sup> The Commission further proposed new Rule 18a-7 (which was modeled on Rule 17a-5) to establish a reporting regime for stand-alone and bank SBSBs and MSBSPs. The Commission is adopting the proposed amendments to Rule 17a-5 and new Rule 18a-7 with modifications, as discussed below.

A commenter requested clarification as to whether an OTC derivatives dealer dually registered as an SBSB or MSBSP would be subject to Rule 17a-5 or instead to new Rule 18a-7.<sup>237</sup> The applicability of Rule 17a-5 or 18a-7 will depend on whether the firm is subject to the capital requirements of Rule 15c3-1 (in which case Rule 17a-5 will apply), is subject to the capital requirements of Rules 18a-1 or 18a-2 (in which case Rule 18a-7 will apply), or has a prudential regulator (in which case Rule 18a-7 will apply).<sup>238</sup> Therefore, a stand-alone broker-dealer, including a stand-alone OTC derivatives dealer, (which is subject to Rule 15c3-1) will continue to be subject to Rule

"which are requested by a representative of the Commission" with "that are requested by a representative of the Commission" in paragraph (g) for consistency with paragraph (j) of Rule 17a-4, as amended.

<sup>236</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25221-47.

<sup>237</sup> See Letter from Angie Karna, Managing Director, Nomura Global Financial Products Inc. (Sept. 10, 2014) ("Nomura Letter").

<sup>238</sup> The undesignated introductory paragraphs to Rules 17a-5 and 18a-7 have been modified to clarify this application of the rules.

17a-5.<sup>239</sup> Similarly, a broker-dealer, other than an OTC derivatives dealer, that is also an SBSB (which is subject to Rule 15c3-1) will be subject to Rule 17a-5. A broker-dealer, including an OTC derivatives dealer, that is also an MSBSP (which is subject to Rule 15c3-1) will be subject to Rule 17a-5. A stand-alone SBSB (which is subject to Rule 18a-1) will be subject to Rule 18a-7. Similarly, an SBSB that is also an OTC derivatives dealer ("OTCDD/SBSB") (which is subject to Rule 18a-1) will be subject to Rule 18a-7.<sup>240</sup> A stand-alone MSBSP (which is subject to Rule 18a-2) will be subject to Rule 18a-7. Finally, a bank SBSB or MSBSP (which has a prudential regulator) will be subject to Rule 18a-7.

The Commission is also adopting amendments to the FOCUS Report. The Commission proposed to create a new part of the FOCUS Report—Form SBS—to be filed by all types of SBSBs and MSBSPs, while stand-alone broker-dealers would continue filing FOCUS Report Parts II, IIA, IIB, or II CSE, as applicable.<sup>241</sup> After further consideration of the issue, the Commission believes the best approach is to consolidate Form SBS and FOCUS Report Parts II, IIB, and II CSE into a single form: The FOCUS Report Part II. In addition, the Commission believes it is appropriate to adopt a new form—the FOCUS Report Part IIC—to be filed by bank SBSBs and MSBSPs rather than Form SBS as was proposed. The decision to require bank SBSBs and MSBSPs to file a separate form is based on the more limited information that they will need to provide on the form (as compared to FOCUS Report Part II filers). Consequently, broker-dealers that file the FOCUS Report Part II will continue to do so. ANC broker-dealers and OTC derivatives dealers also will file the FOCUS Report Part II, as will broker-dealer and stand-alone SBSBs

<sup>239</sup> Paragraph (p) of Rule 17a-5 provides that an OTC derivatives dealer may comply with Rule 17a-5 by complying with the provisions of Rule 17a-12.

<sup>240</sup> As discussed in this release, an OTC derivatives dealer dually registered as an SBSB is subject to Rules 17a-3, 17a-4, 17a-13, 18a-1, 18a-4, 18a-7, and 18a-8 rather than Rules 18a-5, 18a-6, 18a-9, 15c3-1, 15c3-3, 17a-5, and 17a-11, respectively. As a result, the Commission has made conforming modifications to Rule 18a-7. In particular, where Rule 18a-7 refers to Rule 18a-9, the Commission has added the following reference to Rule 17a-13: "or 240.17a-13, as applicable."

<sup>241</sup> The Commission requested comment on whether all broker-dealers, SBSBs, and MSBSPs should file the same consolidated form. See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25235-25236. The Commission received no comments specifically addressing this issue.

and MSBSPs. Bank SBSBs and MSBSPs will file the FOCUS Report Part IIC.

A commenter urged the Commission not to impose "position reporting requirements," arguing that they are unnecessary in light of the "transaction reporting requirements" of Regulation SBSR.<sup>242</sup> The Commission disagrees. The reporting requirements are designed to promote transparency of the financial and operational condition of a broker-dealer, SBSB, or MSBSP to the Commission and, in the case of a portion of the annual reports, to the public.<sup>243</sup> This information will assist the Commission staff in monitoring these firms and examining them for compliance with the securities laws. Position records are of a different nature, and serve a different purpose, than the transaction data that will be reported pursuant to Regulation SBSR. Specifically, position records provide an overview of a firm's holdings at a specific point in time. The commenter states that position reporting requirements are unnecessary "for purposes of market surveillance."<sup>244</sup> However, as discussed above, the recordkeeping requirements being adopted in this document are designed to elicit information about the financial and operation condition of the filer. Market surveillance is not the objective of the requirements. Finally, the commenter stated that if the Commission does adopt position reporting requirements, it "should limit the scope of such requirements for non-U.S. SBSBs to transactions that are either (i) cleared on a U.S.-registered clearing agency or derivatives clearing organization or (ii) opposite a U.S. person counterparty."<sup>245</sup> As discussed above, the purpose of the reporting requirements is to obtain information about the financial and operational condition of the filer. Limiting the requirements to a subset of the filer's positions would not provide a complete picture of the filer's financial and operational condition. Moreover, the Commission has proposed in a separate release additional provisions that are designed to address concerns about the cross-border application of certain requirements applicable to SBSBs and MSBSPs.<sup>246</sup>

<sup>242</sup> See Memorandum from the Division of Trading and Markets regarding a March 25, 2019 meeting with representatives of the Institute of International Bankers ("IIB 3/25/2019 Meeting").

<sup>243</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25221.

<sup>244</sup> See IIB 3/25/2019 Meeting.

<sup>245</sup> See *id.*

<sup>246</sup> See *Cross-Border Application Proposing Release*, 84 FR 24206.

## 2. Periodic Filing of FOCUS Report

## a. Rule 17a-5 and Rule 18a-7

## Undesignated Introductory Paragraph

The Commission proposed amending Rule 17a-5 to add an undesignated introductory paragraph stating that: (1) The rule applies to a broker-dealer, including a broker-dealer SBSD or MSBSP; and (2) a stand-alone or bank SBSD or MSBSP is subject to the reporting requirements under proposed Rule 18a-7.<sup>247</sup> The Commission also proposed amending Rule 17a-5 to remove paragraph (a)(1), which provides that paragraph (a) shall apply to every broker-dealer registered pursuant to Section 15 of the Exchange Act, because this text was redundant of the undesignated introductory paragraph of Rule 17a-5, as proposed to be added. Similarly, the Commission proposed that Rule 18a-7 have an undesignated introductory paragraph explaining that the rule applies to an SBSD or MSBSP that is not dually registered as a broker-dealer (*i.e.*, a stand-alone or bank SBSD or MSBSP). The Commission received no comments on the introductory paragraphs but, as discussed above, is modifying them to clarify which rule (17a-5 or 18a-7) applies to a given type of entity.<sup>248</sup> The Commission received no comments on the proposed amendment to remove paragraph (a)(1) from Rule 17a-5 and is adopting it as proposed.<sup>249</sup>

## Requirement To File the FOCUS Report

Rule 17a-5 requires a broker-dealer, other than an OTC derivatives dealer, to file FOCUS Report Part II or IIA.<sup>250</sup> The

<sup>247</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25222.

<sup>248</sup> See undesignated introductory paragraph of Rule 17a-5, as amended; undesignated introductory paragraph of Rule 18a-7, as adopted.

<sup>249</sup> See Rule 17a-5, as amended. As a consequence of the removal of paragraph (a)(1) of Rule 17a-5, paragraphs (a)(2)(i) through (iv) are redesignated paragraphs (a)(1)(i) through (iv), respectively. Further, as a consequence of the removal of paragraph (a)(1), paragraphs (a)(3) through (7) of Rule 17a-5 are redesignated paragraphs (a)(2) through (6), respectively.

<sup>250</sup> Prior to these amendments, the requirement that an OTC derivatives dealer file FOCUS Report Part IIB was set forth in paragraph (a) of Rule 17a-12. While an ANC broker-dealer is required under paragraph (a) of Rule 17a-5 to file FOCUS Report Part II, FINRA Rule 4521(b) provides that ANC broker-dealers must file supplemental and alternative reports as may be prescribed by FINRA. Under this rule, FINRA requires ANC broker-dealers to file FOCUS Report Part II CSE in lieu of FOCUS Report Part IIA. See also *Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Rule Change to Require Members That Use Appendix E to Calculate Net Capital to File Supplemental and Alternative Reports*, 70 FR 49349 (Commission approval of amendments to NYSE Rule 418 requiring ANC broker-dealers to file Part II CSE).

Commission proposed amending the rule to require a broker-dealer SBSD or MSBSP to file proposed Form SBS rather than the FOCUS Report Part II or IIA.<sup>251</sup> The Commission also proposed including parallel requirements in Rule 18a-7 that: (1) Stand-alone SBSDs and MSBSPs be required to file proposed Form SBS with the Commission or its designee within seventeen business days after the end of each month; and (2) bank SBSDs and MSBSPs be required to file Form SBS with the Commission or its designee within seventeen business days after the end of each calendar quarter (instead of each month).<sup>252</sup> The Commission proposed quarterly financial reporting for bank SBSDs and MSBSPs, instead of monthly reporting, because the prudential regulators currently require banks to file reports of financial and operational condition known as “call reports” on a quarterly basis.<sup>253</sup> Under the proposal, the information reported by bank SBSDs and MSBSPs on the FOCUS Report Part IIC largely would be information that banks are required to provide in the call reports.

In response to the Commission’s proposal to require bank SBSDs and MSBSPs to file Form SBS seventeen business days after the end of the quarter, a commenter requested that it change the deadline to match the prudential regulators’ requirement to file call reports thirty calendar days after the end of the quarter.<sup>254</sup> To respond to the commenter’s concerns, as well as to promote harmonization with prudential regulators’ requirements, the Commission is adopting a thirty calendar-day requirement as requested by the commenter. Since the proposed seventeen business-day requirement would have corresponded with twenty-four calendar days (with a conservative assumption of no public holidays), this will provide administrative relief to bank SBSDs and MSBSPs by allowing them six additional calendar days to file

<sup>251</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25222–24.

<sup>252</sup> In each case, the stand-alone or bank SBSD or MSBSP needed to file Form SBS with the Commission or its designee. The reference to a Commission designee was designed to provide the Commission with the option of requiring that these registrants file the FOCUS Report with a third party. Most broker-dealers file the FOCUS Report directly with their SROs pursuant to plans established by the SROs under paragraph (a)(3) (formerly paragraph (a)(4)) of Rule 17a-5, as amended. See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25223.

<sup>253</sup> See Consolidated Reports of Condition and Income for a Bank with Domestic and Foreign Offices—FFIEC 031 (“FFIEC Form 031” or “call report”). See also 12 U.S.C. 161; 12 U.S.C. 324; 12 U.S.C. 1464; 12 U.S.C. 1817.

<sup>254</sup> See SIFMA 9/5/2014 Letter.

the FOCUS Report Part IIC with the Commission.

The Commission also proposed amendments to Rule 17a-5 to make explicit the requirement that the FOCUS Report filed by a stand-alone broker-dealer or the Form SBS filed by a broker-dealer SBSD or MSBSP must be “executed.”<sup>255</sup> The Commission proposed parallel requirements in Rule 18a-7 to require that a Form SBS filed by a stand-alone or bank SBSD or MSBSP must be executed. The Commission received no comment on these proposals for executed forms. For the reasons discussed above, the Commission is adopting the FOCUS Report filing requirements substantially as proposed.<sup>256</sup>

## Additional Reporting Requirements for Registrants That Use Models

Rule 17a-5 requires ANC broker-dealers to file additional reports on a monthly or quarterly basis with the FOCUS Report.<sup>257</sup> The Commission proposed similar reporting requirements in Rule 18a-7 for stand-alone SBSDs approved to use internal models to compute net capital.<sup>258</sup> These entities would be required to file most of the required documents within 17 business days after the end of each month. However, to correspond with the timing requirement in the proposed capital rule for these entities (Rule 18a-1),<sup>259</sup> they would be required to file the following reports within seventeen business days after the end of each calendar quarter (instead of each month): A report identifying the number of business days for which the actual daily net trading loss exceeded the corresponding daily value at risk (“VaR”); and the results of backtesting of all internal models used to compute allowable capital, indicating the number of backtesting exceptions.

<sup>255</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25224. Prior to these amendments, the FOCUS Report Parts II, IIA, IIB, and II CSE each had a section for the filer to execute the form.

<sup>256</sup> See paragraph (a) of Rule 17a-5, as amended; paragraphs (a)(1) and (2) of Rule 18a-7, as adopted. References in these paragraphs to Form SBS are changed to references to the FOCUS Report Part II and the FOCUS Report Part IIC, respectively. Similarly, references to Form SBS were also included in paragraphs (a)(1), (3), and (4), (b)(1), (d)(2)(i) and (iii), and (e)(3) of Rule 17a-5, as proposed to be amended. The references to proposed Form SBS are not being adopted and these provisions will continue to refer solely to the FOCUS Report. As discussed above, the requirement that an OTCDD/SBSD file the FOCUS Report Part II is prescribed in Rule 18a-7 (rather than 17a-5, as proposed).

<sup>257</sup> See paragraph (a)(5) of Rule 17a-5, as amended.

<sup>258</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25224.

<sup>259</sup> See *Capital, Margin, and Segregation Proposing Release*, 77 FR at 70237–40.

The Commission received no comment on these additional reporting proposals for stand-alone SBSBs and has adopted Rule 18a-1.<sup>260</sup> Consequently, the Commission is adopting the additional reporting requirements, but with the modification that an OTCDD/SBSB must file them pursuant to Rule 18a-7 (rather than Rule 17a-5).<sup>261</sup>

#### b. FOCUS Report

As discussed above, the Commission proposed Form SBS as the reporting form for all categories of SBSBs and MSBSPs. Proposed Form SBS was modeled on the FOCUS Report, particularly FOCUS Report Part II CSE. FOCUS Report Part II CSE served as the template for proposed Form SBS because it was designed to account for the use of internal models to compute net capital by ANC broker-dealers and elicits more detailed information about derivatives positions and exposures than FOCUS Report Parts II and IIA.<sup>262</sup> Based on staff experience, including experience monitoring ANC broker-dealers, the Commission anticipates that most SBSBs will use internal models to compute their net capital.<sup>263</sup>

However, as discussed above, the Commission is not adopting Form SBS as proposed, but is instead requiring the FOCUS Report Part II to be filed by nonbank SBSBs and MSBSPs. Further, the Commission is requiring that bank SBSBs and MSBSPs file FOCUS Report Part IIC (rather than proposed Form SBS or the FOCUS Report Part II, as amended). The information that must be provided by SBSBs and MSBSPs is substantively the same information elicited by proposed Form SBS, except that the information is now being elicited in FOCUS Report Parts II and IIC. Accordingly, the Commission is adopting changes to FOCUS Report Part II and the corresponding instructions to update the form, reflect the required

filers, and account for these firms' derivatives activity.

Thus, ANC broker-dealers that filed Part II CSE prior to these amendments and OTC derivatives dealers that filed Part IIB prior to these amendments instead will be required to file FOCUS Report Part II, as amended—FOCUS Report Parts II CSE and IIB will be discontinued. From the perspective of these entities, the information they will be required to enter into the revised FOCUS Report Part II as compared to FOCUS Report Parts II CSE and IIB is substantively the same. Similarly, from the perspective of broker-dealers that were required to file FOCUS Report Part II prior to these amendments, the information they will be required to enter into the revised form is substantively the same.<sup>264</sup> Importantly, there is already significant overlap among the four forms filed on the eFOCUS system of the Financial Industry Regulatory Authority ("FINRA"): The FOCUS Report Parts II, IIA, IIB, and II CSE.<sup>265</sup> Much of this

<sup>264</sup> In addition to the differences between Form SBS, as proposed to be adopted, and FOCUS Report Part II, as amended, as discussed below, broker-dealers will note the following general changes: (1) There are new sections added to the form that these firms may not be required to complete (e.g., Computation of Tangible Net Worth, which is required to be completed by stand-alone MSBSPs); (2) certain lines are worded differently or assigned different line item numbers (e.g., Pre-Amendment FOCUS Report Part II's "Money differences" (line item numbers 5000, 5010, 5020, and 5030) is relabeled "Money suspense and balancing difference" (line item numbers 5610, 5610, 6010, and 6012) in FOCUS Report Part II, as amended); (3) to the extent these entities engage in security-based swap or swap activities but are not SBSBs or MSBSPs, they will now have specific line items tailored to these products in which to input information; and (4) broker-dealers registered as FCMs are required to complete certain new sections the CFTC added to the CFTC's Form 1-FR-FCM in 2013. See *Enhancing Protections Afforded Customers and Customer Funds Held by Futures Commission Merchants and Derivatives Clearing Organizations*, 78 FR 68506, 68513 (Nov. 14, 2013); 17 CFR 1.10(h) (allowing broker-dealers to file the FOCUS Report instead of Form 1-FR-FCM so long as all information required to be furnished on and submitted with Form 1-FR-FCM is provided with the FOCUS Report)).

<sup>265</sup> For example, all of the forms contain a cover page and contain (with variations): A statement of financial condition, a computation of net capital, a computation of the net capital requirement, a statement of income (loss), a statement of changes in ownership equity, a statement of changes in subordinated liabilities, and a statement of ownership equity and subordinated liabilities maturing or proposing to be withdrawn within the next six months. In addition, all of the forms except FOCUS Report Part IIA elicit financial and operational data; both FOCUS Report Parts II and II CSE contain (with variations): A computation for determination of reserve requirements under Rule 15c3-3, information for possession or control requirements under Rule 15c3-3, and a schedule of segregation requirements; and both FOCUS Report Parts IIB and II CSE contain (with variations): A schedule of aggregate securities and OTC

duplication and overlap between forms is eliminated by combining the forms into a single revised FOCUS Report Part II and modifying the form to include the line items that were in proposed Form SBS.

The Commission believes that broker-dealers registering as an SBSB or MSBSP will find the consolidation preferable, since rather than familiarizing themselves with a new form (Form SBS), such dual registrants can continue to file FOCUS Report Part II, as amended. The consolidation is also expected to enhance the Commission's supervisory capacities, since it will be easier to compare different types of registrants' FOCUS Report responses when they are filing the same form.

Bank SBSBs and MSBSPs will file FOCUS Report Part IIC, which elicits more limited information than FOCUS Report Part II. Moreover, much of the information elicited is already reported by these entities on their call reports. The Commission believes that bank SBSBs and MSBSPs will find it simpler to utilize the shorter FOCUS Report Part IIC, which is tailored to these entities and focuses on their business as an SBSB or MSBSP. Indeed, bank SBSBs and MSBSPs would have shared only one section in common with other Form SBS filers (the cover page), so the vast majority of Form SBS would not have been applicable to these bank entities.<sup>266</sup> In addition, the capital and margin requirements applicable to nonbank SBSBs and MSBSPs—which are the source of the information input into the revised FOCUS Report Part II—do not apply to bank SBSBs and MSBSPs. Bank SBSBs and MSBSPs are instructed to follow FFIEC Form 031's instructions regarding a majority of the line items on FOCUS Report Part IIC, as adopted, since most of the sections require these entities to report general financial information that banks are already required to report on FFIEC Form 031.

FOCUS Report Part II, as amended, continues to elicit financial and

derivatives positions, a schedule of geographic distribution of OTC derivatives exposures, a credit concentration report, and a portfolio summary of OTC derivatives exposures by internal credit rating.

<sup>266</sup> The reporting requirements in Rule 18a-7 and the sections of the FOCUS Report applicable to bank SBSBs and MSBSPs are more limited in scope because bank SBSBs and MSBSPs are subject to the prudential regulators' reporting requirements. Further, the prudential regulators—rather than the Commission—are responsible for capital, margin, and other prudential requirements applicable to bank SBSBs and MSBSPs. For these reasons, the reporting requirements for bank SBSBs and MSBSPs are tailored to their activities as an SBSB or an MSBSP (as opposed to their activities as banks).

<sup>260</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 44052.

<sup>261</sup> See paragraphs (a)(3)(i) through (ix) of Rule 18a-7, as adopted. As proposed, paragraph (a)(3)(vii) of Rule 18a-7 would have required a stand-alone SBSB authorized to use internal models to calculate net capital to report the results of a monthly liquidity stress test. As discussed above, the Commission is deferring consideration of the liquidity stress test requirements for these entities and, therefore, this paragraph is being designated as "[Reserved]."

<sup>262</sup> FOCUS Report Part IIB elicits similar information about derivatives positions and exposures but otherwise is more limited than FOCUS Report Part II CSE because OTC derivatives dealers are permitted to engage only in a narrow range of activities. See 17 CFR 240.3b-12; 17 CFR 240.15a-1. See also *Recordkeeping and Reporting Proposing Release*, 79 FR at 25224, n. 440.

<sup>263</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43959-60.

operational information about a filer through sections consisting of uniquely numbered line items.<sup>267</sup> To the extent a line item number has already been assigned in FOCUS Report Parts II, IIA, IIB, and/or II CSE, revised FOCUS Report Part II uses the same line item number. However, the amended form also includes new lines and corresponding line items that were proposed in Form SBS and are relevant to security-based swap and swap activities. These line items are identified by numbers on revised FOCUS Report Part II with a 5-digit number beginning with 12000 and generally increasing upward.

Proposed Form SBS would have been divided into five parts.<sup>268</sup> FOCUS Report Part II, as amended, and FOCUS Report Part IIC, as adopted, are not divided into parts. Dividing the form into parts was a more useful approach when bank entities would have been required to file the same form as nonbank entities. However, now that bank SBSDs and MSBSPs will separately file FOCUS Report Part IIC, there is no longer a need to subdivide the form into parts based on the type of registrant (*e.g.*, bank SBSD versus broker-dealer SBSD). In addition, separate parts are not necessary because the header at the top of each page of FOCUS Report Parts II and IIC identifies the type of registrants required to complete that page (as proposed in Form SBS). Nonetheless, the sections of revised FOCUS Report Part II appear in the same order as they appeared in proposed Form SBS, so they still follow the logic used to order the sections in the proposed form.

The Commission is amending the instructions for FOCUS Report Part II and adopting instructions for FOCUS Report Part IIC to provide further guidance on the information to be entered into certain line items.<sup>269</sup>

<sup>267</sup> As used in this release, the term “line” refers to the lines in the left column on the FOCUS Report that describe the type of entries to be made on that line. The term “line item” refers to the fields into which information is entered. For example, Line 1 of the Statement of Income (Loss) section on revised FOCUS Report Part II is cash, Line Item 200 is the field to enter the allowable amount of cash, and Line Item 750 is the field to enter the total amount of cash.

<sup>268</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25224–36.

<sup>269</sup> See FOCUS Report Part II instructions, as amended; FOCUS Report Part IIC instructions, as adopted. The amendments to the instructions include incorporating relevant instructions from proposed Form SBS into the instructions for FOCUS Report Parts II and IIC, as well as globally replacing “non-bank” with “nonbank” for internal consistency.

#### i. Revised FOCUS Report Part II Cover Page

The FOCUS Report Parts II, IIA, IIB, and II CSE prior to these amendments (collectively and individually, the “Pre-Amendment FOCUS Reports”) include a cover page that elicits basic information about the reporting firm. Proposed Form SBS included a cover page largely in the same format as the cover page in Pre-Amendment FOCUS Report Part II, but with modifications to account for the additional registrants required to file the form.<sup>270</sup> The Commission is adopting the cover page in proposed Form SBS by retaining the existing cover page in FOCUS Report Part II, as amended, with non-substantive changes largely to account for the additional registrants required to use this form (stand-alone broker-dealers, ANC broker-dealers, OTC derivatives dealers, and broker-dealer and stand-alone SBSDs and MSBSPs) and in response to comment.<sup>271</sup>

#### Statement of Financial Condition

The Pre-Amendment FOCUS Reports have a Statement of Financial Condition section that elicits detail about filers’ assets, liabilities, and ownership equity. Proposed Form SBS similarly had a Statement of Financial Condition section largely modeled on the parallel section in Pre-Amendment FOCUS Report Part II CSE.<sup>272</sup> The Commission received a number of comments on this proposed section and has modified it in response to these comments.

First, a commenter suggested that Lines 8 through 10 on the assets side of the Statement of Financial Condition section (which elicited details about securities, including security-based swaps, commodities, and swaps

<sup>270</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25225.

<sup>271</sup> See FOCUS Report Part II, as amended, *Cover Page*. The following changes are being made: (1) The line soliciting firms to check the type of registrant filing the form is updated to reflect that bank SBSDs and MSBSPs will not be required to file this part of the FOCUS Report Part II; (2) in response to commenters’ requests to more explicitly address OTC derivatives dealers, the option is added to check a box if the respondent is an OTC derivatives dealer (*see, e.g.*, Nomura Letter); (3) in response to comment that Form SBS, as proposed to be adopted, did not reference foreign SBSDs or foreign MSBSPs, a line is added asking firms if the filer is a U.S. person (*see* SIFMA 9/5/2014 Letter); (4) a line is added asking whether the filer is authorized to use models to compute capital as a way to check that the firm is completing the correct net capital section in the form; (5) a typographical error is corrected so that the officer’s title under the signature line matches the officer’s title under the line for the signing officer to print his or her name; and (6) the date field is made more flexible by specifying “2\_\_” instead of “20\_\_.”

<sup>272</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25226–27.

positions) should be simplified and consolidated into a single line item.<sup>273</sup> As discussed below, the revised FOCUS Report Part II elicits details about these positions in other sections of the form. Accordingly, the Commission is consolidating these lines into Line 9 (Total net securities, commodities, and swaps positions) and making a corresponding modification in Line 24 of the liability side of the section (Total net securities, commodities, and swaps positions).<sup>274</sup>

Second, the Statement of Financial Condition section of proposed Form SBS required filers to report the amount of certain assets and liabilities that were includable in the broker-dealer customer reserve formula, the proposed SBS reserve formula, and a catch-all “other” section in which information about assets and liabilities related to segregation requirements under the CEA would be entered if the filer is also registered with the CFTC.<sup>275</sup> Given that Commission and CEA segregation requirements are the most widely applicable segregation requirements for FOCUS Report filers, the Commission is consolidating the reporting of these amounts into single lines to the extent applicable.<sup>276</sup>

Third, the Statement of Financial Condition section of proposed Form SBS required filers to report information about payables due to securities customers and non-customers, security-based swap customers and non-customers, and swap customers and non-customers.<sup>277</sup> A commenter suggested simplifying the form by deleting payables to security-based swap and swap customers and non-customers from the Statement of Financial Condition and capturing this information in the schedule that elicits detail on derivatives positions.<sup>278</sup> The Commission agrees and has deleted these line items from this section and, instead, requires the information to be reported in Schedule 1 to FOCUS Report Part II, as amended.<sup>279</sup> Similarly,

<sup>273</sup> See, *e.g.*, SIFMA 9/5/2014 Letter.

<sup>274</sup> See FOCUS Report Part II, as amended, *Statement of Financial Condition*, Lines 8 and 22.

<sup>275</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25227.

<sup>276</sup> See FOCUS Report Part II, as amended, *Statement of Financial Condition*, Lines 3A1, 3B1, 3C1, 3D1 (receivables), 17A (bank loans payable), 19A1, 19B1, 19C1, 19D1, and 19E1 (payables). Further, the Commission has adopted the SBS reserve segregation requirements that will generate amounts includable in these line items. *See Capital, Margin, and Segregation Adopting Release*, 84 FR at 43930–43.

<sup>277</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25227.

<sup>278</sup> See SIFMA 9/5/2014 Letter.

<sup>279</sup> See FOCUS Report Part II, as amended, *Statement of Financial Condition*, Schedule 1—

the commenter noted the imbalance of requiring the reporting of other derivatives payables on the liabilities side of the balance sheet, but not requiring the reporting of other derivatives receivable on the assets side of the balance sheet.<sup>280</sup> The Commission agrees and filers no longer must report other derivatives payable on the Statement of Financial Condition section and instead will report this information on Schedule 1 to FOCUS Report Part II, as amended.<sup>281</sup>

Fourth, the Statement of Financial Condition section of proposed Form SBS directed filers to report ownership equity from sole proprietorships, partnerships, corporations, and limited partners. The Commission is adding a reference to “members” in Line 29 of the Statement of Financial Condition in FOCUS Report Part II, as amended, instead of solely referencing “limited partners.” This change recognizes the legal structure of limited liability companies as well.

Fifth, lines are being added to the assets and liabilities sides of the Statement of Financial Condition for filers to report excess cash collateral pledged on derivative transactions (Lines 6 and 21 on FOCUS Report Part II, as amended). On the assets side, a broker-dealer or SBSB will report cash collateral posted to a counterparty that exceeds the amount of variation margin the firm has posted to cover current exposure. On the liability side, the broker-dealer or SBSB will report cash collateral posted from a counterparty that is in excess of the amount of variation margin the counterparty is required to post to cover current exposure. The addition of these lines requires firms to report the specific amounts on the asset side that are allowable and non-allowable assets. Establishing unique lines to report this information will avoid firms reporting the amounts in other lines that are not specifically tailored to present the information, which—based on staff experience—has resulted in firms reporting the information on several different lines. For the foregoing reasons, the Statement of Financial Condition section in proposed Form SBS is being adopted by retaining the parallel section in FOCUS Report Part II, as amended, with the modifications discussed above and certain other

*Aggregate Securities, Commodities, and Swaps Positions.*

<sup>280</sup> See, e.g., SIFMA 9/5/2014 Letter.

<sup>281</sup> See FOCUS Report Part II, as amended, Schedule 1—Aggregate Securities, Commodities, and Swaps Positions.

modifications.<sup>282</sup> This section is required to be completed by stand-alone broker-dealers and broker-dealer and stand-alone SBSBs and MSBSPs.

#### Computation of Net Capital

The Pre-Amendment FOCUS Reports have a Computation of Net Capital section. Proposed Form SBS included two sections: One to be completed by SBSBs authorized to use internal models to compute net capital under the proposed capital requirements and the other to be completed by filers not authorized to use internal models for this purpose.<sup>283</sup> The Commission has adopted capital requirements for nonbank SBSBs under which certain firms may be authorized to use internal models to compute net capital.<sup>284</sup>

The Computation of Net Capital section for filers authorized to use models was largely modeled on the parallel section in Pre-Amendment FOCUS Report Part II CSE. The section in proposed Form SBS had a line for filers to report their contractual securities commitments because this line appeared on the Computation of Net Capital section in Pre-Amendment FOCUS Report Part II.<sup>285</sup> However, this line item does not apply to filers authorized to use models and is removing it from the section.<sup>286</sup>

In addition, a commenter requested that the Computation of Net Capital section for filers authorized to use internal models account for firms approved to use the Basel 2.5 framework to compute market risk deductions.<sup>287</sup> The Commission agrees and has added new Line 10 that elicits detail about

<sup>282</sup> See FOCUS Report Part II, as amended, *Statement of Financial Condition*. The following non-substantive changes are being made: (1) A line item is added for firms to report non-allowable cash (e.g., petty or restricted cash); (2) the note on the second page of the Statement of Financial Condition clarifies that “Stand-alone MSBSPs should only complete the Allowable and Total columns” (emphasis added); this sentence is also added to the instructions for the *Statement of Financial Condition*; (3) an obsolete accounting reference is updated globally (including on Line 15E, which was proposed as Line 14E) to accurately reflect “ASC 860” instead of “SFAS 140”; and (4) the instructions are updated to reflect the changes discussed in this section.

<sup>283</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25227–28.

<sup>284</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43898–905.

<sup>285</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25228.

<sup>286</sup> The FOCUS Report instructions clarify that contractual securities commitments not accounted for in the firm’s VaR model will continue to be accounted for in residual marketable securities (Line Item 3665). See FOCUS Report Part II instructions, as amended.

<sup>287</sup> See Email from Mary Kay Scucci, Managing Director, Securities Industry and Financial Markets Association (May 10, 2018) (“SIFMA 5/10/2018 Email”).

market risk deductions computed under the Basel 2.5 framework.<sup>288</sup> This will provide the Commission and other relevant securities regulators with greater detail about the components of the firms’ calculations.

For the foregoing reasons, the Computation of Net Capital section for filers authorized to use models in Form SBS is being adopted by adding that section to FOCUS Report Part II, as amended, with the modifications discussed above and certain other modifications.<sup>289</sup> This section is required to be completed by stand-alone broker-dealers and broker-dealer and stand-alone SBSBs and MSBSPs authorized to use internal models to compute net capital.

The Computation of Net Capital section in proposed Form SBS for filers not authorized to use models was largely the same as the parallel section in Pre-Amendment FOCUS Report Part II. The Commission received no comment on this section. However, the Commission is adding new Line 9.C.8., titled “Risk-based haircuts computed under 17 CFR 240.15c3–1a or 17 CFR 240.18a–1a” and updating the instructions to FOCUS Report Part II accordingly. This change is intended to provide a specific line to report this information. The staff has observed that because the form currently does not have a unique line to enter the information, firms enter the information on several different lines. The Commission is also adopting non-substantive modifications to promote clarity.<sup>290</sup> This section is required to be completed by stand-alone broker-dealers and broker-dealer and stand-alone SBSBs and MSBSPs not authorized to use internal models to compute net capital.

#### Computation of Minimum Regulatory Capital Requirements

The Pre-Amendment FOCUS Reports have a Computation of Minimum

<sup>288</sup> See FOCUS Report Part II, as amended, *Computation of Net Capital (Filer Authorized to Use Models)*, Line 10. For firms not using the Basel 2.5 framework, the calculations are consolidated into Line 9 and the subsequent lines are renumbered accordingly.

<sup>289</sup> See FOCUS Report Part II, as amended, *Computation of Net Capital (Filer Authorized to Use Models)*. The following change is being made: Line 11 now refers to “certain counterparties” instead of “commercial end user counterparties” for consistency with Rules 15c3–1 and 18a–1, as adopted. See paragraph (a)(7) of Rule 15c3–1; paragraph (a)(2) Rule 18a–1, as adopted.

<sup>290</sup> See FOCUS Report Part II, as amended, *Computation of Net Capital (Filer Not Authorized to Use Models)*. The following change is being made: Line 12 now clarifies in parentheses that Line 12 is equal to the “sum of Lines 9A through 9E, 10, and 11.”

Regulatory Capital Requirements section in which a broker-dealer inputs the calculation of its minimum net capital requirement. Proposed Form SBS included two such sections: One to be completed by broker-dealer SBSs and MSBSPs and the other to be completed by stand-alone SBSs.<sup>291</sup> Proposed Form SBS included these separate sections because the proposed minimum net capital computation applicable to a broker-dealer SBS differs from the computation applicable to a stand-alone SBS. The section for broker-dealer SBSs was largely modeled on the parallel section in Pre-Amendment FOCUS Report Part II used by broker-dealers. The section for stand-alone SBSs was a substantially scaled down version of that section reflecting the simpler calculation these entities would perform under the proposed nonbank SBS capital rule (Rule 18a-1). The Commission received no comment on either of the proposed sections and has adopted capital requirements for nonbank SBSs under which these firms will need to calculate a minimum net capital requirement.<sup>292</sup> However, because an OTCDD/SBS will be subject to Rule 18a-1, the Computation of Minimum Regulatory Capital Requirements sections have been modified to indicate that an OTCDD/SBS must complete the simpler section that will also be used by stand-alone SBSs. Consequently, these sections in proposed Form SBS are being adopted with this modification and additional non-substantive modifications by retaining the parallel section in FOCUS Report Part II, as amended, to be used by stand-alone broker-dealers, broker-dealer SBSs (other than OTCDD/SBSs), and broker-dealer MSBSPs, and adding the section for stand-alone SBSs and OTCDD/SBSs.<sup>293</sup>

<sup>291</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25229.

<sup>292</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43879-906.

<sup>293</sup> See FOCUS Report Part II, as amended, *Computation of Minimum Regulatory Capital Requirements (Broker-Dealer) and Computation of Minimum Regulatory Capital Requirements (Non-Broker-Dealer SBS)*. The following changes are being made: (1) Because Line 4 appeared twice in the broker-dealer version in Form SBS, as proposed to be adopted, the second Line 4 is renumbered Line 5 and the subsequent lines are renumbered accordingly; (2) in the broker-dealer version, Line 5B titled "Minimum CFTC net capital requirement" adds "(if applicable)" to the end of the line to clarify that not all firms will need to complete this line; (3) to reflect the staggered implementation of the risk margin amount computation in the nonbank SBS capital rule, Line 5 refers generally to the percentage of the risk margin amount computed under the net capital rule rather than specifically referencing "8%" of the risk margin amount; (4) in the broker-dealer version, the

#### Computation of Tangible Net Worth

The Commission's proposed capital requirement for stand-alone MSBSPs and broker-dealer MSBSPs in Rule 18a-2 was a tangible net worth test.<sup>294</sup> Accordingly, proposed Form SBS included a Computation of Tangible Net Worth section to be completed by stand-alone MSBSPs and broker-dealer MSBSPs.<sup>295</sup> The Commission received no comment on this section. However, the Commission ultimately adopted Rule 18a-2 to apply solely to stand-alone MSBSPs (*i.e.*, not to broker-dealer MSBSPs, which are subject to Rule 15c3-1).<sup>296</sup> Accordingly, the Computation of Tangible Net Worth section in proposed Form SBS is being adopted as an addition to the FOCUS Report Part II with the modification that it applies only to stand-alone MSBSPs.<sup>297</sup>

#### Statement of Income (Loss) or Statement of Comprehensive Income

The Pre-Amendment FOCUS Reports have a Statement of Income (Loss) section in which filers enter information about revenues and expenses. In 2012, the Commission approved a FINRA rule change to adopt Form SSOI (Supplemental Statement of Income), which elicits more detailed information about revenues and expenses.<sup>298</sup> Proposed Form SBS included a

sub-section titled "Computation of Aggregate Indebtedness" adds "(If Applicable)" to the end of the title to clarify that not all firms will need to complete this sub-section; (5) in the broker-dealer version, for clarity and for consistency with Pre-Amendment FOCUS Report Part II, Line 10 now reads "Total aggregate indebtedness liabilities from Statement of Financial Condition (Item 1760)" instead of "Total liabilities from Statement of Financial Condition (Item 1760)"; (6) in the stand-alone SBS version, the title of the Computation of Minimum Regulatory Capital Requirements section clarifies that it applies to a "non-broker-dealer SBS" instead of to any "non-broker-dealer"; (7) in the stand-alone SBS version, Line 7 corrects a cross-reference to read "(greater of Lines 5 and 6)" rather than "(greater of Lines 4 and 5)"; (8) in the stand-alone SBS version, Line 9 corrects a cross-reference so that it refers to "Line 7" instead of "Line 6"; and (9) the instructions for the broker-dealer version correct a cross-reference to CFTC Regulation 1.17 so that it refers to "8%" (instead of "4%") of the amount required to be segregated pursuant to the CEA. See 17 CFR 1.17(a)(1)(i)(B).

<sup>294</sup> See *Capital, Margin, and Segregation Proposing Release*, 77 FR at 70256-57.

<sup>295</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25230.

<sup>296</sup> See Rule 18a-2, as adopted.

<sup>297</sup> See FOCUS Report Part II, as amended, *Computation of Tangible Net Worth*.

<sup>298</sup> See Self-Regulatory Organizations; FINRA; *Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified By Amendment No. 2, Adopting FINRA Rule 4524 (Supplemental FOCUS Information) and Proposed Supplementary Schedule to the Statement of Income (Loss) Page of FOCUS Reports*, Exchange Act Release No. 66364 (Feb. 9, 2012), 77 FR 8938 (Feb. 15, 2012).

Statement of Income (Loss) section modeled on the more detailed Form SSOI to simplify the filings broker-dealers would need to make with the Commission and their designated examining authority ("DEA").<sup>299</sup>

The Commission proposed to incorporate Form SSOI into the Statement of Income (Loss) section of proposed Form SBS. The Commission understands, however, that firms sometimes are required to disclose their FOCUS Reports to third parties for commercial reasons, potentially raising privacy concerns. The Commission further understands that the income information disclosed in Form SSOI is highly proprietary, given the level of detail required to be disclosed in the form. Moreover, the Commission already has access to the information in Form SSOI. Consequently, the Commission believes that it is not necessary to incorporate all the Form SSOI elements into the Statement of Income (Loss).<sup>300</sup>

The Commission recently amended the Statement of Income (Loss) sections in FOCUS Report Parts II, IIA, and IIB to elicit information about comprehensive income and rename the sections "Statement of Income (Loss) or Statement of Comprehensive Income."<sup>301</sup> Accordingly, the Statement of Income (Loss) in proposed Form SBS is being adopted by retaining the Statement of Income (Loss) or Statement of Comprehensive Income section in FOCUS Report Part II, as amended. However, the Commission is adding a new line—Line 3—to the Statement of Income (Loss) or Statement of Comprehensive Income, as amended. This line elicits information about gains or losses from derivatives trading that was elicited on Line Item 3926 on Form SSOI and FOCUS Report Part II CSE. The Commission is also adopting several other non-substantive modifications to this section of FOCUS Report Part II.<sup>302</sup> The Statement of

<sup>299</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25229-30.

<sup>300</sup> The Commission renamed this section of the form in 2018. See *Disclosure Update and Simplification*, Exchange Act Release No. 83875 (Aug. 17, 2018), 83 FR 50148 (Oct. 4, 2018).

<sup>301</sup> See *id.*

<sup>302</sup> See revised FOCUS Report Part II, as amended, *Statement of Income (Loss) or Statement of Comprehensive Income*. The following changes are made: (1) On Line 5, "Profit or losses from underwriting and selling groups" is replaced with "Gains or losses from underwriting and selling groups" for consistency with the terminology used in Lines 2 and 3; (2) on Line 10, "Commodities revenue" is replaced with "Gains or losses on commodities" for consistency with the terminology used in Lines 1 through 5; (3) in the instructions for this section, "brokers" is globally replaced with "broker-dealers"; (4) Line 36 is updated to read

Income (Loss) or Statement of Comprehensive Income must be completed by stand-alone broker-dealers and broker-dealer and stand-alone SBSBs and MSBSPs.

#### Capital Withdrawals and Capital Withdrawals—Recap

The Pre-Amendment FOCUS Report Parts II, IIB, and II CSE have a Capital Withdrawal section and a Capital Withdrawals—Recap section that elicit details about filers' ownership equity and subordinated liabilities maturing or proposed to be withdrawn within the next six months, and accruals which have not been deducted in the computation of net capital. Proposed Form SBS had these two sections, which were largely modeled on the parallel sections in Pre-Amendment FOCUS Report Parts II and II CSE.<sup>303</sup> The Commission received no comment on these sections and has adopted capital requirements for nonbank SBSBs under which these firms will be subject to a net capital requirement.<sup>304</sup> Consequently, the Commission is adopting these sections in proposed Form SBS by retaining the parallel sections in FOCUS Report Part II, as amended, with certain non-substantive modifications.<sup>305</sup> These sections are

“Net income (current month only) before comprehensive income and provision for federal income taxes” (emphasis added) in response to broker-dealers' requests for clarification after the adoption of the Commission's *Disclosure Update and Simplification* release; (5) in the instructions for this section, the instruction for “principal transaction including unrealized gains and losses” is not included because it does not correspond with a specific line of this section; and (6) the *Statement of Income (Loss) or Statement of Comprehensive Income* section also contains non-substantive punctuation changes.

<sup>303</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25226.

<sup>304</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43879–906.

<sup>305</sup> See FOCUS Report Part II, as amended, *Capital Withdrawals and Capital Withdrawals—Recap*. The following changes are being made: (1) For internal consistency and to avoid confusion with the schedules at the end of revised FOCUS Report Part II, the text at the bottom of the Capital Withdrawals section now refers to “This section” instead of “The schedule”; (2) for internal consistency with Lines 1A and 1A2 in the Capital Withdrawals—Recap section which reference LLCs, the title for the Statement of Changes in Ownership Equity subsection now references LLCs in the parenthetical “(sole proprietorship, partnership, LLC or corporation)”; (3) Line 1A in the Statement of Changes in Ownership Equity subsection replaces “Net income (loss)” with “Net income (loss) or comprehensive income (loss), as applicable” for consistency with the references to net income and comprehensive income in the remainder of the FOCUS Report, as amended in the Commission's 2018 *Disclosure Update and Simplification* release; and (4) Line 1B in the Statement of Changes in Ownership Equity subsection titled “Additions (including non-conforming capital of)” is assigned Line Item 4263 (for consistency with Pre-Amendment FOCUS

required to be completed by stand-alone broker-dealers, stand-alone SBSBs, and broker-dealer SBSBs and MSBSPs.

#### Financial and Operational Data

The Pre-Amendment FOCUS Report Part II CSE included a Financial and Operational Data section that elicited detail about filers' operations, including operational deductions from capital and potential operational charges not deducted from capital. Proposed Form SBS had a Financial and Operational Data section modeled largely on the parallel section in Pre-Amendment FOCUS Report Part II CSE.<sup>306</sup> The Commission received no comment on this proposed section and has adopted capital requirements for nonbank SBSBs under which these firms will need to calculate a minimum net capital requirement.<sup>307</sup> Consequently, the Commission is adopting this section in proposed Form SBS by retaining the parallel section in FOCUS Report Part II, as amended, with non-substantive changes for clarity.<sup>308</sup> The section must be completed by stand-alone broker-dealers, stand-alone SBSBs, and broker-dealer SBSBs and MSBSPs.

#### Computation for Determination of Customer Reserve Requirements

Pre-Amendment FOCUS Report Parts II and II CSE have a Computation for Determination of Reserve Requirements section that elicited detail about filers' customer reserve computation under the broker-dealer customer protection rule (Rule 15c3–3). Proposed Form SBS had a Computation for Determination of Customer Reserve Requirements section modeled largely on the parallel section in Pre-Amendment FOCUS Report Part II CSE.<sup>309</sup> The Commission received no comment on this section in proposed Form SBS and is adopting it by

Report Part II) instead of 4262. Pre-Amendment FOCUS Report Part II assigns “Additions (including non-conforming capital of)” the number 4263, while FOCUS Report Part II CSE assigns “Additions (including non-conforming capital of)” the number 4262. Since the form being adopted in this release is FOCUS Report Part II, it is preferable to be more consistent with Pre-Amendment FOCUS Report Part II than FOCUS Report Part II CSE.

<sup>306</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25226.

<sup>307</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43883–86.

<sup>308</sup> See FOCUS Report Part II, as amended, *Financial and Operational Data*. The following changes are being made: (1) For internal consistency and to avoid confusion with the schedules at the end of revised FOCUS Report Part II, this section is no longer referred to as a “schedule;” and (2) the word “mailed” is replaced with “sent” on Line 5 and the corresponding instructions to reflect that customer confirmations can be emailed in addition to mailed.

<sup>309</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25226.

retaining the parallel section in FOCUS Report Part II, as amended, with non-substantive changes for clarity.<sup>310</sup> This section must be completed by stand-alone broker-dealers and broker-dealer SBSBs and MSBSPs.

#### Possession or Control for Customers

Pre-Amendment FOCUS Report Parts II and II CSE have an Information for Possession or Control Requirements section that elicits detail about securities kept in possession or control for customers under Rule 15c3–3. Proposed Form SBS had a Possession or Control for Customers section modeled on the parallel section in Pre-Amendment FOCUS Report Part II CSE.<sup>311</sup> The Commission received no comment on this section of proposed Form SBS and is adopting it by retaining the parallel section in FOCUS Report Part II, as amended, with non-substantive changes for clarity.<sup>312</sup> This section must be completed by stand-alone broker-dealers and broker-dealer SBSBs and MSBSPs.

#### Computation for Determination of PAB Requirements

In 2013, the Commission amended Rule 15c3–3 to establish PAB reserve bank account requirements under which a broker-dealer must perform a reserve account calculation with respect to broker-dealer clients that is similar to the calculation for customers discussed above.<sup>313</sup> Proposed Form SBS included a Computation for Determination of PAB Requirements section for filers to

<sup>310</sup> See FOCUS Report Part II, as amended, *Computation for Determination of Customer Reserve Requirements*. To avoid confusion between the customer and security-based swap customer reserve requirements, this section is retitled “Computation for Determination of Customer Reserve Requirements” (emphasis added), and the instructions are updated accordingly. In addition, in response to commenters, the section includes a clarification that the notes referenced in this section appear in 17 CFR 240.15c3–3a (Rule 15c3–3a) (Exhibit A to Rule 15c3–3). See SIFMA 9/5/2014 Letter.

<sup>311</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25226.

<sup>312</sup> See FOCUS Report Part II, as amended, *Possession or Control for Customers*. To avoid confusion between the customer and security-based swap customer possession and control requirements, this section is retitled “Possession or Control for Customers,” and the instructions are updated accordingly.

<sup>313</sup> See *Financial Responsibility Rules for Broker-Dealers*, 78 FR at 51903. Paragraph (a)(16) of Rule 15c3–3 defines “PAB account” as “a proprietary securities account of a broker or dealer (which includes a foreign broker or dealer, or a foreign bank acting as a broker or dealer) other than a delivery-versus-payment account or a receipt-versus-payment account.” The paragraph further provides that the “term does not include an account that has been subordinated to the claims of creditors of the carrying broker or dealer.”

input this calculation.<sup>314</sup> The Commission received no comment on this proposed section of Form SBS and is adding it to FOCUS Report Part II, as amended, with non-substantive changes for clarity.<sup>315</sup> The section must be completed by stand-alone broker-dealers and broker-dealer SBSDs and MSBSPs.

#### Claiming an Exemption From Rule 15c3-3

Pre-Amendment FOCUS Report Part II has a section for broker-dealers claiming an exemption from Rule 15c3-3 to identify the paragraph of the rule upon which the firm's exemption is based. Proposed Form SBS had a similar section modeled on the parallel section in Pre-Amendment FOCUS Report Part II.<sup>316</sup> The Commission received no comment on this section of proposed Form SBS and is adopting it by retaining the parallel section in FOCUS Report Part II, as amended, with non-substantive changes for clarity and accuracy.<sup>317</sup> This section must be completed by stand-alone broker-dealers and broker-dealer SBSDs and MSBSPs claiming an exemption from Rule 15c3-3.

#### Computation for Determination of Security-Based Swap Customer Reserve Requirements

The Commission's proposed segregation requirements for SBSDs in Rule 18a-4 required them to maintain a security-based swap customer reserve account and to determine the amount kept in the account using the formula in 17 CFR 240.18a-4a (Exhibit A to Rule 18a-4).<sup>318</sup> Accordingly, proposed Form SBS had a section titled "Computation for Determination of the Amount to be

Maintained in the Special Reserve Account for the Exclusive Benefit of Security-Based Swap Customers" in which an SBSD would enter its security-based swap reserve account calculation.<sup>319</sup> The Commission received no comment on this section. However, the final segregation rules codified the security-based swap reserve account requirements in: (1) Rule 15c3-3 to apply to stand-alone broker-dealers and broker-dealer SBSDs and MSBSPs; and (2) Rule 18a-4 to apply to stand-alone SBSDs.<sup>320</sup> Consequently, the Commission is adopting the section in proposed Form SBS by adding it to FOCUS Report Part II, as amended, with non-substantive changes for consistency internally and with Rules 15c3-3 and 18a-4.<sup>321</sup> The modifications also include an instruction that the section must be completed by stand-alone broker-dealers in addition to broker-dealer SBSDs and MSBSPs.

#### Possession or Control for Security-Based Swap Customers

The Commission's proposed segregation requirements for SBSDs in Rule 18a-4 required them to maintain possession or control over excess security collateral.<sup>322</sup> Accordingly, proposed Form SBS had a section titled "Information for Possession or Control Requirements Under Rule 18a-4" that elicits detail about excess securities collateral kept in possession or control for customers under proposed Rule 18a-4.<sup>323</sup> The Commission received no comment on this section of proposed Form SBS. However, the final segregation rules codified the security-

based swap reserve account requirements in: (1) Rule 15c3-3 to apply to stand-alone broker-dealers and broker-dealer SBSDs and MSBSPs; and (2) Rule 18a-4 to apply to stand-alone SBSDs.<sup>324</sup> Consequently, the Commission is adopting the section in proposed Form SBS by adding it to FOCUS Report Part II, as amended, with non-substantive changes for consistency internally and with Rules 15c3-3 and 18a-4.<sup>325</sup> The modifications also include an instruction that the section must be completed by stand-alone broker-dealers in addition to broker-dealer SBSDs and MSBSPs.

#### Claiming an Exemption From Rule 18a-4

As adopted, Rule 18a-4 applies to stand-alone and bank SBSDs and to OTCDD/SBSDs.<sup>326</sup> In addition, the final rule exempts these SBSDs from its requirements of if the SBSD meets certain conditions, including that the SBSD does not clear security-based swap transactions for other persons, provides notice to the counterparty regarding the right to segregate initial margin at an independent third-party custodian, and discloses in writing that any collateral received by the SBSD for non-cleared security-based swaps will not be subject to a segregation requirement and regarding how a claim of the counterparty for the collateral would be treated in a bankruptcy or other formal liquidation proceeding of the SBSD. In light of these modifications to the rule from the proposal (which did not provide an exemption), the Commission is adding a line item to the FOCUS Report Part II for a stand-alone SBSD or OTCDD/SBSD to indicate whether the firm is claiming an exemption from Rule 18a-4.<sup>327</sup>

#### Sections Completed by FCMs

FCMs are required to periodically file Form 1-FR-FCM with the CFTC and their designated SRO.<sup>328</sup> The form elicits financial and operational information about an FCM. To account

<sup>314</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25226.

<sup>315</sup> See revised FOCUS Report Part II, as amended, *Computation for Determination of PAB Requirements*. In addition, in response to commenters, the section includes a clarification that the notes referenced in this section appear in Exhibit A to Rule 15c3-3 (Rule 15c3-3a). See SIFMA 9/5/2014 Letter.

<sup>316</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25226.

<sup>317</sup> See FOCUS Report Part II, as amended, *Claiming an Exemption from Rule 15c3-3*. The following changes are being made: (1) The instruction to "check one only" is replaced with "check all that apply" as a firm can claim more than one exemption from Rule 15c3-3; (2) the incorrect references to paragraphs "(k)(2)(A)" and "(k)(2)(B)" of Rule 15c3-3 are replaced with correct references to paragraphs (k)(2)(i) and (ii) of Rule 15c3-3; and (3) due to the inadvertent omission of instructions regarding this section, the instructions to FOCUS Report Part II, as amended, are updated to direct stand-alone broker-dealers, broker-dealer SBSDs, and broker-dealer MSBSPs that are claiming an exemption from Rule 15c3-3 to complete this section.

<sup>318</sup> See *Capital, Margin, and Segregation Proposing Release*, 77 FR at 70282-87.

<sup>319</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25230-31.

<sup>320</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43930-43.

<sup>321</sup> See FOCUS Report Part II, as amended, *Computation for Determination of Security-Based Swap Customer Reserve Requirements*. The following changes are being made: (1) References to Rule 18a-4 are removed from the section's title, line items, and instructions to accurately reflect that the security-based swap customer reserve requirement adopted by the Commission is located in Rules 15c3-3 and 18a-4 (instead of solely in Rule 18a-4 as initially proposed by the Commission); (2) the parenthetical "(See Note A)" is added to Line 1 for consistency with Line 1 of the *Computation for Determination of Customer Reserve Requirements* section in revised FOCUS Report Part II, and in response to commenters, the section includes a clarification that the notes referenced in this section appear in Exhibit B to Rule 15c3-3 or Exhibit A to Rule 18a-4, as applicable (see SIFMA 9/5/2014 Letter); and (3) in Lines 24 and 26, "Reserve Bank Account(s)" is replaced with "Reserve Account(s)" for consistency with paragraph (a)(9) of Rule 18a-4, as adopted (see paragraph (a)(9) of Rule 18a-4, as adopted).

<sup>322</sup> See *Capital, Margin, and Segregation Proposing Release*, 77 FR at 70278-82.

<sup>323</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25231.

<sup>324</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43930-43.

<sup>325</sup> See FOCUS Report Part II, as amended, *Possession or Control for Security-Based Swap Customers*. References to Rule 18a-4 are removed from the section's title, line items, and instructions in order to accurately reflect that the possession or control requirements adopted by the Commission are located in Rules 15c3-3 and 18a-4 (instead of solely in Rule 18a-4 as initially proposed by the Commission).

<sup>326</sup> See FOCUS Report Part II, as amended, *Claiming an Exemption from Rule 18a-4*.

<sup>328</sup> See 17 CFR 1.10. See also Form 1-FR-FCM, available at <http://www.nfa.futures.org/NFA-registration/templates-and-forms/form1FR-fcm.HTML>.

for broker-dealers that are dually registered as FCMs, Pre-Amendment FOCUS Report Parts II and II CSE incorporate, in substantially the same format, most of the sections in Form 1–FR–FCM. A broker-dealer dually registered as an FCM was permitted to file Pre-Amendment FOCUS Report Part II or II CSE (as applicable) with the CFTC and its designated SRO rather than Form 1–FR–FCM.<sup>329</sup>

Proposed Form SBS contained the following sections from Form 1–FR–FCM in order to permit dual registrants to file Form SBS (rather than Form 1–FR–FCM) with the CFTC and its designated SRO: (1) A Computation of CFTC Minimum Net Capital Requirement; (2) a Statement of Segregation Requirements and Funds in Segregation for Customers Trading on U.S. Commodity Exchanges; (3) a Statement of Cleared Swaps Customer Segregation Requirements and Funds in Cleared Swaps Customer Accounts under Section 4d(f) of the CEA; (4) a Statement of Segregation Requirements and Funds in Segregation for Customers' Dealer Options Accounts; (5) a Statement of Secured Amounts and Funds Held in Separate Accounts for Foreign Futures and Foreign Options Customers Pursuant to CFTC Regulation 30.7 (and Foreign Futures and Foreign Options Secured Amounts Summary); and (6) a Statement of Secured Amounts and Funds Held in Separate Accounts for Foreign Futures and Foreign Options Customers Pursuant to CFTC Regulation 30.7 (and Funds Deposited in Separate CFTC Regulation 30.7 Accounts) (17 CFR 30.7).<sup>330</sup> The Commission received no comment on these sections of proposed Form SBS and is adopting them by retaining or adding them to FOCUS Report Part II, as amended, with non-substantive changes.<sup>331</sup> These

<sup>329</sup> See 17 CFR 1.10(h) (allowing broker-dealers to file the FOCUS Report instead of Form 1–FR–FCM so long as all information required to be furnished on and submitted with Form 1–FR–FCM is provided with the FOCUS Report).

<sup>330</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25232–33.

<sup>331</sup> See FOCUS Report Part II, as amended, *Computation of CFTC Minimum Capital Requirements, Statement of Segregation Requirements and Funds in Segregation for Customers Trading on U.S. Commodity Exchanges, Statement of Cleared Swaps Customer Segregation Requirements and Funds in Cleared Swaps Customer Accounts under Section 4d(f) of the Commodity Exchange Act, Statement of Segregation Requirements and Funds in Segregation for Customers' Dealer Options Accounts, Statement of Secured Amounts and Funds Held in Separate Accounts for Foreign Futures and Foreign Options Customers Pursuant to CFTC Regulation 30.7, Statement of Secured Amounts and Funds Held in Separate Accounts for Foreign Futures and Foreign Options Customers Pursuant to CFTC Regulation 30.7*. The following non-substantive changes were

sections will be filed by broker-dealers that are dually registered with the CFTC as FCMs. The Commission believes that this will promote harmonization with CFTC requirements.

Defined Terms in the Schedules to FOCUS Reports Parts II and IIC

Pre-Amendment FOCUS Report Part II CSE has schedules that elicit information about derivatives positions, counterparties, and exposures. Proposed Form SBS included four schedules that were modeled largely on the schedules to Pre-Amendment FOCUS Report Part II CSE. As discussed in detail below, the Commission is adopting the schedules to proposed Form SBS by adding all four of them to FOCUS Report Part II, as amended, and including one of them in FOCUS Report Part IIC, as adopted. As proposed, the schedules contained the following common terms that were defined in the proposed instructions to Form SBS: (1) “gross replacement value”, also referred to as “gross replacement value—receivable”; (2) “gross replacement value—payables”; (3) “net replacement value”; (4) “current net exposure”; (5) “total exposure”; and (6) “margin collected.”<sup>332</sup> For the sake of clarity, the term “total exposure” is revised to the term “current net and potential exposure” in FOCUS Report Part II, as amended, and FOCUS Report Part IIC, as adopted, and in the instructions to the forms.<sup>333</sup> The definition of the term is not revised. The Commission received no comment on the remaining terms and their definitions and is adopting them as proposed.<sup>334</sup>

made: (1) The parenthetical “(under)” is added to Line 16 of the Statement of Segregation Requirements and Funds in Segregation for Customers Trading on U.S. Commodity Exchanges for consistency with the language used in Form 1–FR–FCM; and (2) instead of using the placeholder line item number “9999”, the line item numbers recently assigned in FINRA’s eFOCUS system are used for the following lines: Lines 15 and 16 in the *Statement of Segregation Requirements and Funds in Segregation for Customers Trading on U.S. Commodity Exchanges*, Lines 15 and 16 in the *Statement of Cleared Swaps Customer Segregation Requirements and Funds in Cleared Swaps Customer Accounts under Section 4d(f) of the Commodity Exchange Act*, Lines 1 through 7 in the *Statement of Secured Amounts and Funds Held in Separate Accounts for Foreign Futures and Foreign Options Customers Pursuant to CFTC Regulation 30.7*, and Lines 9 through 11 in the *Statement of Secured Amounts and Funds Held in Separate Accounts for Foreign Futures and Foreign Options Customers Pursuant to CFTC Regulation 30.7*.

<sup>332</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25233–34.

<sup>333</sup> See FOCUS Report Part II as amended; instructions to FOCUS Report Part II, as amended.

<sup>334</sup> See instructions to FOCUS Report Part II, as amended, *Definitions*; instructions to FOCUS Report Part IIC, as adopted, *Definitions*.

Schedule 1 to FOCUS Report Part II

Pre-Amendment FOCUS Report Part II CSE has a schedule titled “Aggregate Securities and OTC Derivatives Positions” that required ANC broker-dealers to report the month-end gross replacement value of aggregate long and short positions in various categories of financial instruments held by the firm.<sup>335</sup> Schedule 1 to proposed Form SBS was modeled largely on this schedule but instead of including a single line for derivatives, it required filers to enter the aggregate long and short positions for cleared and non-cleared: (1) Debt security-based swaps (other than credit default swaps); (2) equity security-based swaps; (3) credit default security-based swaps; and (4) other security-based swaps.<sup>336</sup> It required the same information with respect to mixed swaps and the following categories of swaps: (1) interest rate swaps; (2) foreign exchange swaps; (3) commodity swaps; (4) debt index swaps (other than credit default swaps); (5) equity index swaps; (6) credit default swaps; and (7) other swaps.

A commenter raised concerns about the practicality of reporting exposures to these subcategories of financial instruments, including the potential that firms will interpret them differently.<sup>337</sup> The Commission believes it is important to record separately amounts attributable to security-based swaps, mixed swaps, and swaps given the Commission’s supervisory responsibilities regarding these products. The Commission further believes, however, that requiring reporting of the exposures to the subcategories of instruments could lead to inconsistent reporting across filers, which, in turn, could diminish the utility of receiving this information in terms of comparing firms. Accordingly, Schedule 1 to the FOCUS Report Part II, as amended, elicits the amounts attributable to cleared and non-cleared security-based swaps, mixed swaps, and swaps, and includes definitions for these products in the instructions, but no longer elicits information regarding the sub-categories. The Commission also received comment that “bought” and “sold” could help clarify the

<sup>335</sup> Pre-Amendment FOCUS Report Part IIB has a similar schedule.

<sup>336</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25234.

<sup>337</sup> See Memorandum from the Division of Trading and Markets regarding an April 30, 2015 meeting with representatives of the Securities Industry and Financial Markets Association (May 5, 2015) (“SIFMA 4/30/2015 Meeting”).

schedule,<sup>338</sup> and in response the columns in Schedule 1 to FOCUS Report Part II, as amended, are relabeled “long/bought” and “short/sold” and the instructions are updated accordingly.

The details in Schedule 1 may be of increased value to examiners if the totals in the schedule (Line Items 8370 and 8371) match the amounts reported for total securities, commodities, and swap positions in the Statement of Financial Condition (Line Items 12024 and 12044). Accordingly, the “Other securities and commodities” and “Securities with no ready market” lines are moved up to Lines 12 and 13 (instead of Lines 16 and 17) in Schedule 1 so that they can be included in the subtotal for “Total net securities and spot commodities.” In addition, Schedule 1 now elicits “Counterparty netting” and “Cash collateral netting” and includes these amounts in the subtotal for “Total derivative receivables and payables.” Consequently, the totals on Schedule 1, titled “Total net securities, commodities, and swaps positions,” are now equal to the sum of “Total net securities and spot commodities” and “Total derivative receivables and payables.”<sup>339</sup>

For the foregoing reasons, the Commission is adopting Schedule 1 to proposed Form SBS by adding it to FOCUS Report Part II, as amended, with the modifications discussed above.<sup>340</sup> Schedule 1 must be completed by stand-alone broker-dealers and stand-alone and broker-dealer SBSBs and MSBSPs.

#### Schedule 2 to FOCUS Report Part II

Pre-Amendment FOCUS Report Part II CSE has a schedule titled “Credit-Concentration Report for Fifteen Largest Net Exposures in Derivatives” that requires ANC broker-dealers to provide details about the fifteen counterparties to which they have the largest credit

exposures in derivatives.<sup>341</sup> Schedule 2 to proposed Form SBS had two tables that were modeled largely on this schedule.<sup>342</sup> The first table would require the filer to identify in the first column the fifteen counterparties to which the firm had the largest current net exposure, in order from the largest to the smallest current net exposure. The second table would require the filer to identify in the first column the fifteen counterparties to which the firm had the largest total exposure, in order from the largest to the smallest total exposure.

A commenter raised concerns about the potential ramifications if counterparties obtained this information and disagreed with the internal credit rating assigned to them.<sup>343</sup> The Commission acknowledges that firms may be required to disclose the FOCUS Report Part II to counterparties and other third parties for commercial reasons, and that this could cause internal credit ratings to be disclosed to the rated entity. The disclosure of this information or the potential disclosure of the information to the rated entity could negatively affect the integrity of the filer’s credit risk function. For example, it could give firms an incentive to assign a higher internal credit rating than warranted to avoid negatively affecting its relationship with a counterparty and potentially losing that entity’s business. Accordingly, the Commission is modifying the table so that it continues to require counterparty identifiers but no longer elicits the internal credit rating assigned to a particular counterparty. This information is available to Commission staff through its monitoring and examination programs.

For the foregoing reasons, Commission is adopting Schedule 2 to proposed Form SBS by adding it to FOCUS Report Part II, as amended, with the modification discussed above.<sup>344</sup> Schedule 2 must be completed by stand-alone broker-dealers that are authorized to calculate net capital using internal models and all stand-alone and broker-dealer SBSBs and MSBSPs.

#### Schedule 3 to FOCUS Report Part II

Pre-Amendment FOCUS Report Part II CSE has a schedule titled “Portfolio Summary of OTC Derivatives Exposures by Internal Credit Rating” that required

ANC broker-dealers to provide details about their aggregate credit exposures to counterparties grouped by the internal credit rating assigned to the counterparty.<sup>345</sup> Schedule 3 to proposed Form SBS had a table modeled on this schedule.<sup>346</sup> The table would require the filer to set forth its internal credit rating scale in the left hand column. For each notch in the rating scale, the filer would need to provide detail about aggregate amounts of exposures and collateral collected from the counterparties rated at that notch. The Commission received no comment on Schedule 3 to proposed Form SBS and is adopting it by adding the schedule to FOCUS Report Part II, as amended.<sup>347</sup> Schedule 3 must be completed by stand-alone broker-dealers that are authorized to calculate net capital using internal models and all stand-alone and broker-dealer SBSBs and MSBSPs.

#### Schedule 4 to FOCUS Report Part II

Pre-Amendment FOCUS Report Part II CSE has a schedule titled “Geographic Distribution of Derivatives Exposures for Ten Largest Countries” that required ANC broker-dealers to provide details about their OTC derivatives exposures grouped by country.<sup>348</sup> Schedule 4 to proposed Form SBS included two tables modeled on this schedule.<sup>349</sup> The first table would require the filer to identify in the left column the ten largest countries in terms of the filer’s aggregate current net exposure to counterparties located in the country, in order from the largest to the smallest current net exposure amounts. The second table would require the filer to identify in the left column the ten largest countries in terms of the filer’s total exposure to counterparties located in the country, in order from the largest to the smallest total exposure amounts. The Commission received no comment on Schedule 4 and is adopting it by adding the schedule to the FOCUS Report Part II, as amended.<sup>350</sup> Schedule 4 must be completed by stand-alone broker-dealers

<sup>338</sup> See, e.g., SIFMA 9/5/2014 Letter.

<sup>339</sup> For clarity and accuracy, the total line now reads “Total net securities, commodities, and swaps positions (sum of Lines 14 and 21)” instead of “Total (sum of Lines 1–17).” A commenter requested additional detail regarding firms’ hedging activities. See Levin Letter. The final rule does not require the linking of hedges as requested by the commenter. However, because the Commission believes that it would be difficult to identify and pair product hedges and therefore report hedges, the Commission believes that linking the totals in Schedule 1 to the lines on the Statement of Financial Condition will provide examiners with additional detail about filers’ securities and derivatives positions that partially addresses the concerns underlying this comment.

<sup>340</sup> See FOCUS Report Part II, as amended, Schedule 1—Aggregate Securities, Commodities, and Swaps Positions.

<sup>341</sup> Pre-Amendment FOCUS Report Part IIB has a schedule titled “Credit-Concentration Report for Twenty Largest Current Net Exposures.”

<sup>342</sup> See Recordkeeping and Reporting Proposing Release, 79 FR at 25234–35.

<sup>343</sup> See SIFMA 4/30/2015 Meeting.

<sup>344</sup> See FOCUS Report Part II, as amended, Schedule 2—Credit Concentration Report for Fifteen Largest Exposures in Derivatives.

<sup>345</sup> Pre-Amendment FOCUS Report Part IIB has a schedule titled “Portfolio Summary of OTC Derivatives Exposures” that elicits the credit rating category of the counterparty.

<sup>346</sup> See Recordkeeping and Reporting Proposing Release, 79 FR at 25235.

<sup>347</sup> See FOCUS Report Part II, as amended, Schedule 3—Portfolio Summary of Derivatives Exposures by Internal Credit Rating.

<sup>348</sup> Pre-Amendment FOCUS Report Part IIB has a schedule titled “Geographic Distribution of OTC Derivatives Exposures” that elicits the top ten country exposures by residence of main operating company.

<sup>349</sup> See Recordkeeping and Reporting Proposing Release, 79 FR at 25235.

<sup>350</sup> See FOCUS Report Part II, as amended, Schedule 4—Geographic Distribution of Derivatives Exposures for Ten Largest Countries.

that are authorized to calculate net capital using internal models and all stand-alone and broker-dealer SBSBs and MSBSPs.

#### ii. FOCUS Report Part IIC

As discussed above, the Commission is requiring bank SBSBs and MSBSPs to report certain general financial information on new FOCUS Report Part IIC to facilitate monitoring these registrants' financial condition. The Commission's reporting requirements for bank SBSBs and MSBSPs generally are designed to be tailored specifically to their activities as an SBSB or an MSBSP. Accordingly, FOCUS Report Part IIC, as adopted, is based on FFIEC Form 031, which most banks are required to file on a quarterly basis.<sup>351</sup> FFIEC Form 031 elicits financial and operational information about a bank that is entered into uniquely numbered line items.

FOCUS Report Part IIC, as adopted, requires bank SBSBs and MSBSPs to report certain information they already report on FFIEC Form 031. Specifically, it includes: (1) A Balance Sheet section that largely mirrors Schedule RC to FFIEC Form 031; (2) a Regulatory Capital section that is a scaled-down version of Schedule RC–R to FFIEC Form 031; and (3) an Income Statement section that is a scaled-down version of Schedule RI to FFIEC Form 031. If the same line appears in both FFIEC Form 031 and FOCUS Report Part IIC, as adopted, the same line item number is used in both forms, except that the FOCUS Report Part IIC line item ends with an additional “b” character.<sup>352</sup>

One commenter pointed out that not all banks file FFIEC Form 031, noting that U.S. branches and agencies of foreign banks file FFIEC Form 002.<sup>353</sup> The Commission acknowledges that there are multiple types of FFIEC reporting forms, but modeled the FOCUS Report Part IIC on the form it believes most bank SBSBs and MSBSPs

<sup>351</sup> See 12 U.S.C. 161; 12 U.S.C. 324; 12 U.S.C. 1464; 12 U.S.C. 1817. FFIEC Form 031 is available at [http://www.ffiec.gov/pdf/FFIEC\\_forms/FFIEC031\\_201303\\_f.pdf](http://www.ffiec.gov/pdf/FFIEC_forms/FFIEC031_201303_f.pdf).

<sup>352</sup> For example, Line Item 0081 on FFIEC Form 031 is Line Item 0081b on FOCUS Report Part IIC. The letter “b” is added because some of the line items on FFIEC Form 031 are already assigned to other lines in the FOCUS Report.

<sup>353</sup> See SIFMA 9/5/2014 Letter. The commenter also noted that foreign bank SBSBs generally report financial information to their home jurisdiction in accordance with the International Financial Reporting Standards rather than U.S. Generally Accepted Accounting Principles. See *id.* However, these firms likely also file FFIEC Form 002, which is required to be prepared using U.S. Generally Accepted Accounting Principles. The FFIEC Form 002 instructions are available at [http://www.ffiec.gov/PDF/FFIEC\\_forms/FFIEC002\\_201409\\_i.pdf](http://www.ffiec.gov/PDF/FFIEC_forms/FFIEC002_201409_i.pdf).

will use. FFIEC Form 031 is filed by banks with both domestic and foreign offices, while FFIEC Form 041 is filed by banks with domestic offices only. All of the line items that appear on FOCUS Report Part IIC, as adopted, appear on both FFIEC Form 031 and FFIEC Form 041, except for three line items which do not apply to FFIEC Form 041 filers.<sup>354</sup>

In addition to the sections drawn from FFIEC Form 031, FOCUS Report Part IIC, as adopted, includes sections for: (1) A Computation for Determination of Security-Based Swap Customer Reserve Requirements; (2) Possession or Control for Security-Based Swap Customers; and (3) Schedule 1—Aggregate Security-Based Swap and Swap Positions. Finally, the Commission is adopting instructions for FOCUS Report Part IIC, which closely track the instructions for proposed Form SBS and FOCUS Report Part II, as amended.<sup>355</sup>

#### Cover Page

As discussed above, proposed Form SBS included a cover page modeled largely on the cover page to Pre-Amendment FOCUS Report Part II.<sup>356</sup> The Commission received no comment on the proposed cover page and is adopting it in FOCUS Report Part IIC with non-substantive changes largely to account for the fact that FOCUS Report Part IIC will only be filed by bank SBSBs and MSBSPs.<sup>357</sup>

<sup>354</sup> Line Items 2200, 6631, and 6636 regarding foreign office deposits do not apply to FFIEC Form 041 filers, because they do not have foreign branches. Line Item 1395 regarding Tier 3 capital does not apply to FFIEC Form 041 filers, because they are not required to compute Tier 3 capital.

<sup>355</sup> In addition to removing references to entities that will not file FOCUS Report Part IIC and removing references to sections and schedules that are not part of FOCUS Report Part IIC, the following change is made to FOCUS Report Part IIC's general instructions: The instruction “Money amounts should be expressed in whole dollars.” is deleted because this instruction does not appear in the instructions accompanying FFIEC Form 031. Additional changes to FOCUS Report Part IIC's instructions that relate to specific sections of the form are discussed in this release's discussion of the applicable section.

<sup>356</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25225.

<sup>357</sup> See FOCUS Report Part IIC, *Cover Page*. The following changes are being made: (1) The line soliciting firms to check the type of registrant filing the form is shortened to only reflect the registrants required to file FOCUS Report Part IIC (bank SBSBs and MSBSPs); (2) in response to comment that proposed Form SBS did not reference foreign SBSBs or foreign MSBSPs, a line is added asking firms whether the filer is a U.S. person (see SIFMA 9/5/2014 Letter); (3) the line soliciting firms to check the reason the firm is filing FOCUS Report Part IIC is shortened to only reflect the range of reasons bank SBSBs and MSBSPs would file the report: at the special request by the Commission, pursuant to Rule 18a–7, or other; (4) the line soliciting firms to “Check here if respondent is filing an audited report” is removed, because bank

#### Balance Sheet

A bank must report details about its assets, liabilities, and equity capital on Schedule RC to FFIEC Form 031. Schedule RC also includes a Memoranda section that elicits information about the bank's external auditors and fiscal year end. Proposed Form SBS had a *Balance Sheet* section to be completed by bank SBSBs and MSBSPs.<sup>358</sup> The lines and line items in this section were the same as in Schedule RC to FFIEC Form 031, except that it did not include line items from the Memoranda section. The Commission received no comment on this proposed section and is adopting it in FOCUS Report Part IIC with non-substantive changes for consistency with Schedule RC to FFIEC Form 031.<sup>359</sup> This section must be completed by bank SBSBs and MSBSPs.

#### Regulatory Capital

The prudential regulators are responsible for administering capital requirements for bank SBSBs and MSBSPs. A bank must report details about its regulatory capital on Schedule RC–R to FFIEC Form 031. Schedule RC–R also includes a Memoranda section that elicits detail about derivatives. Proposed Form SBS similarly included a regulatory capital section to be completed by bank SBSBs and MSBSPs.<sup>360</sup> The lines and line items in this section were largely the same as in Schedule RC–R to FFIEC Form 031. More specifically, the proposed section required banks to enter the total amounts of the components of bank regulatory capital (*i.e.*, total Tier 1, Tier 2, or Tier 3 capital) and other summary measures, rather than requiring the level

SBSBs and MSBSPs are not required to file annual reports with the Commission (see 17 CFR 240.18a–7(c)(1)(i)); (5) a typographical error is corrected so the officer's title printed under the signature line matches the officer's title printed under the line for the signing officer to write out his or her name; and (6) a typographical error in the instructions is corrected so that the “Official use” line references line item 33 instead of 31.

<sup>358</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25231.

<sup>359</sup> See FOCUS Report Part IIC, *Balance Sheet (Information As Reported On FFIEC Form 031—Schedule RC)*. The following changes are being made: (1) Lines 4B, 4C, 13A1, 13A2, 13B1, and 13B2 are indented so their corresponding line items are not included in the Totals column; (2) on Line 8, the word “Investment” is replaced with “Investments”; (3) on Line 23, the Line Item number “3828b” is replaced with “3838b”; (4) in the instructions, clarification is added that “FFIEC Instructions” refers to “instructions accompanying FFIEC Form 031”; and (5) because the instructions direct filers to prepare this section in accordance with the FFIEC Instructions, the following sentence is deleted: “In addition, the data reported on this section should only be updated quarterly.”

<sup>360</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25231–32.

of detail required by the prudential regulators on Schedule RC–R. The Commission received no comment on this proposed section and is adopting it in FOCUS Report Part II, with non-substantive changes for consistency with Schedule RC–R to FFIEC Form 031.<sup>361</sup> This section must be completed by bank SBSBs and MSBSPs.

#### Income Statement

A bank must report details about its income or loss and expenses on Schedule RI to FFIEC Form 031. Schedule RI also includes a Memoranda section that elicits further details about the bank's income or loss. Proposed Form SBS included an income statement section to be completed by bank SBSBs and MSBSPs.<sup>362</sup> The proposed income statement section included some—but not all—of the line items on Schedule RI. More specifically, to focus the reporting on summary information and information relevant to securities and derivatives activities, the proposed income statement section included only line items from Schedule RI that require the entry of: (1) Total amounts for categories of income, expense, and loss; (2) details about gains and losses on securities positions; (3) details about trading revenues; and (4) details about gains and losses on derivatives. The Commission received no comment on the proposed income statement section and is adopting it in FOCUS Report Part IIC with minor non-substantive changes.<sup>363</sup> This section must be completed by bank SBSBs and MSBSPs.

<sup>361</sup> See FOCUS Report Part IIC, *Regulatory Capital (Information As Reported On FFIEC Form 031—Schedule RC–R)*. The following changes are being made: (1) on Line 7, the phrase “Total assets for leverage capital purposes” is replaced with “Total assets for the leverage ratio” and line item number “L138b” is replaced with “A224b”; (2) on Lines 8 through 10, the same line item numbers are assigned to Columns A and B; and (3) because the instructions direct filers to prepare this section in accordance with the FFIEC Instructions, the following sentence is deleted: “In addition, the data reported on this section should only be updated quarterly.”

<sup>362</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25232.

<sup>363</sup> See FOCUS Report Part IIC, *Income Statement (Information As Reported On FFIEC Form 031—Schedule RI)*. The following changes are being made: (1) In FOCUS Report Part IIC, the parentheticals instructing filers which lines to total are deleted from Lines 9, 9F, and 9G, because one of these parentheticals contained an inaccurate cross-reference and this change preserves flexibility in case FFIEC Form 031's lines are renumbered in the future; and (2) because the instructions direct filers to prepare this section in accordance with the FFIEC Instructions, the following sentence is deleted: “In addition, the data reported on this section should only be updated quarterly.”

#### Computation for Determination of Security-Based Swap Customer Reserve Requirements

As discussed above, FOCUS Report Part II, as amended, includes a section for broker-dealers and stand-alone SBSBs to provide a computation of their security-based swap customer reserve requirements. Proposed Form SBS would have required bank SBSBs to complete an identical section.<sup>364</sup> The Commission received no comment on applying this section to bank SBSBs and is adopting it in FOCUS Report Part IIC with non-substantive changes for consistency internally and with Rules 15c3–3 and 18a–4.<sup>365</sup>

#### Possession or Control for Security-Based Swap Customers

As discussed above, FOCUS Report Part II, as amended, includes a section in which broker-dealers and stand-alone SBSBs enter information related to possession or control for security-based swap customers. Proposed Form SBS required bank SBSBs to complete an identical section.<sup>366</sup> The Commission received no comment on applying this section to bank SBSBs and is adopting it in FOCUS Report Part IIC with non-substantive changes for consistency

<sup>364</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25230–31.

<sup>365</sup> See FOCUS Report Part IIC, *Computation for Determination of Security-Based Swap Customer Reserve Requirements*. The following non-substantive changes are being made: (1) References to Rule 18a–4 are removed from the section's title, line items, and instructions to accurately reflect that the security-based swap customer reserve requirement adopted by the Commission is located in Rules 15c3–3 and 18a–4 (instead of solely in Rule 18a–4 as initially proposed by the Commission); (2) to improve clarity, the form and instructions reflect that the section is titled “Computation for Determination of Security-Based Swap Customer Reserve Requirements” instead of “Computation for Determination of the Amount to be Maintained in the Special Account for the Exclusive Benefit of Security-Based Swap Customers—Rule 18a–4, Exhibit A”; (3) the section's heading and instructions are updated to state that a stand-alone SBSB exempt from Rule 18a–4 is not required to complete this section to reflect that paragraph (f) of Rule 18a–4, as amended, provides an exemption from the rule for certain bank SBSBs; (4) the parenthetical “(See Note A)” is added to Line 1 for consistency with Line 1 of the Computation for Determination of Customer Reserve Requirements section in revised FOCUS Report Part II, and, in response to commenters, the section includes a clarification that the notes referenced in this section appear in Exhibit A to Rule 18a–4 (see SIFMA 9/5/2014 Letter); (5) in response to comment received, Lines 20 and 21 now correctly cross-reference “Line 19” instead of “Line 21” (see SIFMA 9/5/2014 Letter); (6) in Lines 23 and 25, “Reserve Bank Account(s)” is replaced with “Reserve Account(s)” for consistency with paragraph (a)(9) of Rule 18a–4; and (7) to eliminate extraneous text, the following sentence is deleted from the instructions: “The term ‘security-based swap customer’ is defined in 17 CFR 240.18a–4.”

<sup>366</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25230–31.

internally and with Rules 15c3–3 and 18a–4.<sup>367</sup>

#### Claiming an Exemption From Rule 18a–4

As discussed above, Rule 18a–4, as adopted, exempts bank SBSBs from the requirements of the rule if the SBSB meets certain conditions.<sup>368</sup> In light of this modification to the rule from the proposal (which did not provide an exemption), the Commission is adding a line item to the FOCUS Report Part IIC for a bank SBSB to indicate whether the firm is claiming an exemption from Rule 18a–4.<sup>369</sup>

#### Schedule 1 to FOCUS Report Part IIC

As discussed above, FOCUS Report Part II, as amended, includes a Schedule 1 that elicits details about filers' aggregate long and short positions in various categories of financial instruments, including sub-categories of security-based swaps and swaps. Proposed Form SBS would have required bank SBSBs and MSBSPs to complete a similar but more truncated version of this section.<sup>370</sup> The Commission received no comment on applying this truncated version of the schedule to bank SBSBs and MSBSPs. However, as discussed above, the Commission did receive comment on the practicality of reporting exposures to subcategories of security-based swaps and swaps, including the potential that firms will interpret them differently.<sup>371</sup> Accordingly, the Commission is modifying the proposed schedule for bank SBSBs and MSBSPs so that it no longer elicits details regarding the sub-categories of security-based swaps and swaps. As discussed above, the Commission also received comment suggesting that references to “long” and “short” positions in security-based

<sup>367</sup> See FOCUS Report Part IIC, *Possession or Control for Security-Based Swap Customers*. The following changes are being made: (1) References to Rule 18a–4 are removed from the section's title, line items, and instructions to accurately reflect that the possession or control requirements adopted by the Commission is located in Rules 15c3–3 and 18a–4 (instead of solely in Rule 18a–4 as initially proposed by the Commission); (2) to improve clarity, the form and instructions reflect that the section is titled “Possession or Control for Security-Based Swap Customers” instead of “Information for Possession or Control Requirements under Rule 18a–4”; and (3) the section's heading and instructions are updated to state that a stand-alone SBSB exempt from Rule 18a–4 is not required to complete this section to reflect that paragraph (f) of Rule 18a–4, as amended, provides an exemption from the rule for certain bank SBSBs.

<sup>368</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43933–35.

<sup>369</sup> See FOCUS Report Part IIC, *Claiming an Exemption From Rule 18a–4*.

<sup>370</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25235.

<sup>371</sup> See SIFMA 4/30/2015 Meeting.

swaps, mixed swaps, and swaps<sup>372</sup> should be changed to references to “long/bought” and “short/sold” positions. The Commission agrees and is making this modification.

For the foregoing reasons, the Commission is adopting the requirement that bank SBSBs and MSBSPs must complete a truncated version of Schedule 1 by including it in FOCUS Report Part IIC, as adopted, with the modifications discussed above.

### 3. Filing of Annual Audited Financial Reports and Other Reports

Rule 17a–5 generally requires a broker-dealer to, among other things, annually file reports audited by a PCAOB-registered independent public accountant, disclose certain financial information to customers, and notify the Commission of a change of accountant. The rule also requires the independent public accountant to notify the broker-dealer if the accountant determines that the broker-dealer is not in compliance with certain broker-dealer financial responsibility rules or that a “material weakness,” as defined in paragraph (d)(3)(iii) of the rule, exists. As discussed above, the Commission is amending Rule 17a–5 so that it is applicable to broker-dealer SBSBs, other than OTCDD/SBSBs, and broker-dealer MSBSPs. With respect to stand-alone SBSBs and MSBSPs and OTCDD/SBSBs, the Commission is adopting in new Rule 18a–7 many requirements that parallel requirements in Rule 17a–5, as amended. However, Rule 18a–7 does not include a parallel requirement for every requirement in Rule 17a–5.<sup>373</sup> Further, the requirements in Rule 18a–7 relating to the filing of annual audited reports and other reports do not apply to bank SBSBs and MSBSPs (as discussed above, bank SBSBs and MSBSPs are subject to requirements to file FOCUS Report Part IIC on a quarterly basis).

<sup>372</sup> See *id.*

<sup>373</sup> The Commission did not propose in Rule 18a–7 (and is not adopting) a requirement that is parallel to the exemption report requirement in paragraph (d)(4) of Rule 17a–5 because this provision would not apply to stand-alone SBSBs and MSBSPs. Rule 18a–7 also does not include requirements that parallel the requirements in paragraphs (d)(6) and (e)(4) of Rule 17a–5, as amended, requiring broker-dealers to file certain reports with the Securities Investor Protection Corporation (“SIPC”) because stand-alone SBSBs and MSBSPs and OTCDD/SBSBs will not be members of SIPC. In addition, Rule 18a–7 does not include a requirement that parallels the requirement for a broker-dealer, other than an OTC derivatives dealer, to file Form Custody with the firm’s DEA. Additional differences between Rule 18–7 and Rule 17a–5 are discussed below.

a. Amendments to Rule 17a–5 and Adoption of Rule 18a–7

#### Liquidity Stress Test Reports

The Commission proposed that broker-dealers (including broker-dealer SBSBs) and stand-alone SBSBs authorized to use internal models to compute net capital be subject to liquidity stress test requirements.<sup>374</sup> Consequently, the Commission proposed to amend Rule 17a–5 and include in proposed Rule 18a–7 a parallel provision to require these entities to file a monthly report with the Commission containing the results of the liquidity stress test.<sup>375</sup> As consideration of the proposed liquidity stress test requirements is being deferred,<sup>376</sup> the Commission is deferring consideration of these related reporting requirements.<sup>377</sup>

#### Customer Statements

Paragraph (c) of Rule 17a–5 requires, among other things, that certain broker-dealers annually send their customers audited statements that must include (along with other information) a statement of financial condition (with appropriate notes), a footnote with information about the firm’s net capital, and, if applicable, information about any material weaknesses in the firm’s internal control over compliance with certain broker-dealer financial responsibility rules identified in the most recent reports of the firm’s auditor. In addition, this paragraph requires these broker-dealers to send their customers unaudited statements dated six months after the date of the audited statements that must include (along with other information) a statement of financial condition and a footnote containing information about the firm’s net capital. Under paragraph (c)(5) of Rule 17a–5, a broker-dealer is exempt from sending the statements to customers if the broker-dealer, among other things, semi-annually sends its customers a financial disclosure statement that includes, among other things, information regarding the firm’s net capital and a statement that the audited and unaudited statements are available at no charge on the broker-dealer’s website and by calling a toll-free number to request a paper copy of

<sup>374</sup> See *Capital, Margin, and Segregation Proposing Release*, 77 FR at 70252–70254.

<sup>375</sup> See *Recordkeeping and Reporting Release*, 79 FR at 25237.

<sup>376</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43874.

<sup>377</sup> See paragraph (a)(5)(vii) of Rule 17a–5, as amended; paragraph (a)(3)(vii) of Rule 18a–7, as adopted. The proposed reporting requirements would have been set forth in these paragraphs, which instead are being designated “[Reserved].”

the statements. Broker-dealer SBSBs, other than OTCDD/SBSBs, and broker-dealer MSBSPs will be subject to these requirements and therefore will need to send the audited and unaudited statements to their customers, including security-based swap customers. However, these firms will be permitted to take advantage of the exemption described above.<sup>378</sup>

The Commission proposed in Rule 18a–7 that stand-alone SBSBs and MSBSPs be required to disclose on their websites (rather than send paper copies) information that is similar to the information broker-dealers are required to send to customers.<sup>379</sup> The proposal required stand-alone SBSBs and MSBSPs to disclose on their websites an audited statement of financial condition with appropriate notes within ten business days after the date the firm is required to file its audited annual reports with the Commission. In addition, it required a stand-alone SBSB (but not an MSBSP) to disclose on its website at the same time: (1) A statement of the amount of the firm’s net capital and required net capital and other information, if applicable, related to the firm’s net capital; and (2) if, in connection with the firm’s most recent annual reports, the report of the independent public accountant identified one or more material weaknesses, a copy of the report. Further, the proposal required stand-alone SBSBs and MSBSPs to disclose on their websites unaudited statements containing the same information as the audited statement discussed above within 30 calendar days of the date of the unaudited statements. Finally, it required stand-alone SBSBs and MSBSPs to make a paper copy of the information required to be disclosed on their websites available at no charge upon request of the customer and to maintain a toll-free number to receive such requests. The Commission received no comments on these customer disclosure proposals and is adopting them with the modification that an OTCDD/SBSB will be subject to these requirements pursuant to Rule 18a–7 (rather than Rule 17a–5).<sup>380</sup>

#### Annual Reports

Paragraph (d) of Rule 17a–5 requires broker-dealers, among other things, to file with the Commission annual reports consisting of a financial report and either a compliance report or an

<sup>378</sup> See the broad definition of “customer” in paragraph (c)(4) of Rule 17a–5.

<sup>379</sup> See *Capital, Margin, and Segregation Proposing Release*, 77 FR at 25237–38.

<sup>380</sup> See paragraph (b) of Rule 18a–7, as adopted.

exemption report, as well as reports that are prepared by an independent public accountant registered with the PCAOB covering the financial report and the compliance report or the exemption report in accordance with standards of the PCAOB. The financial report must contain financial statements, including, among others, a statement of financial condition, a statement of income, and a statement of cash flows and also must contain, as applicable, supporting schedules consisting of a computation of net capital under Rule 15c3-1, a computation of the reserve requirements under Rule 15c3-3, and information relating to the possession or control requirements under Rule 15c3-3. Generally, broker-dealers that maintain custody of customer securities and/or cash (and, therefore, do not claim an exemption from Rule 15c3-3) must file the compliance report. The report must contain statements about the broker-dealer's internal control over compliance with Rules 15c3-1, 15c3-3, 17a-13, and SRO customer account statement rules as well as statements as to whether the firm was in compliance with Rule 15c3-1 and paragraph (e) of Rule 15c3-3 (the customer reserve account requirement) as of the end of the firm's fiscal year. The exemption report must contain statements about the broker-dealer's claimed exemption from Rule 15c3-3.

The Commission proposed amending paragraph (d) of Rule 17a-5 to require a broker-dealer that was subject to proposed Rule 18a-4 (*i.e.*, a broker-dealer SBSB) <sup>381</sup> to: (1) File the compliance report and related report of the independent public accountant covering the compliance report (*i.e.*, the firm could not file the exemption report even if it claimed an exemption from Rule 15c3-3); and (2) incorporate the possession or control and customer reserve requirements of the proposed SBSB segregation rule into the financial report supporting schedules and the compliance report.<sup>382</sup>

The Commission also proposed parallel annual reporting requirements in proposed new Rule 18a-7 for stand-alone SBSBs and MSBSPs. The

<sup>381</sup> As noted above, the Commission proposed that Rule 18a-4, the SBSB segregation rule, apply to all SBSBs, but, in response to comment, adopted security-based swap segregation requirements for broker-dealers, including broker-dealer SBSBs, in paragraph (p) of the broker-dealer segregation rule, Rule 15c3-3. As a result, the Commission is modifying the cross references in paragraph (d) of Rule 17a-5 to reflect the placement of the customer protection requirements for broker-dealer SBSBs in paragraph (p) of Rule 15c3-3 rather than in paragraph (b) of Rule 18a-4 as proposed.

<sup>382</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25238-40.

proposals required stand-alone SBSBs and MSBSPs to annually file with the Commission a financial report. In addition, they required stand-alone SBSBs to file a compliance report that contained statements about the firm's compliance with the proposed SBSB capital and segregation rules and statements about the firm's internal control over compliance with those rules and the proposed SBSB securities count rule. Further, the proposals required stand-alone SBSBs and MSBSPs to file reports of an independent public accountant covering the financial report and the compliance report.

The final segregation rule for stand-alone SBSBs, bank SBSBs, and OTCCD/SBSBs (Rule 18a-4) establishes an exemption from its requirements if the firm meets certain conditions.<sup>383</sup> Consequently, the Commission is modifying the proposed annual reports provisions in Rule 18a-7 to require a stand-alone SBSB or OTCCD/SBSB that is operating under the exemption from Rule 18a-4 to file an exemption report instead of the compliance report.<sup>384</sup> The exemption report for stand-alone SBSBs and OTCCD/SBSBs is modeled on the existing exemption report for broker-dealers. In the report, the SBSB must state that it met the exemptive provisions in Rule 18a-4 throughout the most recent fiscal year without exception or with one or more exceptions. If applicable, the firm will need to briefly describe the nature of each exception and the approximate dates the exception existed. In addition, the stand-alone SBSB or OTCCD/SBSB will need to file a report of its independent public accountant covering the exemption report. Permitting these firms to file the exemption report in lieu of the compliance report should reduce the costs of the audit and will result in a report that aligns more closely with their activities (*i.e.*, operating under the exemption).

Finally, a commenter requested that the Commission permit the independent public accountant to adhere to generally accepted auditing standards ("GAAS") rather than PCAOB standards. The commenter stated that: (1) This would promote consistency with other U.S. regulators; (2) the PCAOB standards are "almost identical" to GAAS; and (3) using GAAS would be the lowest cost

<sup>383</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43933-35 (adopting paragraph (f) of Rule 18a-4). The final segregation requirements for broker-dealer SBSBs, other than OTCCD/SBSBs, do not contain a similar exemption.

<sup>384</sup> See paragraphs (c)(1)(i)(B)(2) and (c)(4) of Rule 18a-7, as adopted.

alternative.<sup>385</sup> The commenter also stated that the Commission should eliminate the PCAOB standards' applicability to audited compliance and exemption reports, because the requirement provides a "non-existent benefit" in light of existing Commission regulations and Commission and FINRA staff examinations.

In response, the Commission first notes that the requirement that broker-dealer annual financial statements be certified by a PCAOB-registered independent public accountant is consistent with the requirements imposed by the Exchange Act.<sup>386</sup> Moreover, as noted above, this requirement applies to all broker-dealers that must file certified annual reports. Further, the PCAOB has issued attestation standards specific to the examination of compliance reports and the review of exemption reports.<sup>387</sup> Consequently, the Commission does not believe it would be appropriate to amend Rule 17a-5 to permit broker-dealers subject to that rule to file annual reports that are not certified by a PCAOB-registered accountant because the firm is dually registered as an SBSB. Additionally, the Commission does not believe it would be appropriate to have the financial reports audited under PCAOB standards and the compliance or exemption report (as applicable) examined or reviewed, respectively, under GAAS.

However, the Commission believes it would be appropriate to permit SBSBs and MSBSPs subject to Rule 18a-7 to file annual reports that are certified by independent public accountants that are not registered with the PCAOB. Stand-alone SBSBs and MSBSPs are not subject to a statutory requirement that their financial statements filed with the Commission be certified by a PCAOB-registered accountant, and the audits of these entities will not be subject to the PCAOB's examination and enforcement authority. While an OTC derivatives dealer (as a broker-dealer) is subject to the statutory requirement, an OTCCD/SBSB will be subject to the same net capital rule (Rule 18a-1) and the same reporting rule (Rule 18a-7) as a stand-alone SBSB. The Commission believes an OTCCD/SBSB should be treated

<sup>385</sup> See Email from Mary Kay Scucci, Managing Director, Securities Industry and Financial Markets Association (Feb. 7, 2019) ("SIFMA 2/7/2019 Email").

<sup>386</sup> See Section 17(e)(1)(A) of the Exchange Act (as amended by Pub. L. 107-204, section 205(c)(2) (2002)).

<sup>387</sup> See PCAOB, Attestation Standard No. 1, Examination Engagements Regarding Compliance Reports of Brokers and Dealers, and Attestation Standard No. 2, Review Engagements Regarding Exemption Reports of Brokers and Dealers.

similarly to a stand-alone SBSB because they are both subject to the same capital rule. Further, Rule 17a-12, the OTC derivatives dealer reporting rule, does not require that the auditor of an OTC derivatives dealer's annual audited financial statements be registered with the PCAOB or that the audit be conducted in accordance with standards of the PCAOB.<sup>388</sup> Accordingly, the Commission believes that stand-alone SBSBs and MSBSPs and OTCDD/SBSBs should have the option to engage an independent public accountant that is not registered with the PCAOB, and that the independent public accountant engaged by the firm should have the option to use either GAAS in the United States or PCAOB standards.<sup>389</sup>

For these reasons, the Commission is adopting the proposed annual reports requirements with the modifications that stand-alone SBSBs and OTCDD/SBSBs operating under the exemption from Rule 18a-4 will be required to file the exemption report instead of the compliance report, that stand-alone SBSBs and MSBSPs and OTCDD/SBSBs may engage an independent public accountant that is not registered with the PCAOB, and that the accountant must undertake, as part of the engagement, to prepare its reports based on an examination or review, as applicable, of the reports prepared by the broker-dealer in accordance with GAAS in the United States or PCAOB standards.<sup>390</sup> In addition, the Commission made a number of non-substantive modifications to paragraph (d) of Rule 17a-5,<sup>391</sup> as proposed to be

<sup>388</sup> Paragraph (b) of Rule 17a-12 provides that the statements must be audited by "a certified public accountant," paragraph (f) provides that the accountant must be independent, and paragraph (h)(1) provides that the audit must be "made in accordance with U.S. Generally Accepted Auditing Standards."

<sup>389</sup> See Section 17(e)(1)(A) of the Exchange Act. See also Section 17(e)(1)(C) of the Exchange Act (providing the Commission with exemptive authority with respect to Section 17(e)(1)(A) of the Exchange Act).

<sup>390</sup> See paragraph (d) of Rule 17a-5, amended; paragraphs (c), (e), and (f) of Rule 18a-7, as adopted.

<sup>391</sup> Proposed references to Rule 18a-4 in paragraph (d) of Rule 17a-5 are changed to Rule 15c3-3 because—as discussed above—the segregation requirements for broker-dealer SBSBs are codified in Rule 15c3-3. Proposed references to Form SBS are changed to the FOCUS Report because—as discussed above—that will be the financial reporting form for SBSBs and MSBSPs. Paragraph (d)(2)(iii) of Rule 17a-5, as amended, also contains the following non-substantive differences from the paragraph as proposed to be amended: (1) Replacing the word "either" with "any of" in paragraph (d)(2)(iii) because the paragraph references more than two computations; and (2) replacing the word "the" with "Customer" in the phrase "Computation for Determination of the Reserve Requirements Under Exhibit A of

amended, and paragraph (c) of Rule 18a-7, as proposed to be adopted.<sup>392</sup>

#### Timing and Location of Filing

Paragraph (d)(5) of Rule 17a-5 provides that a broker-dealer, broker-dealer SBSB, other than an OTCDD/SBSB, and broker-dealer MSBSP must file the annual reports with the Commission not more than sixty calendar days after the end of the firm's fiscal year. Paragraph (d)(6) of Rule 17a-5 requires that the broker-dealer file the annual reports: (1) At the office of the Commission for the region where the broker-dealer has its principal place of business; (2) at the Commission's principal office in Washington, DC; (3) at the principal office of the broker-dealer's DEA; and (4) with SIPC. The Commission proposed parallel filing requirements in Rule 18a-7 for stand-alone SBSBs and MSBSPs, except that these entities would need to file the annual reports solely with the Commission.<sup>393</sup> Broker-dealers, including OTC derivatives dealers, currently may file their annual reports electronically.<sup>394</sup> The Commission is amending paragraph (d)(6) of Rule 17a-5 to provide broker-dealers, including broker-dealer SBSBs and MSBSPs the option to file the annual reports with the Commission electronically. In addition, the Commission is modifying paragraph (c)(6) of Rule 18a-7 to provide this option to stand-alone SBSBs, OTCDD/SBSBs, and stand-alone MSBSPs. For these reasons, the Commission is adopting the proposed requirements regarding the timing and location of the filings with these modifications.<sup>395</sup>

#### Nature and Form of the Reports

Paragraph (e) of Rule 17a-5, among other things: (1) Requires the broker-

§ 240.15c3-3" for consistency with FOCUS Report Parts II and III.

<sup>392</sup> Proposed references to Form SBS are changed to the FOCUS Report. In addition, the final rule refers to "the Computation of Tangible Net Worth under § 240.18a-2" instead of the "the Computation for Determination of Tangible Net Worth under § 240.18a-2." Further, the final rule refers to "a Computation for Determination of Security-Based Swap Customer Reserve Requirements under Exhibit A of § 240.18a-4" instead of "a Computation for Determination of the Reserve Requirements under Exhibit A of § 240.18a-4." Finally, the final rule refers to "Possession or Control for Security-Based Swap Customers under § 240.18a-4" instead of "Information Relating to the Possession or Control Requirements under § 240.18a-4."

<sup>393</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25240. Stand-alone SBSBs and MSBSPs would not be members of SIPC and would not have a DEA.

<sup>394</sup> See <https://www.sec.gov/divisions/marketreg/electronic-filing-broker-dealer-annual-reports.htm>.

<sup>395</sup> See paragraphs (c)(5) and (6) of Rule 18a-7, as adopted.

dealer to attach a notarized oath or affirmation to the financial reports; (2) provides that the annual reports are not confidential, except that the broker-dealer can request confidentiality for all parts of the annual reports other than the statement of financial condition and related accountant's report; and (3) requires a broker-dealer to file certain additional reports with SIPC. FOCUS Report Part III serves as the cover sheet for the annual reports and provides a template for the broker-dealer to execute the oath or affirmation. Broker-dealer SBSBs, other than OTCDD/SBSBs, and broker-dealer MSBSPs will be subject to these requirements, as amended. The Commission proposed amendments to paragraph (e) of Rule 17a-5 and parallel nature and form of the reports requirements in Rule 18a-7 for stand-alone SBSBs and MSBSPs.<sup>396</sup>

More specifically, the Commission proposed amending paragraph (e) of Rule 17a-5 to remove the text of the oath or affirmation because the text is set forth in FOCUS Report Part III as well. The Commission received no comment on this aspect of the proposal. However, to avoid confusion as to whether this change would result in a new substantive requirement, the Commission has determined to retain the text of the oath or affirmation in paragraph (e)(2) of Rule 17a-5 and to include it in paragraph (d)(1) of Rule 18a-7.

Paragraph (e)(4)(i) of Rule 17a-5 requires a broker-dealer to file with SIPC "a report on the SIPC annual general assessment reconciliation or exclusion from membership forms that contains such information and is in such format as determined by SIPC by rule and approved by the Commission." SIPC's rule (SIPC Rule 600, "Rules Relating to Supplemental Report of SIPC Membership") was approved by the Commission on March 14, 2016.<sup>397</sup>

Under paragraph (e)(4)(ii) of Rule 17a-5, broker-dealers are required to file the report with the Commission pursuant to the requirements in that paragraph (which prescribes the information that must be included in, and the format of, the report). However, under paragraph (e)(4)(ii) of Rule 17a-5, broker-dealers were no longer required to do so after SIPC adopted its rule under paragraph (e)(4)(i) of Rule 17a-5 and the rule was approved by the Commission. Therefore, for fiscal years that ended on or after April 30, 2016,

<sup>396</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25240-41.

<sup>397</sup> See *Securities Investor Protection Corporation*, Release No. SIPA-175 (Mar. 14, 2016), 81 FR 14372 (Mar. 17, 2016).

when SIPC's rule became effective, paragraph (e)(4)(ii) of Rule 17a-5 became moot. As a consequence, the Commission is making the technical amendment to paragraph (e)(4) of Rule 17a-5 to eliminate paragraph (e)(4)(ii). As amended, paragraph (e)(4) of Rule 17a-5 provides that: "The broker or dealer must file with SIPC a report on the SIPC annual general assessment reconciliation or exclusion from membership forms that contains such information and is in such format as determined by SIPC by rule and approved by the Commission." A broker-dealer is not required to also file the report with the Commission. There is no parallel provision in Rule 17a-12, the reporting rule for OTC derivatives dealers,<sup>398</sup> or in Rule 18a-7, because these entities are not (or will not) be members of SIPC.

In addition, the Commission proposed a number of changes to FOCUS Report Part III, which before these amendments was the cover page to be attached to a broker-dealer's annual reports, to accommodate its use by OTC derivatives dealers and stand-alone SBSBs and MSBSPs.<sup>399</sup> The Commission also proposed amending FOCUS Report Part III to address amendments made to Rule 17a-5 in 2013.<sup>400</sup> Further, the Commission proposed a number of non-substantive changes to FOCUS Report Part III.<sup>401</sup> The Commission received no comments on these proposed requirements and is adopting them.<sup>402</sup> However, the Commission is making several non-substantive changes to the original proposal to improve the clarity of FOCUS Report Part III.<sup>403</sup> The

<sup>398</sup> Paragraph (p) of Rule 17a-5 provides that an OTC derivatives dealer may comply with Rule 17a-5 by complying with Rule 17a-12.

<sup>399</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25241, n. 689. The Commission's EDGAR system will be updated to reflect the amendments to FOCUS Report Part III.

<sup>400</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 2524, n. 690. See also *Broker-Dealer Reports*, 78 FR 51910.

<sup>401</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25241, n. 691.

<sup>402</sup> See paragraph (e) of Rule 17a-5, as amended; paragraph (d) of Rule 18a-7, as adopted; FOCUS Report Part III, as amended. References in the paragraphs to "Form SBS" are changed to the "FOCUS Report" and references to "Rule 18a-4" in paragraph (e) of Rule 17a-5 are changed to "Rule 15c3-3."

<sup>403</sup> The following non-substantive changes to the rule were made. The title of the facing page was changed from "Audited Annual Report" to "Annual Reports" to more accurately reflect that multiple reports are filed with the facing page, and not all of these reports are audited. For the same reason, "report" is replaced with "filing" or "reports", as applicable, in the phrases "Report for the period beginning \_\_\_\_\_ and ending \_\_\_\_\_," "PCAOB-registered independent public accountant whose opinion is contained in this report", and "This report\*\* contains." Similarly, because not all the

Commission is also making several non-substantive changes to the checklist on the second page of FOCUS Report Part III.<sup>404</sup>

accountant-prepared documents filed with the facing page are opinions, the word "opinion" is replaced with "reports" in the phrases "PCAOB-registered independent public accountant whose opinion is contained in this report" and "Claims for exemption from the requirement that the annual report be covered by the opinion of a PCAOB-registered independent public accountant must be supported by a statement of facts and circumstances relied on as the basis of the exemption." For further confirmation of the PCAOB-registered accountant's identity, a field was added to identify the accountant's PCAOB registration number (if applicable). This information is publicly available on the PCAOB's website. In the "Type of Registrant" section, the "OTC derivatives dealer" checkbox is replaced with a "Check here if respondent is an OTC derivatives dealer" for consistency with FOCUS Report Part II, and to clarify that an OTC derivatives dealer is a type of broker-dealer. To simplify text and improve accuracy, "Name and Telephone Number of" is removed from the phrase "Name and Telephone Number of Person to Contact with Regard to this Filing." The language in the oath or affirmation is updated for consistency with the language in the oath or affirmation in paragraph (e)(2) of Rule 17a-5 and paragraph (d)(1) of Rule 18a-7.

<sup>404</sup> The following amendments were made to the checklist. The line item for the facing page is deleted because the checklist is part of the facing page, so a firm filling out the checklist is also necessarily filling out the facing page. In new line item (e), "Statement of changes in stockholders' equity or partners' or sole proprietor's capital" is replaced with "Statement of changes in stockholders' or partners' or sole proprietor's equity" to match the language used in paragraph (d)(2)(i) of Rule 17a-5, paragraph (b)(2) of Rule 17a-12, and paragraph (c)(2)(i) of Rule 18a-7. "Notes to consolidated statement of financial condition" and "Notes to consolidated financial statements" are added to the checklist as new line items (b) and (g), respectively, because they are required by paragraph (d)(2)(i) of Rule 17a-5, paragraph (b)(2) of Rule 17a-12, and paragraph (c)(2)(i) of Rule 18a-7. The line items titled "Computation of net capital under 17 CFR 240.15c3-1" and "Computation of net capital under 17 CFR 240.18a-1" are consolidated into a single new line item (h). Because the security-based swap reserve requirements are now included in both Rule 15c3-3 (governing broker-dealers) and Rule 18a-4 (governing SBSBs), cross-references to Rule 15c3-3 are added to new line items (k) and (n). To clarify that proposed line item (o) includes both the customer and PAB reserve requirements, new line item (l) is added requiring a computation for determination of PAB requirements under Exhibit A of § 240.15c3-3. In addition, for added clarity about which line items apply to securities instead of security-based swaps, the phrase "reserve requirements" is replaced with "customer reserve requirements" in new line item (j) and "possession or control requirements" is replaced with "possession or control requirements for customers" in new line item (m). Proposed line items (n) through (r) are consolidated into new line item (o) which better matches the language used in paragraph (d)(2)(iii) of Rule 17a-5, paragraph (b)(4) of Rule 17a-12, and paragraph (c)(2)(iii) of Rule 18a-7. In new line item (p), "A reconciliation between the audited and unaudited Statements of Financial Condition with respect to methods of consolidation" is replaced with "Summary of financial data for subsidiaries not consolidated in the statement of financial condition" to better match the language used in paragraph (d)(2)(i) of Rule 17a-5 and paragraph (b)(2) of Rule 17a-12. In

## Qualification of the Independent Public Accountant

As noted above, a broker-dealer is required to file with the Commission a report of a PCAOB-registered independent public accountant covering the annual reports. Paragraph (f) of Rule 17a-5: (1) Prescribes certain minimum qualifications for the independent public accountant; (2) requires the broker-dealer to file with the Commission a statement concerning the accountant; and (3) requires the broker-dealer to file a notice when replacing the accountant. Broker-dealer SBSBs, other than OTCCD/SBSBs, and broker-dealer MSBSPs will be subject to these requirements. The Commission proposed to include in Rule 18a-7 parallel independent public accountant qualifications, statement, and notice requirements for stand-alone SBSBs and MSBSPs.<sup>405</sup> The Commission is modifying these requirements to conform them to the modifications discussed above pursuant to which a

line item (s), a reference to Rule 18a-7 is added to reflect that an exemption report can be filed pursuant to this rule in addition to pursuant to Rule 17a-5. In line item (q), the phrase "in accordance with 17 CFR 240.17a-5, 17 CFR 240.17a-12, or 17 CFR 240.18a-7, as applicable" is added after "Oath or affirmation." Proposed line item (u), "A copy of the SIPC Supplemental Report" is removed from the checklist, because for fiscal years that end on or after April 30, 2016, the supplemental report is filed only with SIPC (and not with the Commission). See 17 CFR 240.17a-5(e)(4); *Securities Investor Protection Corporation*, File No. SIPC-2015-01 (Mar. 14, 2016), 81 FR 14372 (Mar. 17, 2016); Letter from SIPC to All Broker-Dealers including those that pay SIPC assessments and those that claim exclusion from SIPC membership regarding SIPC Series 600 Rules (Apr. 29, 2016). In line item (w), a reference to Rule 18a-7 is added to reflect that an exemption report can be filed pursuant to this rule in addition to pursuant to Rule 17a-5. Proposed line items (z), (aa), and (dd) are consolidated into new line item (u), which better matches the language used in paragraph (f)(1) of Rule 17a-5, paragraph (b) of Rule 17a-12, and paragraph (f)(1) of Rule 18a-7. The checklist also includes new line item (t), titled "Independent public accountant's report based on an examination of the statement of financial condition" to account for a firm's ability to request confidential treatment for the financial statements but not the statement of financial condition. Proposed line items (bb) and (ee) are consolidated into new line item (v), which now reads "Independent public accountant's report based on an examination of certain statements in the compliance report under 17 CFR 240.17a-5 or 17 CFR 240.18a-7, as applicable" to better reflect the language used in paragraph (g)(2)(i) of Rule 17a-5 and paragraph (f)(2)(i) of Rule 18a-7. Line item (x) is added for supplemental reports on applying agreed-upon procedures, in accordance with Rule 17a-5 (with respect to ANC broker-dealers) and Rule 17a-12 (with respect to OTC derivatives dealers). Throughout the checklist, the articles "A" and "An" are deleted as unnecessary and for internal consistency. In addition, line items are renumbered as needed due to insertions or deletions, and proposed line item (v) is moved to the end of the checklist as line item (y).

<sup>405</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25241-43.

stand-alone SBSB or MSBSP as well as an OTCDD/SBBD may engage an independent public accountant that is not registered with the PCAOB. The Commission received no other comments related to these proposed accountant qualification requirements and is adopting them with the modification discussed above.<sup>406</sup>

#### Engagement of the Independent Public Accountant

Paragraph (g) of Rule 17a-5 provides that the independent public accountant engaged by the broker-dealer to provide the reports covering the annual reports must, as part of the engagement, undertake to prepare the following reports, as applicable, in accordance with PCAOB standards: (1) A report based on an examination of the financial report; and (2) either a report based on an examination of certain statements in the compliance report or a report based on a review of the statements in the exemption report. Broker-dealer SBSBs, other than OTCDD/SBBDs, and broker-dealer MSBSPs will be subject to these requirements. The Commission proposed parallel engagement of accountant requirements in Rule 18a-7 for stand-alone SBSBs and MSBSPs.<sup>407</sup> The Commission is modifying these requirements to conform them to the modifications discussed above pursuant to which a stand-alone SBSB or MSBSP as well as an OTCDD/SBBD may engage an independent public accountant that is not registered with the PCAOB and the accountant may use GAAS in the United States or PCAOB standards. The Commission received no other comments related to these proposed requirements and is adopting them with the modification discussed above and with one additional modification.<sup>408</sup> As discussed above, the final segregation rule for stand-alone SBSBs, OTCDD/SBBDs, and bank SBSBs includes an exemption from the rule's requirements if firm meets certain conditions.<sup>409</sup> Consequently, the Commission is requiring a stand-alone SBSB or OTCDD/SBBD that is exempt from the segregation rule to file the exemption report instead of the compliance report. Accordingly, a stand-alone SBSB or OTCDD/SBBD that is exempt from the segregation rule must engage the

<sup>406</sup> See paragraph (e) of Rule 18a-7, as adopted. The modification deletes the phrase "and the independent public accountant must be registered with the Public Company Accounting Oversight Board" from the text of the final rule.

<sup>407</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25243.

<sup>408</sup> See paragraph (f) of Rule 18a-7, as adopted.

<sup>409</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43933-35 (adopting paragraph (f) of Rule 18a-4).

independent public accountant to perform a review of the firm's exemption report instead of an examination of the compliance report.<sup>410</sup>

#### Notification of Non-Compliance or Material Weakness

Paragraph (h) of Rule 17a-5 requires the independent public accountant engaged to prepare reports covering a broker-dealer's annual reports to provide the broker-dealer with a notification if, during the course of preparing its reports, the accountant discovers the firm is not in compliance with Rule 15c3-1, 15c3-3, 17a-13, or SRO customer account statement rules, or if the accountant determines that any material weaknesses exist. If the notification from the accountant concerns an occurrence that requires the broker-dealer to provide notification to the Commission (e.g., under Rule 17a-11), the broker-dealer must provide the accountant with a copy of the notification sent to the Commission. If the accountant does not receive the copy of the notification within one business day, or if the accountant disagrees with the statements in the notification, the accountant must notify the Commission and the broker-dealer's DEA within one business day.<sup>411</sup> Broker-dealer SBSBs, OTCDD/SBBDs, and broker-dealer MSBSPs will be subject to these requirements.

The Commission proposed parallel notification requirements in Rule 18a-7 for stand-alone SBSBs and MSBSPs and their independent public accountants.<sup>412</sup> The proposed notification requirements for stand-alone SBSBs would be triggered if the independent public accountant discovers the firm is not in compliance with the proposed SBSB capital, segregation, or security-count rules or that a material weakness exists. The proposed notification requirements for stand-alone MSBSPs would be triggered if the independent public accountant

<sup>410</sup> See paragraph (f)(2)(ii) of Rule 18a-7, as adopted.

<sup>411</sup> The Commission proposed to amend paragraph (h) of Rule 17a-5 to add references to the proposed SBSB segregation rule (Rule 18a-4) so that the notification requirements would be triggered if the accountant discovered a broker-dealer SBSB was not in compliance with that rule. As discussed above, the broker-dealer SBSB segregation requirements are being codified in Rule 15c3-3 (which is already referenced in paragraph (h) of Rule 17a-5). Therefore, these proposed amendments are not being adopted. However, the note to paragraph (h) of Rule 17a-5 refers to the "special reserve account" instead of "special account" as proposed, for internal consistency with Rules 15c3-3 and 18a-4, as adopted.

<sup>412</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25243-44.

discovers the firm is not in compliance with the proposed MSBSP capital rule. The Commission received no comment on these proposed notification requirements and is adopting them with the modification that an OTCDD/SBBD will be subject to these requirements pursuant to Rule 18a-7 (rather than Rule 17a-5).<sup>413</sup>

#### Reports of the Independent Public Accountant

Paragraph (i) of Rule 17a-5 prescribes requirements for the reports of the independent public accountant covering the broker-dealer's annual reports, including: (1) Technical requirements; (2) required representations; (3) the opinions or conclusions to be expressed in the accountant's reports; and (4) requirements related to matters to which the accountant takes exception. Broker-dealer SBSBs, other than OTCDD/SBBDs, and broker-dealer MSBSPs will be subject to these requirements. The Commission proposed parallel requirements in Rule 18a-7 for stand-alone SBSBs and MSBSPs.<sup>414</sup> The Commission is modifying these requirements to conform them to the modifications discussed above pursuant to which a stand-alone SBSB or MSBSP as well as an OTCDD/SBBD also registered as an OTC derivatives dealer may engage an independent public accountant that is not registered with the PCAOB and the accountant may use GAAS in the United States or PCAOB standards. The Commission received no other comments related to these proposed requirements regarding reports of the independent accountant and is adopting them as proposed.<sup>415</sup>

#### Notification of Change of Fiscal Year

Paragraph (n)(1) of Rule 17a-5 requires a broker-dealer to notify the Commission and its DEA of a change of its fiscal year. Paragraph (n)(2) requires that the notice contain a detailed explanation for the reasons for the change and requires that changes in the filing period for the annual reports must be approved in writing by the broker-dealer's DEA. Broker-dealer SBSBs, other than OTCDD/SBBDs, and broker-dealer MSBSPs will be subject to these requirements. The Commission proposed a parallel notification of a change of fiscal year requirement in Rule 18a-7 for stand-alone SBSBs and MSBSPs, except that under the proposal, the Commission (rather than the DEA) must approve a change in the

<sup>413</sup> See paragraph (g) of Rule 18a-7, as adopted.

<sup>414</sup> See also *Recordkeeping and Reporting Proposing Release*, 79 FR at 25245.

<sup>415</sup> See paragraph (h) of Rule 18a-7, as adopted.

filing period for the annual reports.<sup>416</sup> The Commission received no comments on these proposed requirements regarding notification of a change of fiscal year and is adopting them with the modification that an OTCDD/SBSD will be subject to these requirements pursuant to Rule 18a-7 (rather than Rule 17a-5).<sup>417</sup>

#### Filing Requirements

Paragraph (o) of Rule 17a-5 provides that a filing pursuant to the rule is deemed to be accomplished when it is received by the Commission's principal office with duplicates filed simultaneously at the locations prescribed in particular paragraphs of Rule 17a-5. Broker-dealer SBSBs, other than OTCDD/SBSBs, and broker-dealer MSBSPs will be subject to this requirement. The Commission proposed a parallel filing requirement in proposed Rule 18a-7 for stand-alone and bank SBSBs and MSBSPs.<sup>418</sup> The Commission received no comment on these proposed filing requirements and is adopting them with the modification that an OTCDD/SBSD will be subject to these requirements pursuant to Rule 18a-7 (rather than Rule 17a-5).<sup>419</sup>

#### b. Additional Amendments to Rule 17a-5 and Modifications to Rule 18a-7

The Commission proposed several amendments to Rule 17a-5 to eliminate obsolete text, improve readability, and to modernize terminology.<sup>420</sup> The Commission also proposed to redesignate certain paragraphs in Rule 17a-5 as a consequence of the proposal to delete other paragraphs in Rule 17a-5. The Commission received no comment on these amendments or redesignations and is adopting them as substantially as proposed.<sup>421</sup>

<sup>416</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25245.

<sup>417</sup> See paragraph (i) of Rule 18a-7, as adopted. As proposed, these requirements were in paragraph (j) of Rule 18a-7. Paragraph (i) of the rule contained a provision under which the Commission could grant extensions and exemptions from the filing requirements in the rule. On further consideration, the Commission believes this provision is unnecessary and is not adopting it. No commenters addressed it.

<sup>418</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25245.

<sup>419</sup> See paragraph (j) of Rule 18a-7, as adopted. As proposed, this requirement was in paragraph (k) of Rule 18a-7, but for the reasons discussed above it is being adopted in paragraph (j).

<sup>420</sup> See also *Recordkeeping and Reporting Proposing Release*, 79 FR at 25246.

<sup>421</sup> In addition to the differences discussed above between Rule 17a-5, as proposed to be amended, and Rule 17a-5, as amended, the Commission is adopting the following non-substantive changes to Rule 17a-5: (1) Replacing "Each broker or dealer that computes certain of its capital charges in accordance with" with "Broker-dealers that have

The Commission proposed amending paragraph (a)(4) of Rule 17a-5 to specify that a DEA "must promptly transmit that information" obtained through the filing of Form Custody, instead of merely requiring that the DEA "transmit the information" obtained through the Form Custody filing.<sup>422</sup> The Commission received no comment on this amendment and is adopting it as proposed. The Commission also proposed changes to the structuring of paragraph (a)(5) of Rule 17a-5, which requires certain ANC reports to be filed.<sup>423</sup> The Commission received no comment on this reorganization and is adopting it as proposed.

The Commission also made additional modifications to the text of Rule 18a-7 as proposed.<sup>424</sup>

been authorized by the Commission to compute net capital pursuant to" to clarify in paragraph (a)(5) that ANC broker-dealers must file additional reports "with the Commission"; (2) replacing "VaR" with "value at risk" in paragraph (a)(5)(ii) for consistency with paragraph (a)(3)(ii) of Rule 18a-6, as adopted; (3) replacing "broker or dealer's" with "broker's or dealer's" in paragraphs (a)(5)(v)(D)-(G); (4) adding "within 17 business days after the end of the month" in paragraph (a)(5)(vi) for clarity regarding the timing of the risk reports and consistency with paragraph (a)(3)(vi) of Rule 18a-6, as adopted; (5) replacing "from" with "after" in paragraph (c)(3) for consistency with paragraph (b)(2) of Rule 18a-7, as adopted; (6) adding "to" after the phrase "the broker or dealer is not subject" in paragraph (d)(1)(i)(B)(2) for internal consistency; (7) removing "as applicable, including" and adding "Information Relating to the" after the phrases "Possession or Control" in paragraph (d)(2)(ii) for clarity and consistency with 17 CFR 240.17a-5(d)(2)(ii); (8) replacing references to § 240.18a-4(c) with § 240.15c3-3(p)(3) in paragraphs (d)(3)(i)(A)(4) and (5), (d)(3)(i)(C), and (d)(3)(iii); (9) adding "identified" to paragraph (d)(3)(i)(B) for consistency with paragraph (c)(3)(i)(B) Rule 18a-7, as adopted; (10) removing references to "members" as a distinct class of registrant in addition to a "broker" or "dealer" in paragraph (e)(3) of Rule 17a-5; and (11) for internal consistency, the phrase "shall fail" is replaced with "fails" in the note to paragraph (h).

<sup>422</sup> See also *Recordkeeping and Reporting Proposing Release*, 79 FR at 25246.

<sup>423</sup> See paragraph (a)(5) of Rule 17a-5, as proposed to be amended. See also *Recordkeeping and Reporting Proposing Release*, 79 FR at 25246-47.

<sup>424</sup> In particular, the Commission is adopting the following non-substantive modifications to proposed Rule 18a-7: (1) Replacing "must file an executed Part II of Form X-17A-5 (§ 249.617 of this chapter) with the Commission or its designee" with "must file with the Commission or its designee Part II of Form X-17A-5 (§ 249.617 of this chapter)" in paragraph (a)(1) for consistency with paragraph (a)(1)(ii) of Rule 17a-5, as amended; (2) replacing "must file an executed Part IIC of Form X-17A-5 (§ 249.617 of this chapter) with the Commission or its designee" with "must file with the Commission or its designee Part IIC of Form X-17A-5 (§ 249.617 of this chapter)" in paragraph (a)(2) for consistency with paragraph (a)(1)(ii) of Rule 17a-5, as amended; (3) adding "additional reports with the Commission" at the end of paragraph (a)(3) for clarity; (4) adding "in the format described in the application" before the phrase "within 17 business days after the end of the month" in paragraph (a)(3)(vi) for consistency with paragraph (a)(5)(vi) of Rule 17a-5, as amended; (5) removing "," after

#### C. Notification

##### 1. Introduction

After considering the anticipated business activities of SBSBs and MSBSPs, the Commission proposed a notification program for these registrants under Sections 15F and 17(a) of the Exchange Act modeled on the

"VaR" in paragraph (a)(3)(ix) for consistency with paragraph (a)(5)(ix) of Rule 17a-5, as amended; (6) removing the phrase "required by § 240.18a-7(d)" from paragraph (b)(2)(v) to eliminate an incorrect cross-reference to this paragraph; (6) removing "a model approved pursuant to" after the phrase "in accordance with" in paragraph (a)(3)(i) for consistency with paragraph (a)(5)(i) of Rule 17a-5; (7) removing "otherwise" from paragraph (c)(1)(i) for consistency with paragraph (d)(1)(i)(B)(1) of Rule 17a-5, as amended; (8) replacing "request for a change should" with "request for a change must" in paragraph (c)(1)(ii) for clarity; (9) replacing "is not required to" with "need not" in paragraph (c)(1)(iii) for consistency with paragraph (d)(1)(iii) of Rule 17a-5, as amended; (10) removing "including" before the phrase "a Computation of Net Capital" in paragraph (c)(2)(ii) for clarity; (11) adding "Information Relating to the" before the phrase "Possession or Control" in paragraph (c)(2)(ii) for consistency with 17 CFR 240.17a-5(d)(2)(ii); (12) replacing "filed pursuant to paragraph (a) of this section, a reconciliation, including appropriate explanations, between the computation in the financial report and the computation in the most recently filed report, or if no material differences exist, a statement so indicating must be included in the financial report." with "filed by the registrant pursuant to paragraph (a) of this section, a reconciliation, including appropriate explanations, between the computation in the financial report and the computation in the most recent Part II of Form X-17A-5 filed by the registrant. If no material differences exist, a statement so indicating must be included in the financial report." in paragraph (c)(2)(iii) for consistency with paragraph (d)(2)(iii) of Rule 17a-5, as amended; (13) adding "as of the end of the most recent fiscal year; and" to the end of paragraph (c)(3)(i)(A)(4) for consistency with paragraph (d)(3)(i)(A)(4) of Rule 17a-5, as amended; (14) replacing "The information used to assert compliance with §§ 240.18a-1 and 240.18a-4(c) was derived from the books and records of the security-based swap dealer; and" with "The information the security-based swap dealer used to state whether it was in compliance with §§ 240.18a-1, 240.18a-4(c), and, if 240.18a-4(c) was derived from the books and records of the security-based swap dealer." in paragraph (c)(3)(i)(A)(5) for consistency with paragraph (d)(3)(i)(A)(5) of Rule 17a-5, as amended; (15) replacing "60" with "sixty (60)" in paragraph (c)(5) for consistency with paragraph (d)(5) of Rule 17a-5, as amended; (16) removing "(d)(2)" from the third sentence of paragraph (d)(2) for consistency with paragraph (e)(3) of Rule 17a-5, as amended; (17) replacing "of this chapter. In addition, the accountant" with "of this chapter, and the independent public accountant" in paragraph (e)(1) for consistency with paragraph (f)(1) of Rule 17a-5, as amended; (18) replacing "Such statement must" with "The statement must" in paragraph (e)(2) for consistency with paragraph (f)(2) of Rule 17a-5, as amended; (19) replacing "a notice which must" with "a notice that must" in paragraph (e)(3) for consistency with paragraph (f)(3) of Rule 17a-5, as amended; (20) adding "," after "§ 240.18a-8" in the second sentence of paragraph (g)(1) for consistency with paragraph (h) of Rule 17a-5, as amended; and (21) removing "and" at the end of paragraph (h)(3)(i) for consistency with paragraph (i)(3)(i) of Rule 17a-5, as amended.

notification program for broker-dealers codified in Rule 17a-11. Rule 17a-11 specifies the circumstances under which a broker-dealer must notify the Commission and other regulators about its financial or operational condition, as well as the form of the notice. Rule 17a-11 is being amended to account for the security-based swap activities of entities subject to its requirements and new Rule 18a-8—which is modeled on Rule 17a-11—is being adopted to establish reporting requirements for SBSBs and MSBSPs that will not be subject to Rule 17a-11. Rule 18a-8 does not include a parallel requirement for every requirement in Rule 17a-11.<sup>425</sup>

As is the case with Rules 17a-5 and 18a-7, the applicability of Rule 17a-11 or 18a-8 will depend on whether the firm is subject to the capital requirements of Rule 15c3-1 (in which case Rule 17a-5 will apply), is subject to the capital requirements of Rules 18a-1 or 18a-2 (in which case Rule 18a-7 will apply), or has a prudential regulator (in which case Rule 18a-7 will apply).<sup>426</sup> Therefore, a stand-alone broker-dealer, including a stand-alone OTC derivatives dealer, (which is subject to Rule 15c3-1) will continue to be subject to Rule 17a-11. Similarly, a broker-dealer SBSB, other than an OTCCD/SBSB, (which is subject to Rule 15c3-1) will be subject to Rule 17a-11. A broker-dealer, including an OTC derivatives dealer, that is also an MSBSP (which is subject to Rule 15c3-1), will be subject to Rule 17a-11. A stand-alone SBSB (which is subject to Rule 18a-1) will be subject to Rule 18a-8. Similarly, an OTCCD/SBSB (which is subject to Rule 18a-1) will be subject to Rule 18a-8.<sup>427</sup> A stand-alone MSBSP (which is subject to Rule 18a-2) will be subject to Rule 18a-8. Finally, a bank SBSB or MSBSP (which has a prudential regulator) will be subject to Rule 18a-8.<sup>428</sup>

<sup>425</sup> The Commission did not propose to include certain Rule 17a-11 notification requirements in Rule 18a-8 because they are not relevant to stand-alone and bank SBSBs and MSBSPs. See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25247, n. 773.

<sup>426</sup> The undesignated introductory paragraphs to Rules 17a-11 and 18a-8 have been modified to clarify this application of the rules.

<sup>427</sup> An OTCCD/SBSB is subject to Rules 17a-3, 17a-4, 17a-13, 18a-1, 18a-4, 18a-7, and 18a-8 rather than Rules 18a-5, 18a-6, 18a-9, 15c3-1, 15c3-3, 17a-5, and 17a-11, respectively. As a result, the Commission has made a conforming modification to Rule 18a-8. In particular, where Rule 18a-8 refers to Rule 18a-5, the Commission has added the following reference to Rule 17a-3: “or § 240.17a-3, as applicable.”

<sup>428</sup> The notification requirements for bank SBSBs and MSBSPs are substantially narrower in scope than the notification requirements for broker-dealer and stand-alone SBSBs and MSBSPs.

## 2. Amendments to Rule 17a-11 and New Rule 18a-8

### Undesignated Introductory Paragraph

The Commission proposed that an undesignated introductory paragraph be added to Rule 17a-11, explaining that the rule applies to a broker-dealer, including a broker-dealer SBSB or MSBSP.<sup>429</sup> Further, the Commission proposed to delete paragraph (a) of Rule 17a-11, which provides that the rule shall apply to every broker-dealer registered pursuant to Section 15 of the Exchange Act. This text would be redundant given the proposed undesignated introductory paragraph. Similarly, the Commission proposed that Rule 18a-8 have an undesignated introductory paragraph explaining that the rule applies to an SBSB or MSBSP that is not registered as a broker-dealer.<sup>430</sup> The note further explained that a broker-dealer that is dually registered as an SBSB or MSBSP is subject to the notification requirements under Rule 17a-11. The Commission received no comments on the introductory paragraphs but, as discussed above, is modifying them to clarify which rule (17a-11 or 18a-8) applies to a given type of entity.

### Failure To Meet Minimum Capital Requirements

Rule 17a-11 requires a broker-dealer to notify the Commission if the firm discovers or is informed by the Commission or its DEA that its net capital has declined below the minimum amount required under Rule 15c3-1.<sup>431</sup> Further, a broker-dealer registered as an OTC derivatives dealer also must provide notice if its tentative net capital falls below the minimum amount required under Rule 15c3-1. Broker-dealer SBSBs, other than OTCCD/SBSBs, and broker-dealer MSBSPs will be subject to these existing notification requirements, as applicable. The Commission proposed parallel capital notification requirements in Rule 18a-8 for stand-alone SBSBs and MSBSPs.<sup>432</sup> The Commission received no comment on these notification provisions and has adopted the capital rules for nonbank SBSBs and MSBSPs.<sup>433</sup> The Commission is adopting the failure to meet minimum capital requirements notification

<sup>429</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25247-48.

<sup>430</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25247-48.

<sup>431</sup> See paragraph (a) of Rule 17a-11, as amended.

<sup>432</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25248.

<sup>433</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43879-908.

provisions as proposed with the modification that an OTCCD/SBSB will be subject to these requirements pursuant to Rule 18a-7 (rather than Rule 17a-5).<sup>434</sup>

### Early Warning of Potential Capital or Model Problem

Rule 17a-11 specifies five events that trigger a requirement that a broker-dealer send notice promptly (within twenty-four hours) to the Commission.<sup>435</sup> These notices are designed to provide the Commission with “early warning” that the broker-dealer may experience financial difficulty.<sup>436</sup> Broker-dealer SBSBs, other than OTCCD/SBSBs, and broker-dealer MSBSPs will be required to comply with these existing notification requirements. The Commission proposed parallel early warning notification requirements in Rule 18a-8 for stand-alone SBSBs and MSBSPs.<sup>437</sup> The Commission received no comment on these early warning provisions and is adopting them with the modification that an OTCCD/SBSB will be subject to these requirements pursuant to Rule 18a-7 (rather than Rule 17a-5).<sup>438</sup>

### Notice of Adjustment of Reported Capital Category

Prudential regulators have established five capital categories that are used to describe a bank’s capital strength: Well capitalized, adequately capitalized, undercapitalized, significantly undercapitalized, and critically undercapitalized.<sup>439</sup> The definition of each capital category is based on capital measures under the bank capital standard and other factors.<sup>440</sup> A bank is required to notify its appropriate prudential regulator of adjustments to the bank’s capital category that would put the bank into a lower capital category from the category previously assigned to it. Following the notice, the

<sup>434</sup> See paragraphs (a)(1)(i) and (ii) and (a)(2) of Rule 18a-8, as adopted.

<sup>435</sup> See paragraph (b) of Rule 17a-11, as amended.

<sup>436</sup> The Commission proposed a new notification requirement applicable to broker-dealer MSBSPs that would require a broker-dealer MSBSP to notify the Commission when its level of tangible net worth falls below \$20 million. Rule 18a-2, as adopted, does not apply to broker-dealer MSBSPs. Accordingly, the Commission is not adopting this requirement.

<sup>437</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25248-49.

<sup>438</sup> See paragraphs (b)(1) through (4) of Rule 18a-8, as adopted. In addition, the Commission is making the following non-substantive change to paragraph (b) of Rule 17a-11, as adopted: Replacing “paragraph (b)(1), (b)(2), (b)(3) or (b)(4)” with “paragraph (b)(1), (2), (3), (4), or (5)” to correct an inadvertent omission.

<sup>439</sup> See 12 CFR 325.103; 12 CFR 6.4; 12 CFR 208.43.

<sup>440</sup> See *id.*

prudential regulator determines whether the bank needs to adjust its capital category.<sup>441</sup> The Commission proposed to include a notification requirement in Rule 18a–8 that requires a bank SBSB to give notice to the Commission when it files an adjustment of reported capital category with its prudential regulator by transmitting a copy of the notice to the Commission.<sup>442</sup> The Commission received no comment on this provision and for the reasons discussed in the proposing release is adopting it as proposed.<sup>443</sup>

#### Failure To Make and Keep Current Books and Records

Rule 17a–11 requires a broker-dealer that fails to make and keep current the books and records required under Rule 17a–3 to notify the Commission of this fact on the same day that the failure arises.<sup>444</sup> In addition, a broker-dealer is required to report to the Commission within forty-eight hours of the original notice a report stating what the broker or dealer has done or is doing to correct the situation. Broker-dealer SBSBs, other than OTCCDD/SBSBs, and broker-dealer MSBSPs will be required to comply with these existing notification requirements. The Commission proposed a parallel books and records notification requirement in Rule 18a–8 for stand-alone and bank SBSBs and MSBSPs.<sup>445</sup> The Commission received no comment on this provision and is adopting it with the modification that an OTCCDD/SBSB will be subject to these requirements pursuant to Rule 18a–7 (rather than Rule 17a–5).<sup>446</sup>

#### Material Weakness

Rule 17a–11 requires a broker-dealer to provide notification about a *material weakness* as that term is defined in Rule 17a–5.<sup>447</sup> Specifically, the rule provides that, whenever a broker-dealer discovers or is notified by an independent public accountant of a material weakness as defined in Rule 17a–5, the broker-dealer must: (1) Give notice to the Commission within twenty-four hours of the discovery or notification of the material weakness; and (2) transmit a report within forty-eight hours of the notice stating what the broker-dealer has done or is doing to correct the situation.

<sup>441</sup> See 12 CFR 6.3(c); 12 CFR 208.42(c); 12 CFR 325.102(c).

<sup>442</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25249.

<sup>443</sup> See paragraph (c) of Rule 18a–8, as adopted.

<sup>444</sup> See paragraph (c) of Rule 17a–11, as amended.

<sup>445</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25249–50.

<sup>446</sup> See paragraph (d) of Rule 18a–8, as adopted.

<sup>447</sup> See paragraph (d) of Rule 17a–11, as amended (defining “material weakness”).

Broker-dealer SBSBs, other than OTCCDD/MSPSPs, and broker-dealer MSBSPs will be required to comply with these existing notification requirements. The Commission proposed a parallel material weakness notification requirement in Rule 18a–8 applicable to stand-alone SBSBs.<sup>448</sup> The Commission received no comment on this provision and is adopting it with the modification that an OTCCDD/SBSB will be subject to these requirements pursuant to Rule 18a–7 (rather than Rule 17a–5).<sup>449</sup>

#### Insufficient Liquidity Reserve

The Commission proposed that broker-dealers (including broker-dealer SBSBs) and stand-alone SBSBs authorized to use internal models to compute net capital be subject to liquidity stress test requirements.<sup>450</sup> Consequently, the Commission proposed that these types of broker-dealers and stand-alone SBSBs give immediate notice in writing if the liquidity stress test indicates that the amount of the firm’s liquidity reserve is insufficient.<sup>451</sup> As consideration of the proposed liquidity stress test requirements is being deferred,<sup>452</sup> the Commission is deferring consideration of these related notification requirements.<sup>453</sup>

#### Failure To Make a Required Reserve Deposit

Paragraph (i) of Rule 15c3–3 requires a broker-dealer to notify the Commission and its DEA if it fails to make a required deposit into its customer reserve account under Rule 15c3–3. Since a broker-dealer SBSB was required to maintain a separate reserve account for its security-based swap customers under Rule 18a–4, as proposed, the Commission proposed a new notification requirement in Rule 17a–11 that would be triggered if a broker-dealer SBSB fails to make a required deposit into its special account for the exclusive benefit of security-based swap customers.<sup>454</sup> The Commission also proposed a parallel

<sup>448</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25250.

<sup>449</sup> See paragraph (e) of Rule 18a–8, as adopted.

<sup>450</sup> *Capital, Margin, and Segregation Proposing Release*, 77 FR at 70252–54.

<sup>451</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25250–51.

<sup>452</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43874.

<sup>453</sup> See paragraph (e) of Rule 17a–11, as amended; paragraph (f) of Rule 18a–8, as adopted. The proposed notification requirements would have been set forth in these paragraphs, which instead are being designated “[Reserved].”

<sup>454</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25251.

reserve account notification requirement in Rule 18a–8 applicable to stand-alone SBSBs and bank SBSBs. The Commission received no comment on these notification provisions and has adopted security-based swap customer segregation requirements.<sup>455</sup> The Commission is adopting the proposed notification requirements for the reasons discussed in the proposing release with certain modifications.<sup>456</sup> In particular, the security-based swap reserve requirement applicable to broker-dealers, including broker-dealer SBSBs (other than OTCCDD/SBSBs), is codified in Rule 15c3–3 and is expanded to apply to stand-alone broker-dealers engaged in security-based swap activities. Accordingly, the Commission is adopting requirements that stand-alone broker-dealers and SBSBs must provide notice if they fail to make a required security-based swap customer reserve deposit.<sup>457</sup>

#### Manner of Notification

Rule 17a–11 specifies how and to whom the notices and reports required by the rule must be transmitted. Broker-dealers, broker-dealer SBSBs, other than OTCCDD/SBSBs, and broker-dealer MSBSPs will be required to give notice or transmit the notices and reports, including the proposed new notices, pursuant to these existing requirements.<sup>458</sup> The Commission proposed to amend this paragraph to no longer permit notice by telegraphic transmission, and instead to only allow notice by facsimile transmission.<sup>459</sup> The change was proposed in light of the fact that telegrams are no longer widely used in the United States,<sup>460</sup> and that Commission staff no longer receive Rule 17a–11 notices by telegram.<sup>461</sup> The

<sup>455</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43930–43.

<sup>456</sup> See paragraph (f) of Rule 17a–11, as amended; paragraph (g) of Rule 18a–8, as adopted.

<sup>457</sup> Because the reserve requirements for broker-dealers, other than OTCCDD/SBSBs, are codified in paragraph (p) of Rule 15c3–3, paragraph (f) of Rule 17a–11, as amended, refers to Rule 15c3–3 instead of Rule 18a–4. Finally, paragraph (f) of Rule 17a–11, as amended, and paragraph (g) of Rule 18a–8, as adopted, refer to the “special reserve account” instead of “special account” as proposed, for internal consistency with Rules 15c3–3 and 18a–4.

<sup>458</sup> As discussed above, current paragraph (g) of Rule 17a–11 (containing the existing manner of notification requirements for broker-dealers) was redesignated as paragraph (h).

<sup>459</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25251.

<sup>460</sup> See Tom Standage, *No Morse*, L.A. Times, Feb. 8, 2006, at B15 (noting that Western Union discontinued its telegram services effective January 27, 2006).

<sup>461</sup> The Commission’s website provides instructions on how to send the Rule 17a–11 notifications by facsimile transmission. The instructions are available at <https://www.sec.gov/>

Commission received no comment on this revision but believes it would be appropriate to further modernize the rule by amending it to permit the notices to be sent by email. Accordingly, the rule, as amended, provides in pertinent part that the notice section must be given or transmitted to the principal office of the Commission in Washington, DC and the regional office of the Commission for the region in which the broker or dealer has its principal place of business, *or to an email address provided on the Commission's website*.<sup>462</sup> This modification to provide for notification by email is based on the notification provision in recently adopted Rule 18a-10 and is designed to provide a simpler and more efficient process for sending the notifications (*i.e.*, via email).<sup>463</sup> Consequently, a broker-dealer will be able to transmit a notification required pursuant to Rule 17a-11 using an email address provided on the Commission's website and designated for the purpose of receiving such notifications.

The Commission proposed a parallel manner of notification requirement in Rule 18a-8.<sup>464</sup> The Commission received no comment on this provision but is modifying Rule 18a-8 to provide that the notice must be given or transmitted to the principal office of the Commission in Washington, DC and the regional office of the Commission for the region in which the SBSB or MSBSP has its principal place of business, *or to an email address provided on the Commission's website*.<sup>465</sup> Consequently, SBSBs and MSBSPs also will be permitted to transmit a notification required pursuant to Rule 18a-8 using an email address provided on the Commission's website and designated for the purpose of receiving such notifications.

For these reasons, the Commission is adopting the manner of notification requirements with the modification discussed above and with the modification that an OTCDD/SBSB will be subject to these requirements pursuant to Rule 18a-7 (rather than Rule 17a-5).

*divisions/marketreg/bdnotices.htm*. Notifications sent to the Commission's headquarters pursuant to the instructions are converted to PDFs and sent to an email box that is monitored by Commission staff.

<sup>462</sup> See paragraph (h) of Rule 17a-11, as amended.

<sup>463</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43943-46 (adopting Rule 18a-10).

<sup>464</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25251.

<sup>465</sup> See paragraph (h) of Rule 18a-8, as amended. As discussed below, the Commission is amending the email notification provision in paragraph (e) of Rule 18a-10 to align it with this modification to paragraph (h) of Rule 18a-8.

3. Additional Amendments to Rule 17a-11 and Modifications to Rule 18a-8.

The Commission proposed several amendments to Rule 17a-11 to eliminate obsolete text, improve readability, and modernize terminology. The Commission proposed a global change to Rule 17a-11 that replaced the use of the word "shall" in the rule with the word "must" or "will" where appropriate.<sup>466</sup> The Commission also proposed certain stylistic, corrective, and punctuation amendments to improve the readability of Rule 17a-11.<sup>467</sup> The Commission received no comment on these amendments and is adopting them as proposed.

As a consequence of the deletion of paragraph (a), paragraphs (b) through (e) of Rule 17a-11 were redesignated paragraphs (a) through (d), respectively. Further, the Commission is adding two new notification provisions to Rule 17a-11 that are codified in paragraphs (e) and (f) of the rule, as amended. As a consequence of the deletion of paragraph (a) and the addition of the two new provisions, paragraphs (f) through (i) were redesignated paragraphs (g) through (j), respectively. Similarly, due to the addition and deletion of various paragraphs, the Commission made a global change that replaced the cross-references to "paragraph (g)" of Rule 17a-11 with "paragraph (h)" of Rule 17a-11.<sup>468</sup> The Commission received no comment on these revisions and is adopting them as proposed.

Prior to these amendments, paragraph (f) of Rule 17a-11 made reference to a "member" of a national securities exchange as a distinct class of registrant in addition to a "broker" and "dealer." The Commission proposed to remove this reference to a "member" given that the rule applies to broker-dealers, which would include a member of a national

<sup>466</sup> The amendments would replace the word "shall" with the word "must" or "will" in the following paragraphs of Rule 17a-11, as proposed to be amended: (a)(1) and (2), (b), (c), (g), (h), and (j). See Rule 17a-11, as proposed to be amended.

<sup>467</sup> The Commission proposed the following stylistic and corrective changes to Rule 17a-11: (1) Replacing the phrase "this § 240.17a-11" with the phrase "this section" in paragraph (a)(1); (2) replacing the phrase "Every broker or dealer who" with the phrase "Every broker or dealer that" in paragraph (c); (3) replacing the phrase "such discovery or notification of the material inadequacy or the material weakness" with the phrase "the discovery or notification of the material inadequacy or material weakness" in paragraph (d)(1); and (4) removing the U.S.C. citations from paragraph (j) since the rule already cites to the applicable section of the Exchange Act.

<sup>468</sup> The amendments replace the phrase "paragraph (g)" with the phrase "paragraph (h)" in the following paragraphs of Rule 17a-11, as amended: (a)(1), (b), (c), (d)(1) and (2), and (g). See Rule 17a-11, as amended.

securities exchange that is a broker-dealer (and as discussed above, proposed to redesignate paragraph (f) as paragraph (g)).<sup>469</sup> The Commission received no comment on this revision and is adopting it as proposed.

Prior to these amendments, paragraph (f) of Rule 17a-11 contained a reference to the notices required under "paragraphs (b), (c), (d), or (e)" of Rule 17a-11. The Commission proposed to replace the quoted language with a reference to "this section" (and as discussed above, proposed to redesignate paragraph (f) as paragraph (g)).<sup>470</sup> The proposed change incorporated all the notices required under Rule 17a-11, including notices that are required under the new security-based swap customer reserve account notification requirement. The Commission received no comment on this revision and is adopting it as proposed.<sup>471</sup>

Finally, prior to these amendments, paragraph (h) contained references to "§ 240.15c3 1(a)(6)(iv)(B), § 240.15c3 1(a)(6)(v), § 240.15c3 1(a)(7)(ii), § 240.15c3 1(c)(2)(x)(B)(1), § 240.15c3 1(e), § 240.15c3 1d(c)(2), § 240.15c3 3(i), § 240.17a 5(h)(2), and § 240.17a 12(f)(2)." The Commission proposed amending the references to state, "§ 240.15c3-1, § 240.15c3-1d, § 240.15c3-3, § 240.17a-5, and § 240.17a-12."<sup>472</sup> This amendment corrected certain cross-references that are outdated due to the recently adopted amendments to some of these rules.<sup>473</sup> It also eliminated cross-references to specific paragraphs in the event of future amendments to these cross-referenced rules. The Commission received no comment on this amendment and is adopting it as proposed.<sup>474</sup>

The Commission also made certain non-substantive modifications to Rule 18a-8.<sup>475</sup>

<sup>469</sup> See paragraph (g) of Rule 17a-11, as proposed to be amended.

<sup>470</sup> See paragraph (g) of Rule 17a-11, as proposed to be amended.

<sup>471</sup> See paragraph (g) of Rule 17a-11, as amended.

<sup>472</sup> See paragraph (i) of Rule 17a-11, as proposed to be amended.

<sup>473</sup> See *Broker-Dealer Reports*, 78 FR 51910; *Financial Responsibility Rules for Broker-Dealers*, 78 FR 51824.

<sup>474</sup> See paragraph (i) of Rule 17a-11, as amended.

<sup>475</sup> The non-substantive modifications to Rule 18a-8, as adopted, are: (1) Adding "of such deficiency" after the phrase "must give notice" in paragraph (a)(1)(i) and (ii) and (a)(2) for consistency with paragraph (a)(1) of Rule 17a-11, as amended; (2) removing "as appropriate" after the phrase "its current amount of tentative net capital" in paragraph (a)(1)(ii) for clarity; (3) adding a "," after the phrase "with paragraph (h) of this section" in paragraph (e)(2) for consistency with paragraph

*D. Quarterly Securities Count and Capital Charge for Unresolved Securities Differences*

1. Introduction

The Commission proposed a securities count program for stand-alone SBSBs under Section 15F of the Exchange Act that is modeled on the securities count program for broker-dealers codified in Rule 17a–13.<sup>476</sup> Rule 17a–13 requires certain broker-dealers (generally, broker-dealers that hold customer funds and securities) to examine and count the securities they physically hold, account for the securities that are subject to their control or direction but are not in their physical possession, verify the locations of securities under certain circumstances, and compare the results of the count and verification with their records. Broker-dealer SBSBs, including OTCCDD/SBSBs, and broker-dealer MSBSPs will be subject to Rule 17a–13.<sup>477</sup> Consequently, they must comply with the existing securities count requirements in the rule with respect to security-based swaps.

Stand-alone SBSBs will be subject to Rule 18a–9, which is modeled on Rule 17a–13. Rule 18a–9 does not include a parallel requirement for every requirement in Rule 17a–13.<sup>478</sup> In addition, Rule 18a–9 does not apply to stand-alone MSBSPs because the customer protection rationale for Rule 17a–13 and Rule 18a–9 is not as pertinent to stand-alone MSBSPs. For example, the Commission does not anticipate that stand-alone MSBSPs will engage in securities operations involving the movement of funds and securities from buyer to seller that are as complex as the operations of dealers

(d)(2) of Rule 17a–11, as amended; and (4) adding “for which there is no prudential regulator” after the phrase “If a security-based swap dealer” in paragraph (g) for clarity.

<sup>476</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25252–54.

<sup>477</sup> The undesignated introductory paragraph to Rule 18a–9 has been modified to clarify this application of the rules. The Dodd-Frank Act amended the definition of “security” in Section 3(a)(10) of the Exchange Act to include a security-based swap. Therefore, each reference in Rule 17a–13 to a security in the Exchange Act includes a security-based swap. The Commission, however, has issued temporary exemptive relief excluding security-based swaps from the definition of security to the extent Commission rules did not otherwise apply specifically to security-based swaps prior to the amendment. See section III.C. of this release.

<sup>478</sup> The Commission is not including in Rule 18a–9, as adopted, provisions that would parallel the provisions in paragraphs (a)(1), (2), and (3) and (e) of Rule 17a–13. These paragraphs of Rule 17a–13 provide exemptions from complying with Rule 17a–13 for certain types of broker-dealers. The Commission believes that SBSBs will not limit their activities to the types of activities in which the exempt broker-dealers engage.

in securities such as broker-dealers and SBSBs.

2. Rule 18a–9

Undesignated Introductory Paragraph

The Commission proposed that Rule 18a–9 have an undesignated introductory paragraph explaining that the rule applies only to a stand-alone SBSB.<sup>479</sup> The note further explained that a broker-dealer, including a broker-dealer SBSB, is subject to the securities count requirements under Rule 17a–13.<sup>480</sup> The Commission received no comments on this proposed introductory paragraph and is adopting it with modifications to clarify which rule (17a–13 or 18a–9) applies to a given type of entity.<sup>481</sup>

Requirement To Perform a Securities Count

Paragraph (b) of Rule 17a–13 requires a quarterly securities count and specifies the steps a broker-dealer must take in performing the count. In general terms, the rule requires a broker-dealer to physically examine, count, and verify all securities positions (e.g., equities, corporate bonds, and government securities, and, after the Commission’s exemptive relief expires,<sup>482</sup> security-based swaps), and to compare the results of the count and verification with the firm’s records at least once each calendar quarter. A securities count difference results when the count reflects positions different than those reflected in the firm’s books and records.

The Commission proposed parallel securities count requirements in Rule 18a–9 that mirrored the requirements in paragraph (b) of Rule 17a–13.<sup>483</sup> Consequently, a stand-alone SBSB would be required to perform a securities count each quarter following steps that are identical to the steps specified in paragraph (b) of Rule 17a–13.<sup>484</sup> Moreover, a securities count needed to be performed no sooner than two months after the last count and no later than four months after the last count.<sup>485</sup>

Stand-alone SBSBs may have limited activities. The Commission believes, however, that stand-alone SBSBs will likely hold securities in a proprietary

<sup>479</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25253.

<sup>480</sup> See *id.*

<sup>481</sup> See undesignated introductory paragraph of Rule 18a–9, as adopted.

<sup>482</sup> See section III.C. of this release.

<sup>483</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25253–54.

<sup>484</sup> See paragraph (a) of Rule 18a–9, as proposed to be adopted.

<sup>485</sup> See *id.*

capacity and as hedges or collateral related to their swaps activity, and therefore are susceptible to the same risks as broker-dealers if securities are not counted and verified. This is the same reason that OTC derivatives dealers are not exempt from performing quarterly securities counts even though they also conduct a more limited business than traditional broker-dealers.

The Commission acknowledges that security-based swaps are not held in depositories or at other types of custodians. Instead, they are documented in contractual agreements. In order to meet the requirements of Rules 17a–13 and 18a–9, as applicable, a broker-dealer and SBSB generally will need to account for or verify its open security-based swap transactions. The method of doing so could involve steps to confirm open transactions reflected in the firm’s books and records with securities clearing agencies or counterparties. The Commission is adopting this requirement as proposed.<sup>486</sup>

Date of the Count

Paragraph (c) of Rule 17a–13 provides that: (1) The examination, count, verification, and comparison may be made either as of a date certain or on a cyclical basis covering the entire list of securities; (2) in either case the recordation of unresolved differences shall be effected within seven business days subsequent to the examination, count, verification, and comparison of a particular security; (3) in the event that an examination, count, verification, and comparison is made on a cyclical basis, it shall not extend over more than one calendar quarter-year; and (4) no security shall be examined, counted, verified, or compared for the purpose of the rule less than two months or more than four months after a prior examination, count, verification, and comparison. This permits a broker-dealer to perform the securities count on a rolling basis throughout the quarter as opposed to performing it all at once.<sup>487</sup> The Commission proposed a parallel securities count requirement in Rule 18a–8.<sup>488</sup> Consequently, a stand-alone SBSB could perform the securities count as of a date certain or on a cyclical basis subject to conditions that

<sup>486</sup> See paragraph (a) of Rule 18a–9, as adopted.

<sup>487</sup> For example, on day one the broker-dealer could perform the count with respect to securities of ABC Corporation, on day two the broker-dealer could perform the count with respect to securities of DEF Corporation, and on day three the broker-dealer could perform the count with respect to securities of GHI Corporation.

<sup>488</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25254.

are identical to the conditions in paragraph (c) of Rule 17a-13. The Commission received no comment on this provision and is adopting it as proposed.<sup>489</sup>

#### Separation of Duties

Paragraph (d) of Rule 17a-13 provides that the examination, count, verification, and comparison shall be made or supervised by persons whose regular duties do not require them to have direct responsibility for the proper care and protection of the securities or the making or preservation of the subject records. Thus, the rule requires a separation of duties as a control to promote the integrity of the securities count process. The Commission proposed a parallel separation of duties requirement in Rule 18a-9 that mirrored the requirement in paragraph (d) of Rule 17a-13.<sup>490</sup> Consequently, a stand-alone SBSBSP was required to assign responsibility for making or supervising the count to individuals whose regular duties do not require them to have direct responsibility for the proper care and protection of the securities or the making or preservation of the subject records.<sup>491</sup> The Commission received no comment on this provision and is adopting it as proposed.<sup>492</sup>

#### E. Alternative Compliance Mechanisms

A commenter urged the Commission to harmonize its recordkeeping requirements for SBSBSPs and MSBSPs with the CFTC's final recordkeeping requirements for swap dealers and major swap participants to the maximum extent possible with the goal of permitting firms to utilize a single recordkeeping system for security-based swaps and swaps.<sup>493</sup> In response to the comment and to promote harmonization with CFTC requirements, the Commission—as discussed below—is adopting a limited alternative compliance mechanism in Rules 17a-3 and 18a-5 and amending Rule 18a-10 to add recordkeeping and reporting requirements to the full alternative

compliance mechanism provided by that rule.<sup>494</sup>

#### 1. Limited Alternative Compliance Mechanism—Rules 17a-3 and 18a-5

Under the limited alternative compliance mechanism, an SBSBSP or MSBSP may comply with the recordkeeping requirements of the CEA and the rules thereunder applicable to swap dealers and major swap participants in lieu of complying with the requirements in Rules 17a-3 and 18a-5 to make and keep current trade blotters, customer account ledgers, and stock records solely with respect to information required to be included in these records regarding security-based swap transactions and positions if the SBSBSP or MSBSP:

- is registered as an SBSBSP or MSBSP pursuant to Section 15F of the Exchange Act;
- is registered as a swap dealer or major swap participant pursuant to section 4s of the Commodity Exchange Act and the rules thereunder;
- is subject to 17 CFR 23.201–202, 17 CFR 23.402, and 17 CFR 23.501 (the “CFTC’s Books and Records Rules”) with respect to its swap-related books and records;
- preserves all of the data elements necessary to create the records required by paragraphs (a)(1), (3), and (5) of Rule 17a-3; paragraphs (a)(1), (3), and (4) of Rule 18a-5; or paragraphs (b)(1) through (3) of Rule 18a-5, as applicable, as they pertain to security-based swap and swap transactions and positions;
- upon request furnishes promptly to representatives of the Commission the records required by paragraphs (a)(1), (3), and (5) of Rule 17a-3; paragraphs (a)(1), (3), and (4) of Rule 18a-5; or paragraphs (b)(1) through (3) of Rule 18a-5, as applicable, as they pertain to security-based swap and swap transactions and positions, as well as the records required by the CFTC’s Books and Records Rules, as they pertain to security-based swap and swap transactions and positions, in the format applicable to that category of record as set forth in Rule 17a-3 or Rule 18a-5, as applicable; and
- provides notice of its intent to utilize the limited alternative compliance mechanism by notifying the Commission in writing, both at the principal office of the Commission in Washington, DC and at the regional office of the Commission for the region

in which the registrant has its principal place of business, and, if the registrant is a broker-dealer, by notifying in writing the registrant’s DEA.<sup>495</sup>

These records must be maintained for the retention period and in the manner specified for that category of record in Rule 17a-4 or 18a-6, as applicable.

The first three prongs of the limited alternative compliance mechanism identify the entities that may use it; that is, entities that are registered with the Commission as an SBSBSP or MSBSP and with the CFTC as a swap dealer or major swap participant and are subject to the recordkeeping requirements of the CFTC with respect to its swap-related books and records. The fourth and fifth prongs set forth the substantive requirements of the limited alternative compliance mechanism: (1) That the registrant preserve the data elements necessary to create the relevant required records as they pertain to security-based swap and swap transactions and positions, regardless of format; and (2) that the registrant provide those data elements as they pertain to security-based swap and swap transactions and positions in the format required by Commission rules upon request by a representative of the Commission. In effect, these two requirements taken together mean that a firm will not be required to create a trade blotter, customer account ledger, or stock record reflecting security-based swap transactions and positions formatted pursuant to the Commission’s rules each day, but instead only when requested to do so by Commission staff. This should promote harmonization with CFTC requirements because firms will be able to create the daily records for both security-based swap and swap transactions and positions in the format required by the CFTC. For example, firms will not have to create on a daily basis two sets of trade blotters for security-based swap and swap transactions and positions: one in the Commission’s required format and the other in the CFTC’s required format.

The limited alternative compliance mechanism applies only to the provisions of Rules 17a-3 and 18a-5 that were specifically referenced by the commenter as appropriate for “harmonization,”<sup>496</sup> with the exception of the general ledger requirements in paragraph (a)(2) of Rules 17a-3 and 18a-5. Consequently, the limited alternative compliance mechanism may be applied to: (1) The trade blotter requirements in paragraph (a)(1) of Rule 17a-3, as amended, and paragraphs

<sup>489</sup> See paragraph (b) of Rule 18a-9, as adopted.

<sup>490</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25254.

<sup>491</sup> See paragraph (c) of Rule 18a-9, as proposed to be adopted.

<sup>492</sup> See paragraph (c) of Rule 18a-9, as adopted. Paragraph (d) of Rule 18a-9, as proposed to be adopted, would have mirrored paragraph (f) of Rule 17a-13, but the Commission is not adopting that provision.

<sup>493</sup> See SIFMA 9/5/2014 Letter. See also *Recordkeeping and Reporting Proposing Release*, 79 FR at 25198, 25209 (seeking comment on whether there are provisions in the CFTC’s recordkeeping and reporting rules for swap dealers and major swap participants that the Commission should consider with respect to the rules for SBSBSPs and MSBSPs).

<sup>494</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43943–46 (adopting Rule 18a-10, which provides an alternative compliance mechanism for certain SBSBSPs with respect to capital, margin, and segregation requirements).

<sup>495</sup> See paragraph (b) of Rule 17a-3, as amended, and paragraph (c) of Rule 18a-5, as adopted.

<sup>496</sup> See SIFMA 9/5/2014 Letter.

(a)(1) and (b)(1) of Rule 18a–5, as adopted; (2) the customer account ledger requirements of paragraph (a)(3) of Rule 17a–3, as amended, and paragraphs (a)(3) and (b)(2) of Rule 18a–5, as adopted; and (3) the stock record requirements of paragraph (a)(5)(ii) of Rule 17a–3, as amended, and paragraphs (a)(4) and (b)(3) of Rule 18a–5, as adopted. The Commission does not believe it would be appropriate to apply the limited alternative compliance mechanism to the general ledger requirements in paragraph (a)(2) of Rules 17a–3 and 18a–5 because the information that must be recorded in a general ledger is not limited to security-based swap and swap information. In particular, the general ledger must include information reflecting *all* assets and liabilities, income and expense, and capital accounts in order to facilitate examinations of the firm’s overall financial condition and solvency. The Commission believes that the substantive requirements of the remaining provisions identified by the commenter as applied to security-based swap and swap transactions and positions are sufficiently similar to their counterparts in the CFTC’s Books and Records Rules to make use of the limited alternative compliance mechanism appropriate. The Commission emphasizes that the limited alternative compliance mechanism applies solely to the books and records requirements with respect to security-based swap and swap transactions and positions, and does not extend to any books and records requirements for other types of transactions and positions. For other types of transactions and positions, the SBSB or MSBSP must make and keep current a trade blotter, customer account ledger, and stock record in the format required by Rule 17a–3 or 18a–5 as applicable.

The commenter seeking harmonization with the CFTC’s requirements also stated that the Commission should permit bank SBSBs and MSBSPs to satisfy the Commission’s recordkeeping requirements by complying with recordkeeping rules established by their prudential regulator, stating that “[s]uch rules should be supplemented with additional requirements only to the extent that such additional obligations are necessary for the Commission to fulfill its regulatory oversight of bank SBSBs and MSBSPs.”<sup>497</sup> Based largely on its consultations with the prudential regulators regarding their recordkeeping and reporting requirements, the

Commission believes that the final amendments and rules being adopted in this document achieve this objective by specifically addressing a bank’s activities as an SBSB or an MSBSP and only those activities. In particular, the rules being adopted in this document for bank SBSBs and MSBSPs are focused solely on documenting or requiring the reporting of information relating to engaging in security-based swap activities as opposed to the more traditional banking activities addressed by prudential regulators’ existing recordkeeping and reporting requirements. In addition, as discussed above in section II.B.2. of this release, the Commission is adopting a reporting form for bank SBSBs and MSBSPs (the FOCUS Report Part IIC) that elicits information that largely is drawn from the call reports banks must file with the prudential regulators. In this way, the Commission has harmonized its reporting requirements for bank SBSBs and MSBSPs with the reporting requirements of the prudential regulators.

## 2. Full Alternative Compliance Mechanism—Rule 18a–10

The Commission adopted the full alternative compliance mechanism in Rule 18a–10.<sup>498</sup> Rule 18a–10 permits certain SBSBs that are registered as swap dealers and that predominantly engage in a swaps business to elect to comply with the capital, margin, and segregation requirements of the CEA and the CFTC’s rules in lieu of complying with the capital, margin, and segregation requirements of Rules 18a–1, 18a–3, and 18a–4.<sup>499</sup> The Commission is amending Rule 18a–10 in this document to permit firms that will operate under Rule 18a–10 to elect to comply with the recordkeeping and reporting requirements of the CEA and the CFTC’s rules in lieu of complying with Rules 18a–5, 18a–6, 18a–7, 18a–8, and 18a–9.

Paragraph (a) of Rule 18a–10 sets forth the conditions that an SBSB must meet to operate under the full alternative compliance mechanism. The Commission is amending the preface of paragraph (a) to reference recordkeeping

and reporting requirements of the CEA and the CFTC’s rules as well as Rules 18a–5, 18a–6, 18a–7, 18a–8, and 18a–9 in order to add these requirements to the full alternative compliance mechanism.<sup>500</sup> The conditions for operating under the full alternative compliance mechanism are set forth in paragraphs (a)(1) through (5) of Rule 18a–10. Paragraphs (a)(1) through (3) of Rule 18a–10 provide that the firm must be registered with the Commission as an SBSB, must not be registered with the Commission as a broker-dealer (including an OTC derivatives dealer), and must be registered with the CFTC as a swap dealer. Paragraph (a)(4) of Rule 18a–10 provides that the SBSB must be exempt from the segregation requirements of Rule 18a–4. Paragraph (a)(5) of Rule 18a–10 provides that the aggregate gross notional amount of the firm’s outstanding security-based swap positions must not exceed the lesser of two thresholds as of the most recently ended quarter of the firm’s fiscal year.<sup>501</sup> The thresholds are: (1) The maximum fixed-dollar gross notional amount of open security-based swaps specified in paragraph (f) of the rule (“maximum fixed-dollar threshold”); and (2) 10% of the combined aggregate gross notional amount of the firm’s open security-based swap and swap positions. The amount of the maximum fixed-dollar threshold is \$250 billion for a transitional period of three years and will then drop to \$50 billion unless the Commission, by order: (1) Maintains the maximum fixed-dollar amount at \$250 billion for an additional period of time or indefinitely after the 3-year transition period ends; or (2) lowers it to an amount that is less than \$250 billion but greater than \$50 billion.<sup>502</sup> Other than the amendment to the preface of paragraph (a) discussed above, the Commission is not amending the conditions set forth in paragraphs (a)(1) through (5) of Rule 18a–10. In addition, the Commission is not amending paragraph (f) of Rule 18a–10 (specifying the maximum fixed-dollar threshold).

Paragraph (b) of Rule 18a–10 sets forth requirements for a firm that is

<sup>498</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43943–46.

<sup>499</sup> The full alternative compliance mechanism of Rule 18a–10 is not available to a nonbank SBSB that is also registered as a broker-dealer, including a broker-dealer that is an OTC derivatives dealer. In theory, a bank SBSB could use the full alternative compliance mechanism of Rule 18a–10 if it met the required conditions. However, the Commission does not expect that these entities would choose to do so. See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43944 n. 707.

<sup>500</sup> As amended, the preface to paragraph (a) of Rule 18a–10 provides that a security-based swap dealer may comply with capital, margin, segregation, recordkeeping, and reporting requirements of the Commodity Exchange Act and chapter I of title 17 of the Code of Federal Regulations applicable to swap dealers in lieu of complying with §§ 240.18a–1 and 240.18a–3 through 240.18a–9.

<sup>501</sup> The gross notional amount is based on the notional amounts of the firm’s security-based swaps and swaps that are outstanding as of the quarter end. It is not based on transaction volume during the quarter.

<sup>502</sup> See paragraphs (f)(1)(i) and (ii) of Rule 18a–10, as adopted.

<sup>497</sup> See SIFMA 9/5/2014 Letter.

operating pursuant to the rule. Paragraph (b)(1) provides, in pertinent part, that the firm must comply with the capital, margin, and segregation requirements of the CEA and the CFTC's rules applicable to swap dealers. The Commission is amending paragraph (b)(1) to reference recordkeeping and reporting requirements of the CEA and the CFTC's rules to add these requirements to this provision.<sup>503</sup> Consequently, a firm that is subject to Rule 18a–10 must comply with applicable capital, margin, segregation, recordkeeping, and reporting requirements of the CEA and the CFTC's rules and a failure to comply with one or more of those rules will constitute a failure to comply with Rule 18a–10.

Paragraph (b)(1) also provides, in pertinent part, that the firm must treat security-based swaps and related collateral pursuant of the CEA and the CFTC's rules to the extent the requirements do not specifically address security-based swaps and related collateral. This provision is designed to ensure that security-based swaps and related collateral do not fall into a "regulatory gap" with respect to an SBSB operating under the full alternative compliance mechanism. Under a CFTC no-action letter, if a capital, margin, segregation, recordkeeping, or reporting requirement applicable to a swap or collateral related to a swap is silent as to a security-based swap or collateral related to a security-based swap, the nonbank SBSB must treat the security-based swap or collateral related to the security-based swap pursuant to the requirement applicable to the swap or collateral related to the swap.<sup>504</sup>

The Commission is making clarifying amendments to paragraph (b)(1) of Rule 18a–10 to provide that the firm must

treat a security-based swap or collateral related to a security-based swap as a swap or collateral related to a swap, as applicable, if the CEA or the CFTC's rules do not specifically address a security-based swap or collateral related to a security-based swap.<sup>505</sup>

The amendments to Rule 18a–10 being adopted in this document will require a firm operating under the rule to treat security-based swaps and related collateral pursuant to the recordkeeping and reporting requirements of the CEA and the CFTC's rules as if they were swaps or related collateral to the extent those requirements do not specifically address security-based swaps and related collateral. For example, if the recordkeeping and reporting requirements of the CEA and CFTC's rules do not address a security-based swap transaction, the firm will need to treat it as a swap transaction for the purposes of the recordkeeping and reporting requirements that apply to swap transactions.

Paragraph (b)(2) of Rule 18a–10 requires the firm to provide a written disclosure to its counterparties after it begins operating pursuant to the rule. The disclosure must be provided before the first transaction with the counterparty after the firm begins operating pursuant to the rule. The disclosure must notify the counterparty that the firm is complying with the applicable capital, margin, and segregation requirements of the CEA and the CFTC's rules in lieu of complying with Rules 18a–1, 18a–3, and 18a–4. The Commission is amending paragraph (b)(2) to reference the recordkeeping and reporting requirements of the CEA and the CFTC's rules as well as Rules 18a–5, 18a–6, 18a–7, 18a–8, and 18a–9 in order to add these requirements to the disclosure requirement.<sup>506</sup>

<sup>505</sup> The amendments adding the recordkeeping and reporting requirements to paragraph (b)(1) and making the clarification discussed above result in the paragraph providing that compliance with capital, margin, segregation, recordkeeping, and reporting requirements of the Commodity Exchange Act and chapter I of title 17 of the Code of Federal Regulations applicable to swap dealers and treat security-based swaps or collateral related to security-based swaps as swaps or collateral related to swaps, as applicable, pursuant to those requirements to the extent the requirements do not specifically address security-based swaps or collateral related to security-based swaps.

<sup>504</sup> See, e.g., Letter from Eileen T. Flaherty, Director, Division of Swap Dealer and Intermediary Oversight, and Jeffrey M. Bandman, Acting Director, Division of Clearing and Risk, CFTC, to Mary P. Johannes, Senior Director, ISDA (Aug. 23, 2016) (providing no-action relief to swap dealers and major swap participants with respect to the CFTC's margin rules for non-cleared swaps pursuant to which these entities can portfolio margin non-cleared swaps with non-cleared security-based swaps, provided, among other conditions, the security-based swaps shall be treated as if they were swaps for all applicable provisions of the CFTC's margin rules).

<sup>506</sup> As amended, paragraph (b)(2) of Rule 18a–10 provides that an SBSB must disclose in writing to each counterparty to a security-based swap before entering into the first transaction with the counterparty after the date the SBSB begins operating under this section that the SBSB is operating under this section and is therefore complying with the applicable capital, margin, segregation, recordkeeping, and reporting requirements of the Commodity Exchange Act and

Paragraph (b)(3) of Rule 18a–10 requires the SBSB to immediately notify the Commission and the CFTC in writing if it fails to meet a condition in paragraph (a) of the rule. The Commission is making a non-substantive amendment to paragraph (b)(3) because—as discussed next—new paragraph (b)(4) is being added to the rule.<sup>507</sup> As discussed above in section II.C. of this release, Rule 17a–11 specifies the circumstances under which a broker-dealer must notify the Commission and other regulators about its financial or operational condition, as well as the form of the notice. Stand-alone and bank SBSBs and MSBSPs are subject to Rule 18a–8, which is modeled on Rule 17a–11. Rule 18a–8 is designed to provide the Commission with the ability to take effective proactive steps to respond when a stand-alone or bank SBSB is experiencing or likely to experience financial difficulty.<sup>508</sup> However, an SBSB operating under Rule 18a–10 may comply with the notification requirements of the CFTC's rules in lieu of complying with Rule 18a–8. Therefore, in order to retain a requirement that the SBSB provide notice to the Commission if it is experiencing or likely to experience financial difficulty, the Commission is adding paragraph (b)(4) to Rule 18a–10. This paragraph provides that an SBSB operating pursuant to Rule 18a–10 must simultaneously notify the Commission if the firm is required to send a notice concerning its capital, books and records, liquidity, margin operations, or segregation operations to the CFTC by transmitting to the Commission a copy of the notice being sent to the CFTC.<sup>509</sup>

In addition, as discussed in section II.A.3.a. of this release, paragraph (j) of Rule 17a–4 requires a broker-dealer to furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the broker-dealer that are required to be preserved under Rule 17a–4, or any other records of the broker-dealer subject to examination under Section 17(b) of the Exchange Act that are

the rules promulgated by the Commodity Futures Trading Commission thereunder in lieu of complying with the capital, margin, segregation, recordkeeping, and reporting requirements promulgated by the Commission in §§ 240.18a–1, 240.18a–3, 240.18a–4; 240.18a–5, 240.18a–6, 240.18a–7, 240.18a–8, and 240.18a–9.

<sup>507</sup> The non-substantive amendment removes the period at the end of the paragraph and in its place adds the text: "; and."

<sup>508</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25247.

<sup>509</sup> See paragraph (b)(4) of Rule 18a–10, as amended. See, e.g., 17 CFR 1.12 (CFTC) (maintenance of minimum financial requirements by futures commission merchants and introducing brokers).

requested by the representative of the Commission. Paragraph (g) of Rule 18a–6 prescribes a parallel prompt production requirement for stand-alone and bank SBSBs and MSBSPs. However, an SBSB operating under Rule 18a–10 may comply with the record preservation requirements of the CFTC’s rules in lieu of complying with Rule 18a–6. Therefore, in order to retain a requirement that the SBSB furnish records promptly to the Commission, paragraph (b)(5) is being added to Rule 18a–10. This paragraph provides that the SBSB must furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the SBSB that are required to be preserved under the CEA and CFTC’s rules applicable to swap dealers, or any other records of the SBSB subject to examination pursuant to Section 15F of the Exchange Act that are requested by a representative of the Commission.

Paragraph (c) of Rule 18a–10 addresses the situation in which a firm fails to comply with a condition in paragraph (a) of the rule and, therefore, no longer qualifies to operate pursuant to the rule. The paragraph provides that a firm in that circumstance must begin complying with Rules 18a–1, 18a–3, and 18a–4 no later than either: (1) Two months after the end of the month in which the firm failed to meet the condition in paragraph (a); or (2) after a longer period of time as granted by the Commission by order subject to any conditions imposed by the Commission. The Commission is amending the preface to paragraph (c) to reference Rules 18a–5, 18a–6, 18a–7, 18a–8, and 18a–9 in order to add these rules to the compliance requirement.<sup>510</sup>

Paragraph (d) of Rule 18a–10 addresses how a firm would elect to operate pursuant to the rule. Under paragraph (d)(1), a firm can make the election as part of the process of applying to register as an SBSB. In this case, the firm must provide written notice to the Commission and the CFTC during the registration process of its intent to operate pursuant to the rule. Upon being registered as an SBSB, the firm can begin complying with Rule 18a–10, provided it meets the conditions in paragraph (a) of the rule. Under paragraph (d)(2) of Rule 18a–10, an SBSB can make the election after the firm has been registered as an SBSB. In this case, paragraph (d)(2)(i) provides

that the firm must provide written notice to the Commission and the CFTC of its intent to operate pursuant to the rule. In addition, paragraph (d)(2)(ii) provides that the firm must continue to comply with Rules 18a–1, 18a–3, and 18a–4 for two months after the end of the month in which the firm provides the notice or for a shorter period of time as granted by the Commission by order subject to any conditions imposed by the Commission. The Commission is amending the preface to paragraph (d)(2)(ii) to reference Rules 18a–5, 18a–6, 18a–7, 18a–8, and 18a–9 in order to add these rules to the compliance requirement.<sup>511</sup>

As discussed above, paragraph (b)(3) requires a firm operating pursuant to the rule to immediately notify the Commission and the CFTC in writing if the SBSB fails to meet a condition in paragraph (a). Further, paragraphs (d)(1) and (2) require a firm to provide written notice to the Commission and the CFTC of its intent to operate pursuant to the rule. Paragraph (e) of Rule 18a–10 provides that the notices required by the rule must be sent by facsimile transmission to the principal office of the Commission and the regional office of the Commission for the region in which the security-based swap dealer has its principal place of business *or to an email address to be specified separately*, and to the principal office of the CFTC in a manner consistent with the notification requirements of the CFTC. The paragraph also requires that notices include a brief summary of the reason for the notice and contact information for an individual who can provide further information about the matter that is the subject of the notice (emphasis added). The Commission is amending paragraph (e) of Rule 18a–10 to provide that the notice must be sent by facsimile transmission to the principal office of the Commission and the regional office of the Commission for the region in which the security-based swap dealer has its principal place of business *or to an email address provided on the Commission’s website*, and to the principal office of the CFTC in a manner consistent with the notification requirements of the CFTC. This amendment is intended to clarify the location of the email address for firms that choose to send the notice via email.

## F. Cross-Border Application and Availability of Substituted Compliance

### 1. Cross-Border Application of Recordkeeping and Reporting Requirements

In the 2013 cross-border proposing release, the Commission preliminarily interpreted the Title VII requirements associated with registration to apply generally to the activities of registered entities.<sup>512</sup> In reaching that preliminary conclusion, the Commission did not concur with the views of certain commenters that the Title VII requirements should not apply to the foreign security-based swap activities of registered entities, stating that such a view could be difficult to reconcile with, among other things, the statutory language describing the requirements applicable to SBSBs.<sup>513</sup> The Commission further preliminarily identified the recordkeeping and reporting requirements as entity-level requirements, rather than requirements specifically applicable to particular transactions. Entity-level requirements primarily address concerns relating to the entity as a whole, with a particular focus on safety and soundness of the entity to reduce systemic risk in the U.S. financial system. The Commission accordingly proposed to apply the entity-level requirements on a firm-wide basis to address risks to the SBSB as a whole. The Commission did not propose any exception from the application of the entity-level requirements to SBSBs.<sup>514</sup>

A commenter expressed the view that requirements with respect to daily trading records and confirmations should be deemed transaction-level, on the grounds that the application and enforcement of these requirements will be addressed at the transaction level, and for consistency with the CFTC’s approach.<sup>515</sup> After considering the commenter’s concerns, the Commission continues to believe that the entirety of the recordkeeping and reporting requirements—including requirements addressing daily trading records and confirmations—appropriately are considered entity-level requirements.<sup>516</sup>

<sup>512</sup> See *Trade Acknowledgment and Verification of Security-Based Swap Transactions*, 81 FR at 39825, n.191 (citing *Cross-Border Proposing Release*, 78 FR at 30986).

<sup>513</sup> See *Cross-Border Proposing Release*, 78 FR at 30986.

<sup>514</sup> See *Cross-Border Proposing Release*, 78 FR at 31011. The Commission similarly expressed the preliminary view that MSBSPs should be required to adhere to the entity-level requirements. See *id.* at 31035.

<sup>515</sup> See SIFMA 9/5/2014 Letter.

<sup>516</sup> The Commission also believes that treating these requirements as entity-level requirements is

<sup>510</sup> As amended, the preface to paragraph (c) of Rule 18a–10 reads: “A security-based swap dealer that fails to meet one or more of the conditions specified in paragraph (a) of this section must begin complying with §§ 240.18a–1 and 240.18a–3 through 240.18a–9 no later than:”

<sup>511</sup> As amended, paragraph (d)(2)(ii) of Rule 18a–10 provides: “Continue to comply with §§ 240.18a–1 and 240.18a–3 through 240.18a–9 for at least:”

If the Commission treated its recordkeeping requirements as transaction-based requirements, and then excluded certain transactions from its recordkeeping requirements, it would not be able to effectively regulate and examine registrants. Not only would the Commission have an incomplete picture of registrants' transactions if other jurisdictions did not require records regarding the excluded transactions, but this approach would create logistical complexities when comparing records kept in different formats. These concerns about an incomplete picture of a registrant's business are exacerbated by the possibility that a registrant would not keep records of excluded transactions because its jurisdiction does not regulate either the transaction (*e.g.*, exclusions for certain security-based swap products or for certain transactions) or the entity. For these reasons, the Commission is treating recordkeeping and reporting requirements as entity-level requirements.

## 2. Availability of Substituted Compliance in Connection With Recordkeeping and Reporting Requirements

### a. Existing Substituted Compliance Rule

In 2013, the Commission proposed to make substituted compliance potentially available in connection with the requirements applicable to foreign SBSBs pursuant to Section 15F of the Exchange Act, other than the registration requirements applicable to dealers. Because the recordkeeping and reporting requirements being adopted are grounded in Section 15F, substituted compliance generally would have been available for those requirements under the proposal.<sup>517</sup> Upon a Commission substituted compliance determination, a person would be able to satisfy relevant recordkeeping or reporting requirements by substituting compliance with corresponding requirements under a foreign regulatory system.

The Commission subsequently adopted Rule 3a71-6, which provides that substituted compliance is available with respect to the Commission's business conduct requirements, and (rather than addressing all requirements under Section 15F of the Exchange Act) reserved the issue as to whether

necessary or appropriate to help prevent the evasion of the particular provisions of the Exchange Act that were added by the Dodd-Frank Act and prophylactically will help ensure that the purposes of those provisions of the Dodd-Frank Act are not undermined.

<sup>517</sup> See *Cross-Border Proposing Release*, 78 FR at 30968, 31085.

substituted compliance also would be available in connection with other requirements under that statute.<sup>518</sup> Rule 3a71-6 was amended to make substituted compliance available with respect to the Commission's trade acknowledgment and verification requirements,<sup>519</sup> and to make it available with respect to capital and margin requirements.<sup>520</sup>

### b. Amendments to Final Rule

A commenter requested that the Commission permit a foreign SBSB or MSBSP to satisfy its recordkeeping requirements by complying with recordkeeping rules established by its foreign regulator, provided the Commission determines such rules impose requirements comparable to Commission rules.<sup>521</sup> Another commenter stated that "[t]he Commission should allow non-U.S. SBSBs to satisfy any public disclosure requirements through substituted compliance."<sup>522</sup> The Commission agrees with the commenters and is amending Rule 3a71-6 to provide foreign SBSBs and MSBSPs with the potential to utilize substituted compliance with comparable foreign requirements to satisfy Section 15F of the Exchange Act and Exchange Act Rules 18a-5, 18a-6, 18a-7, 18a-8, and 18a-9 thereunder.<sup>523</sup>

A commenter requested that foreign branches of U.S. banks (*i.e.*, registered bank SBSBs that engage in dealing activity through foreign branches) be

<sup>518</sup> See *Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 81 FR 29960. See also *Cross-Border Proposing Release*, 78 FR at 31207.

<sup>519</sup> See *Trade Acknowledgment and Verification of Security-Based Swap Transactions*, 81 FR at 30143-44.

<sup>520</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43946-50.

<sup>521</sup> See SIFMA 9/5/2014 Letter. See also Letter from Kyle Brandon, Managing Director and Director of Research, Securities Industry and Financial Markets Association (Jan. 13, 2015) ("SIFMA 1/13/2015 Letter").

<sup>522</sup> See IIB 3/25/2019 Meeting.

<sup>523</sup> See paragraph (d)(6) of Rule 3a71-6, as amended. Rule 3a71-6 provides that substituted compliance is potentially available in connection with the business conduct requirements for foreign MSBSPs and SBSBs. This decision reflects the fact that the business conduct standards apply to MSBSPs and SBSBs, and recognizes that the market efficiency goals that underpin substituted compliance also can apply when substituted compliance is granted to MSBSPs. See *Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 81 FR at 30076. This same reasoning applies with respect to the Commission's recordkeeping and reporting requirements and Rule 3a71-6, as amended, provides that substituted compliance is also potentially available to foreign MSBSPs (in addition to foreign SBSBs) with respect to Section 15F of the Exchange Act and Rules 18a-5, 18a-6, 18a-7, 18a-8, and 18a-9, as applicable.

eligible for substituted compliance with respect to recordkeeping and reporting requirements classified as transaction-level requirements.<sup>524</sup> As discussed above, the Commission does not believe it would be appropriate to treat the recordkeeping and reporting requirements as transaction-level requirements. In addition, the Commission has previously stated its belief that substituted compliance should not be available to registered entities that are U.S. persons.<sup>525</sup>

In amending Rule 3a71-6, the Commission concludes that the principles associated with substituted compliance for the business conduct, trade acknowledgment and verification, and capital and margin requirements in large part similarly apply to these recordkeeping and reporting requirements. Accordingly, except as discussed below, the revised substituted compliance rule applies to Section 15F of the Exchange Act and Rules 18a-5, 18a-6, 18a-7, 18a-8, and 18a-9 thereunder in the same manner as it applies to the business conduct, trade acknowledgment and verification, and capital and margin requirements.

### i. Basis for Substituted Compliance in Connection With the Recordkeeping and Reporting Requirements

In light of the global nature of the security-based swap market and the prevalence of cross-border transactions within that market, there is the potential that the application of the Title VII recordkeeping and reporting requirements may lead to requirements that are duplicative of or in conflict with applicable foreign requirements, even when the two sets of requirements implement similar goals and lead to similar results. Those results have the potential to disrupt existing business relationships, and, more generally, to reduce competition and market efficiency.<sup>526</sup>

To address those effects, the Commission concludes that under certain circumstances it may be appropriate to allow for the possibility of substituted compliance whereby foreign SBSBs and MSBSPs may satisfy Section 15F of the Exchange Act and Rules 18a-5, 18a-6, 18a-7, 18a-8, and 18a-9 thereunder by complying with

<sup>524</sup> See SIFMA 9/5/2014 Letter.

<sup>525</sup> See *Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 81 FR at 30077.

<sup>526</sup> See generally *Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 81 FR at 30073-74 (addressing the basis for making substituted compliance available in the context of the business conduct requirements).

comparable foreign requirements. Allowing for the possibility of substituted compliance in this manner may help achieve the benefits of these recordkeeping and reporting requirements in a way that helps avoid regulatory duplication or conflict and hence promotes market efficiency, enhances competition, and facilitates a well-functioning global security-based swap market. Accordingly, Rule 3a71-6 is amended to identify the recordkeeping and reporting requirements of Section 15F of the Exchange Act and Rules 18a-5, 18a-6, 18a-7, 18a-8, and 18a-9 thereunder as being eligible for substituted compliance.<sup>527</sup>

#### ii. Comparability Criteria, and Consideration of Related Requirements

The Commission will endeavor to take a holistic approach in determining the comparability of foreign requirements for substituted compliance purposes, focusing on regulatory outcomes as a whole rather than on requirement-by-requirement similarity.<sup>528</sup> The Commission's comparability assessments associated with Section 15F of the Exchange Act and Rules 18a-5, 18a-6, 18a-7, 18a-8, and 18a-9 thereunder accordingly will consider whether, in the Commission's view, the foreign regulatory system achieves regulatory outcomes that are comparable to the regulatory outcomes associated with these recordkeeping and reporting requirements. However, paragraph (a)(2)(i) of Rule 3a71-6 provides that the Commission's substituted compliance determination will take into account factors that the Commission determines appropriate, such as, for example the scope and objectives of the relevant foreign regulatory requirements, as well as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by a foreign financial regulatory authority or authorities in such system to support its oversight of such foreign security-based swap entity (or class thereof) or of the activities of such security-based swap entity (or class thereof).

<sup>527</sup> See paragraph (d) of Rule 3a71-6, as adopted. Paragraph (a)(1) of Rule 3a71-6 provides that the Commission may, conditionally or unconditionally, by order, make a determination with respect to a foreign financial regulatory system that compliance with specified requirements under that foreign financial system by a registered SBSB and/or registered MSBSP, or class thereof, may satisfy the corresponding requirements identified in paragraph (d) of the rule that would otherwise apply.

<sup>528</sup> See, e.g., *Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 81 FR at 30078-79.

In reviewing applications, the Commission may determine to conduct its comparability analyses regarding the recordkeeping and reporting requirements in conjunction with comparability analyses regarding other Exchange Act requirements in connection with SBSBs and MSBSPs. Accordingly, depending on the applicable facts and circumstances, the comparability assessment associated with the recordkeeping and reporting requirements may constitute part of a broader assessment of the foreign regulatory system's risk mitigation requirements, and the applicable comparability assessments may be conducted at the level of those risk mitigation requirements as a whole.

Commenters generally requested additional guidance regarding the criteria the Commission would consider when making a substituted compliance determination.<sup>529</sup> Such criteria have been set forth in the final rule as discussed below. The Commission's recordkeeping, reporting, notification, and security count requirements reflect and support prudent business practices and accountability of registrants and have facilitated the ability of securities regulators to review and monitor compliance with securities laws. The Commission's recordkeeping and reporting requirements are integral to the ability of the Commission and other securities regulators to effectively examine and inspect regulated firms' compliance with the applicable securities laws.<sup>530</sup> More specifically, the records that firms are required to preserve can be reviewed by Commission staff and other securities regulators to monitor compliance with

<sup>529</sup> See, e.g., Letter from Catherine T. Dixon, Chair, Federal Regulation of Securities Committee, American Bar Association (Oct. 2, 2013); Letter from Americans for Financial Reform (Aug. 22, 2013); Letter from Futures and Options Association (Aug. 21, 2013).

<sup>530</sup> See *Commission Guidance to Broker-Dealers on the Use of Electronic Storage Media Under the Electronic Signatures in Global and National Commerce Act of 2000 with Respect to Rule 17a-4(f)*, 66 FR at 22917, 22921 (The Commission's recordkeeping rules "impose minimum recordkeeping requirements that are based on standards a prudent broker-dealer should follow in the normal course of business. The requirements are an integral part of the investor protection function of the Commission, and other securities regulators, in that the preserved records are the primary means of monitoring compliance with applicable securities laws". "Investor protection depends on the examination process, which, in turn, relies on the records that broker-dealers are required to make and maintain."); *FOCUS Reporting System; Requirements for Financial Reporting*, Exchange Act Release No. 17534 (Feb. 11, 1981), 46 FR 13205, 13205 (Feb. 20, 1981) ("The FOCUS Report is one of the primary means of monitoring the financial and operational condition of brokers and dealers and enforcing the financial responsibility rules").

applicable securities laws.<sup>531</sup> Similarly, FOCUS Reports are used to determine which firms are engaged in various securities-related activities, and how economic events and government policies might affect segments of the securities industry.<sup>532</sup>

The Commission's recordkeeping and reporting requirements are also important for protecting customers against the risks involved in having their securities held by a third party.<sup>533</sup> A failure to maintain accurate, accessible, and true records may lead to situations where a firm cannot account for customer property or its own assets.<sup>534</sup> Similarly, the Commission's reporting requirements promote transparency of the financial and operational condition of broker-dealers to the Commission, the firm's DEA, and, in the case of a portion of the annual reports, to the public.<sup>535</sup>

In light of these considerations, paragraph (d)(6) of Rule 3a71-6 states that prior to making a substituted compliance determination regarding SBSB and MSBSP recordkeeping and reporting requirements, the Commission intends to consider (in addition to any conditions imposed), whether the foreign financial regulatory system's required records and reports, the timeframes for recording or reporting information, the accounting standards governing the records and reports, and the required format of the records and reports are comparable to applicable provisions arising under the Act and its rules and regulations and would permit the Commission to examine and inspect regulated firms' compliance with the applicable securities laws.

A commenter stated that a Commission substituted compliance determination should not be a

<sup>531</sup> See *Commission Guidance to Broker-Dealers on the Use of Electronic Storage Media Under the Electronic Signatures in Global and National Commerce Act of 2000 with Respect to Rule 17a-4(f)*, 66 FR at 22917.

<sup>532</sup> See *FOCUS Reporting System; Requirements for Financial Reporting*, 46 FR at 13205.

<sup>533</sup> See *Study of Unsafe and Unsound Practices of Brokers and Dealers* at 6 (the Commission's reporting requirements, "together with the Commission's inspection powers, [are] an integral element in the arsenal for protection of customers against the risks involved in leaving securities with their broker-dealer").

<sup>534</sup> See *Commission Guidance to Broker-Dealers on the Use of Electronic Storage Media Under the Electronic Signatures in Global and National Commerce Act of 2000 with Respect to Rule 17a-4(f)*, 66 FR at 22919 ("A failure to maintain accurate, accessible, and true records may lead to situations where a firm cannot account for customer property or its own assets. For these reasons, the Commission's broker-dealer recordkeeping requirements are an important part of managing systemic risk in the industry.").

<sup>535</sup> See section II.B.1. of this release.

prerequisite for a foreign bank SBSB to comply with “home-country” financial recordkeeping and reporting requirements in lieu of the Commission’s requirements.<sup>536</sup> The commenter referred to this approach as “Automatic Substituted Compliance” for foreign bank SBSBs. Rule 3a71–6 does not provide “automatic” substituted compliance for any type of registrant. Moreover, as discussed above, the Commission preliminarily interpreted the Title VII requirements associated with registration to apply generally to the activities of registered entities.<sup>537</sup> Further, in reaching that preliminary conclusion, the Commission did not concur with the views of certain commenters that the Title VII requirements should not apply to the foreign security-based swap activities of registered entities, stating that such a view could be difficult to reconcile with, among other things, the statutory language describing the requirements applicable to SBSBs.<sup>538</sup> The Commission believes that it is appropriate to evaluate the substance of a foreign regulatory system to which substituted compliance would apply before granting substituted compliance to an entity. An “automatic” substituted compliance regime would be contrary to this view, as it would permit a foreign bank SBSB to comply with local requirements without any analyses by the Commission as to whether those requirements were comparable to the Commission’s requirements. Therefore, the Commission does not believe the approach suggested by the commenter would be appropriate.

The same commenter stated that the Commission should allow a foreign stand-alone SBSB to satisfy financial recordkeeping and reporting requirements through substituted compliance if the SBSB qualifies for substituted compliance with respect to the Commission’s capital and margin requirements for SBSBs.<sup>539</sup> The commenter referred to this approach as “One-Step Substituted Compliance.” The Commission does not believe that a positive substituted compliance determination with respect to nonbank SBSB capital and margin requirements should automatically result in a positive substituted compliance determination with respect to SBSB recordkeeping and reporting requirements. Once again, the

Commission believes that it is appropriate to evaluate the substance of each foreign regulatory system to which substituted compliance would apply before granting substituted compliance to an entity. As discussed above, the recordkeeping and reporting requirements are integral to the ability of the Commission and other securities regulators to effectively examine and inspect regulated firms’ compliance with the applicable securities laws, including capital and margin requirements. Therefore, the Commission will need to analyze a jurisdiction’s recordkeeping and reporting requirements to determine whether they would permit the Commission to examine and inspect regulated firms’ compliance with the applicable securities laws in a manner comparable to its examinations and inspections for firms subject to the recordkeeping and reporting requirements specified in Section 15F of the Exchange Act and Rules 18a–5, 18a–6, 18a–7, 18a–8, and 18a–9.

However, as discussed above, in reviewing substituted compliance applications, the Commission may conduct its comparability analyses regarding the recordkeeping and reporting requirements in conjunction with comparability analyses regarding other Exchange Act requirements that promote risk management in connection with SBSBs and MSBSPs. Thus, the Commission’s comparability analyses regarding the recordkeeping and reporting requirements could be made in conjunction with comparability analyses regarding capital and margin requirements.

Finally, this commenter also stated that, if substituted compliance is not available with respect to a disclosure requirement, “the Commission should limit the application of such public disclosure requirements to SBSBs that are not otherwise subject to a public disclosure regime.”<sup>540</sup> For example, the commenter argues that paragraph (b)(7) of Rule 18a–7, as proposed, “could require a standalone SBSB that is a public reporting company to publish material, non-public information every six months, rather than on an annual basis on Form 20–F.”<sup>541</sup> Form 20–F, however, requires the public disclosure of substantially more information than will be required by Rule 18a–7, which requires relatively little information to be publicly disclosed. Moreover, Rule 18a–7 will require the disclosure of information such as a firm’s net capital computation that may not be required

under other disclosure regimes. For these reasons, the Commission is not adopting the commenter’s proposed approach.

#### G. Amendments to Rule 18a–1

Paragraph (e) of appendix E to Rule 15c3–1 establishes a non-exclusive list of circumstances under which the Commission may restrict the business of an ANC broker-dealer, including when the firm fails to meet the reporting requirements set forth in Rule 17a–5 or an event specified in Rule 17a–11 occurs. The Commission proposed a parallel provision in Rule 18a–1 to apply to a stand-alone SBSB authorized to use models.<sup>542</sup> The circumstances in proposed Rule 18a–1 under which the Commission could have restricted the stand-alone SBSB’s business included that the firm failed to meet a proposed reporting requirement or an event in the proposed notification rule for SBSBs occurs. The Commission adopted the provision in Rule 18a–1 under which the Commission may restrict the business of a stand-alone SBSB or OTCDD/SBSB authorized to use models.<sup>543</sup> However, in the final rule, the circumstances under which the Commission can restrict a firm’s business did not include that the firm fails to meet a reporting requirement or an event in the notification rule for SBSBs occurs. As the SBSB reporting and notification rules are being adopted in this document, the Commission is amending Rule 18a–1 to add these circumstances to those listed in the rule under which the Commission may restrict the business of a stand-alone SBSB or OTCDD/SBSB authorized to use models: (1) The SBSB fails to meet the reporting requirements set forth in Rule 18a–7; or (2) any event specified in Rule 18a–8 occurs.<sup>544</sup>

#### H. Delegation of Authority

In recognition of the adoption in this document of recordkeeping, reporting, and notification requirements for SBSBs and MSBSPs, securities count requirements applicable to certain SBSBs, and additional recordkeeping requirements applicable to broker-dealers to account for their security-based swap and swap activities in accordance with the Dodd-Frank Act, the Commission is amending its rule governing delegations of authority to the Director of the Division of Trading and Markets (“Division”).

<sup>542</sup> See *Capital, Margin, and Segregation Proposing Release*, 77 FR at 70240, 70338.

<sup>543</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 44058–59.

<sup>544</sup> See paragraphs (d)(9)(iii)(A) and (B) of Rule 18a–1, as amended.

<sup>536</sup> See IIB 3/25/2019 Meeting.

<sup>537</sup> See *Trade Acknowledgment and Verification of Security-Based Swap Transactions*, 81 FR at 39825, n.191 (citing *Cross-Border Proposing Release*, 78 FR at 30986).

<sup>538</sup> See *Cross-Border Proposing Release*, 78 FR at 30986.

<sup>539</sup> See IIB 3/25/2019 Meeting.

<sup>540</sup> See IIB 3/25/2019 Meeting.

<sup>541</sup> See IIB 3/25/2019 Meeting.

Because OTC derivatives dealers will be required to file FOCUS Report Part II instead of FOCUS Report Part IIB, the reference to FOCUS Report Part IIB is being changed to FOCUS Report Part II. Specifically, paragraph (a)(65) of 17 CFR 200.30-3 (“Rule 30-3”) is being amended to delegate authority to the Division to authorize the issuance of orders requiring OTC derivatives dealers to file FOCUS Report Part II instead of FOCUS Report Part IIB. In addition, due to re-numbering of paragraphs as a result of these amendments, paragraph (a)(30) of Rule 30-3 is amended to cross-reference paragraph (a)(3) instead of paragraph (a)(4) of Rule 17a-5. Finally, paragraph (a)(65)’s cross-reference to Rule 17a-12 is corrected to read “§ 240.17a-12(a)(1)(ii)” instead of “§ 240.17a-12(a)(ii),”<sup>545</sup> and paragraph (a)(5)’s cross-reference to Rule 17a-5 is corrected to read “§ 240.17a-5(m)(3) of this chapter (Rule 17a-5(m)(3))” instead of “Rule 17a-5(1)(3) (§ 240.17a-5(1)(3) of this chapter).” These delegations of authority are intended to preserve Commission resources and increase the effectiveness and efficiency of the Commission’s oversight of compliance with the financial responsibility rules. Nevertheless, the Division may submit matters to the Commission for its consideration, as it deems appropriate.

#### Administrative Law Matters

The Commission finds, in accordance with the Administrative Procedure Act (“APA”),<sup>546</sup> that these amendments relate solely to agency organization, procedure, or practice, and do not relate to a substantive rule. Accordingly, the provisions of the APA regarding notice of rulemaking, opportunity for public comment, and publication of the amendment prior to its effective date are not applicable. For the same reason, and because this amendment does not substantively affect the rights or obligations of non-agency parties, the provisions of the Small Business Regulatory Enforcement Fairness Act,<sup>547</sup> are not applicable. Additionally, the provisions of the Regulatory Flexibility Act, which apply only when notice and comment are required by the APA or other law,<sup>548</sup> are not applicable. Further, because this amendment imposes no new burdens on private persons, the Commission does not believe that the amendment will have any anti-competitive effects for purposes of

Section 23(a)(2) of the Exchange Act.<sup>549</sup> Finally, this amendment does not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1980, as amended.

### III. Explanation of Dates

#### A. Effective Date

These final rules will be effective 60 days following publication of this release in the **Federal Register**.

#### B. Compliance Date

The compliance date for the rules being adopted in this document, other than the amendments to Rule 3a71-6 discussed below, will be 18 months after the effective date of any final rules originally proposed in May 2019 addressing the cross-border application of certain security-based swap requirements.<sup>550</sup> As set forth recently in the release adopting capital, margin, and segregation requirements, this compliance date will also be the compliance date for SBSB and MSBSP registration requirements (the “Registration Compliance Date”).<sup>551</sup> The Commission believes the compliance date provided in this release, which will be in excess of 18 months, will allow sufficient time to prepare for and come into compliance with the new recordkeeping and reporting requirements.

A commenter asked to delay cross-border application of the Commission’s recordkeeping and reporting rules with respect to home jurisdiction regulations that have not yet been finalized, as a preferable solution to requiring foreign firms to build the technological, operational, and compliance systems

required to comply with U.S. law for a short, interim period if the home jurisdiction is ultimately deemed comparable for substituted compliance purposes.<sup>552</sup> The commenter’s concerns should be mitigated by the extended compliance date applicable to the rules being adopted in this document. The Commission believes that such a delay would not be appropriate because a comprehensive set of records will be integral to the Commission’s ability to exercise its regulatory responsibilities once these firms are registered.<sup>553</sup> In addition, as discussed below in section III.D. of this release, to address concerns that the compliance date could be before substituted compliance determinations are made, the Commission would consider substituted compliance requests that are submitted prior to the compliance date.

Finally, one commenter stated that SBSBs and MSBSPs will require adequate time following registration to begin complying with substantive Title VII requirements, since considerable resources will be needed to amend recordkeeping systems and documentation processes between finalization of recordkeeping and documentation rules and the initial compliance dates for those rules.<sup>554</sup> Regarding the Commission’s policy statement on the sequencing of final rules governing security-based swaps,<sup>555</sup> another commenter suggested grouping rulemakings into two categories in terms of the applicable compliance date.<sup>556</sup> In response, the Commission notes that it has coordinated the compliance dates

<sup>552</sup> See SIFMA 9/5/2014 Letter.

<sup>553</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25197 (“The recordkeeping, reporting, notification, and securities count requirements applicable to broker-dealers are an integral part of the financial responsibility rules as they are designed to provide transparency into the business activities of broker-dealers and to assist the Commission and other securities regulators in reviewing and monitoring compliance with the capital, margin, and segregation requirements.”).

<sup>554</sup> See Letter from Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, Securities Industry and Financial Markets Association (Aug. 13, 2012) (“SIFMA 8/13/2012 Letter”). See also Memorandum from Richard E. Grant, Office of Commissioner Michael S. Piwowar, regarding an email from Sarah A. Miller, Chief Executive Officer, Institute of International Bankers (Nov. 16, 2016) (“IIB 11/16/2016 Letter”).

<sup>555</sup> See *Statement of General Policy on the Sequencing of the Compliance Dates for Final Rules Applicable to Security-Based Swaps Adopted Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act*, Exchange Act Release No. 67177 (June 11, 2012), 77 FR 35625 (June 14, 2012). Comments on the sequencing policy statement which are relevant to the Commission’s recordkeeping and reporting requirements are available at <http://www.sec.gov/comments/s7-05-12/s70512.shtml>.

<sup>556</sup> See Letter from Chris Barnard (Aug. 13, 2012).

<sup>549</sup> See 15 U.S.C. 78w(a)(2).

<sup>550</sup> The Commission proposed rules on May 10, 2019 which include rules and/or guidance regarding security-based swap transactions “arranged, negotiated, or executed” by personnel located in the United States, the cross-border scope of the SBSB *de minimis* exception, the certification and opinion of counsel requirement of Rule 15Fb2-1, the questionnaire and application requirement of Rule 18a-5, and the cross-border application of the statutory disqualification prohibition within Section 15F(b)(6) of the Exchange Act. See *Cross-Border Application Proposing Release*, 84 FR at 24206.

<sup>551</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43954-57. Moreover, as explained in that release, the Registration Compliance Date will also be the compliance date for (1) nonbank SBSB and MSBSP capital and margin requirements; (2) SBSB and MSBSP segregation requirements; (3) SBSB and MSBSP business conduct and chief compliance officer requirements; and (4) SBSB and MSBSP trade acknowledgement and verification requirements. See also *Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 81 FR at 30081; see also *Trade Acknowledgment and Verification of Security-Based Swap Transactions*, 81 FR 39807.

<sup>545</sup> See paragraph (a)(65)(i) of Rule 30-3 under the Exchange Act, as amended.

<sup>546</sup> See 5 U.S.C. 553(b)(3)(A).

<sup>547</sup> See 5 U.S.C. 804(3)(C).

<sup>548</sup> See 5 U.S.C. 603.

for the Commission's: (1) SBSB and MSBSP registration requirements; (2) nonbank SBSB and MSBSP capital and margin requirements; (3) SBSB and MSBSP segregation requirements; (4) SBSB and MSBSP recordkeeping and reporting requirements; (5) SBSB and MSBSP business conduct and chief compliance officer requirements; (6) SBSB and MSBSP trade acknowledgement and verification requirements; and (7) statutory disqualification process. The Commission also does not believe it would be appropriate to delay the compliance date for the Commission's recordkeeping rules beyond the compliance date for the rules establishing the registration process for SBSBs and MSBSPs, because this would undermine the Commission's ability to effectively regulate and supervise registrants.

### C. Effect on Existing Commission Exemptive Relief

On July 1, 2011, the Commission issued an order granting, among other things, temporary exemptive relief from compliance with certain recordkeeping and reporting provisions of the Exchange Act that would have applied to the security-based swap activities of registered broker-dealers due to the expansion of the Exchange Act definition of "security" to include security-based swaps.<sup>557</sup> The compliance dates of this release implicate the expiration of this temporary exemptive relief related to registered broker-dealer recordkeeping and reporting requirements.

With regard to the recordkeeping and reporting obligations of registered broker-dealers, the Exchange Act Exemptive Order provided limited exemptions for registered broker-dealers, subject to certain conditions and limitations, from compliance with Sections 17(a) and 17(b) of the Exchange Act and Rules 17a-3, 17a-4, 17a-5, 17a-11, and 17a-13 (collectively, "the Recordkeeping Provision Exemptions") in connection with security-based swaps solely to the extent the provisions or rules did not apply to the broker-dealer's security-based swap positions or activities as of July 15, 2011.<sup>558</sup> The Exchange Act Exemptive Order also provided that, until such time as the

underlying exemptive relief expires, no contract entered into on or after July 16, 2011 shall be void or considered voidable by reason of Section 29(b) of the Exchange Act because any person that is a party to the contract violated a provision of the Exchange Act for which the Commission provided exemptive relief in the Exchange Act Exemptive Order ("Section 29(b) Exemption").<sup>559</sup> The Recordkeeping Provision Exemptions are scheduled to expire on the compliance date for any final rules regarding recordkeeping and reporting requirements for SBSBs and MSBSPs.<sup>560</sup> Accordingly, all the Recordkeeping Provision Exemptions, together with the portion of the Section 29(b) Exemption that relates to the Exchange Act provisions for which the Commission provided exemptive relief in the Recordkeeping Provision Exemptions, will expire upon the compliance date set forth in section III.B. of this release.

In addition, the Commission also has provided an exemption from the "dealer" registration requirements of Section 15(a)(1) of the Exchange Act, and the other requirements of the Exchange Act and the rules and regulations thereunder that apply to a dealer that is not registered with the Commission, solely in connection with dealing activities involving security-based swaps with counterparties that meet the definition of eligible contract participant as set forth in Section 1a(12) of the CEA as in effect on July 20, 2010 ("Dealer Exemptions").<sup>561</sup> The Dealer Exemptions are scheduled to expire on the later of the compliance dates set

forth in any final rules regarding capital, margin, and segregation requirements for SBSBs and MSBSPs and any final rules regarding recordkeeping and reporting requirements for SBSBs and MSBSPs.<sup>562</sup> As noted in section III.B. of this release, both relevant compliance dates will be 18 months after the effective date of any final rules addressing the cross-border application of certain security-based swap requirements or the Registration Compliance Date. Accordingly, all of the Dealer Exemptions, together with the portion of the Section 29(b) Exemption that relates to the Exchange Act provisions for which the Commission provided exemptive relief in the Dealer Exemptions, will expire upon the Registration Compliance Date.

Finally, the Commission has provided an exemption from the "broker" registration requirements of Section 15(a)(1) of the Exchange Act, and the other requirements of the Exchange Act and the rules and regulations thereunder that apply to a broker that is not registered with the Commission, solely in connection with broker activities involving security-based swaps ("Broker Exemptions").<sup>563</sup> The Broker Exemptions are scheduled to expire on the later of the compliance dates set forth in any final rules regarding capital, margin, and segregation requirements for SBSBs and MSBSPs and any final rules regarding recordkeeping and reporting requirements for SBSBs and MSBSPs.<sup>564</sup>

<sup>562</sup> The Dealer Exemptions originally were set to expire on the compliance date for any final rules further defining the terms "security-based swap" and "eligible contract participant." See Exchange Act Exemptive Order at 39938, 39940. In the final rules further defining the term "security-based swap," the Commission extended this expiration date to February 13, 2013. See *Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 FR at 48304. On February 7, 2013, the Commission again extended the expiration date until February 11, 2014. See *Order Extending Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Revision of the Definition of "Security" to Encompass Security-Based Swaps, and Request for Comment*, 78 FR at 10220. On February 5, 2014, the Commission further extended the expiration date until the later of the compliance dates set forth in any final rules regarding capital, margin, and segregation requirements for SBSBs and MSBSPs and any final rules regarding recordkeeping and reporting requirements for SBSBs and MSBSPs. See Exchange Act Exemption Extension Order at 7734-35.

<sup>563</sup> See Exchange Act Exemptive Order at 39939.

<sup>564</sup> The Broker Exemptions originally were set to expire on the compliance date for any final rules further defining the terms "security-based swap" and "eligible contract participant." See Exchange Act Exemptive Order at 39938, 39940. In the final rules further defining the term "security-based swap," the Commission extended this expiration

<sup>557</sup> See *Order Granting Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Pending Revisions of the Definition of "Security" to Encompass Security-Based Swaps*, Exchange Act Release No. 64795 (July 1, 2011), 76 FR 39927 (July 7, 2011) ("Exchange Act Exemptive Order").

<sup>558</sup> See Exchange Act Exemptive Order at 39938-39.

<sup>559</sup> See Exchange Act Exemptive Order at 39940.

<sup>560</sup> The Recordkeeping Provision Exemptions originally were set to expire on the compliance date for any final rules further defining the terms "security-based swap" and "eligible contract participant." See Exchange Act Exemptive Order at 39938-39. In the final rules further defining the term "security-based swap," the Commission extended this expiration date to February 13, 2013. See *Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 FR at 48304. On February 7, 2013, the Commission extended the expiration date until February 11, 2014. See *Order Extending Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Revision of the Definition of "Security" to Encompass Security-Based Swaps, and Request for Comment*, Exchange Act Release No. 68864 (Feb. 7, 2013), 78 FR 10218, 10220 (Feb. 13, 2013). On February 5, 2014, the Commission further extended the expiration date until the compliance date set forth in any recordkeeping and reporting rules for SBSBs and MSBSPs. See *Order Extending Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Revision of the Definition of "Security" to Encompass Security-Based Swaps, and Request for Comment*, Exchange Act Release No. 71485 (Feb. 5, 2014), 79 FR 7731, 7734 (Feb. 10, 2014) ("Exchange Act Exemption Extension Order").

<sup>561</sup> See Exchange Act Exemptive Order at 39939.

However, the Commission has stated that an entity that meets the definition of “security-based swap execution facility” in Section 3(a)(77) of the Exchange Act also would meet the definition of “broker” in Section 3(a)(4) of the Act.<sup>565</sup> The Commission also has granted temporary exemptions from the registration requirements for security-based swap execution facilities in Section 3D(a)(1) of the Exchange Act and from certain disclosure requirements in Section 3D(c) of the Exchange Act (“SB SEF Exemptions”).<sup>566</sup> The SB SEF Exemptions will expire on the earliest compliance date set forth in any of the final rules regarding registration of security-based swap execution facilities.<sup>567</sup> The Commission recognizes that market participants who currently rely on the SB SEF Exemptions pending the Commission’s finalization of registration rules for security-based swap execution facilities may also currently rely on the Broker Exemptions. The Commission therefore finds that it is necessary and appropriate in the public interest and consistent with the protection of investors to extend the Broker Exemptions, insofar as they apply to persons and activities subject to the SB SEF Exemptions, until the expiration date for the SB SEF Exemptions.<sup>568</sup>

Accordingly, solely for purposes of the Exchange Act Exemption Extension Order as it relates to exemption from the “broker” registration requirements of Section 15(a)(1) of the Exchange Act and the other requirements of the Exchange Act and the rules and regulations thereunder that apply to a broker that is not registered with the Commission, and solely in connection with the operation of a facility for the trading or processing of security-based swaps that is not

currently registered as a national securities exchange or as a security-based swap execution facility (“SB SEF Broker Exemptions”), the compliance date is the expiration date of the SB SEF Exemptions. Similarly, solely for purposes of the Exchange Act Exemption Extension Order as it relates to the portion of the Section 29(b) Exemption that relates to the Exchange Act provisions for which the Commission provided exemptive relief in the SB SEF Broker Exemptions, the compliance date set forth in this release is the expiration date of the SB SEF Exemptions. All other portions of the Broker Exemptions, together with the portion of the Section 29(b) Exemption that relates to the Exchange Act provisions for which the Commission provided exemptive relief in these other portions of the Broker Exemptions, will expire upon the Registration Compliance Date.

*D. Application to Substituted Compliance*

For the amendments to Rule 3a71–6 being adopted in this release to provide foreign SBSBs and MSBSPs with the potential to utilize substituted compliance with comparable foreign requirements to satisfy Section 15F of the Exchange Act and new Exchange Act Rules 18a–5, 18a–6, 18a–7, 18a–8, and 18a–9, consistent with the other rules adopted in this document, the Commission is adopting an effective date of 60 days following publication in the **Federal Register**. There will be no separate compliance date in connection with that rule amendment, as the rule does not impose obligations upon entities. As discussed above, SBSBs and MSBSPs will not be required to comply with the recordkeeping and reporting requirements until they are registered, and the registration requirement for

those entities will not be triggered until a number of regulatory benchmarks have been met.

In practice, the Commission recognizes that if the requirements of a foreign regime are comparable to Title VII requirements, and the other prerequisites to substituted compliance also have been satisfied, then it may be appropriate to permit an SBSB or MSBSP to rely on substituted compliance commencing at the time that entity is registered with the Commission. Accordingly, to address commenters’ concerns that the compliance date could be before substituted compliance determinations are made, the Commission would consider substituted compliance requests that are submitted prior to the compliance date for its recordkeeping and reporting requirements.

**IV. Paperwork Reduction Act**

Certain provisions of the rule amendments and new rules being adopted in this release contain a new “collection of information” within the meaning of the Paperwork Reduction Act of 1995 (“PRA”).<sup>569</sup> The Commission submitted the rule amendments and new rules to the Office of Management and Budget (“OMB”) for review and approval in accordance with the PRA.<sup>570</sup> The Commission’s earlier PRA assessments have been revised to reflect the modifications to the rules and amendments from those that were proposed, as well as additional information and data now available to the Commission.<sup>571</sup> An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The titles and OMB control numbers for the collections of information are:

Rule	Rule title	OMB control No.
Rule 17a–3 ....	Records to be made by certain exchange members, brokers and dealers .....	3235–0033
Rule 17a–4 ....	Records to be preserved by certain exchange members, brokers and dealers .....	3235–0279
Rule 17a–5 ....	Reports to be made by certain brokers and dealers .....	3235–0123

date to February 13, 2013. See *Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”*; *Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 FR at 48304. On February 7, 2013, the Commission again extended the expiration date until February 11, 2014. See *Order Extending Temporary Exemptions under the Securities Exchange Act of 1934 in Connection with the Revision of the Definition of “Security” to Encompass Security-Based Swaps, and Request for Comment*, 78 FR at 10220. On February 5, 2014, the Commission further extended the expiration date until the later of the compliance dates set forth in any final rules regarding capital, margin, and segregation requirements for SBSBs and MSBSPs and any final rules regarding

recordkeeping and reporting requirements for SBSBs and MSBSPs. See Exchange Act Exemption Extension Order at 7734–35.

<sup>565</sup> *Registration and Regulation of Security-Based Swap Execution Facilities*, Exchange Act Release No. 63825 (Feb. 2, 2011), 76 FR 10948, 10959 (Feb. 28, 2011).

<sup>566</sup> See *Temporary Exemptions and Other Temporary Relief, Together with Information on Compliance Dates for New Provisions of the Securities Exchange Act of 1934 Applicable to Security-Based Swaps*, Exchange Act Release No. 64678 (June 15, 2011), 76 FR 36287, 36292–93, 36306 (June 22, 2011).

<sup>567</sup> See *id.*

<sup>568</sup> See 15 U.S.C. 78mm.

<sup>569</sup> See 44 U.S.C. 3501 *et seq.*

<sup>570</sup> See 44 U.S.C. 3507(d); 5 CFR 1320.11.

<sup>571</sup> The hourly rates use for internal professionals used throughout this section IV. of the release are taken from SIFMA’s *Management & Professional Earnings in the Securities Industry 2013*, modified to account for an 1800-hour work-year and inflation, and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, in addition to SIFMA’s *Office Salaries in the Securities Industry 2013*, modified by Commission staff to account for an 1800-hour work-year and inflation, and multiplied by 2.93 to account for bonuses, firm size, employee benefits, and overhead.

Rule	Rule title	OMB control No.
Rule 17a-11 ..	Notification provisions for brokers and dealers .....	3235-0085
Rule 17a-12 ..	Reports to be made by certain OTC derivatives dealers .....	3235-0498
Rule 18a-5 ....	Records to be made by certain security-based swap dealers and major security-based swap participants .....	3235-0745
Rule 18a-6 ....	Records to be preserved by certain security-based swap dealers and major security-based swap participants .....	3235-0751
Rule 18a-7 ....	Reports to be made by certain security-based swap dealers and major security-based swap participants .....	3235-0749
Rule 18a-8 ....	Notification provisions for security-based swap dealers and major security-based swap participants .....	3235-0750
Rule 18a-9 ....	Quarterly security counts to be made by certain security-based swap dealers .....	3235-0752
Rule 18a-10 ..	Alternative compliance mechanism for security-based swap dealers that are registered as swap dealers and have limited security-based swap activities.	3235-0702
Rule 3a71-6 ..	Substituted compliance for security-based swap dealers and major security-based swap participants .....	3235-0715

*A. Summary of Collections of Information Under the Rule Amendments and New Rules*

1. Amendments to Rule 17a-3 and New Rule 18a-5

Rule 17a-3 requires a broker-dealer to make and keep current certain records. The Commission is amending this rule to account for the security-based swap and swap activities of broker-dealers,

including broker-dealer SBSBs and MSBSPs. With respect to stand-alone SBSBs and MSBSPs, and bank SBSBs and MSBSPs, the Commission is adopting new Rule 18a-5—which is modeled on Rule 17a-3, as amended—to require these registrants to make and keep current certain records.<sup>572</sup> Rule 18a-5 does not include a parallel requirement for every requirement in

Rule 17a-3. Paragraph (a) of Rule 18a-5 contains recordkeeping requirements for stand-alone SBSBs and MSBSPs, and paragraph (b) contains recordkeeping requirements for bank SBSBs and MSBSPs that are more limited in scope. The amendments to Rule 17a-3 and new Rule 18a-5 establish a number of new collections of information, as summarized in the table below.

	Stand-alone broker-dealers	Non-model broker-dealer SBSBs	ANC broker-dealer SBSBs	Broker-dealer MSBSPs	Non-model stand-alone SBSBs	Model stand-alone SBSBs	Bank SBSBs	Stand-alone MSBSPs
Trade blotters .....	* 17a-3(a)(1)	* 17a-3(a)(1)	* 17a-3(a)(1)	* 17a-3(a)(1)	18a-5(a)(1)	18a-5(a)(1)	18a-5(b)(1)	18a-5(a)(1)
General ledger .....					18a-5(a)(2)	18a-5(a)(2)		18a-5(a)(2)
Ledgers for customer and non-customer accounts	* 17a-3(a)(3)	* 17a-3(a)(3)	* 17a-3(a)(3)	* 17a-3(a)(3)	18a-5(a)(3)	18a-5(a)(3)	18a-5(b)(2)	18a-5(a)(3)
Stock record .....	* 17a-3(a)(5)	* 17a-3(a)(5)	* 17a-3(a)(5)	* 17a-3(a)(5)	18a-5(a)(4)	18a-5(a)(4)	18a-5(b)(3)	18a-5(a)(4)
Memoranda of brokerage orders .....	* 17a-3(a)(6)	* 17a-3(a)(6)	* 17a-3(a)(6)	* 17a-3(a)(6)			18a-5(b)(4)	
Memoranda of proprietary orders .....	* 17a-3(a)(7)	* 17a-3(a)(7)	* 17a-3(a)(7)	* 17a-3(a)(7)	18a-5(a)(5)	18a-5(a)(5)	18a-5(b)(5)	18a-5(a)(5)
Confirmations .....	* 17a-3(a)(8)	* 17a-3(a)(8)	* 17a-3(a)(8)	* 17a-3(a)(8)	18a-5(a)(6)	18a-5(a)(6)	18a-5(b)(6)	18a-5(a)(6)
Accountholder information	* 17a-3(a)(9)	* 17a-3(a)(9)	* 17a-3(a)(9)	* 17a-3(a)(9)	18a-5(a)(7)	18a-5(a)(7)	18a-5(b)(7)	18a-5(a)(7)
Options positions .....					18a-5(a)(8)	18a-5(a)(8)		18a-5(a)(8)
Trial balances and computation of net capital					18a-5(a)(9)	18a-5(a)(9)		18a-5(a)(9)
Associated person's employment application					18a-5(a)(10)	18a-5(a)(10)	18a-5(b)(8)	18a-5(a)(10)
Account equity and margin calculations under Rule 18a-3		17a-3(a)(25)	17a-3(a)(25)	17a-3(a)(25)	18a-5(a)(12)	18a-5(a)(12)		18a-5(a)(12)
Possession or control requirements for security-based swap customers	17a-3(a)(26)	17a-3(a)(26)	17a-3(a)(26)	17a-3(a)(26)	18a-5(a)(13)	18a-5(a)(13)	18a-5(b)(9)	
Security-based swap customer reserve requirements	17a-3(a)(27)	17a-3(a)(27)	17a-3(a)(27)	17a-3(a)(27)	18a-5(a)(14)	18a-5(a)(14)	18a-5(b)(10)	
Unverified transactions .....		17a-3(a)(28)	17a-3(a)(28)	17a-3(a)(28)	18a-5(a)(15)	18a-5(a)(15)	18a-5(b)(11)	18a-5(a)(15)
Political contributions .....		17a-3(a)(29)	17a-3(a)(29)		18a-5(a)(16)	18a-5(a)(16)	18a-5(b)(12)	
Compliance with business conduct requirements		17a-3(a)(30)	17a-3(a)(30)	17a-3(a)(30)	18a-5(a)(17)	18a-5(a)(17)	18a-5(b)(13)	18a-5(a)(17)

\* The Commission is amending these pre-existing paragraphs of Rule 17a-3 to account for the security-based swap and swap activities of broker-dealers, including broker-dealer SBSBs and MSBSPs.

A commenter urged the Commission to harmonize its recordkeeping requirements for SBSBs and MSBSPs with the CFTC's final recordkeeping requirements for swap dealers and major swap participants to the maximum extent possible, with the goal of permitting firms to utilize a single recordkeeping system for swaps and

security-based swaps.<sup>573</sup> As discussed in more detail above, in response to the comment and to promote harmonization with CFTC requirements, the Commission is adopting a limited alternative compliance mechanism in Rules 17a-3 and 18a-5.<sup>574</sup> In particular, an SBSB or MSBSP that also is registered with the CFTC as a swap

dealer or major swap participant may comply with the recordkeeping requirements of the CEA and the rules thereunder applicable to swap dealers and major swap participants in lieu of complying with the requirements in Rules 17a-3 and 18a-5 to make and keep current trade blotters, customer account ledgers, and stock records

<sup>572</sup> See Rule 18a-5, as adopted.

<sup>573</sup> See SIFMA 9/5/2014 Letter.

<sup>574</sup> See paragraph (b) of Rule 17a-3, as amended; paragraph (c) of Rule 18a-5, as adopted.

solely with respect to information required to be included in these records regarding security-based swap transactions and positions if the SBSB or MSBSP meets certain conditions. The conditions include, among other things, that the SBSB or MSBSP preserves all of the data elements necessary to create these records as they pertain to security-based swap and swap transactions and upon request promptly furnishes to representatives of the Commission such records that includes security-based swap and swap transactions and positions in the format required by Rule 17a-3 or 18a-5, as applicable. This provision will permit an SBSB or MSBSP that also is registered with the CFTC as a swap dealer or major swap participant to maintain a single recordkeeping system for security-based swap and swap transactions and positions in accordance with the CFTC's

rules with respect to these required records.

2. Amendments to Rule 17a-4 and New Rule 18a-6

Rule 17a-4 requires a broker-dealer to preserve certain records if it makes or receives them and prescribes the time period and the manner in which records must be preserved. The Commission is amending this rule to account for the security-based swap and swap activities of broker-dealers, including broker-dealer SBSBs and MSBSPs. With respect to stand-alone SBSBs, stand-alone MSBSPs, bank SBSBs, and bank MSBSPs, the Commission is adopting new Rule 18a-6—which is modeled on Rule 17a-4, as amended. Rule 18a-6 does not include a parallel requirement for every requirement in Rule 17a-4, and the recordkeeping requirements in Rule 18a-6 applicable to bank SBSBs and MSBSPs are more limited in scope

than the requirements in the rule applicable to stand-alone SBSBs and MSBSPs. As discussed above, the records a broker-dealer, including a broker-dealer SBSB or MSBSP, is required to maintain and preserve under Rules 17a-3 and 17a-4 may be maintained and preserved by means of electronic storage media. The use of electronic storage media is subject to certain conditions, including that the media must preserve the records exclusively in a non-rewriteable and non-erasable format. In response to comment, the Commission is modifying Rule 18a-6 to eliminate the requirement that the electronic storage system preserve the records exclusively in a non-rewriteable and non-erasable format.<sup>575</sup> The amendments to Rule 17a-4 and new Rule 18a-6 establish a number of new collections of information, as summarized in the table below.

	Stand-alone broker-dealers	Non-model broker-dealer SBSBs	ANC broker-dealer SBSBs	Broker-dealer MSBSPs	Non-model stand-alone SBSBs	Model stand-alone SBSBs	Bank SBSBs	Stand-alone MSBSPs
<b>Records to be preserved for a period of not less than 6 years</b>								
Trade blotters .....					18a-6(a)(1) citing 18a-5(a)(1)	18a-6(a)(1) citing 18a-5(a)(1)	18a-6(a)(2) citing 18a-5(b)(1)	18a-6(a)(1) citing 18a-5(a)(1)
General ledger .....					18a-6(a)(1) citing 18a-5(a)(2)	18a-6(a)(1) citing 18a-5(a)(2)		18a-6(a)(1) citing 18a-5(a)(2)
Ledgers for customer and non-customer accounts .....					18a-6(a)(1) citing 18a-5(a)(3)	18a-6(a)(1) citing 18a-5(a)(3)	18a-6(a)(2) citing 18a-5(b)(2)	18a-6(a)(1) citing 18a-5(a)(3)
Stock record .....					18a-6(a)(1) citing 18a-5(a)(4)	18a-6(a)(1) citing 18a-5(a)(4)	18a-6(a)(2) citing 18a-5(b)(3)	18a-6(a)(1) citing 18a-5(a)(4)
<b>Records to be preserved for a period of not less than 3 years</b>								
Memoranda of brokerage orders .....							18a-6(b)(2)(i) citing 18a-5(b)(4)	
Memoranda of proprietary orders .....					18a-6(b)(1)(i) citing 18a-5(a)(5)	18a-6(b)(1)(i) citing 18a-5(a)(5)	18a-6(b)(2)(i) citing 18a-5(b)(5)	18a-6(b)(1)(i) citing 18a-5(a)(5)
Confirmations .....					18a-6(b)(1)(i) citing 18a-5(a)(6)	18a-6(b)(1)(i) citing 18a-5(a)(6)	18a-6(b)(2)(i) citing 18a-5(b)(6)	18a-6(b)(1)(i) citing 18a-5(a)(6)
Accountholder information .....					18a-6(b)(1)(i) citing 18a-5(a)(7)	18a-6(b)(1)(i) citing 18a-5(a)(7)	18a-6(b)(2)(i) citing 18a-5(b)(7)	18a-6(b)(1)(i) citing 18a-5(a)(7)
Options positions .....					18a-6(b)(1)(i) citing 18a-5(a)(8)	18a-6(b)(1)(i) citing 18a-5(a)(8)		18a-6(b)(1)(i) citing 18a-5(a)(8)
Trial balances and computation of net capital ....	17a-4(b)(1) citing 17a-3(a)(11)	17a-4(b)(1) citing 17a-3(a)(11)	17a-4(b)(1) citing 17a-3(a)(11)	17a-4(b)(1) citing 17a-3(a)(11)	18a-6(b)(1)(i) citing 18a-5(a)(9)	18a-6(b)(1)(i) citing 18a-5(a)(9)		18a-6(b)(1)(i) citing 18a-5(a)(9)
Account equity and margin calculations under new Rule 18a-3 .....		17a-4(b)(1) citing 17a-3(a)(25)	17a-4(b)(1) citing 17a-3(a)(25)	17a-4(b)(1) citing 17a-3(a)(25)	18a-6(b)(1)(i) citing 18a-5(a)(12)	18a-6(b)(1)(i) citing 18a-5(a)(12)		18a-6(b)(1)(i) citing 18a-5(a)(12)

<sup>575</sup> See Rule 18a-6, as adopted.

	Stand-alone broker-dealers	Non-model broker-dealer SBSBs	ANC broker-dealer SBSBs	Broker-dealer MSBSPs	Non-model stand-alone SBSBs	Model stand-alone SBSBs	Bank SBSBs	Stand-alone MSBSPs
Possession or control requirements for security-based swap customers ..	17a-4(b)(1) citing 17a-3(a)(26)	17a-4(b)(1) citing 17a-3(a)(26)	17a-4(b)(1) citing 17a-3(a)(26)	17a-4(b)(1) citing 17a-3(a)(26)	18a-6 (b)(1)(i) citing 18a-5(a)(13)	18a-6 (b)(1)(i) citing 18a-5(a)(13)	18a-6 (b)(2)(i) citing 18a-5(b)(9)	.....
Security-based swap customer reserve requirements .....	17a-4(b)(1) citing 17a-3(a)(27)	17a-4(b)(1) citing 17a-3(a)(27)	17a-4(b)(1) citing 17a-3(a)(27)	17a-4(b)(1) citing 17a-3(a)(27)	18a-6 (b)(1)(i) citing 18a-5(a)(14)	18a-6 (b)(1)(i) citing 18a-5(a)(14)	18a-6 (b)(2)(i) citing 18a-5(b)(10)	.....
Unverified transactions .....	.....	17a-4(b)(1) citing 17a-3(a)(28)	17a-4(b)(1) citing 17a-3(a)(28)	17a-4(b)(1) citing 17a-3(a)(28)	18a-6 (b)(1)(i) citing 18a-5(a)(15)	18a-6 (b)(1)(i) citing 18a-5(a)(15)	18a-6 (b)(2)(i) citing 18a-5(b)(11)	18a-6 (b)(1)(i) citing 18a-5(a)(15)
Political contributions .....	.....	17a-4(b)(1) citing 17a-3(a)(29)	17a-4(b)(1) citing 17a-3(a)(29)	.....	18a-6 (b)(1)(i) citing 18a-5(a)(16)	18a-6 (b)(1)(i) citing 18a-5(a)(16)	18a-6 (b)(2)(i) citing 18a-5(b)(12)	.....
Compliance with business conduct requirements ....	.....	17a-4(b)(1) citing 17a-3(a)(30)	17a-4(b)(1) citing 17a-3(a)(30)	17a-4(b)(1) citing 17a-3(a)(30)	18a-6 (b)(1)(i) citing 18a-5(a)(17)	18a-6 (b)(1)(i) citing 18a-5(a)(17)	18a-6 (b)(2)(i) citing 18a-5(b)(13)	18a-6 (b)(1)(i) citing 18a-5(a)(17)
Bank records .....	.....	.....	.....	.....	18a-6 (b)(1)(ii)	18a-6 (b)(1)(ii)	.....	18a-6 (b)(1)(ii)
Bills .....	.....	.....	.....	.....	18a-6 (b)(1)(iii)	18a-6 (b)(1)(iii)	.....	18a-6 (b)(1)(iii)
Communications .....	17a-4(b)(4)*	17a-4(b)(4)*	17a-4(b)(4)*	17a-4(b)(4)*	18a-6 (b)(1)(iv)	18a-6 (b)(1)(iv)	18a-6 (b)(2)(ii)	18a-6 (b)(1)(iv)
Trial balances .....	.....	.....	.....	.....	18a-6 (b)(1)(v)	18a-6 (b)(1)(v)	.....	18a-6 (b)(1)(v)
Account documents .....	.....	.....	.....	.....	18a-6 (b)(1)(vi)	18a-6 (b)(1)(vi)	18a-6 (b)(2)(iii)	18a-6 (b)(1)(vi)
Written agreements .....	17a-4(b)(7)*	17a-4(b)(7)*	17a-4(b)(7)*	17a-4(b)(7)*	18a-6 (b)(1)(vii)	18a-6 (b)(1)(vii)	18a-6 (b)(2)(iv)	18a-6 (b)(1)(vii)
Information supporting financial reports .....	17a-4(b)(8)*	17a-4(b)(8)*	17a-4(b)(8)*	17a-4(b)(8)*	18a-6 (b)(1)(viii)	18a-6 (b)(1)(viii)	18a-6 (b)(2)(v)	18a-6 (b)(1)(viii)
Rule 15c3-4 risk management records (OTC derivatives dealers only) ...	.....	.....	.....	.....	18a-6 (b)(1)(ix)	18a-6 (b)(1)(ix)	.....	18a-6 (b)(1)(ix)
Credit risk determinations .....	.....	.....	.....	.....	18a-6 (b)(1)(x)	18a-6 (b)(1)(x)	.....	.....
Regulation SBSR information .....	17a-4(b)(14)	17a-4(b)(14)	17a-4(b)(14)	17a-4(b)(14)	18a-6 (b)(1)(xi)	18a-6 (b)(1)(xi)	18a-6 (b)(2)(vi)	18a-6 (b)(1)(xi)
Records relating to business conduct standards .....	.....	17a-4(b)(15)	17a-4(b)(15)	17a-4(b)(15)	18a-6 (b)(1)(xii)	18a-6 (b)(1)(xii)	18a-6 (b)(2)(vii)	18a-6 (b)(1)(xii)
Special entity documents ..	.....	17a-4(b)(16)	17a-4(b)(16)	17a-4(b)(16)	18a-6 (b)(1)(xiii)	18a-6 (b)(1)(xiii)	18a-6 (b)(2)(viii)	18a-6 (b)(1)(xiii)
Associated person's employment application .....	.....	.....	.....	.....	18a-6(d)(1)	18a-6(d)(1)	18a-6(d)(1)	18a-6(d)(1)
Regulatory authority reports .....	.....	.....	.....	.....	18a-6 (d)(2)(i)	18a-6 (d)(2)(i)	18a-6 (d)(2)(ii)	18a-6 (d)(2)(i)
Compliance, supervisory, and procedures manuals .....	.....	.....	.....	.....	18a-6 (d)(3)(i)	18a-6 (d)(3)(i)	18a-6 (d)(3)(ii)	18a-6 (d)(3)(i)
<b>Life of the enterprise and of any successor enterprise</b>								
Corporate documents .....	17a-4(d)*	17a-4(d)*	17a-4(d)*	17a-4(d)*	18a-6(c)	18a-6(c)	.....	18a-6(c)

\* The Commission is amending these pre-existing paragraphs of Rule 17a-4 to account for the security-based swap and swap activities of broker-dealers, including broker-dealer SBSBs and MSBSPs.

3. Amendments to Rule 17a-5 and New Rule 18a-7

Rule 17a-5, the broker-dealer reporting rule, requires, among other things, that broker-dealers file periodic unaudited reports about their financial and operational condition using the FOCUS Report form; and that broker-dealers annually file financial statements and certain reports, as well as reports covering those statements and reports prepared by an independent

public accountant registered with the PCAOB, in accordance with PCAOB standards.

Rule 17a-5 is being amended to account for the security-based swap activities of entities subject to its requirements and new Rule 18a-7—which is modeled on Rule 17a-5; is being adopted to establish reporting requirements for SBSBs and MSBSPs

that will not be subject to Rule 17a-5.<sup>576</sup> A stand-alone broker-dealer, including a stand-alone OTC derivatives dealer, will continue to be subject to Rule 17a-5.<sup>577</sup> Similarly, a broker-dealer, other than an

<sup>576</sup> See section II.B.3.a. of this release (discussing the requirement to file annual reports and the qualifications of independent public accountants).

<sup>577</sup> Paragraph (p) of Rule 17a-5 provides that an OTC derivatives dealer may comply with Rule 17a-5 by complying with the provisions of Rule 17a-12.

OTC derivatives dealer, that is also an SBSBD will be subject to Rule 17a-5. A broker-dealer, including an OTC derivatives dealer, that is also an MSBSP will be subject to Rule 17a-5. A stand-alone SBSBD will be subject to Rule 18a-7. Similarly, an SBSBD that is also an OTC derivatives dealer will be subject to Rule 18a-7. A stand-alone MSBSP will be subject to Rule 18a-7. Finally, a bank SBSBD or MSBSP will be subject to Rule 18a-7.

4. Amendments to Rule 17a-11 and New Rule 18a-8

Rule 17a-11 specifies the circumstances under which a broker-dealer must notify the Commission and other securities regulators about its financial or operational condition, as well as the form that the notice must take. The Commission is amending Rule 17a-11 to account for the security-based swap activities of broker-dealers.<sup>578</sup> The

Commission is adopting new Rule 18a-8—which is modeled on Rule 17a-11, as amended—to establish notification requirements for stand-alone SBSBDs and MSBSPs, and bank SBSBDs and MSBSPs.<sup>579</sup> The amendments to Rule 17a-11 and new Rule 18a-8 establish a number of new collections of information, as summarized in the table below.

	Non-SBSBD/MSBSP broker-dealers	Non-model broker-dealer SBSBDs	ANC broker-dealer SBSBDs	Broker-dealer MSBSPs	Model stand-alone SBSBDs	Non-model stand-alone SBSBDs	Bank SBSBDs	Stand-alone MSBSPs
Net capital below minimum					18a-8 (a)(1)(i)	18a-8 (a)(1)(i)		
Tentative net capital below minimum					18a-8 (a)(1)(ii)			
Tangible net worth below minimum								18a-8 (a)(2)
Early warning of net capital					18a-8(b)(1)	18a-8(b)(1)		
Early warning of tentative net capital					18a-8 (b)(2)			
Early warning of tangible net worth								18a-8(b)(3)
Backtesting exception					18a-8(b)(4)			
Notice of adjustment of reported capital category							18a-8(c)	
Failure to make and keep current books and records					18a-8(d)	18a-8(d)	18a-8(d)	18a-8(d)
Material weakness					18a-8(e)	18a-8(e)		
Failure to make a required special reserve deposit	17a-11(f)	17a-11(f)	17a-11(f)		18a-8(g)	18a-8(g)	18a-8(g)	

5. Amendments to Rule 17a-12

The amendments to Rule 17a-12, the OTC derivatives dealer reporting rule,<sup>580</sup> require OTC derivatives dealers to file FOCUS Report Part II, as amended, instead of FOCUS Report Part IIB by replacing the phrase “Part II” with the phrase “Part IIB” each time it appears in the rule.<sup>581</sup>

6. New Rule 18a-9

The Commission is adopting new Rule 18a-9, which is modeled on Rule 17a-13, to require stand-alone SBSBDs to examine and count the securities they physically hold, account for the securities that are subject to their control or direction but are not in their physical possession, verify the locations of securities under certain circumstances, and compare the results of the count and verification with their records. Rule 18a-9 does not include a parallel requirement for every

requirement in Rule 17a-13.<sup>582</sup> In addition, Rule 18a-9 does not apply to stand-alone MSBSPs because the customer protection rationale for Rules 17a-13 and 18a-9 is not as pertinent to stand-alone MSBSPs.

7. Amendments to Rule 18a-10

Rule 18a-10 permits certain SBSBDs that are registered as swap dealers and that predominantly engage in a swaps business to elect to comply with the capital, margin, and segregation requirements of the CEA and the CFTC’s rules in lieu of complying with the capital, margin, and segregation requirements of Rules 18a-1, 18a-3, and 18a-4.<sup>583</sup> The Commission is amending Rule 18a-10 to permit firms that will operate under the rule to elect to comply with the recordkeeping and reporting requirements of the CEA and the CFTC’s rules in lieu of complying

with Rules 18a-5, 18a-6, 18a-7, 18a-8, and 18a-9.<sup>584</sup>

As discussed above, Rule 17a-11 specifies the circumstances under which a broker-dealer must notify the Commission and other regulators about its financial or operational condition, as well as the form of the notice. Stand-alone and bank SBSBDs and MSBSPs are subject to Rule 18a-8, which is modeled on Rule 17a-11 and is designed to provide the Commission with the ability to take effective proactive steps to respond when a firm is experiencing or likely to experience financial difficulty.<sup>585</sup> A stand-alone SBSBD operating under Rule 18a-10, however, may comply with the notification requirements of the CFTC’s rules in lieu of complying with Rule 18a-8. In order to retain a requirement that the SBSBD provide notice to the Commission if it is experiencing or likely to experience financial difficulty, the Commission is

<sup>578</sup> See paragraph (f) of Rule 17a-11, as amended.

<sup>579</sup> See Rule 18a-8, as adopted.

<sup>580</sup> OTC derivatives dealers dually registered as SBSBDs are subject to the reporting requirements of Rule 18a-7.

<sup>581</sup> OTC derivatives dealers dually registered as SBSBDs or MSBSPs will also file FOCUS Report Part II.

<sup>582</sup> The Commission is not including in Rule 18a-9, as adopted, provisions that would parallel the provisions in paragraphs (a)(1), (2), and (3) and (e) of Rule 17a-13. These paragraphs of Rule 17a-13 provide exemptions from complying with Rule 17a-13 for certain types of broker-dealers. The Commission believes that SBSBDs will not limit their

activities to the types of activities in which the exempt broker-dealers engage.

<sup>583</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43943-46.

<sup>584</sup> See Rule 18a-10, as amended.

<sup>585</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25247.

adding paragraph (b)(4) to Rule 18a–10. This paragraph provides that the SBSD must simultaneously notify the Commission if the firm is required to send a notice concerning its capital, books and records, liquidity, margin operations, or segregation operations to the CFTC by transmitting to the Commission a copy of the notice being sent to the CFTC.<sup>586</sup>

8. Amendments to Rule 3a71–6

In May 2016, the Commission adopted Rule 3a71–6 to provide that foreign SBSDs and MSBSPs could satisfy applicable business conduct requirements under Section 15F by complying with comparable regulatory requirements of a foreign jurisdiction, subject to certain conditions. The Commission is amending Rule 3a71–6 to provide foreign SBSDs and MSBSPs with the option to apply for substituted compliance to satisfy the recordkeeping and reporting requirements of Section 15F of the Exchange Act and Rules 18a–5, 18a–6, 18a–7, 18a–8, and 18a–9 thereunder.<sup>587</sup>

B. Use of Information

Rules 17a–3 and 17a–4, as amended, and new Rules 18a–5 and 18a–6 are designed, among other things, to promote the prudent operation of broker-dealers, SBSDs, and MSBSPs, and to assist the Commission, SROs, and state securities regulators in conducting effective examinations.<sup>588</sup> Thus, the collections of information under the amendments to Rules 17a–3 and 17a–4, and new Rules 18a–5 and 18a–6, are expected to facilitate the examinations of broker-dealers, SBSDs, and MSBSPs.

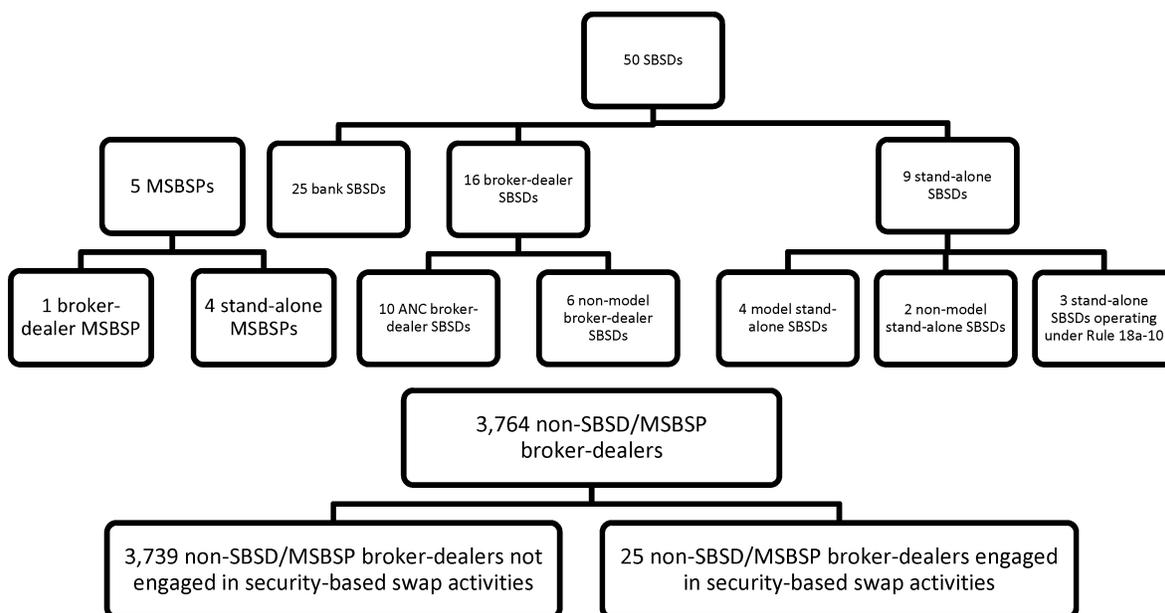
Rules 17a–5, 17a–11, 17a–12, and 18a–10, as amended, and new Rules 18a–7 and 18a–8 are designed to promote compliance with the financial responsibility requirements for broker-dealers, SBSDs, and MSBSPs, facilitate regulators’ oversight and examinations of such firms, and promote transparency of their financial condition and operation.

Rule 18a–9 is designed to promote an SBSD’s custody of securities and accurate accounting for securities.

The Commission plans to use the information collected pursuant to Rule 3a71–6, as amended, to evaluate requests for substituted compliance determinations with respect to the recordkeeping and reporting requirements applicable to foreign SBSDs and MSBSPs.

C. Respondents

The Commission estimated the number of respondents in the proposing release. The Commission received no comment on these estimates and continues to believe they are appropriate. However, the Commission is updating its estimated number of broker-dealers to reflect the number of broker-dealers registered with the Commission as of December 31, 2018 (instead of April 1, 2013 as reflected in the proposing release), and is revising the number of respondents with respect to certain rules, as discussed below, to reflect the amendments to Rule 18a–10. The following chart summarizes the Commission’s estimated number of respondents:



Consistent with prior releases, based on available data regarding the single-name CDS market—which the Commission believes will comprise the majority of security-based swaps—the Commission estimates that the number

of MSBSPs likely will be five or fewer and, in actuality, may be zero.<sup>589</sup> Therefore, to capture the likely number of MSBSPs that may be subject to the collections of information for purposes of this PRA, the Commission estimates

for purposes of this PRA that five entities will register with the Commission as MSBSPs.

The Commission estimates there will be one broker-dealer FCM MSBSP for the purposes of calculating PRA

<sup>586</sup> See paragraph (b)(4) of Rule 18a–10, as amended.

<sup>587</sup> See paragraph (d)(6) of Rule 3a71–6, as amended.

<sup>588</sup> See, e.g., *Books and Records Requirements for Brokers and Dealers Under the Securities Exchange*

*Act of 1934*, 66 FR at 55818 (“The Commission has required that broker-dealers create and maintain certain records so that, among other things, the Commission, [SROs], and State Securities Regulators . . . may conduct effective examinations of broker-dealers” (footnote omitted)).

<sup>589</sup> See *Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 80 FR at 48990. See also *Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant”*, 77 FR at 30727.

burdens, in recognition that broker-dealer MSBSPs and stand-alone MSBSPs are subject to different burdens under the new and amended rules in certain instances.<sup>590</sup> However, by definition, an MSBSP's primary business is not engaging in security-based swap activity, so it would be rare for an MSBSP to qualify as a broker-dealer and/or FCM but not an SBSB. Such an MSBSP would be engaged in the business of effecting securities transactions,<sup>591</sup> but not in the business of effecting security-based swap transactions<sup>592</sup> or commodities, securities futures products, or swaps<sup>593</sup> and yet involved in enough security-based swap transactions to be required to register as an MSBSP.<sup>594</sup>

Consistent with prior releases, the Commission estimates that 50 or fewer entities ultimately may be required to register with the Commission as SBSBs, and 16 broker-dealers will likely seek to register as SBSBs.<sup>595</sup> The Commission believes that all 16 broker-dealer SBSBs also will be registered as FCMs, since SBSBs may find it beneficial to hedge security-based swap positions with futures contracts, options on futures, or swaps.<sup>596</sup>

Because many of the dealers that currently engage in OTC derivatives activities are banks, the Commission estimates that approximately 75% of the 34 non-broker-dealer SBSBs will register as bank SBSBs (*i.e.*, 25 firms), and the remaining 25% will register as stand-alone SBSBs (*i.e.*, 9 firms).<sup>597</sup> The Commission believes that none of the bank SBSBs will register as FCMs, because of the burden associated with complying with three different supervisors' regulatory requirements.<sup>598</sup> However, the Commission cannot precisely estimate how many of the nine stand-alone SBSBs will register as FCMs. The Commission anticipates that

entities that want to clear security-based swaps for others may also want to clear swaps for others and, therefore, may need to register as FCMs.<sup>599</sup> The Commission also anticipates that some stand-alone SBSBs that deal in non-cleared security-based swaps will generally seek exemption from the omnibus segregation requirements in Rule 18a-4. In order to qualify for the exemption, these firms cannot clear security-based swap transactions for others. The Commission believes that stand-alone SBSBs that seek this exemption and thus will not clear security-based swaps for others likely also would not clear swaps for others, which obviates the need for these SBSBs to register as an FCM.<sup>600</sup> For purposes of developing paperwork burden estimates in connection with the recently adopted capital, margin, and segregation requirements, the Commission estimated six of nine stand-alone SBSBs would avail themselves of the exemption under paragraph (f) of Rule 18a-4.<sup>601</sup> Consistent with that estimate, the Commission estimates that the remaining three of the nine stand-alone SBSBs will also be registered as FCMs.

Of the nine stand-alone SBSBs, the Commission estimates that, based on its experience with ANC broker-dealers and OTC derivatives dealers, four of the nine stand-alone SBSBs will apply to operate as stand-alone SBSBs which will use internal models to compute net capital under Rule 18a-1.<sup>602</sup> This estimate has been reduced from six in the proposing release<sup>603</sup> to account for the adoption of Rule 18a-10, which will enable stand-alone SBSBs to elect the full alternative compliance mechanism and comply with certain CFTC rules in lieu of Commission rules, including recordkeeping and reporting rules. Finally, in the proposing release, the Commission estimated that three stand-alone SBSBs would not apply to use models.<sup>604</sup> This estimate has been

modified from three to two in the final release to account for the nonbank SBSBs that will elect the full alternative compliance mechanism under Rule 18a-10.

Of the 16 broker-dealer FCM SBSBs, the Commission estimates that ten firms will operate as ANC broker-dealer SBSBs, which use internal models to compute net capital under Rule 15c3-1.<sup>605</sup>

As of December 31, 2018, there were 3,764 broker-dealers registered with the Commission. The Commission estimates that 25 registered broker-dealers will be engaged in security-based swap activities but will not be required to register as an SBSB or MSBSP. Other than OTC derivatives dealers, which are subject to significant limitations on their activities, broker-dealers historically have not participated in a significant way in security-based swap trading for at least two reasons.<sup>606</sup> First, because the Exchange Act has not previously defined security-based swaps as *securities*, security-based swaps have not been required to be traded through registered broker-dealers.<sup>607</sup> Second, a broker-dealer engaging in security-based swap activities is currently subject to existing regulatory requirements with respect to those activities, including capital, margin, segregation, and recordkeeping requirements. The existing financial responsibility requirements make it more costly to conduct these activities in a broker-dealer than in an unregulated entity. As a result, security-based swap activities are mostly concentrated in affiliates of broker-dealers, not broker-dealers themselves.<sup>608</sup>

Finally, for purposes of estimating the number of respondents with respect to the amendments to Rule 3a71-6, applications for substituted compliance may be filed by foreign financial authorities, or by non-U.S. SBSBs or

<sup>590</sup> The Commission believes that the broker-dealer MSBSP would register as an FCM, since the broker-dealer may find it beneficial to hedge security and security-based swap positions with futures contracts, options on futures, or swaps. See *Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants*, 76 FR at 65814.

<sup>591</sup> See Section 3(a)(4) of the Exchange Act.

<sup>592</sup> See Section 3(a)(71) of the Exchange Act.

<sup>593</sup> See 7 U.S.C. 1a(28).

<sup>594</sup> See Section 3(a)(67) of the Exchange Act.

<sup>595</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43959; *Recordkeeping and Reporting Proposing Release*, 79 FR at 25260.

<sup>596</sup> See *Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 80 FR at 79002.

<sup>597</sup> The Commission does not anticipate that any firms will be dually registered as a broker-dealer and a bank.

<sup>598</sup> The Commission understands that affiliates of banks (rather than banks) register as FCMs.

<sup>599</sup> See *Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 80 FR at 79002.

<sup>600</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 44025.

<sup>601</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43959.

<sup>602</sup> VaR models, while more risk-sensitive than standardized haircuts, tend to substantially reduce the amount of the deductions to tentative net capital in comparison to the standardized haircuts because the models recognize more offsets between related positions than the standardized haircuts. Therefore, the Commission expects that stand-alone SBSBs that have the capability to use internal models to calculate net capital would choose to do so.

<sup>603</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25260.

<sup>604</sup> See *id.*

<sup>605</sup> Currently, 5 broker-dealers are registered as ANC broker-dealers. The Commission has previously estimated that all current and future ANC broker-dealers will also register as SBSBs. See *Recordkeeping and Reporting Proposing Release; Capital Rule for Certain Security-Based Swap Dealers*, 79 FR at 25261.

<sup>606</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43960; *Recordkeeping and Reporting Proposing Release*, 79 FR at 25261.

<sup>607</sup> See Section 761 of the Dodd-Frank Act (amending definition of "security" in Section 3 of the Exchange Act).

<sup>608</sup> See International Swaps and Derivatives Association ("ISDA"), *Margin Survey 2015* (Aug. 2015) ("ISDA Margin Survey 2015"), available at <http://www2.isda.org/attachment/Nzc4MQ=/Margin%20survey%202015%20FINAL.pdf>. The ISDA Margin Survey is conducted annually to examine the state of collateral use and management among derivatives dealers and end-users. The appendix to the survey lists firms that responded to the survey, including broker-dealers. See *id.*

MSBSPs. Consistent with prior estimates, the Commission staff expects that there may be approximately 22 non-U.S. entities that may potentially register as SBSBs.<sup>609</sup> Potentially, all such non-U.S. SBSBs, or some subset thereof, may seek to rely on substituted compliance in connection with the requirements adopted in this document.<sup>610</sup> For purposes of this PRA, however, consistent with prior estimates, the Commission estimates

that three of these security-based swap entities will submit such applications in connection with the Commission's recordkeeping, reporting, and notification requirements.<sup>611</sup>

*D. Total Initial and Annual Recordkeeping and Reporting Burden*

1. Amendments to Rule 17a-3 and New Rule 18a-5

The amendments to Rule 17a-3 and new Rule 18a-5 will impose collection

of information requirements that result in initial and annual burdens for broker-dealers, SBSBs, and MSBSPs. The Commission estimates that these amendments to Rule 17a-3 will impose the following initial and annual burdens:<sup>612</sup>

Burden	Initial burden	Annual burden
New security-based swap records .....	<i>Per firm:</i> 70 hours .....	<i>Per firm:</i> 42 hours.
	<i>Industry:</i> 2,940 hours. ....	<i>Industry:</i> 1,764 hours.
New burdens applicable to broker-dealer SBSBs and MSBSPs. ....	<i>Per firm:</i> 60 hours .....	<i>Per firm:</i> 75 hours.
	<i>Industry:</i> 1,020 hours. ....	<i>Industry:</i> 1,275 hours.
New burdens applicable to broker-dealer SBSBs .....	<i>Per firm:</i> 20 hours .....	<i>Per firm:</i> 25 hours.
	<i>Industry:</i> 320 hours. ....	<i>Industry:</i> 400 hours.
Total—Amendments to Rule 17a-3 .....	<i>Industry:</i> 4,280 hours. ....	<i>Industry:</i> 3,439 hours.

The Commission estimates that new Rule 18a-5 will impose the following initial and annual burdens:<sup>613</sup>

Burden	Initial burden	Annual burden
Burdens applicable to stand-alone SBSBs and MSBSPs .....	<i>Per firm:</i> 260 hours and \$1,000 ....	<i>Per firm:</i> 325 hours and \$4,650.
	<i>Industry:</i> 2,600 hours and \$10,000	<i>Industry:</i> 3,250 hours and \$46,500.
Burdens applicable to stand-alone SBSBs .....	<i>Per firm:</i> 60 hours .....	<i>Per firm:</i> 75 hours.
	<i>Industry:</i> 360 hours .....	<i>Industry:</i> 450 hours.
Burdens applicable to bank SBSBs and MSBSPs .....	<i>Per firm:</i> 200 hours .....	<i>Per firm:</i> 250 hours.
	<i>Industry:</i> 5,000 hours .....	<i>Industry:</i> 6,250 hours.
Burdens applicable to bank SBSBs .....	<i>Per firm:</i> 60 hours .....	<i>Per firm:</i> 75 hours.
	<i>Industry:</i> 1,500 hours .....	<i>Industry:</i> 1,875 hours.
Total—New Rule 18a-5 .....	<i>Industry:</i> 9,460 hours and \$10,000	<i>Industry:</i> 11,825 hours and \$46,500.

Estimated Hours and Costs of Amendments to Rule 17a-3

In the proposing release, the Commission estimated that many of the amendments to Rule 17a-3 are not expected to impose an initial burden.<sup>614</sup> The Commission received no comment on these estimates and continues to believe they are appropriate.

The Commission is amending Rule 17a-3 to require broker-dealers to make

and keep current various records for security-based swaps.<sup>615</sup> The Commission estimates that these amendments will impose on each broker-dealer that engages in security-based swap activities an initial burden of 70 hours and an ongoing burden of approximately ten minutes per business day, or 42 hours per year.<sup>616</sup> The Commission estimates that there are 42 respondents.<sup>617</sup> Thus, the Commission

estimates that the amendments will add to the industry an estimated initial burden of 2,940 hours<sup>618</sup> and an ongoing burden of 1,764 hours per year.<sup>619</sup>

The amendments to Rule 17a-3 require three additional types of records to be made and kept current by broker-dealer SBSBs and MSBSPs.<sup>620</sup> Because the burden to run the applicable calculation or comply with the

<sup>609</sup> See *Trade Acknowledgment and Verification of Security-Based Swap Transactions*, 81 FR at 39832.

<sup>610</sup> It is possible that some subset of MSBSPs will be non-U.S. MSBSPs and seek to rely on substituted compliance. See *Trade Acknowledgment and Verification of Security-Based Swap Transactions*, 81 FR at 39832.

<sup>611</sup> See *id.* at 38392.

<sup>612</sup> See paragraphs (a)(1) and (3), (a)(5)(ii), (a)(6)(ii), (a)(7)(ii), (a)(8)(ii), (a)(9)(iv), and (a)(25) through (30) of Rule 17a-3, as amended.

<sup>613</sup> See paragraphs (a)(1) through (10) and (12) through (17) and (b)(1) through (13) of Rule 18a-5, as adopted.

<sup>614</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25262-63.

<sup>615</sup> See paragraphs (a)(1) and (3), (a)(5)(ii), (a)(6)(ii), (a)(7)(ii), (a)(8)(ii), (a)(9)(iv), and (a)(26) and (27) of Rule 17a-3, as amended.

<sup>616</sup> (10 minutes per business day + 60 minutes per hour) × 251 business days per year = 42 hours per year. There were 251 business days in 2018.

<sup>617</sup> 16 broker-dealer SBSBs + 1 broker-dealer MSBSP + 25 stand-alone broker-dealers engaged in security-based swap activities = 42 broker-dealers engaged in security-based swap activities.

<sup>618</sup> 70 hours per year × 42 broker-dealers engaged in security-based swap activities = 2,940 hours per

year. These internal hours likely will be performed by a compliance manager.

<sup>619</sup> 42 hours per year × 42 broker-dealers engaged in security-based swap activities = 1,764 hours per year. These internal hours likely will be performed by a compliance clerk.

<sup>620</sup> See paragraphs (a)(25), (28), and (30) of Rule 17a-3, as amended (adopting recordkeeping requirements for Rule 18a-3 calculations, unverified transactions, and compliance with business conduct requirements, respectively).

applicable standard is accounted for in the PRA estimates for Rules 18a–3, 15Fh–2, 15Fh–1 through 15Fh–5, and 15Fk–1,<sup>621</sup> the burden imposed by these new requirements is the requirement to make and keep current a written record of these tasks. The Commission estimates that paragraphs (a)(25), (a)(28), and (a)(30) of Rule 17a–3, as amended, will impose an initial burden of 60 hours per firm and an ongoing annual burden of 75 hours per firm. The Commission estimates that there are 17 respondents (16 broker-dealer SBSDs and 1 broker-dealer MSBSP), adding to the industry an initial burden of 1,020 hours<sup>622</sup> and an ongoing burden of 1,275 hours per year.<sup>623</sup>

The amendments to Rule 17a–3 require one additional type of record to be made and kept current by broker-dealer SBSDs.<sup>624</sup> Because the burden to run the applicable calculation or comply with the applicable standard is accounted for in the PRA estimate for Rule 15Fh–6,<sup>625</sup> the burden imposed by this requirement is the requirement to make and keep current a written record of these tasks. The Commission estimates that new paragraph (a)(29) of Rule 17a–3 will impose an initial burden of 20 hours per firm and an ongoing annual burden of 25 hours per firm. The Commission estimates that there are 16 broker-dealer SBSDs, adding to the industry an initial burden of 320 hours<sup>626</sup> and an ongoing burden of 400 hours per year.<sup>627</sup>

The Commission received no comments regarding its hour and cost burden estimates for the amendments to Rule 17a–3. However, the estimated initial burden for Rule 17a–3 is increased to reflect that the requirements to make and keep possession or control and special reserve account computation records

now apply to all broker-dealers engaged in security-based swap activities (instead of just broker-dealer SBSDs).<sup>628</sup> Other than this change, the Commission continues to believe its hour and cost burden estimates for the amendments to Rule 17a–3 are appropriate.

#### Estimated Hours and Costs of New Rule 18a–5

The Commission estimates that new Rule 18a–5 will cause a stand-alone SBSD or MSBSP to incur an initial dollar cost of approximately \$1,000 to purchase recordkeeping system software and an ongoing dollar cost of \$4,650 per year for associated equipment and systems development. The Commission estimates that there are 10 respondents (6 stand-alone SBSDs and 4 stand-alone MSBSPs), resulting in an estimated industry-wide initial burden of \$10,000<sup>629</sup> and an industry-wide ongoing burden of \$46,500 per year.<sup>630</sup>

New Rule 18a–5 is not expected to increase the initial and ongoing dollar costs that bank SBSDs and MSBSPs incur to purchase recordkeeping system software and for equipment and systems development. Banks are already subject to recordkeeping requirements by their prudential regulators,<sup>631</sup> so they should already own or have established the requisite recordkeeping system software. Although bank SBSDs and MSBSPs may need to program the software to begin collecting additional records, the Commission expects these services to be performed in-house, and these hour burdens are estimated below.

New Rule 18a–5 requires 13 types of records to be made and kept current by stand-alone SBSDs and MSBSPs.<sup>632</sup> New Rule 18a–5 imposes the burden to make and keep current these records, but does not require the firm to perform the underlying task.<sup>633</sup> Therefore, after

consideration of the estimated burdens under Rule 17a–3, as amended, the Commission estimates that these 13 paragraphs will impose on each firm an initial burden of 260 hours and an ongoing annual burden of 325 hours. The Commission estimates that there are 10 respondents (6 stand-alone SBSDs and 4 stand-alone MSBSPs), resulting in an estimated industry-wide initial burden of 2,600 hours<sup>634</sup> and an industry-wide ongoing annual burden of 3,250 hours.<sup>635</sup>

New Rule 18a–5 requires three types of records to be made and kept current by stand-alone SBSDs.<sup>636</sup> Because the burden to run the applicable calculation or comply with the applicable standard is accounted for in the PRA estimates for Rules 18a–4 and 15Fh–6,<sup>637</sup> the burden imposed by these new requirements is the requirement to make and keep current a written record of these tasks. The Commission estimates that these three paragraphs will impose an initial burden of 60 hours per firm and an ongoing annual burden of 75 hours per firm. The Commission estimates that there are 6 stand-alone SBSDs, resulting in an industry-wide initial burden of 360 hours<sup>638</sup> and an industry-wide ongoing burden of 450 hours per year.<sup>639</sup>

New Rule 18a–5 requires ten types of records to be made and kept current by bank SBSDs and MSBSPs, all of which are limited to the firm's business as an SBSD or MSBSP.<sup>640</sup> New Rule 18a–5

recognizes that entities that will register stand-alone SBSDs and MSBSPs likely make and keep some records today as a matter of routine business practice, but the Commission does not have information about the records that such entities currently keep. Therefore, the Commission assumes that these entities currently keep no records when it estimates the PRA burden for these entities.

<sup>634</sup> 260 hours × 10 stand-alone SBSDs and MSBSPs = 2,600 hours. These internal hours likely will be performed by a compliance manager.

<sup>635</sup> 325 hours per year × 10 stand-alone SBSDs and MSBSPs = 3,250 hours per year. These internal hours likely will be performed by a compliance clerk.

<sup>636</sup> See Rule 18a–5, as adopted (paragraph (a)(13) (compliance with Rule 18a–4 possession or control requirements); paragraph (a)(14) (Rule 18a–4 reserve account computations); and paragraph (a)(16) (political contributions)).

<sup>637</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43964–67; *Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 81 FR at 29959.

<sup>638</sup> 60 hours × 6 stand-alone SBSDs = 360 hours. These internal hours likely will be performed by a compliance manager.

<sup>639</sup> 75 hours per year × 6 stand-alone SBSDs = 450 hours per year. These internal hours likely will be performed by a compliance clerk.

<sup>640</sup> See Rule 18a–5, as adopted (paragraph (b)(1) (trade blotters); paragraph (b)(2) (ledgers for customer and non-customer accounts); paragraph (b)(3) (stock record); paragraph (b)(4) (memoranda of brokerage orders); paragraph (b)(5) (memoranda

<sup>621</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43963; *Trade Acknowledgment and Verification of Security-Based Swap Transactions*, 81 FR at 39807; *Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 76 FR at 42443–48.

<sup>622</sup> 60 hours × 17 broker-dealer SBSDs and MSBSPs = 1,020 hours. These internal hours likely will be performed by a compliance manager.

<sup>623</sup> 75 hours per year × 17 broker-dealer SBSDs and MSBSPs = 1,275 hours per year. These internal hours likely will be performed by a compliance clerk.

<sup>624</sup> See paragraph (a)(29) of Rule 17a–3, as amended (political contributions).

<sup>625</sup> See *Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 81 FR at 29959.

<sup>626</sup> 20 hours × 16 broker-dealer SBSDs = 320 hours. These internal hours likely will be performed by a compliance manager.

<sup>627</sup> 25 hours per year × 16 broker-dealer SBSDs = 400 hours per year. These internal hours likely will be performed by a compliance clerk.

<sup>628</sup> See Rule 17a–3, as amended (paragraph (a)(26) (compliance with Rule 15c3–3(p) possession or control requirements); paragraph (a)(27) (Rule 15c3–3(p) reserve account computations)).

<sup>629</sup> \$1,000 × 10 stand-alone SBSDs and MSBSPs = \$10,000.

<sup>630</sup> \$4,650 per year × 10 stand-alone SBSDs and MSBSPs = \$46,500 per year.

<sup>631</sup> See, e.g., 12 CFR 12.3 (Department of Treasury); 12 CFR 219.21 through 219.24 (Federal Reserve); 12 CFR 344.4 (FDIC).

<sup>632</sup> See Rule 18a–5, as adopted (paragraph (a)(1) (trade blotters); paragraph (a)(2) (general ledgers); paragraph (a)(3) (ledgers of customer and non-customer accounts); paragraph (a)(4) (stock record); paragraph (a)(5) (memoranda of proprietary orders); paragraph (a)(6) (confirmations); paragraph (a)(7) (account holder information); paragraph (a)(8) (options positions); paragraph (a)(9) (trial balances and computation of net capital); paragraph (a)(10) (associated person's application); paragraph (a)(12) (Rule 18a–3 calculations); paragraph (a)(15) (unverified transactions); paragraph (a)(17) (compliance with business conduct standards)).

<sup>633</sup> In estimating the burden associated with Rules 18a–5 and 18a–6, as adopted, the Commission

imposes the burden to make and keep current these records, but does not require the firm to perform the underlying task. Therefore, after consideration of the estimated burdens under Rule 17a–3, as amended, the Commission estimates that these ten paragraphs will impose on each firm an initial burden of 200 hours per firm and an ongoing burden of 250 hours per firm. The Commission estimates that there are 25 respondents (25 bank SBSBs and no bank MSBSPs), resulting in an estimated industry-wide initial burden of 5,000 hours<sup>641</sup> and an industry-wide ongoing burden of 6,250 hours per year.<sup>642</sup>

New Rule 18a–5 requires three types of records to be made and kept current by bank SBSBs, all of which are limited to the firm’s business as an SBSB.<sup>643</sup> Because the burden to run the applicable calculation or comply with the applicable standard is accounted for in the PRA estimates for Rules 18a–4 and 15Fh–6,<sup>644</sup> the burden imposed by these new requirements is the requirement to make and keep current a

written record of these tasks. The Commission estimates that these three paragraphs will impose an initial burden of 60 hours per firm and an ongoing annual burden of 75 hours per firm. The Commission estimates that there are 25 bank SBSBs, resulting in an industry-wide initial burden of 1,500 hours<sup>645</sup> and an industry-wide ongoing burden of 1,875 hours per year.<sup>646</sup>

The Commission received no comments regarding its hour and cost burden estimates for new Rule 18a–5 and continues to believe they are appropriate.

**Estimated Hours and Costs of the Limited Alternative Compliance Mechanism**

As discussed above, the Commission is adopting the limited alternative compliance mechanism. The registrant’s obligation to preserve these records will continue for the retention period specified for that category of record as set forth in Rule 17a–4 or Rule 18a–6, as applicable.

The Commission believes that registrants who choose to use the

limited alternative compliance mechanism will incur lower costs and hour burdens, especially with respect to initial compliance burdens, than they would pursuant to the standard compliance requirements. Indeed, were that not the case, registrants would be unlikely to use the limited alternative compliance mechanism. However, for purposes of this Paperwork Reduction Act analysis, the Commission is making the conservative estimate that no firms will utilize the limited alternative compliance mechanism.

**2. Amendments to Rule 17a–4 and New Rule 18a–6**

The amendments to Rule 17a–4 and new Rule 18a-6 impose collection of information requirements that will result in initial and ongoing burdens for broker-dealers, SBSBs, MSBSPs, and certain third-party custodians. The Commission estimates that the amendments to Rule 17a–4 will impose the following initial and annual burdens:<sup>647</sup>

Burden	Initial burden	Annual burden
Recorded telephone calls .....	<i>Per firm:</i> 13 hours .....	<i>Per firm:</i> 6 hours and \$2,000.
	<i>Industry:</i> 221 hours .....	<i>Industry:</i> 102 hours and \$34,000.
New burdens applicable to all broker-dealers .....	<i>Per firm:</i> 65 hours .....	<i>Per firm:</i> 30 hours and \$600.
	<i>Industry:</i> 2,730 hours .....	<i>Industry:</i> 1,260 hours and \$25,200.
New burdens applicable to broker-dealer SBSBs and MSBSPs .....	<i>Per firm:</i> 65 hours .....	<i>Per firm:</i> 30 hours and \$600.
	<i>Industry:</i> 1,105 hours .....	<i>Industry:</i> 510 hours and \$10,200.
New burdens applicable to broker-dealer SBSBs .....	<i>Per firm:</i> 13 hours .....	<i>Per firm:</i> 6 hours and \$120.
	<i>Industry:</i> 208 hours .....	<i>Industry:</i> 96 hours and \$1,920.
Total—Amendments to Rule 17a–4 .....	<i>Industry:</i> 4,264 hours .....	<i>Industry:</i> 1,968 hours and \$40,720.

The Commission estimates that new Rule 18a–6 will impose the following initial and annual burdens:<sup>648</sup>

Burden	Initial burden	Annual Burden
Burdens applicable to stand-alone SBSBs and MSBSPs .....	<i>Per firm:</i> 364 hours .....	<i>Per firm:</i> 280 hours and \$5,720.
	<i>Industry:</i> 3,640 hours .....	<i>Industry:</i> 2,800 hours and \$57,200.
Burdens applicable to stand-alone SBSBs .....	<i>Per firm:</i> 44 hours .....	<i>Per firm:</i> 30 hours and \$360.
	<i>Industry:</i> 264 hours .....	<i>Industry:</i> 180 hours and \$2,160.
Burdens applicable to model stand-alone SBSBs .....	<i>Per firm:</i> 18 hours .....	<i>Per firm:</i> 10 hours and \$120.
	<i>Industry:</i> 72 hours .....	<i>Industry:</i> 40 hours and \$480.

of proprietary orders); paragraph (b)(6) (confirmations); paragraph (b)(7) (account holder information); paragraph (b)(8) (associated person’s application); paragraph (b)(11) (unverified transactions); and paragraph (b)(13) (compliance with business conduct requirements)).

<sup>641</sup> 200 hours × 25 bank SBSBs = 5,000 hours. These internal hours likely will be performed by a compliance manager.

<sup>642</sup> 250 hours per year × 25 bank SBSBs = 6,250 hours per year. These internal hours likely will be performed by a compliance clerk.

<sup>643</sup> See Rule 18a–5, as adopted (paragraph (b)(9) (compliance with Rule 18a–4 possession or control requirements); paragraph (b)(10) (Rule 18a–4 reserve account computations); and paragraph (b)(12) (political contributions)).

<sup>644</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43964–67; *Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 81 FR at 29959.

<sup>645</sup> 60 hours × 25 bank SBSBs = 1,500 hours. These internal hours likely will be performed by a compliance manager.

<sup>646</sup> 75 hours per year × 25 bank SBSBs = 1,875 hours per year. These internal hours likely will be performed by a compliance clerk.

<sup>647</sup> See paragraphs (b)(1) and (4), (b)(8)(v) through (viii) and (xvi), and (b)(14), (15), and (16) of Rule 17a–4, as amended.

<sup>648</sup> See paragraphs (a)(1) and (2), (b)(1)(i) through (xiii), (b)(2)(i) through (viii), (c), (d)(1), (d)(2)(i) and (ii), (d)(3)(i) and (ii), and (f) of Rule 18a-6, as adopted.

Burden	Initial burden	Annual Burden
Burdens applicable to bank SBSBs and MSBSPs .....	<i>Per firm:</i> 247 hours ..... <i>Industry:</i> 6,175 hours .....	<i>Per firm:</i> 190 hours and \$4,520. <i>Industry:</i> 4,750 hours and \$113,000.
Burdens applicable to bank SBSBs .....	<i>Per firm:</i> 57 hours ..... <i>Industry:</i> 1,425 hours .....	<i>Per firm:</i> 40 hours and \$480. <i>Industry:</i> 1,000 hours and \$12,000.
Burdens applicable to third-party custodians .....	<i>Per firm:</i> 0 hours ..... <i>Industry:</i> 0 hours .....	<i>Per firm:</i> 2 hours. <i>Industry:</i> 35 hours.
Total—New Rule 18a–6 .....	<i>Industry:</i> 11,576 hours .....	<i>Industry:</i> 8,805 hours and \$184,840.

Estimated Hours and Costs of Amendments to Rule 17a–4

In the proposing release, the Commission estimated that many of the amendments to Rule 17a–4 are not expected to impose an initial burden.<sup>649</sup> The Commission received no comment on these estimates and continues to believe they are appropriate.

The Commission is amending Rule 17a–4 to require broker-dealer SBSBs and MSBSPs to retain telephone calls that are already recorded and are related to the broker-dealer SBSB’s and broker-dealer MSBSP’s business as such.<sup>650</sup> Because the retention of telephonic recordings is only required if the broker-dealer SBSB or broker-dealer MSBSP voluntarily chooses to record, the Commission’s burden estimate does not include the cost of recording phone calls. Therefore, the burdens imposed by the amendment will be to provide adequate physical space and computer hardware and software for storage. The Commission estimates that the amendment will impose an initial burden of 13 hours per firm. The Commission estimates that there are 17 respondents (16 broker-dealer SBSBs and 1 broker-dealer MSBSP), resulting in an estimated industry-wide initial burden of 221 hours.<sup>651</sup>

The Commission estimates that each firm will incur an annual burden of approximately 6 hours to confirm that telephonic communications are being retained in accordance with Rule 17a–4, and approximately \$2,000 for server, equipment, and systems development costs. The Commission estimates that there are 17 respondents (16 broker-dealer SBSBs and 1 broker-dealer MSBSP), resulting in an estimated

industry-wide ongoing annual cost of 102 hours<sup>652</sup> and \$34,000.<sup>653</sup>

The amendments to Rule 17a-4 add five types of records to be preserved by broker-dealers.<sup>654</sup> Because the burden to create these records is already accounted for in the PRA estimates for Rule 17a–3, Rule 15c3–1, or Regulation SBSR,<sup>655</sup> the Commission estimates that these amendments will impose an initial burden of 65 hours per firm and an ongoing annual burden of 30 hours and \$600 per firm.<sup>656</sup> The Commission estimates that there are 42 respondents—16 broker-dealer SBSBs, 1 broker-dealer MSBSP, and 25 stand-alone broker-dealers engaged in security-based swap activities.<sup>657</sup> Thus, these amendments will add to the industry an estimated initial burden of 2,730 hours<sup>658</sup> and an ongoing annual

<sup>652</sup> 6 hours x 17 broker-dealer SBSBs and MSBSPs = 102 hours. These internal hours likely will be performed by a compliance clerk.

<sup>653</sup> \$2,000 x 17 broker-dealer SBSBs and MSBSPs = \$34,000.

<sup>654</sup> See Rule 17a–4, as amended (paragraph (b)(1) (cross-referencing paragraph (a)(26) of Rule 17a–3, as amended (compliance with possession or control requirements for security-based swap customers); paragraph (a)(27) of Rule 17a–3, as amended (Rule 18a-4 reserve account computations)); paragraph (b)(8)(v) through (viii) (identifying information about swaps); paragraph (b)(8)(xvi) (risk margin calculation); and paragraph (b)(14) (Regulation SBSR information)).

<sup>655</sup> See Commission, *Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Rule 17a–3* (Oct. 19, 2016), available at <https://www.reginfo.gov/public/do/DownloadDocument?objectID=68827501>; Commission, *Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Rule 15c3–1* (May 26, 2017), available at <https://www.reginfo.gov/public/do/DownloadDocument?objectID=74206901>; Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, 81 FR 53545.

<sup>656</sup> Unless otherwise noted, the estimates for this rule consider the burden of providing adequate physical space and computer hardware and software for storage, preserving these records for the requisite time period, and producing them when requested.

<sup>657</sup> 16 broker-dealer SBSBs + 1 broker-dealer MSBSP + 25 stand-alone broker-dealers engaged in security-based swap activities = 42 broker-dealers engaged in security-based swap activities.

<sup>658</sup> 65 hours x 42 respondents = 2,730 hours. These internal hours likely will be performed by a senior database administrator.

burden of 1,260 hours<sup>659</sup> and \$25,200.<sup>660</sup>

The amendments to Rule 17a–4 add five types of records to be preserved by broker-dealer SBSBs and MSBSPs.<sup>661</sup> Because the burden to create these records is accounted for in the PRA estimates for Rule 17a–3 or for Rules 15Fh–1 through 15Fh–5 and 15Fk–1,<sup>662</sup> the Commission estimates that these amendments will impose an initial burden of 65 hours per firm and an ongoing annual burden of 30 hours and \$600 per firm. The Commission estimates that there are 17 respondents (16 broker-dealer SBSBs and 1 broker-dealer MSBSP), adding to the industry an initial burden of 1,105 hours<sup>663</sup> and an ongoing annual burden of 510 hours<sup>664</sup> and \$10,200.<sup>665</sup>

The amendments to Rule 17a–4 add one type of record to be preserved by broker-dealer SBSBs.<sup>666</sup> Because the burden to create this record is accounted for in the PRA estimate for

<sup>659</sup> 30 hours per year x 42 respondents = 1,260 hours per year. These internal hours likely will be performed by a compliance clerk.

<sup>660</sup> \$600 x 42 respondents = \$25,200.

<sup>661</sup> See Rule 17a–4, as amended (paragraph (b)(1), cross-referencing paragraph (a)(25) of Rule 17a–3, as amended (Rule 18a–3 calculations); paragraph (b)(1), cross-referencing paragraph (a)(28) of Rule 17a–3, as amended (unverified transactions); paragraph (b)(1), cross-referencing paragraph (a)(30) of Rule 17a–3, as amended (compliance with business conduct standards); paragraph (b)(15) (documents and notices related to the business conduct standards); and paragraph (b)(16) (special entity documents)).

<sup>662</sup> See Commission, *Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Rule 17a–3*; section IV.D.1. of this release; *Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 81 FR at 29959.

<sup>663</sup> 65 hours x 17 broker-dealer SBSBs and MSBSPs = 1,105 hours. These internal hours likely will be performed by a senior database administrator.

<sup>664</sup> 30 hours per year x 17 broker-dealer SBSBs and MSBSPs = 510 hours per year. These internal hours likely will be performed by a compliance clerk.

<sup>665</sup> \$600 x 17 broker-dealer SBSBs and MSBSPs = \$10,200.

<sup>666</sup> See paragraph (b)(1) of Rule 17a–4, as amended (cross-referencing paragraph (a)(29) of Rule 17a–3, as amended (political contributions)).

<sup>649</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25266.

<sup>650</sup> See paragraph (b)(4) of Rule 17a–4, as amended.

<sup>651</sup> 13 hours x 17 broker-dealer SBSBs and MSBSPs = 221 hours. These internal hours likely will be performed by a senior database administrator.

Rule 17a-3, as amended,<sup>667</sup> the Commission estimates that the amendment will impose an initial burden of 13 hours per firm and an ongoing annual burden of 6 hours and \$120 per firm. The Commission estimates that there are 16 broker-dealer SBSBs, adding to the industry an initial burden of 208 hours,<sup>668</sup> and an ongoing annual burden of 96 hours<sup>669</sup> and \$1,920.<sup>670</sup>

The Commission received no comments regarding its hour and cost burden estimates for the amendments to Rule 17a-4. However, the estimated burden for Rule 17a-4 is increased to reflect that the requirements to make and keep possession or control and special reserve account computation records now apply to all broker-dealers engaged in security-based swap activities (instead of just broker-dealer SBSBs).<sup>671</sup> Other than this change, the Commission continues to believe its hour and cost burden estimates for the amendments to Rule 17a-3 are appropriate.

#### Estimated Hours and Costs of New Rule 18a-6

New Rule 18a-6 requires 27 types of records to be preserved by stand-alone SBSBs and MSBSPs.<sup>672</sup> The

Commission estimates that the record preservation requirements applicable to stand-alone SBSBs and MSBSPs will impose an initial burden of 364 hours<sup>673</sup> and an ongoing annual burden of 280 hours and \$5,720 per firm. The Commission estimates that there are 10 respondents (6 stand-alone SBSBs and 4 stand-alone MSBSPs), resulting in an estimated industry-wide initial burden of 3,640 hours,<sup>674</sup> and an industry-wide ongoing annual burden of 2,800 hours<sup>675</sup> and \$57,200.<sup>676</sup>

New Rule 18a-6 requires three types of records to be preserved by stand-alone SBSBs.<sup>677</sup> The Commission estimates that the relevant portions of paragraph (b)(1)(i) of new Rule 18a-6 will impose an initial burden of 44 hours per firm,<sup>678</sup> and an ongoing annual burden of 30 hours and \$360 per firm. The Commission estimates that there are 6 stand-alone SBSBs, resulting in an industry-wide initial burden of 264 hours<sup>679</sup> and an industry-wide

ongoing annual burden of 180 hours<sup>680</sup> and \$2,160.<sup>681</sup>

New Rule 18a-6 requires one type of record to be preserved by stand-alone SBSBs authorized to use models to compute capital.<sup>682</sup> The Commission estimates that paragraph (b)(1)(x) will impose an initial burden of 18 hours<sup>683</sup> and an ongoing annual burden of ten hours and \$120 per stand-alone SBSB authorized to use models. The Commission estimates that there are 4 stand-alone SBSBs authorized to use models to compute capital, resulting in an industry-wide initial burden of 72 hours<sup>684</sup> and an industry-wide ongoing annual burden of 40 hours<sup>685</sup> and \$480.<sup>686</sup>

New Rule 18a-6 requires 18 types of records to be preserved by bank SBSBs and MSBSPs, all of which are limited to the firm's business as an SBSB or MSBSP.<sup>687</sup> After consideration of the

<sup>680</sup> 30 hours per year × 6 stand-alone SBSBs = 180 hours per year. These internal hours likely will be performed by a compliance clerk.

<sup>681</sup> \$360 per year × 6 stand-alone SBSBs = \$2,160 per year.

<sup>682</sup> See Rule 18a-6, as adopted (paragraph (b)(1)(x) (credit risk determinations)). The burden of actually performing the underlying task and creating the written record is already accounted for in the PRA estimate for Rule 18a-1. See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43961-63.

<sup>683</sup> The Commission believes that any initial dollar cost associated with new Rule 18a-6 is already accounted for in the PRA estimate for Rule 18a-5, as adopted, which includes the cost of recordkeeping system software.

<sup>684</sup> 18 hours × 4 model stand-alone SBSBs = 72 hours. These internal hours likely will be performed by a senior database administrator.

<sup>685</sup> 10 hours per year × 4 model stand-alone SBSBs = 40 hours per year. These internal hours likely will be performed by a compliance clerk.

<sup>686</sup> \$120 per year × 4 model stand-alone SBSBs = \$480 per year.

<sup>687</sup> See Rule 18a-6, as adopted (paragraph (a)(2), cross-referencing paragraph (b)(1) of Rule 18a-5, as adopted (trade blotters); paragraph (a)(2), cross-referencing paragraph (b)(2) of Rule 18a-5, as adopted (ledgers of security-based swap customers and non-customers); paragraph (a)(2), cross-referencing paragraph (b)(3) of Rule 18a-5, as adopted (stock records); paragraph (b)(2)(i), cross-referencing paragraph (b)(4) of Rule 18a-5, as adopted (memoranda of brokerage orders); paragraph (b)(2)(i), cross-referencing paragraph (b)(5) of Rule 18a-5, as adopted (memoranda of proprietary orders); paragraph (b)(2)(i), cross-referencing paragraph (b)(6) of Rule 18a-5, as adopted (confirmations); paragraph (b)(2)(i), cross-referencing paragraph (b)(7) of Rule 18a-5, as adopted (account holder information); paragraph (b)(2)(i), cross-referencing paragraph (b)(11) of Rule 18a-5, as adopted (unverified transactions); paragraph (b)(2)(i), cross-referencing paragraph (b)(13) of Rule 18a-5, as adopted (compliance with external business conduct requirements); paragraph (b)(2)(ii) (communications); paragraph (b)(2)(iii) (account documents); paragraph (b)(2)(iv) (written agreements); paragraph (b)(2)(vi) (Regulation SBSR information); paragraph (b)(2)(vii) (records relating to business conduct standards); paragraph (b)(2)(viii) (special entity documents); paragraph (d)(1) (associated person's employment

(b)(1)(v) (trial balances); paragraph (b)(1)(vi) (account documents); paragraph (b)(1)(vii) (written agreements); paragraph (b)(1)(viii) (information supporting financial reports); paragraph (b)(1)(ix) (Rule 15c3-4 risk management records); paragraph (b)(1)(xi) (Regulation SBSR information); paragraph (b)(1)(xii) (records relating to business conduct standards); paragraph (b)(1)(xiii) (special entity documents); paragraph (c) (corporate documents); paragraph (d)(1) (associated person's employment application); paragraph (d)(2)(i) (regulatory authority reports); and paragraph (d)(3)(i) (compliance, supervisory, and procedures manuals). Unless otherwise noted, new Rule 18a-6 does not require firms to create records or perform the underlying task, so the estimates for this rule consider the burden of providing adequate physical space and computer hardware and software for storage, preserving these records for the requisite time period, and producing them when requested.

<sup>673</sup> The Commission believes that any initial dollar cost associated with Rule 18a-6, as adopted, is already accounted for in the PRA estimate for Rule 18a-5, as adopted, which includes the cost of recordkeeping system software.

<sup>674</sup> 364 hours × 10 stand-alone SBSBs and MSBSPs = 3,640 hours. These internal hours likely will be performed by a senior database administrator.

<sup>675</sup> 280 hours per year × 10 stand-alone SBSBs and MSBSPs = 2,800 hours per year. These internal hours likely will be performed by a compliance clerk.

<sup>676</sup> \$5,720 per year × 10 stand-alone SBSBs and MSBSPs = \$57,200 per year.

<sup>677</sup> See paragraph (b)(1)(i) of Rule 18a-6, as adopted (cross-referencing paragraph (a)(13) of Rule 18a-5, as adopted (compliance with Rule 18a-4 possession or control requirements); paragraph (a)(14) of Rule 18a-5, as adopted (Rule 18a-4 reserve account computations); and paragraph (a)(16) of Rule 18a-5, as adopted (political contributions)). The burden to create these records is accounted for in the PRA estimate for new Rule 18a-5. See section IV.D.1. of this release.

<sup>678</sup> The Commission believes that any initial dollar cost associated with Rule 18a-6, as adopted, is already accounted for in the PRA estimate for Rule 18a-5, as adopted, which includes the cost of recordkeeping system software.

<sup>679</sup> 44 hours × 6 stand-alone SBSBs = 264 hours. These internal hours likely will be performed by a senior database administrator.

<sup>667</sup> See section IV.D.1. of this release.

<sup>668</sup> 13 hours × 16 broker-dealer SBSBs = 208 hours. These internal hours likely will be performed by a senior database administrator.

<sup>669</sup> 6 hours per year × 16 broker-dealer SBSBs = 96 hours per year. These internal hours likely will be performed by a compliance clerk.

<sup>670</sup> \$120 × 16 broker-dealer SBSBs = \$1,920.

<sup>671</sup> See paragraph (b)(1) of Rule 17a-3, as amended (cross-referencing paragraph (a)(26) (compliance with Rule 15c3-3(p) possession or control requirements); paragraph (a)(27) (Rule 15c3-3(p) reserve account computations)).

<sup>672</sup> See Rule 18a-6, as adopted (paragraph (a)(1), cross-referencing paragraph (a)(1) of Rule 18a-5, as adopted (trade blotters); paragraph (a)(1), cross-referencing paragraph (a)(2) of Rule 18a-5, as adopted (general ledgers); paragraph (a)(1), cross-referencing paragraph (a)(3) of Rule 18a-5, as adopted (ledgers of customer and non-customer accounts); paragraph (a)(1), cross-referencing paragraph (a)(4) of Rule 18a-5, as adopted (stock record); paragraph (b)(1)(i), cross-referencing paragraph (a)(5) of Rule 18a-5, as adopted (memoranda of proprietary orders); paragraph (b)(1)(i), cross-referencing paragraph (a)(6) of Rule 18a-5, as adopted (confirmations); paragraph (b)(1)(i), cross-referencing paragraph (a)(7) of Rule 18a-5, as adopted (account holder information); paragraph (b)(1)(i), cross-referencing paragraph (a)(8) of Rule 18a-5, as adopted (options positions); paragraph (b)(1)(i), cross-referencing paragraph (a)(9) of Rule 18a-5, as adopted (trial balances and computation of net capital); paragraph (b)(1)(i), cross-referencing paragraph (a)(12) of Rule 18a-5, as adopted (Rule 18a-3 calculations); paragraph (b)(1)(i), cross-referencing paragraph (a)(15) of Rule 18a-5, as adopted (unverified transactions); paragraph (b)(1)(i), cross-referencing paragraph (a)(17) of Rule 18a-5, as adopted (compliance with business conduct standards); paragraph (b)(1)(ii) (bank records); paragraph (b)(1)(iii) (bills); paragraph (b)(1)(iv) (communications); paragraph

similar burdens imposed by Rule 17a-4, as amended, the Commission estimates that new Rule 18a-6 will impose on bank SBSBs and MSBSPs an initial burden of 247 hours per firm<sup>688</sup> and an ongoing burden of 190 hours and \$4,520 per firm. The Commission estimates that there are 25 respondents (25 bank SBSBs and no bank MSBSPs), resulting in an estimated industry-wide initial burden of 6,175 hours<sup>689</sup> and an industry-wide ongoing annual burden of 4,750 hours<sup>690</sup> and \$113,000.<sup>691</sup>

New Rule 18a-6 requires four types of records to be preserved by bank SBSBs, all of which are limited to the firm's business as an SBSB.<sup>692</sup> The Commission estimates that paragraphs (b)(2)(i) and (v) of new Rule 18a-6 will impose an initial burden of 57 hours per firm<sup>693</sup> and an ongoing annual burden of 40 hours and \$480 per firm. The Commission estimates that there are 25 bank SBSBs, resulting in an industry-

wide initial burden of 1,425 hours<sup>694</sup> and an industry-wide ongoing annual burden of 1,000 hours<sup>695</sup> and \$12,000.<sup>696</sup>

Paragraph (f) of new Rule 18a-6 requires third-party custodians for non-broker-dealer SBSBs and non-broker-dealer MSBSPs to file with the Commission a written undertaking and surrender the SBSB or MSBSP's records upon the Commission's request.<sup>697</sup> The obligation to provide documents upon the Commission's request does not impose a new burden, since this requirement merely changes the respondent's identity rather than adding to the quantity of burdens. Thus, the burden is the requirement to prepare and file a written undertaking. The Commission estimates that 50% of the 35 non-broker-dealer SBSBs and non-broker-dealer MSBSPs will retain a third-party custodian, resulting in approximately 17.5 written

undertakings. The Commission estimates that paragraph (f) of new Rule 18a-6 will impose an ongoing annual burden of 2 hours per written undertaking, resulting in an industry-wide ongoing burden of 35 hours per year.<sup>698</sup>

The Commission received no comments regarding its hour and cost burden estimates for new Rule 18a-6 and continues to believe they are appropriate.

3. Amendments to Rule 17a-5 and New Rule 18a-7

The amendments to Rule 17a-5 and new Rule 18a-7 will impose collection of information requirements that result in annual burdens for broker-dealers, SBSBs, and MSBSPs. The Commission estimates that the amendments to Rule 17a-5 will impose the following initial and annual burdens:<sup>699</sup>

Burden	Initial burden	Annual burden
FOCUS Report Part II (ANC broker-dealer SBSBs) .....	<i>Per firm:</i> 25 hours .....	<i>Per firm:</i> 228 hours.
FOCUS Report Part II (non-model broker-dealer SBSBs) .....	<i>Industry:</i> 250 hours .....	<i>Industry:</i> 2,280 hours.
FOCUS Report Part II (broker-dealer MSBSPs) .....	<i>Per firm:</i> 50 hours .....	<i>Per firm:</i> 240 hours.
FOCUS Report Part II (stand-alone broker-dealers engaged in security-based swap activities).	<i>Industry:</i> 300 hours .....	<i>Industry:</i> 1,440 hours.
	<i>Per firm:</i> 35 hours .....	<i>Per firm:</i> 204 hours.
	<i>Industry:</i> 35 hours .....	<i>Industry:</i> 204 hours.
	<i>Per firm:</i> 20 hours .....	<i>Per firm:</i> 120 hours.
	<i>Industry:</i> 500 hours .....	<i>Industry:</i> 3,000 hours.
Total—Amendments to Rule 17a-5 .....	<i>Industry:</i> 1,085 hours .....	<i>Industry:</i> 6,924 hours.

The Commission estimates that Rule 18a-7 will impose the following initial and annual burdens:<sup>700</sup>

Burden	Initial burden	Annual burden
Additional ANC reports .....	<i>Per firm:</i> 0 hours .....	<i>Per firm:</i> 120 hours.
Customer statements .....	<i>Industry:</i> 0 hours .....	<i>Industry:</i> 480 hours.
Annual report (stand-alone SBSBs not exempt from Rule 18a-4) .....	<i>Per firm:</i> 10 hours .....	<i>Per firm:</i> 1 hours.
Annual report (stand-alone SBSBs exempt from Rule 18a-4) .....	<i>Industry:</i> 100 hours .....	<i>Industry:</i> 10 hours.
	<i>Per firm:</i> 0 hours .....	<i>Per firm:</i> 70 hours and \$6.70.
	<i>Industry:</i> 0 hours .....	<i>Industry:</i> 0 hours and \$0.
	<i>Per firm:</i> 0 hours .....	<i>Per firm:</i> 17 hours and \$6.70.
	<i>Industry:</i> 0 hours .....	<i>Industry:</i> 102 hours and \$40.2.

application); paragraph (d)(2)(ii) (regulatory authority reports); paragraph (d)(3)(ii) (compliance, supervisory, and procedures manuals).

<sup>688</sup> The Commission believes that any initial dollar cost associated with Rule 18a-6, as adopted, is already accounted for in the PRA estimate for Rule 18a-5, as adopted, which includes the cost of recordkeeping system software.

<sup>689</sup> 247 hours × 25 bank SBSBs = 6,175 hours. These internal hours likely will be performed by a senior database administrator.

<sup>690</sup> 190 hours per year × 25 bank SBSBs = 4,750 hours per year. These internal hours likely will be performed by a compliance clerk.

<sup>691</sup> \$4,520 per year × 25 bank SBSBs = \$113,000 per year.

<sup>692</sup> See Rule 18a-6, as adopted (paragraph (b)(2)(i), cross-referencing paragraph (b)(9)

(compliance with Rule 18a-4 possession or control requirements) of Rule 18a-5, as adopted; paragraph (b)(2)(i), cross-referencing paragraph (b)(10) (Rule 18a-4 reserve account computations) of Rule 18a-5, as adopted; paragraph (b)(2)(i), cross-referencing paragraph (b)(12) (political contributions) of Rule 18a-5, as adopted; and paragraph (b)(2)(v) (Rule 18a-4 reserve account computations)). The burden to perform the underlying task or create these records is accounted for in the PRA estimates for new Rules 18a-4 and 18a-5. See *Capital, Margin, and Segregation Adopting Release*, 84FR at 43964-67; section IV.D.1. of this release.

<sup>693</sup> The Commission believes that any initial dollar cost associated with new Rule 18a-6 is already accounted for in the PRA estimate for Rule 18a-5, as adopted, which includes the cost of recordkeeping system software.

<sup>694</sup> 57 hours × 25 bank SBSBs = 1,425 hours. These internal hours likely will be performed by a compliance manager and a senior database administrator.

<sup>695</sup> 40 hours per year × 25 bank SBSBs = 1,000 hours per year. These internal hours likely will be performed by a compliance clerk.

<sup>696</sup> \$480 per year × 25 bank SBSBs = \$12,000 per year.

<sup>697</sup> See paragraph (f) of Rule 18a-6, as adopted.

<sup>698</sup> 2 hours per year × 17.5 written undertakings = 35 hours per year. These internal hours likely will be performed by an attorney.

<sup>699</sup> See paragraph (a)(1)(ii) of Rule 17a-5, as amended.

<sup>700</sup> See paragraphs (a)(1) through (3), (b), (c), (d), (e), (f), and (i) of Rule 18a-7, as adopted.

Burden	Initial burden	Annual burden
Annual report (stand-alone MSBSPs) .....	<i>Per firm:</i> 0 hours .....	<i>Per firm:</i> 10 hours and \$6.70.
	<i>Industry:</i> 0 hours .....	<i>Industry:</i> 40 hours and \$26.80.
Statement regarding accountant .....	<i>Per firm:</i> 10 hours .....	<i>Per firm:</i> 2 hours and 50¢.
	<i>Industry:</i> 100 hours .....	<i>Industry:</i> 20 hours and \$5.00.
Engagement of accountant (stand-alone SBSBs not exempt from Rule 18a-4).	<i>Per firm:</i> 0 hours .....	<i>Per firm:</i> \$450,000.
	<i>Industry:</i> 0 hours .....	<i>Industry:</i> \$0.
Engagement of accountant (stand-alone SBSBs exempt from Rule 18a-4).	<i>Per firm:</i> 0 hours .....	<i>Per firm:</i> \$303,000.
	<i>Industry:</i> 0 hours .....	<i>Industry:</i> \$1,818,000.
Engagement of accountant (stand-alone MSBSPs) .....	<i>Per firm:</i> 0 hours .....	<i>Per firm:</i> \$300,000.
	<i>Industry:</i> 0 hours .....	<i>Industry:</i> \$1,200,000.
Notice of change of fiscal year .....	<i>Per firm:</i> 0 hours .....	<i>Per firm:</i> 1 hour and 50¢.
	<i>Industry:</i> 0 hours .....	<i>Industry:</i> 1 hour and 50¢.
FOCUS Report Part II (stand-alone SBSBs) .....	<i>Per firm:</i> 160 hours .....	<i>Per firm:</i> 192 hours.
	<i>Industry:</i> 960 hours .....	<i>Industry:</i> 1,152 hours.
FOCUS Report Part II (stand-alone MSBSPs) .....	<i>Per firm:</i> 40 hours .....	<i>Per firm:</i> 48 hours.
	<i>Industry:</i> 160 hours .....	<i>Industry:</i> 192 hours.
FOCUS Report Part IIC (bank SBSBs) .....	<i>Per firm:</i> 36 hours .....	<i>Per firm:</i> 16 hours.
	<i>Industry:</i> 900 hours .....	<i>Industry:</i> 400 hours.
Total—New Rule 18a-7 .....	<i>Industry:</i> 2,220 hours .....	<i>Industry:</i> 2,397 hours and \$3,018,072.5.

### Estimated Hours and Costs of Amendments to Rule 17a-5

In the proposing release, the Commission estimated that many of the amendments to Rule 17a-5 are not expected to impose an initial burden.<sup>701</sup> The Commission received no comment on these estimates and continues to believe they are appropriate.

Paragraph (a)(1)(ii) of Rule 17a-5, as amended, will require broker-dealer SBSBs and MSBSPs to file FOCUS Report Part II, as amended, monthly instead of filing the applicable part of the FOCUS Report quarterly.<sup>702</sup> Part II, Part IIA, and Part II CSE of the FOCUS Report each impose a different burden on respondents due to their varying lengths and calculations, so the burden of filing FOCUS Report Part II, as amended, depends on which part of the FOCUS Report the firm is currently required to file.

ANC broker-dealer SBSBs will be required to file FOCUS Report Part II, as amended, instead of FOCUS Report Part II CSE. Although FOCUS Report Part II, as amended, is modeled on Part II CSE, the burden on ANC broker-dealer SBSBs

will increase, because ANC broker-dealer SBSBs will be required to complete additional sections and line items eliciting more detail about their security-based swap and swap activities.<sup>703</sup> In consideration of these additional requirements, the Commission estimates that the requirement for ANC broker-dealer SBSBs to file FOCUS Report Part II, as amended, every month will add an initial burden of 25 hours per firm and an ongoing annual burden of 228 hours per firm. The Commission estimates that there are ten ANC broker-dealer SBSBs, adding to the industry an initial burden of 250 hours<sup>704</sup> and an ongoing burden of 2,280 hours per year.<sup>705</sup>

Non-model broker-dealer SBSBs will be required to file FOCUS Report Part II, as amended, instead of Part II or Part IIA of the FOCUS Report. Given that SBSBs are expected to be larger and relatively sophisticated firms, the Commission assumes that all non-model broker-dealer SBSBs are carrying firms that file Part II. Although sections of Part II are also found in FOCUS Report Part II, as amended, the burden on non-model broker-dealer SBSBs will increase (but not as much as for ANC broker-dealer SBSBs), because non-model broker-

dealer SBSBs will be required to file monthly instead of quarterly and will complete additional sections and line items eliciting more detail about their security-based swap and swap activities.<sup>706</sup> In consideration of these additional requirements, the Commission estimates that the

<sup>706</sup> Non-model broker-dealer SBSBs will be required to complete the following new sections: (1) Financial and Operational Data—Operational Deductions from Capital—Note A; (2) Financial and Operational Data—Potential Operational Charges Not Deducted from Capital—Note B; (3) Computation for Determination of PAB Requirements; (4) Computation for Determination of Security-Based Swap Customer Reserve Requirements; (5) Possession or Control for Security-Based Swap Customers; (6) Schedule 1—Aggregate Securities, Commodities, and Swaps Positions; (7) Schedule 2—Credit Concentration Report for Fifteen Largest Current Exposures in Derivatives; (8) Schedule 3—Portfolio Summary of Derivatives Exposures by Internal Credit Rating; and (9) Schedule 4—Geographic Distribution of Derivatives Exposures for Ten Largest Countries. In addition, non-model broker-dealer SBSBs also registered as FCMs will be required to file the following sections not included on Pre-Amendment FOCUS Report Part II, but which the CFTC already requires FCMs to file as part of Form 1-FR-FCM: (1) Computation of CFTC Minimum Capital Requirement; (2) Statement of Segregation Requirements and Funds in Segregation for Customers Trading on U.S. Commodity Exchanges; (3) Statement of Cleared Swaps Customer Segregation Requirements and Funds in Cleared Swaps Customer Accounts under Section 4d(f) of the Commodity Exchange Act; (4) Statement of Segregation Requirements and Funds in Segregation for Customers' Dealer Options Accounts; and (5) Statement of Secured Amounts and Funds Held in Separate Accounts for Foreign Futures and Foreign Options Customers Pursuant to CFTC Regulation 30.7. The Commission does not estimate a burden for these 5 sections from Form 1-FR-FCM, since the CFTC already requires FCMs to file these 5 sections on a monthly basis (17 CFR 1.10(b)(1)(i)), and therefore, the hourly burden is already accounted for in the PRA estimate for the CFTC's Rule 1.10 (1 CFR 1.10). In addition, the Commission does not anticipate that FCMs will be required to file both the CFTC's Form 1-FR-FCM and the Commission's FOCUS Report Part II, as amended.

<sup>701</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25270. The Commission does not estimate a change in the burden associated with the new lines added to the FOCUS Report, as compared with Form SBS in the proposing release, because the addition of new lines is offset by the deletion of other lines, such as the deletion of lines in the Statement of Income (Loss) or Statement of Comprehensive Income, as Applicable. In addition, many of the new lines are not so much new burdens as different burdens, since in the absence of these new lines, firms would still be required to report this same information, except that it would be reported on a different line. For example, in the Statement of Financial Condition, excess cash collateral pledged on derivative transactions (Line 6) is currently reported under other assets (Line 15).

<sup>702</sup> See paragraph (a)(1)(ii) of Rule 17a-5, as amended.

<sup>703</sup> ANC broker-dealer SBSBs will be required to complete the following new sections: (1) Computation for Determination of Security-Based Swap Customer Reserve Requirements; (2) Possession or Control for Security-Based Swap Customers; (3) Schedule 1—Aggregate Securities, Commodities, and Swaps Positions; and (4) Schedule 4—Geographic Distribution of Derivatives Exposures for Ten Largest Countries.

<sup>704</sup> 25 hours × 10 ANC broker-dealer SBSBs = 250 hours. These internal hours likely will be performed by a compliance manager.

<sup>705</sup> 228 hours per year × 10 ANC broker-dealer SBSBs = 2,280 hours per year. These internal hours likely will be performed by a compliance manager.

requirement for non-model broker-dealer SBSBs to file FOCUS Report Part II, as amended, every month will add an initial burden of 50 hours per firm and an ongoing annual burden of 240 hours per firm. The Commission estimates that there are 6 non-model broker-dealer SBSBs, adding to the industry an initial burden of 300 hours<sup>707</sup> and an ongoing burden of 1,440 hours per year.<sup>708</sup>

Broker-dealer MSBSPs will be required to file FOCUS Report Part II, as amended, instead of Part II or Part IIA of the FOCUS Report. Given that MSBSPs are expected to be larger and relatively sophisticated firms, the Commission assumes that broker-dealer MSBSPs are carrying firms that file Part II. Although sections of Part II are also found in FOCUS Report Part II, as amended, the burden on broker-dealer MSBSPs will increase (but not as much as for broker-dealer SBSBs), because broker-dealer MSBSPs will be required to file monthly instead of quarterly and will complete additional sections and line items eliciting more detail about their security-based swap and swap activities.<sup>709</sup> In consideration of these additional requirements, the Commission estimates that the requirement for broker-dealer MSBSPs

<sup>707</sup> 50 hours × 6 non-model broker-dealer SBSBs = 300 hours. These internal hours likely will be performed by a compliance manager.

<sup>708</sup> 240 hours per year × 6 non-model broker-dealer SBSBs = 1,440 hours per year. These internal hours likely will be performed by a compliance manager.

<sup>709</sup> Broker-dealer MSBSPs will be required to complete the following new sections: (1) Financial and Operational Data—Operational Deductions from Capital—Note A; (2) Financial and Operational Data—Potential Operational Charges Not Deducted from Capital—Note B; (3) Computation for Determination of PAB Requirements; and (4) Schedule 1—Aggregate Securities, Commodities, and Swaps Positions. In addition, broker-dealer MSBSPs also registered as FCMs will be required to file the following sections not included on Pre-Amendment FOCUS Report Part II, but which the CFTC already requires FCMs to file as part of Form 1—FR—FCM: (1) Computation of CFTC Minimum Capital Requirement; (2) Statement of Segregation Requirements and Funds in Segregation for Customers Trading on U.S. Commodity Exchanges; (3) Statement of Cleared Swaps Customer Segregation Requirements and Funds in Cleared Swaps Customer Accounts under Section 4d(f) of the Commodity Exchange Act; (4) Statement of Segregation Requirements and Funds in Segregation for Customers' Dealer Options Accounts; and (5) Statement of Secured Amounts and Funds Held in Separate Accounts for Foreign Futures and Foreign Options Customers Pursuant to CFTC Regulation 30.7. The Commission does not estimate a burden for these 5 sections from Form 1—FR—FCM, since the CFTC already requires FCMs to file these 5 sections on a monthly basis (17 CFR 1.10(b)(1)(i)), and therefore, the hourly burden is already accounted for in the PRA estimate for the CFTC's Rule 1.10 (1 CFR 1.10). In addition, the Commission does not anticipate that FCMs will be required to file both the CFTC's Form 1—FR—FCM and the Commission's FOCUS Report Part II, as amended.

to file FOCUS Report Part II, as amended, every month will add an initial burden of 35 hours per firm and an ongoing annual burden of 204 hours per firm. The Commission estimates that there will be one broker-dealer MSBSP, meaning that the estimated burden on the industry will be the same as for a single broker-dealer MSBSP.

Stand-alone non-model broker-dealers that engage in security-based swap activities will be required to file FOCUS Report Part II, as amended, instead of the currently existing FOCUS Report Part II. Although sections of Part II are also found in FOCUS Report Part II, as amended, the burden on stand-alone non-model broker-dealers engaged in security-based swap activities will increase, because stand-alone non-model broker-dealers will be required to complete additional line items eliciting more detail about their security-based swap and swap activities.<sup>710</sup> In consideration of these additional requirements, the Commission estimates that the requirement for stand-alone non-model broker-dealers engaged in security-based swap activities to file FOCUS Report Part II, as amended, will add an initial burden of 20 hours per firm and an ongoing annual burden of 120 hours per firm. The Commission estimates that there are 25 stand-alone non-model broker-dealers engaged in security-based swap activities, adding to the industry an initial burden of 500

<sup>710</sup> Stand-alone non-model broker-dealers that engage in security-based swap activities will be required to complete the following new sections: (1) Computation for Determination of PAB Requirements; (2) Computation for Determination of Security-Based Swap Customer Reserve Requirements; (3) Possession or Control for Security-Based Swap Customers; and (4) Schedule 1—Aggregate Securities, Commodities, and Swaps Positions. In addition, non-model broker-dealer SBSBs also registered as FCMs will be required to file the following sections not included on Pre-Amendment FOCUS Report Part II, but which the CFTC already requires FCMs to file as part of Form 1—FR—FCM: (1) Computation of CFTC Minimum Capital Requirement; (2) Statement of Segregation Requirements and Funds in Segregation for Customers Trading on U.S. Commodity Exchanges; (3) Statement of Cleared Swaps Customer Segregation Requirements and Funds in Cleared Swaps Customer Accounts under Section 4d(f) of the Commodity Exchange Act; (4) Statement of Segregation Requirements and Funds in Segregation for Customers' Dealer Options Accounts; and (5) Statement of Secured Amounts and Funds Held in Separate Accounts for Foreign Futures and Foreign Options Customers Pursuant to CFTC Regulation 30.7. The Commission does not estimate a burden for these 5 sections from Form 1—FR—FCM, since the CFTC already requires FCMs to file these 5 sections on a monthly basis (17 CFR 1.10(b)(1)(i)), and therefore, the hourly burden is already accounted for in the PRA estimate for the CFTC's Rule 1.10 (1 CFR 1.10). In addition, the Commission does not anticipate that FCMs will be required to file both the CFTC's Form 1—FR—FCM and the Commission's FOCUS Report Part II, as amended.

hours<sup>711</sup> and an ongoing burden of 3,000 hours per year.<sup>712</sup>

The Commission received no comments regarding its hour and cost burden estimates for new Rule 17a–5 and continues to believe they are appropriate. However, the estimated burden for Rule 17a–5 is decreased to reflect that stand-alone non-model broker-dealers are no longer required to complete Schedules 2 through 4 of the FOCUS Report. Other than this change, the Commission continues to believe its hour and cost burden estimates for the amendments to Rule 17a–5 are appropriate.

Estimated Hours and Costs of New Rule 18a–7

New Rule 18a–7, which is modeled on Rule 17a–5, as amended, will require non-broker-dealer SBSBs and non-broker-dealer MSBSPs to satisfy certain reporting requirements.<sup>713</sup>

New Rule 18a–7 will require stand-alone SBSBs authorized to use models to compute capital to periodically file certain additional reports relating to their use of internal models to calculate net capital.<sup>714</sup> After consideration of the Supporting Statement accompanying the most recent extension of Rule 17a–5, which estimates that the requirement to file additional ANC reports imposes a burden of 120 hours per respondent,<sup>715</sup> the Commission estimates that paragraph (a)(3) of new Rule 18a–7 will impose an annual burden of 120 hours per model stand-alone SBSB. The Commission estimates that there are 4 model stand-alone SBSBs, resulting in an industry-wide ongoing burden of 480 hours per year.<sup>716</sup>

New Rule 18a–7 will require stand-alone SBSBs and MSBSPs to disclose certain financial statements on their

<sup>711</sup> 20 hours × 25 stand-alone non-model broker-dealers engaged in security-based swap activities = 500 hours. These internal hours likely will be performed by a compliance manager.

<sup>712</sup> 120 hours per year × 25 stand-alone non-model broker-dealers engaged in security-based swap activities = 3,000 hours per year. These internal hours likely will be performed by a compliance manager.

<sup>713</sup> See Rule 18a–7, as adopted.

<sup>714</sup> See paragraph (a)(3) of Rule 18a–7, as adopted.

<sup>715</sup> See *Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Rule 17a–5* (May 26, 2017), available at <https://www.reginfo.gov/public/do/DownloadDocument?objectID=74209001> (4 hours per monthly report × 12 months per year + 8 hours per quarterly report × 4 quarters per year + 40 hours per annual report = 120 hours per year).

<sup>716</sup> 120 hours per year × 4 model stand-alone SBSBs = 480 hours per year. These internal hours likely would be performed by a compliance manager.

internet websites.<sup>717</sup> After consideration of the Supporting Statement accompanying the most recent extension of Rule 17a-5, which requires similar disclosures by mail instead of on the firm's website,<sup>718</sup> the Commission staff's experience with burden estimates for similar collections of information, and the estimated initial web development costs, the Commission estimates that paragraph (b) of new Rule 18a-7 will impose an initial burden of ten hours per firm and an annual burden of one hour per firm. The Commission estimates that there are 10 respondents (6 stand-alone SBSBs and 4 stand-alone MSBSPs), resulting in an industry-wide initial burden of 100 hours<sup>719</sup> and an industry-wide ongoing burden of 10 hours per year.<sup>720</sup>

New Rule 18a-7 will require stand-alone SBSBs and MSBSPs to file with the Commission an annual report consisting of certain financial reports, and attach to the financial report an oath or affirmation.<sup>721</sup> Based on the Commission staff's experience with the burden imposed by current Rule 17a-5's annual reports requirement and related postage costs,<sup>722</sup> the Commission estimates that paragraphs (c) and (d) of new Rule 18a-7 will impose on stand-alone MSBSPs an annual burden of 10 hours and \$6.70 per firm. The Commission estimates that there are 4 stand-alone MSBSPs, resulting in an industry-wide ongoing burden of 40 hours<sup>723</sup> and \$26.80 per year.<sup>724</sup> In the proposing release, the Commission

estimated that many of the amendments to Rule 17a-5 are not expected to impose an initial burden.<sup>725</sup> The Commission received no comment on these estimates and continues to believe they are appropriate.

Stand-alone SBSBs not exempt from Rule 18a-4 will be required to include a compliance report with their annual reports.<sup>726</sup> Thus, after consideration of the Supporting Statement accompanying the most recent extension of Rule 17a-5, which estimates that each compliance report takes approximately 60 hours to prepare,<sup>727</sup> the Commission estimates that paragraphs (c) and (d) of new Rule 18a-7 will impose an annual burden of 70 hours and \$6.70 per stand-alone SBSB that files a compliance report. The Commission estimates that there are no stand-alone SBSBs that will file a compliance report, resulting in an industry-wide ongoing burden of 0 hours<sup>728</sup> and \$0 per year.<sup>729</sup>

Stand-alone SBSBs exempt from Rule 18a-4 will be required to include an exemption report with their annual reports.<sup>730</sup> Thus, after consideration of the Supporting Statement accompanying the most recent extension of Rule 17a-5, which estimates that each exemption report takes approximately 7 hours to prepare,<sup>731</sup> the Commission estimates that paragraphs (c) and (d) of new Rule 18a-7 will impose an annual burden of 17 hours and \$6.70 per stand-alone SBSB that files an exemption report. The Commission estimates that there are 6 stand-alone SBSBs that will file an exemption report, resulting in an

industry-wide ongoing burden of 102 hours<sup>732</sup> and \$40.20 per year.<sup>733</sup>

New Rule 18a-7 will require stand-alone SBSBs and MSBSPs to file a statement regarding the independent public accountant engaged to audit the firm's annual reports.<sup>734</sup> In addition to postage costs, the Supporting Statement accompanying the most recent extension of Rule 17a-5 estimates that the parallel requirement in Rule 17a-5 will impose a two-hour burden on each introducing broker-dealer to file an updated statement, and a more significant ten-hour burden on each carrying broker-dealer, since the changes may require renegotiating the carrying broker-dealer's agreement with its independent public accountant.<sup>735</sup> Consistent with that Supporting Statement, the Commission estimates that paragraph (e) of new Rule 18a-7 will impose an initial burden of ten hours per firm and an annual burden of 2 hours and 50 cents per firm.<sup>736</sup> The Commission estimates that there are 10 respondents (6 stand-alone SBSBs and 4 stand-alone MSBSPs), resulting in an industry-wide initial burden of 100 hours<sup>737</sup> and an industry-wide ongoing burden of 20 hours<sup>738</sup> and \$5.00 per year.<sup>739</sup>

New Rule 18a-7 will require stand-alone SBSBs and MSBSPs to engage an independent public accountant to provide reports covering the firm's annual reports.<sup>740</sup> As discussed above, the Commission is modifying the provisions of Rule 18a-7 to allow stand-alone SBSBs and MSBSPs, as well as an SBSB also registered as an OTC derivatives dealer, to engage an independent public accountant that is not registered with the PCAOB, and to permit the accountant to use GAAS in the United States or PCAOB

<sup>717</sup> See paragraph (b) of Rule 18a-7, as adopted. The Commission does not anticipate a dollar cost to establish a website and a toll-free number under this paragraph, because the Commission believes firms that are large enough to register as an SBSB or MSBSP already maintain a toll-free number for their customers and already have an internet website. See *Broker-Dealer Exemption from Sending Certain Financial Information to Customers*, Exchange Act Release No. 48272 (Aug. 1, 2003), 68 FR 46446, 46450 (Aug. 6, 2003).

<sup>718</sup> See *Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Rule 17a-5*. See section II.B.3.a. of this release for a discussion of the similarities between paragraph (c) of Rule 17a-5, as amended and paragraph (b) of Rule 18a-7, as adopted.

<sup>719</sup> 10 hours × 10 stand-alone SBSBs and MSBSPs = 100 hours. These internal hours likely would be performed by a compliance manager.

<sup>720</sup> 1 hour per year × 10 stand-alone SBSBs and MSBSPs = 10 hours per year. These internal hours likely would be performed by a compliance clerk.

<sup>721</sup> See paragraphs (c) and (d) of Rule 18a-7, as adopted.

<sup>722</sup> As of May 2018, a priority mail flat rate envelope costs \$6.70, based on costs obtained on the U.S. Postal Service website, available at [www.usps.gov](http://www.usps.gov). Firms that file electronically will not incur this cost.

<sup>723</sup> 10 hours per year × 4 stand-alone MSBSPs = 40 hours per year. These internal hours likely would be performed by a senior accountant.

<sup>724</sup> \$6.70 per year × 4 stand-alone MSBSPs = \$26.80 per year.

<sup>725</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25270.

<sup>726</sup> See paragraph (c)(1)(i)(B) of Rule 18a-7, as adopted.

<sup>727</sup> See *Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Rule 17a-5*.

<sup>728</sup> 70 hours per year × 2 stand-alone SBSBs = 210 hours per year. These internal hours likely would be performed by a senior accountant.

<sup>729</sup> \$6.70 per year × 2 stand-alone SBSBs = \$20.10 per year. Firms that file electronically will not incur this cost. As discussed above, the Commission estimates that of the 9 stand-alone SBSBs, 6 will avail themselves of the exemption from Rule 18a-4, and the remaining 3 will be registered as FCMs. The Commission also believes that the three stand-alone SBSBs that are registered as FCMs will also elect to avail themselves of the full alternative compliance mechanism. Consequently, the Commission estimates that there will be no stand-alone SBSBs not exempt from Rule 18a-4. See section IV.C of this release.

<sup>730</sup> See paragraph (c)(1)(i)(B) of Rule 18a-7, as adopted.

<sup>731</sup> See *Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Rule 17a-5*.

<sup>732</sup> 17 hours per year × 6 stand-alone SBSBs = 102 hours per year. These internal hours likely would be performed by a senior accountant.

<sup>733</sup> \$6.70 per year × 6 stand-alone SBSBs = \$40.20 per year. Firms that file electronically will not incur this cost.

<sup>734</sup> See paragraph (e) of Rule 18a-7, as adopted.

<sup>735</sup> See *Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Rule 17a-5*.

<sup>736</sup> It currently costs 50 cents to send a one ounce retail domestic first-class letter through the U.S. Postal Service. See U.S. Postal Service, First-Class Mail, available at [http://pe.usps.com/text/dmm300/Notice123.htm#\\_c011](http://pe.usps.com/text/dmm300/Notice123.htm#_c011) (last visited May 10, 2018).

<sup>737</sup> 10 hours × 13 stand-alone SBSBs and MSBSPs = 130 hours. These internal hours likely would be performed by a senior accountant.

<sup>738</sup> 2 hours per year × 10 stand-alone SBSBs and MSBSPs = 20 hours per year. These internal hours likely would be performed by a compliance clerk.

<sup>739</sup> \$0.50 per year × 10 stand-alone SBSBs and MSBSPs = \$5.00 per year.

<sup>740</sup> See paragraph (f) of Rule 18a-7, as adopted.

standards.<sup>741</sup> The Supporting Statement accompanying the most recent extension of Rule 17a-5 estimates that it will cost each carrying firm \$300,000 to retain an independent public accountant to audit its financial statements and \$150,000 to examine its compliance report.<sup>742</sup> Stand-alone MSBSPs are not required to file a compliance or exemption report, while stand-alone SBSBs will be required to retain an independent public accountant to review their compliance report (if they are not exempt from Rule 18a-4) or exemption report (if they are exempt from Rule 18a-4).

Therefore, the Commission estimates that paragraph (f) of new Rule 18a-7 will impose an annual cost of \$300,000 on each stand-alone MSBSP. The Commission estimates that there are 4 stand-alone MSBSPs, resulting in an industry-wide ongoing burden of \$1,200,000 per year.<sup>743</sup> The Commission estimates that paragraph (f) of new Rule 18a-7 will impose on stand-alone SBSBs exempt from Rule 18a-4 an annual cost of \$303,000 per firm,<sup>744</sup> since both their financial statements and exemption report will need to be audited. The Commission estimates that there are 6 stand-alone SBSBs exempt from Rule 18a-4, resulting in an industry-wide ongoing burden of \$1,818,000 per year.<sup>745</sup> The Commission estimates that paragraph (f) of new Rule 18a-7 will impose on stand-alone SBSBs not exempt from Rule 18a-4 an annual cost of \$450,000 per firm,<sup>746</sup> since both their financial statements and compliance report will need to be audited. The Commission estimates that there are no stand-alone SBSBs not exempt from Rule 18a-4, resulting in an industry-wide ongoing burden of \$0 per year.<sup>747</sup>

<sup>741</sup> See section II.B.3.a. of this release (discussing the requirement to file annual reports and the qualifications of independent public accountants).

<sup>742</sup> See *Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Rule 17a-5*.

<sup>743</sup> \$300,000 per year × 4 stand-alone MSBSPs = \$1,200,000 per year.

<sup>744</sup> \$300,000 per year (financial statements) + \$3,000 per year (exemption report) = \$303,000 per year.

<sup>745</sup> \$303,000 per year × 6 stand-alone SBSBs = \$1,818,000 per year.

<sup>746</sup> \$300,000 per year (financial statements) + \$150,000 per year (compliance report) = \$450,000 per year.

<sup>747</sup> \$450,000 per year × 0 stand-alone SBSBs = \$0 per year. As discussed above, the Commission estimates that of the 9 stand-alone SBSBs, 6 will avail themselves of the exemption from Rule 18a-4, and the remaining 3 will be registered as FCMs. The Commission also believes that the three stand-alone SBSBs that are registered as FCMs will also elect to avail themselves of the full alternative compliance mechanism. Consequently, the Commission estimates that there will be no stand-

New Rule 18a-7 will require stand-alone SBSBs and MSBSPs to notify the Commission of a change in fiscal year.<sup>748</sup> Based on the Commission staff's experience with the parallel requirement under Rule 17a-5, and the Supporting Statement accompanying the most recent extension of Rule 17a-11, which estimates that each financial notice takes approximately 1 hour to prepare and file with the Commission,<sup>749</sup> the Commission estimates that paragraph (i) of new Rule 18a-7 will impose a burden of 1 hour and 50 cents on a firm planning to change its fiscal year. The Commission estimates that each year, 1 firm will change its fiscal year, such that the estimated burden on the industry will be 1 hour and 50 cents per year.

New Rule 18a-7 will require stand-alone SBSBs and MSBSPs to file FOCUS Report Part II, as amended, monthly,<sup>750</sup> and will require bank SBSBs and MSBSPs to file new FOCUS Report Part IIC quarterly.<sup>751</sup>

Stand-alone SBSBs will be required to file FOCUS Report Part II, as amended, on a monthly basis.<sup>752</sup> FOCUS Report Part II, as amended, includes eleven sections and four schedules applicable to stand-alone SBSBs.<sup>753</sup> Stand-alone SBSBs dually registered as FCMs will be required to complete five additional sections, all of which the CFTC already requires FCMs to file as part of Form 1-FR-FCM.<sup>754</sup> In consideration of these

alone SBSBs not exempt from Rule 18a-4. See section IV.C of this release.

<sup>748</sup> See paragraph (i) of Rule 18a-7, as adopted.

<sup>749</sup> See Commission, *Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Rule 17a-11* (July 24, 2017), available at <https://www.reginfo.gov/public/do/DownloadDocument?objectID=75553601>.

<sup>750</sup> See paragraph (a)(1) of Rule 18a-7, as adopted.

<sup>751</sup> See paragraph (a)(2) of Rule 18a-7, as adopted.

<sup>752</sup> See paragraph (a)(1) of Rule 18a-7, as adopted.

<sup>753</sup> Stand-alone SBSBs will be required to complete the following sections and schedules: (1) Statement of Financial Condition; (2) either Computation of Net Capital (Filer Authorized to Use Models) or Computation of Net Capital (Filer Not Authorized to Use Models); (3) Computation of Minimum Regulatory Capital Requirements (Non-Broker-Dealer); (4) Statement of Income (Loss); (5) Capital Withdrawals; (6) Capital Withdrawals—Recap; (7) Financial and Operational Data; (8) Financial and Operational Data—Operational Deductions from Capital—Note A; (9) Financial and Operational Data—Potential Operational Charges Not Deducted from Capital—Note B; (10) Computation for Determination of Security-Based Swap Customer Reserve Requirements; (11) Possession or Control for Security-Based Swap Customers; (12) Schedule 1—Aggregate Securities, Commodities, and Swaps Positions; (13) Schedule 2—Credit Concentration Report for Fifteen Largest Exposures in Derivatives; (14) Schedule 3—Portfolio Summary of Derivatives Exposures by Internal Credit Rating; and (15) Schedule 4—Geographic Distribution of Derivatives Exposures for Ten Largest Countries.

<sup>754</sup> Stand-alone SBSBs also registered as FCMs will be required to file the following sections: (1)

additional requirements, the Commission estimates that the requirement for stand-alone SBSBs to file FOCUS Report Part II, as amended, every month will impose an initial burden of 160 hours per firm and an ongoing annual burden of 192 hours per firm. The Commission estimates that there are 6 stand-alone SBSBs, resulting in an industry-wide initial burden of 960 hours<sup>755</sup> and an industry-wide ongoing burden of 1,152 hours per year.<sup>756</sup>

Stand-alone MSBSPs will be required to file FOCUS Report Part II, as amended, on a monthly basis.<sup>757</sup> FOCUS Report Part II, as amended, includes three sections and four schedules applicable to stand-alone MSBSPs.<sup>758</sup> Stand-alone MSBSPs dually registered as FCMs will be required to complete five additional sections, all of which the CFTC already requires FCMs to file as part of Form 1-FR-FCM.<sup>759</sup> In

Computation of CFTC Minimum Capital Requirement; (2) Statement of Segregation Requirements and Funds in Segregation for Customers Trading on U.S. Commodity Exchanges; (3) Statement of Cleared Swaps Customer Segregation Requirements and Funds in Cleared Swaps Customer Accounts under Section 4d(f) of the Commodity Exchange Act; (4) Statement of Segregation Requirements and Funds in Segregation for Customers' Dealer Options Accounts; and (5) Statement of Secured Amounts and Funds Held in Separate Accounts for Foreign Futures and Foreign Options Customers Pursuant to CFTC Regulation 30.7. The Commission does not estimate a burden for these five sections, since the CFTC already requires FCMs to file these five sections on a monthly basis (17 CFR 1.10(b)(1)(i)), and therefore, the hourly burden is already accounted for in the PRA estimate for the CFTC's Rule 1.10 (1 CFR 1.10). In addition, the Commission does not anticipate that FCMs will be required to file both the CFTC's Form 1-FR-FCM and the Commission's FOCUS Report Part II, as amended.

<sup>755</sup> 160 hours × 6 stand-alone SBSBs = 960 hours. These internal hours likely would be performed by a senior compliance manager.

<sup>756</sup> 192 hours per year × 6 stand-alone SBSBs = 1,152 hours per year. These internal hours likely would be performed by a senior compliance manager.

<sup>757</sup> See paragraph (a)(1) of Rule 18a-7, as adopted.

<sup>758</sup> Stand-alone MSBSPs will be required to complete the following sections and schedules: (1) Statement of Financial Condition; (2) Computation of Tangible Net Worth; (3) Statement of Income (Loss); (4) Schedule 1—Aggregate Securities, Commodities, and Swaps Positions; (5) Schedule 2—Credit Concentration Report for Fifteen Largest Exposures in Derivatives; (6) Schedule 3—Portfolio Summary of Derivatives Exposures by Internal Credit Rating; and (7) Schedule 4—Geographic Distribution of Derivatives Exposures for Ten Largest Countries.

<sup>759</sup> Stand-alone MSBSPs also registered as FCMs will be required to file the following sections: (1) Computation of CFTC Minimum Capital Requirement; (2) Statement of Segregation Requirements and Funds in Segregation for Customers Trading on U.S. Commodity Exchanges; (3) Statement of Cleared Swaps Customer Segregation Requirements and Funds in Cleared Swaps Customer Accounts under Section 4d(f) of the Commodity Exchange Act; (4) Statement of Segregation Requirements and Funds in Segregation

consideration of these additional requirements, the Commission estimates that the requirement for stand-alone MSBSPs to file FOCUS Report Part II, as amended, every month will impose an initial burden of 40 hours per firm and an ongoing annual burden of 48 hours per firm. The Commission estimates that there are 4 stand-alone MSBSPs, resulting in an industry-wide initial burden of 160 hours<sup>760</sup> and an industry-wide ongoing burden of 192 hours per year.<sup>761</sup>

Bank SBSDs will be required to file new FOCUS Report Part IIC on a quarterly basis.<sup>762</sup> New FOCUS Report Part IIC includes five sections and one schedule applicable to bank SBSDs.<sup>763</sup> The Commission does not expect new FOCUS Report Part IIC to impose a significant burden on bank SBSDs, because two of the five sections require the firm to file calculations already computed in accordance with Rule 18a-3, and the other three sections either mirror or are scaled down versions of schedules to FFIEC Form 031, which

banks are already required to file with their prudential regulator (although they will need to transpose this information from FFIEC Form 031 to FOCUS Report Part IIC). Although bank SBSDs dually registered as FCMs will be required to complete five additional sections, the CFTC already requires FCMs to file these schedules on Form 1-FR-FCM.<sup>764</sup> In consideration of these additional requirements, the Commission estimates that the requirement for bank SBSDs to file FOCUS Report Part IIC quarterly will impose an initial burden of 36 hours per firm and an ongoing annual burden of 16 hours per firm. The Commission estimates that there are 25 bank SBSDs, resulting in an industry-wide initial burden of 900 hours<sup>765</sup> and an industry-wide ongoing burden of 400 hours per year.<sup>766</sup>

Bank MSBSPs will be required to file new FOCUS Report Part IIC on a quarterly basis.<sup>767</sup> New FOCUS Report Part IIC includes three sections and one schedule applicable to bank MSBSPs.<sup>768</sup> Bank MSBSPs dually registered as FCMs

will be required to complete five additional sections, all of which the CFTC already requires FCMs to file as part of Form 1-FR-FCM.<sup>769</sup> However, the Commission does not expect any banks to register with the Commission as MSBSPs and therefore does not anticipate these requirements to impose an additional burden.<sup>770</sup>

The Commission received no comments regarding its hour and cost burden estimates for new Rule 18a-7 and continues to believe they are appropriate.

4. Amendments to Rule 17a-11 and New Rule 18a-8

The amendments to Rule 17a-11 and new Rule 18a-8 will impose collection of information requirements that result in annual burdens for broker-dealers, SBSDs, MSBSPs, and national securities exchanges and national securities associations. The Commission estimates that Rule 17a-11, as amended, will impose the following initial and annual burdens:<sup>771</sup>

Burden	Annual burden
New notice of failure to deposit in Rule 15c3-3(p) account .....	<i>Per notice:</i> 1 hour. <i>Industry:</i> 100 hours.
New notices filed by exchanges and national securities associations .....	<i>Per notice:</i> 1 hour. <i>Industry:</i> 5 hours.
Total—Amendments to Rule 17a-11 .....	<i>Industry:</i> 105 hours.

for Customers' Dealer Options Accounts; and (5) Statement of Secured Amounts and Funds Held in Separate Accounts for Foreign Futures and Foreign Options Customers Pursuant to CFTC Regulation 30.7. The Commission does not estimate a burden for these 5 sections, since the CFTC already requires FCMs to file these 5 sections on a monthly basis (17 CFR 1.10(b)(1)(i)), and therefore, the hourly burden is already accounted for in the PRA estimate for the CFTC's Rule 1.10 (1 CFR 1.10). In addition, the Commission does not anticipate that FCMs will be required to file both the CFTC's Form 1-FR-FCM and the Commission's FOCUS Report Part II, as amended.

<sup>760</sup> 40 hours × 4 stand-alone MSBSPs = 160 hours. These internal hours likely will be performed by a senior compliance manager.

<sup>761</sup> 48 hours per year × 4 stand-alone MSBSPs = 192 hours per year. These internal hours likely will be performed by a senior compliance manager.

<sup>762</sup> See paragraph (a)(2) of Rule 18a-7, as adopted.

<sup>763</sup> Bank SBSDs will be required to complete the following sections and schedules: (1) Balance Sheet (Information as Reported on FFIEC Form 031—Schedule RC); (2) Regulatory Capital (Information as Reported on FFIEC Form 031—Schedule RC-R); (3) Income Statement (Information as Reported on FFIEC Form 031—Schedule RI); (4) Computation for Determination of Security-Based Swap Customer Reserve Requirements; (5) Possession or Control for Security-Based Swap Customers; and (6) Schedule 1—Aggregate Security-Based Swap and Swap Positions.

<sup>764</sup> Bank SBSDs also registered as FCMs will be required to file the following sections: (1) Computation of CFTC Minimum Capital

Requirement; (2) Statement of Segregation Requirements and Funds in Segregation for Customers Trading on U.S. Commodity Exchanges; (3) Statement of Cleared Swaps Customer Segregation Requirements and Funds in Cleared Swaps Customer Accounts under Section 4d(f) of the Commodity Exchange Act; (4) Statement of Segregation Requirements and Funds in Segregation for Customers' Dealer Options Accounts; and (5) Statement of Secured Amounts and Funds Held in Separate Accounts for Foreign Futures and Foreign Options Customers Pursuant to CFTC Regulation 30.7. The Commission does not estimate a burden for these 5 sections, since the CFTC already requires FCMs to file these 5 sections on a monthly basis (17 CFR 1.10(b)(1)(i)), and therefore, the hourly burden is already accounted for in the PRA estimate for the CFTC's Rule 1.10 (1 CFR 1.10). In addition, the Commission does not anticipate that FCMs will be required to file both the CFTC's Form 1-FR-FCM and the Commission's FOCUS Report Part II, as amended.

<sup>765</sup> 36 hours × 25 bank SBSDs = 900 hours. These internal hours likely will be performed by a senior compliance manager.

<sup>766</sup> 16 hours per year × 25 bank SBSDs = 400 hours per year. These internal hours likely will be performed by a senior compliance manager.

<sup>767</sup> See paragraph (a)(2) of Rule 18a-7, as adopted.

<sup>768</sup> Bank MSBSPs will be required to complete the following sections and schedules: (1) Balance Sheet (Information as Reported on FFIEC Form 031—Schedule RC); (2) Regulatory Capital (Information as Reported on FFIEC Form 031—Schedule RC-R); (3) Income Statement (Information as Reported on FFIEC Form 031—Schedule RI); and (4) Schedule

1—Aggregate Security-Based Swap and Swap Positions.

<sup>769</sup> Bank MSBSPs also registered as FCMs will be required to file the following sections: (1) Computation of CFTC Minimum Capital Requirement; (2) Statement of Segregation Requirements and Funds in Segregation for Customers Trading on U.S. Commodity Exchanges; (3) Statement of Cleared Swaps Customer Segregation Requirements and Funds in Cleared Swaps Customer Accounts under Section 4d(f) of the Commodity Exchange Act; (4) Statement of Segregation Requirements and Funds in Segregation for Customers' Dealer Options Accounts; and (5) Statement of Secured Amounts and Funds Held in Separate Accounts for Foreign Futures and Foreign Options Customers Pursuant to CFTC Regulation 30.7. The Commission does not estimate a burden for these 5 sections, since the CFTC already requires FCMs to file these 5 sections on a monthly basis (17 CFR 1.10(b)(1)(i)), and therefore, the hourly burden is already accounted for in the PRA estimate for the CFTC's Rule 1.10 (1 CFR 1.10). In addition, the Commission does not anticipate that FCMs will be required to file both the CFTC's Form 1-FR-FCM and the Commission's FOCUS Report Part II, as amended.

<sup>770</sup> The Commission estimates that the requirement for bank MSBSPs to file FOCUS Report Part IIC quarterly will impose an initial burden of 16 hours per firm and an ongoing annual burden of 8 hours per firm.

<sup>771</sup> See paragraphs (f) and (g) of Rule 17a-11, as amended.

The Commission estimates that new Rule 18a–8 will impose an annual burden of 4.6 hours per year.

#### Estimated Hours and Costs of Amendments to Rule 17a–11

The Commission is adopting paragraph (f) to Rule 17a–11, which will require broker-dealers engaged in security-based swap activities to notify the Commission if they fail to make a deposit required under paragraph (p) of Rule 15c3–3.<sup>772</sup> Because the burden to calculate the reserve amount is already accounted for in the PRA estimate for Rule 15c3–3,<sup>773</sup> the burden imposed by paragraph (f) of Rule 17a–11, as amended, is the requirement to notify the Commission when the firm fails to act in accordance with paragraph (p) of Rule 15c3–3. Given the similarity of this new requirement to the current requirements of Rule 17a–11, the Commission estimates that each required notice will take one hour to prepare and file.<sup>774</sup> Based on Commission experience with the number of notices filed under current Rule 17a–11,<sup>775</sup> the Commission estimates that 100 notices will be filed each year under paragraph (f) of Rule 17a–11, as amended, resulting in an industry-wide ongoing burden of 100 hours per year.<sup>776</sup>

The Commission is redesignating current paragraph (f) of Rule 17a–11 as paragraph (g) and requiring a broker-dealer's national securities exchange or national securities association to notify the Commission if it learns that the broker-dealer failed to provide a notice required under any paragraph of Rule 17a–11 (instead of just paragraphs (b) through (e) of Rule 17a–11 as it currently requires).<sup>777</sup> Thus, these entities will be subject to new burdens to file a delinquent broker-dealer's notices under new paragraph (f) (failure to deposit in Rule 15c3–3(p) account). After considering the similar preexisting Rule 17a–11 requirement, the Commission estimates that each required notice will take one hour to prepare and file.<sup>778</sup> Based on

Commission experience with the number of notices currently filed by these entities, the Commission estimates that five notices will be filed pursuant to the amendment to paragraph (g) of Rule 17a–11, as amended, resulting in an estimated industry-wide ongoing burden of five hours per year.<sup>779</sup>

The Commission received no comments regarding its hour and cost burden estimates for the amendments to Rule 17a–11 and continues to believe they are appropriate.

#### Estimated Hours and Costs of New Rule 18a–8

New Rule 18a–8 will require non-broker-dealer SBSBs and non-broker-dealer MSBSPs to notify the Commission of certain indicia of their financial condition.<sup>780</sup> The Commission estimates that each Rule 18a–8 notice will take approximately 55 minutes to prepare and file, in contrast to its estimate that a Rule 17a–11 notice will take one hour to prepare and file,<sup>781</sup> because stand-alone SBSBs and MSBSPs do not have a DEA with which to file a copy of the Rule 17a–11 notice and bank SBSBs and MSBSPs are not required to file the Rule 17a–11 notice with their prudential regulator.<sup>782</sup>

The Commission estimates that it will receive approximately five Rule 18a–8 notices per year, based on the substantially smaller pool of possible respondents, as compared with current Rule 17a–11. Under current Rule 17a–11, there are approximately 3,582 possible respondents—3,764 registered broker-dealers, minus approximately 182 broker-dealers registered pursuant to Section 15(b)(11)(A) of the Exchange Act.<sup>783</sup> In contrast, the Commission estimates that there will be 35 non-broker-dealer SBSBs and non-broker-dealer MSBSPs (25 bank SBSBs, 6 stand-alone SBSBs, and 4 stand-alone MSBSPs). Assuming that each of the 5 Rule 18a–8 notices takes 55 minutes to

<sup>779</sup> 5 notices per year × 1 hour per notice = 5 hours per year. These internal hours likely will be performed by a compliance manager.

<sup>780</sup> See Rule 18a–8, as adopted.

<sup>781</sup> See *Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Rule 17a–11*.

<sup>782</sup> Compare paragraph (h) of Rule 17a–11, as amended, with paragraph (h) of Rule 18a–8, as adopted.

<sup>783</sup> Rule 17a–11 does not apply to a broker-dealer registered pursuant to Section 15(b)(11)(A) of the Exchange Act that is not a member of either a national securities exchange or a national securities association. See paragraph (j) of Rule 17a–11, as amended. The Commission estimates that there are approximately 3,582 broker-dealers subject to Rule 17a–11 after consulting with SIPC (3,764 registered broker-dealers—approximately 182 broker-dealers registered pursuant to Section 15(b)(11)(A) of the Exchange Act = 3,711 Rule 17a–11 respondents).

prepare and file, the Commission estimates new Rule 18a–8 will result in an industry-wide ongoing burden of 4.6 hours per year.<sup>784</sup>

The Commission received no comments regarding its hour and cost burden estimates for new Rule 18a–8 and continues to believe they are appropriate.

#### 5. Amendments to Rule 17a–12

Rule 17a–12, as amended, will require OTC derivatives dealers to file FOCUS Report Part II, as amended, instead of FOCUS Report Part IIB. This is not so much a new burden as a different burden, since in the absence of this amendment these firms would be required to file FOCUS Report Part IIB instead. The new lines on FOCUS Report Part II, as amended, will generally not be applicable to OTC derivatives dealers. Some new lines on FOCUS Report Part II, as amended, require similar types of information as FOCUS Report Part IIB, but may be phrased in a different way.<sup>785</sup> Other new lines on FOCUS Report Part II, as amended, may require additional detail regarding information that was already required to be reported on FOCUS Report Part IIB.<sup>786</sup> Still other new lines on FOCUS Report Part II, as amended, require information that the OTC derivative dealers are already required to calculate pursuant to another Exchange Act rule.<sup>787</sup> Finally, some new line items on FOCUS Report Part II, as amended, are not applicable to OTC derivatives dealers and therefore will not be completed by these firms.<sup>788</sup>

Although FOCUS Report Part II, as amended, is partially modeled on Part

<sup>784</sup> 5 notices per year × (55 minutes per notice + 60 minutes per hour) = 4.6 hours per year. These internal hours likely will be performed by a compliance manager.

<sup>785</sup> Compare, e.g., FOCUS Report Part IIB, Schedule VI—Aggregate Securities and Commodities Positions, Line 2 (U.S. Government agency), with FOCUS Report Part II, as amended, Schedule 1—Aggregate Securities, Commodities, and Swaps Positions, Line 2 (U.S. government agency and U.S. government sponsored enterprises).

<sup>786</sup> Compare, e.g., FOCUS Report Part IIB, Schedule VI—Aggregate Securities and Commodities Positions, Line 2 (U.S. Government agency), with FOCUS Report Part II, as amended, Schedule 1—Aggregate Securities, Commodities, and Swaps Positions, Lines 2A–2B (requesting a break-out of the portion of U.S. government agency and U.S. government sponsored enterprises attributable to mortgage-backed securities and debt securities).

<sup>787</sup> See, e.g., FOCUS Report Part II, as amended, Computation of Minimum Regulatory Capital Requirements (Broker-Dealer), Line 9A (soliciting the filer's net capital in excess of 120% of the firm's minimum net capital requirement).

<sup>788</sup> See, e.g., FOCUS Report Part II, as amended, Computation of Minimum Regulatory Capital Requirements (Non-Broker-Dealer SBSB).

<sup>772</sup> See paragraph (f) of Rule 17a–11, as amended.

<sup>773</sup> See *Capital, Margin, and Segregation Adopting Release*, 84FR at 43964–67.

<sup>774</sup> See *Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Rule 17a–11*.

<sup>775</sup> See *id.* (noting that in 2016, the Commission received approximately 253 notices under Rule 17a–11).

<sup>776</sup> 100 notices per year × 1 hour per notice = 100 hours per year. These internal hours likely will be performed by a compliance manager.

<sup>777</sup> See paragraph (g) of Rule 17a–11, as amended.

<sup>778</sup> See *Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Rule 17a–11*.

IIB, the initial burden on OTC derivatives dealers is expected to increase, so that firms can analyze revised FOCUS Report Part II. However, once firms have analyzed FOCUS Report Part II, as amended, the amendments to Rule 17a–12 are not expected to change the estimated ongoing burden imposed by Rule 17a–12. The Commission estimates that Rule 17a–12, as amended, will impose on each OTC derivative dealers an initial burden of 20 hours. The Commission estimates that there are 4 respondents, resulting in an estimated industry-wide initial burden of 80 hours.<sup>789</sup> The Commission estimates that Rule 17a–12, as amended, will not change the estimated ongoing burden imposed by Rule 17a–12.

#### 6. New Rule 18a–9

New Rule 18a–9, which is modeled on Rule 17a–13, will require stand-alone SBSBs to establish a securities count program.<sup>790</sup> As explained below, the Commission estimates that new Rule 18a–9 will impose an industry-wide initial burden of 225 hours and an industry-wide ongoing burden of 900 hours per year.

The current approved PRA estimate for Rule 17a–13 estimates a securities count program imposes an average ongoing cost of 100 hours per year.<sup>791</sup> The Commission is using this estimate, and therefore estimates that new Rule 18a–9 will impose an ongoing annual burden of 100 hours per stand-alone SBSB. The Commission estimates that there are 6 stand-alone SBSBs, resulting in an estimated industry-wide ongoing burden of 600 hours per year.<sup>792</sup>

The Commission also estimates that new Rule 18a–9 will impose an initial burden of 25 hours per firm. The records required by new Rule 18a–9 should already be recorded by the systems implemented under new Rules 18a–5 and 18a–6, and accordingly, the resulting initial burden is largely already accounted for under these rules.<sup>793</sup> However, the Commission estimates that the initial cost to establish procedures for conducting the

<sup>789</sup> 20 hours × 4 OTC derivatives dealers = 80 hours. These internal hours likely will be performed by a compliance manager.

<sup>790</sup> See Rule 18a–9, as adopted.

<sup>791</sup> See Commission, *Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Rule 17a–13* (Feb. 28, 2017), available at <https://www.reginfo.gov/public/do/DownloadDocument?objectID=7182940>.

<sup>792</sup> 100 hours per year × 6 stand-alone SBSBs = 600 hours per year. These internal hours likely will be performed by an operations specialist.

<sup>793</sup> However, the Commission assumes that stand-alone SBSBs and MSBSPs do not currently have a securities count program in place.

securities count program, including identifying the persons involved in the program, will create an initial burden of approximately 25 hours per stand-alone SBSB, or 150 hours for the estimated 6 stand-alone SBSBs.<sup>794</sup>

The Commission received no comments regarding its hour and cost burden estimates for new Rule 18a–9 and continues to believe they are appropriate.

#### 7. Amendments to Rule 18a–10

Rule 18a–10, as amended, contains an alternative compliance mechanism pursuant to which a stand-alone SBSB that is registered as a swap dealer and predominantly engages in a swaps business may elect to comply with the recordkeeping and reporting requirements of the CEA and the CFTC's rules in lieu of complying with Rules 18a–5, 18a–6, 18a–7, 18a–8, and 18a–9.<sup>795</sup> The Commission estimates that 3 stand-alone SBSBs will elect to operate under Rule 18a–10. These respondents were included in the proposing release in other collections of information (Rule 18a–5, Rule 18a–6, Rule 18a–7, Rule 18a–8, and Rule 18a–9, as proposed), and have been moved to the information collection for new Rule 18a–10.<sup>796</sup>

The Commission estimates the paperwork burden associated with transmitting to the Commission a copy of the notice required by paragraph (b)(4) of Rule 18a–10, as amended, to be 5 minutes for a stand-alone SBSB operating under Rule 18a–10. The Commission further estimates that it will receive one notice from a single submitting SBSB per year. The Commission is basing this estimate on the smaller pool of possible respondents, as compared with new Rule 18a–8.<sup>797</sup>

Assuming that the single Rule 18a–10 notice takes 5 minutes to transmit to the Commission, the Commission estimates Rule 18a–10, as amended, will result in an industry-wide ongoing burden of 0.083 hours per year.<sup>798</sup>

#### 8. Amendments to Rule 3a71–6

Rule 3a71–6, as amended, will require submission of certain information to the Commission to the extent foreign SBSBs or MSBSPs elect to request a substituted compliance determination with respect

<sup>794</sup> 25 hours × 6 stand-alone SBSBs = 150 hours. These internal hours likely will be performed by a senior operations manager.

<sup>795</sup> See Rule 18a–10, as amended.

<sup>796</sup> See *supra* section IV.C.

<sup>797</sup> See *supra* section IV.D.4.

<sup>798</sup> 1 notice per year × (5 minutes per notice + 60 minutes per hour) = 0.0833 hours per year. These internal hours likely will be performed by a compliance manager.

to the Title VII recordkeeping and reporting requirements. The Commission expects that foreign SBSBs and MSBSPs will seek to rely on substituted compliance upon registration, and that it is likely that the majority of such requests will be made during the first year following the effective date of this amendment. Requests will not be necessary with regard to applicable rules and regulations of a foreign jurisdiction that have previously been the subject of a substituted compliance determination in connection with the applicable rules.

The Commission expects that the majority of substituted compliance applications will be submitted by foreign authorities, and that very few substituted compliance requests will come from SBSBs or MSBSPs. For purposes of this assessment, the Commission estimates that three SBSBs or MSBSPs will submit such applications in connection with the Commission's recordkeeping and reporting requirements.<sup>799</sup> After consideration of the release adopting Rule 3a71–6, the Commission estimates that the total paperwork burden incurred by such entities associated with preparing and submitting a request for a substituted compliance determination in connection with the recordkeeping and reporting requirements will be approximately 240 hours, plus \$240,000 for the services of outside professionals for all 3 requests.<sup>800</sup>

<sup>799</sup> See *Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 81 FR at 29959. See also *Trade Acknowledgment and Verification of Security-Based Swap Transactions*, 81 FR at 39382; *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43960.

<sup>800</sup> See *Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 81 FR at 30097 (“The Commission estimates that the total one-time paperwork burden incurred by such entities associated with preparing and submitting a request for a substituted compliance determination in connection with the business conduct requirements will be approximately 240 hours, plus \$240,000 for the services of outside professionals for all three requests”). The Commission further stated that in practice those amounts may overestimate the costs of requests pursuant to Rule 3a71–6 as adopted, as such requests would solely address the business conduct requirements, rather than the broader proposed scope of substituted compliance set forth in the Cross-Border Proposing Release. See *id.* at 30097, n. 1583. To the extent that an SBSB submits substituted compliance requests in connection with the business conduct requirements, the trade acknowledgment and verification requirements, the capital and margin requirements, and the recordkeeping and reporting requirements, the Commission believes that the paperwork burden associated with the requests would be greater than that associated with a narrower request, given the need for more information regarding the

The Commission received no comments regarding its hour and cost burden estimates for Rule 3a71–6, as amended, and continues to believe they are appropriate.

#### *E. Collection of Information Is Mandatory*

The collections of information pursuant to the rule amendments and new rules, being adopted, are mandatory, as applicable, for broker-dealers, SBSBs, MSBSPs, certain third-party custodians, and NSEs and NSAs. Compliance with the collection of information requirements associated with Rule 3a71–6, regarding the availability of substituted compliance, is mandatory for all foreign financial authorities, foreign SBSBs, or foreign MSBSPs that seek a substituted compliance determination.

#### *F. Confidentiality*

The broker-dealer and stand-alone SBSB and MSBSP annual reports filed with the Commission are not confidential, except that if the statement of financial condition is bound separately from the balance of the annual reports and each page of the balance of the annual reports is stamped “confidential,” then the balance of the annual reports shall be deemed confidential to the extent permitted by law.<sup>801</sup> Subject to certain exceptions,<sup>802</sup> if there are material weaknesses, the accountant’s report on the compliance report must be made available for customers’ inspection and, consequently, it will not be deemed confidential.<sup>803</sup> Subject to certain exceptions,<sup>804</sup> a broker-dealer must furnish to its customers its unaudited financial statements,<sup>805</sup> and must provide annually a balance sheet with appropriate notes prepared in accordance with generally accepted accounting principles and which must be audited if the broker-dealer is

comparability of the relevant rules and the adequacy of the associated supervision and enforcement practices. In the Commission’s view, however, the burden associated with such a combined request would not exceed the prior estimate. See *Trade Acknowledgment and Verification of Security-Based Swap Transactions*, 81 FR at 39833, n. 258.

<sup>801</sup> See paragraph (e)(3) of Rule 17a–5, as amended; paragraph (d)(2) of Rule 18a–7, as adopted.

<sup>802</sup> See paragraph (c)(1)(i) through (iii) of Rule 17a–5, as amended.

<sup>803</sup> See paragraph (c)(2)(iv) of Rule 17a–5, as amended.

<sup>804</sup> See paragraph (c)(1)(i) through (iii) of Rule 17a–5, as amended.

<sup>805</sup> See paragraph (c)(3) of Rule 17a–5, as amended.

required to file audited financial statements with the Commission.<sup>806</sup>

Stand-alone SBSBs and MSBSPs must also make publicly available on their websites audited and unaudited financial statements, and also make these documents available in writing, upon request, to any person that has a security-based swap account.<sup>807</sup> A stand-alone SBSB will also be required to disclose on its website at the same time: (1) A statement of the amount of the firm’s net capital and required net capital and other information, if applicable, related to the firm’s net capital;<sup>808</sup> and (2) if, in connection with the firm’s most recent annual reports, the report of the independent public accountant identifies one or more material weaknesses, a copy of the report.<sup>809</sup>

The forms that the Commission has adopted for use by applicants for registration as SBSBs or MSBSPs provides for applicants to notify the Commission regarding intended reliance on substituted compliance.<sup>810</sup> The Commission generally will make requests for substituted compliance determinations public, subject to requests for confidential treatment being submitted pursuant to any applicable provisions governing confidentiality under the Exchange Act.<sup>811</sup>

With respect to the other information collected under the rule amendments and new rules being adopted, the firm can request the confidential treatment of the information.<sup>812</sup> If such a confidential treatment request is made, the Commission anticipates that it will keep the information confidential subject to the provisions of applicable law.<sup>813</sup>

Rule 17a–4, as amended, specifies the required retention periods for a broker-dealer.<sup>814</sup> New Rule 18a–6 specifies the

<sup>806</sup> See paragraph (c)(2)(i) of Rule 17a–5, as amended.

<sup>807</sup> See paragraph (b) of Rule 18a–7, as adopted.

<sup>808</sup> See paragraph (b)(1)(ii) of Rule 18a–7, as adopted.

<sup>809</sup> See paragraphs (b)(1)(iii) of Rule 18a–7, as adopted.

<sup>810</sup> See *Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants*, 80 FR at 49049.

<sup>811</sup> See *Application of “Security-Based Swap Dealer” and “Major Security-Based Swap Participant” Definitions to Cross-Border Security-Based Swap Activities*, Exchange Act Release No. 72372 (June 25, 2014, 79 FR 47278, 47359 (Aug. 12, 2014)).

<sup>812</sup> See 17 CFR 200.83. Information regarding requests for confidential treatment of information submitted to the Commission is available at <http://www.sec.gov/foia/howfo2.htm#privacy>.

<sup>813</sup> See, e.g., 5 U.S.C. 552 *et seq.*; 15 U.S.C. 78x (governing the public availability of information obtained by the Commission).

for Recordkeeping Requirements

<sup>814</sup> See Rule 17a–4, as amended.

required retention periods for non-broker-dealer SBSBs and non-broker-dealer MSBSPs.<sup>815</sup> Many of the required records must be retained for three years; certain other records must be retained for longer periods.<sup>816</sup>

### **V. Economic Analysis**

#### *A. Introduction*

The Commission is sensitive to the costs and benefits of its rules. The following economic analysis presents the costs and benefits—including the effects on efficiency, competition, and capital formation—that will result from the new recordkeeping, reporting, notification, and securities count rules for stand-alone SBSBs, stand-alone MSBSPs, bank SBSBs, and bank MSBSPs and from the amendments to Rules 17a–3, 17a–4, 17a–5, 17a–11 and 17a–12 with respect to firms that are registered as broker-dealers. The costs and benefits of adopting these new rules and rule amendments are discussed below and have informed the policy choices described throughout this release.

As discussed more fully in section II. above, pursuant to Sections 15F and 17(a) of the Exchange Act, the Commission is amending Rules 17a–3, 17a–4, 17a–5, 17a–11, and 17a–12 to establish recordkeeping, reporting, and notification requirements for broker-dealers, including broker-dealer SBSBs and MSBSPs to account for their security-based swap activities. Pursuant to Section 15F of the Exchange Act, the Commission is adopting new Rules 18a–5 through 18a–9 to establish recordkeeping, reporting, and notification requirements for stand-alone SBSBs, stand-alone MSBSPs, bank SBSBs, and bank MSBSPs, and securities count requirements for stand-alone SBSBs. Further, pursuant to Sections 15F and 17(a) of the Exchange Act, the Commission is amending FOCUS Report Part II that consolidates proposed Form SBS and existing FOCUS Report Parts II, IIB, and II CSE that will be filed by nonbank SBSBs, nonbank MSBSPs, stand-alone broker-dealers, and stand-alone OTC derivatives dealers to report financial information. The Commission is adopting FOCUS Report Part IIC for bank SBSBs and MSBSPs to report their financial information because these entities will be required to provide more limited information relative to other SBSBs and MSBSPs. The Commission believes these rules and rule amendments will help regulators

<sup>815</sup> See Rule 18a–6, as adopted.

<sup>816</sup> See Rule 17a–4, as amended; Rule 18a–6, as adopted.

determine whether relevant market participants comply with the recently adopted capital, margin, and segregation requirements.<sup>817</sup>

As discussed above, the Commission is establishing limited and full alternative compliance mechanisms. The limited alternative compliance mechanism in Rules 17a-3 and 18a-5 will allow an SBSB or MSBSP that also is registered with the CFTC as a swap dealer or major swap participant to comply with the requirements to make and keep certain current trade blotters, customer account ledgers, and stock records solely with respect to required information regarding security-based swaps by complying with the requirements of the CEA and the rules thereunder applicable to swap dealers and major swap participants if the SBSB or MSBSP meets certain conditions.<sup>818</sup>

The Commission is amending the full alternative compliance mechanism in existing Rule 18a-10 that permits certain SBSBs that are registered as swap dealers and that predominantly engage in a swaps business to elect to comply with the capital, margin, and segregation requirements of the CEA and the CFTC's rules in lieu of complying with the capital, margin, and segregation requirements in Rules 18a-1, 18a-3, and 18a-4. The amendments to Rule 18a-10 will permit firms that will operate under Rule 18a-10 to elect to comply with the recordkeeping and reporting requirements of the CEA and the CFTC's rules in lieu of complying with Rules 18a-5, 18a-6, 18a-7, 18a-8, and 18a-9.<sup>819</sup> The Commission believes the availability of the alternative compliance mechanisms will promote harmonization with CFTC requirements and reduce compliance costs for eligible SBSBs and MSBSPs.

Additionally, as discussed above, the Commission is amending Rule 3a71-6 to provide non-U.S. stand-alone SBSBs and non-U.S. stand-alone MSBSPs with the potential to utilize substituted compliance with comparable foreign requirements to satisfy the recordkeeping and reporting requirements of Section 15F of the Exchange Act and Rules 18a-5, 18a-6, 18a-7, 18a-8 and 18a-9 thereunder.<sup>820</sup> The Commission believes that allowing for the possibility of substituted compliance will help achieve the benefits of the recordkeeping and

reporting requirements being adopted in this document in a manner that avoids the costs that non-U.S. stand-alone SBSBs and non-U.S. stand-alone MSBSPs would have to bear due to regulatory duplication or conflict.

The sections below present an overview of the security-based swap market, a discussion of the general costs and benefits of the adopted recordkeeping and reporting requirements, and a discussion of the costs and benefits of each amendment and new rule. The Economic Analysis also includes a discussion of the potential effects of the rule amendments and new rules on competition, efficiency, and capital formation. Where possible, the Commission has attempted to quantify the costs, benefits, and effects on efficiency, competition, and capital formation expected to result from adopting these rules. At times, however, the Commission is unable to quantify the economic effects because, as explained in detail below, it lacks the information necessary to provide a reasonable estimate, and in those instances, the discussion of the economic effects of the rule or amendment is qualitative in nature.

#### B. Baseline of Economic Analysis

To assess the economic impact of the final rules described in this release, the Commission employs as a baseline the security-based swap market as it exists at the time of this release, including applicable rules that the Commission already has adopted but excluding rules that the Commission has proposed but not yet finalized. The baseline for analysis includes the statutory provisions that currently govern the security-based swap market pursuant to the Dodd-Frank Act and rules adopted in the Commission's intermediary definitions release,<sup>821</sup> cross-border release,<sup>822</sup> SDR registration release,<sup>823</sup> security-based swap entity registration release,<sup>824</sup> Regulation SBSR release and

amendments,<sup>825</sup> U.S. activity release,<sup>826</sup> business conduct release,<sup>827</sup> and trade acknowledgment release<sup>828</sup> as these statutes and final rules—even if compliance is not yet required—are part of the existing regulatory landscape that market participants expect to govern their security-based swap activity.

Additionally, the baseline includes any recordkeeping and reporting rules currently applicable to participants in the security-based swap market including applicable rules previously adopted by the Commission,<sup>829</sup> but excludes the rules and rule amendments addressed in this release. With respect to the minor amendments to Rules 17a-3, 17a-4, 17a-5, 17a-11, and 17a-12, the baseline for purposes of this economic analysis is the current recordkeeping and reporting regime for broker-dealers under such rules.

The following sections provide an overview of aspects of the security-based swap market that are likely to be most affected by the amendments being adopted in this document, as well as elements of the current market structure, such as central clearing and platform trading, that are likely to determine the scope of transactions that will be covered by them.

#### 1. Available Data From the Security-Based Swap Market

The Commission's understanding of the market is informed, in part, by available data on security-based swap transactions, though the Commission acknowledges that limitations in the data limit the extent to which it is possible to quantitatively characterize the market.<sup>830</sup> Since these data do not

<sup>825</sup> See *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information*, 80 FR 14563. See also *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information*, 81 FR 53546.

<sup>826</sup> See *Security-Based Swap Transactions Connected With a Non-U.S. Person's Dealing Activity That Are Arranged, Negotiated, or Executed by Personnel Located in a U.S. Branch or Office of an Agent; Security-Based Swap Dealer De Minimis Exception*, Exchange Act Release No. 77104 (Feb. 10, 2016), 81 FR 8598 (Feb. 19, 2016).

<sup>827</sup> See *Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 81 FR 29960.

<sup>828</sup> See *Trade Acknowledgment and Verification of Security-Based Swap Transactions*, 81 FR 39808.

<sup>829</sup> The Commission has temporarily excluded security-based swaps from the definition of "security." See section III.C. of this release. Thus, for purposes of the Commission's baseline analysis for broker-dealers, security-based swap activities will be excluded.

<sup>830</sup> The Commission also relies on qualitative information regarding market structure and evolving market practices provided by commenters, both in letters and in meetings with Commission staff, and knowledge and expertise of Commission staff.

<sup>817</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR 43872.

<sup>818</sup> See Rule 17a-3, as amended, and Rule 18a-5, as adopted. See also discussion in section II.E.1. of this release.

<sup>819</sup> See Rule 18a-10, as amended. See also discussion in section II.E.2. of this release.

<sup>820</sup> See section II.F.2. of this release.

<sup>821</sup> See *Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant"*, 77 FR 30597.

<sup>822</sup> See *Application of "Security-Based Swap Dealer" and "Major Security-Based Swap Participant" Definitions to Cross-Border Security-Based Swap Activities*, 79 FR 47278.

<sup>823</sup> See *Security-Based Swap Data Repository Registration, Duties, and Core Principles*, Exchange Act Release No. 74246 (Feb. 11, 2015), 80 FR 14438 (Mar. 19, 2015).

<sup>824</sup> See *Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 80 FR 48964.

cover the entire market, the Commission has analyzed market activity using a sample of transactions data that includes only certain segments of the market. The Commission believes, however, that the data underlying this analysis provides reasonably comprehensive information regarding single-name credit default swap (“CDS”) transactions and the composition of the participants in the single-name CDS market.

Specifically, the analysis of the current state of the security-based swap market is based on data obtained from the DTCC Derivatives Repository Limited Trade Information Warehouse (“TIW”), especially data regarding the activity of market participants in the single-name CDS market during the period from 2008 to 2017. Although the definition of security-based swaps is not limited to single-name CDS,<sup>831</sup> single-name CDS contracts make up a majority of security-based swaps, and the Commission believes that the single-name CDS data are sufficiently representative of the market to inform our analysis of the current security-based swap market. According to data published by the Bank for International Settlements (“BIS”), the global notional amount outstanding in single-name CDS was approximately \$4.6 trillion,<sup>832</sup> in multi-name index CDS was approximately \$4.4 trillion, and in multi-name, non-index CDS was approximately \$343 billion.<sup>833</sup> The total gross market value outstanding in single-name CDS was approximately \$130 billion, and in multi-name CDS instruments was approximately \$174 billion.<sup>834</sup> The global notional amount outstanding in equity forwards and swaps as of December 2017 was \$3.21 trillion, with total gross market value of \$197 billion.<sup>835</sup>

<sup>831</sup> While other repositories may collect data on transactions in total return swaps on equity and debt, the Commission does not currently have access to such data for these products (or other products that are security-based swaps). Additionally, the Commission explains below that data related to single-name CDS provides reasonably comprehensive information for the purpose of this analysis.

<sup>832</sup> The global notional amount outstanding represents the total face amount used to calculate payments under outstanding contracts. The gross market value is the cost of replacing all open contracts at current market prices.

<sup>833</sup> See BIS, *Semi-annual OTC derivatives statistics at December 2017*, Table 10.1, available at [https://www.bis.org/statistics/d10\\_1.pdf](https://www.bis.org/statistics/d10_1.pdf) (accessed May 18, 2018).

<sup>834</sup> See *id.*

<sup>835</sup> These totals include swaps and security-based swaps, as well as products that are excluded from the definition of “swap,” such as certain equity forwards. See OTC, *equity-linked derivatives statistics*, Table D8, available at <https://www.bis.org/statistics/d8.pdf> (accessed May 18,

The Commission further notes that the data available from TIW does not encompass those CDS transactions that both: (i) Do not involve U.S. counterparties;<sup>836</sup> and (ii) are based on non-U.S. reference entities. Notwithstanding this limitation, the TIW single-name CDS data should provide sufficient information to permit the Commission to identify the types of market participants active in the security-based swap market and the general pattern of dealing within that market.<sup>837</sup>

## 2. Security-Based Swap Market: Market Participants and Activity

The final rules and rule amendments will apply regulatory requirements to security-based swap market participants. The following sections provide information about the security-based swap market, focusing on the

2018). For the purposes of this analysis, the Commission assumes that multi-name index CDS are not narrow-based index CDS and therefore, do not fall within the *security-based swap* definition. See 15 U.S.C. 78c(a)(68)(A); see also *Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”*; *Mixed Swaps; Security-Based Swap Agreement Recordkeeping*, 77 FR 48208. The Commission also assumes that all instruments reported as equity forwards and swaps are security-based swaps, potentially resulting in underestimation of the proportion of the security-based swap market represented by single-name CDS. Therefore, when measured on the basis of gross notional outstanding single-name CDS contracts appear to constitute roughly 59% of the security-based swap market. Although the BIS data reflects the global OTC derivatives market, and not just the U.S. market, the Commission has no reason to believe that these ratios differ significantly in the U.S. market.

<sup>836</sup> Following publication of the Warehouse Trust Guidance on CDS data access, TIW surveyed market participants, asking for the physical address associated with each of their accounts (*i.e.*, where the account is organized as a legal entity). This physical address is designated the registered office location by TIW. When an account reports a registered office location, the Commission has assumed that the registered office location reflects the place of domicile for the fund or account. When an account does not report a registered office location, the Commission has assumed that the settlement country reported by the investment adviser or parent entity to the fund or account is the place of domicile. Thus, for purposes of this analysis, the Commission has classified accounts as “U.S. counterparties” when they have reported a registered office location in the United States. The Commission notes, however, that this classification is not necessarily identical in all cases to the definition of *U.S. person* under Rule 3a71–3(a)(4).

<sup>837</sup> The challenges the Commission faces in estimating measures of current market activity stem, in part, from the absence of comprehensive reporting requirements for security-based swap market participants. The Commission has adopted rules regarding trade reporting, data elements, and public reporting for security-based swaps that are designed to, when fully implemented, provide the Commission with additional measures of market activity that will allow us to better understand and monitor activity in the security-based swap market. See *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information*, 81 FR 53545.

subset of participants likely to incur recordkeeping and reporting requirements as a result of these rules and rule amendments and the activities that would be subject to these requirements.

### a. Security-Based Swap Dealers

Security-based swap activity is concentrated in a relatively small number of dealers, which already represent a small percentage of all market participants active in the security-based swap market. Based on an analysis of the 2017 single-name CDS data, the Commission’s earlier estimates of the number of entities likely to register as security-based swap dealers remain largely unchanged. Of the approximately 50 entities that the Commission estimates might register as security-based swap dealers, the Commission believes that it is reasonable to expect 22 to be non-U.S. persons.

Many of these dealers are already subject to other regulatory frameworks under U.S. law based on their role as intermediaries or on the volume of their positions in other products, such as swaps. Persons who will register as SBSBs and MSBSPs are likely also to be engaged in swap activity, which is subject to regulation by the CFTC.<sup>838</sup> This overlap reflects the relationship between single-name CDS contracts, which are security-based swaps, and index CDS contracts, which may be swaps or security-based swaps. A single-name CDS contract covers default events for a single reference entity or reference security. Index CDS contracts and related products make payouts that are contingent on the default of index components and allow participants in these instruments to gain exposure to the credit risk of the basket of reference entities that comprise the index, which is a function of the credit risk of the index components. A default event for a reference entity that is an index component will result in payoffs on both single-name CDS written on the reference entity and index CDS written on indices that contain the reference entity. Because of this relationship between the payoffs of single-name CDS and index CDS products, prices of these

<sup>838</sup> See section II. of this release. See also *Application of Certain Title VII Requirements to Security-Based Swap Transactions Connected with a Non-U.S. Person’s Dealing Activity That Are Arranged, Negotiated, or Executed by Personnel Located in a U.S. Branch or Office or in a U.S. Branch or Office of an Agent*, Exchange Act Release No. 74834 (Apr. 29, 2015), 80 FR 27444, 27458 (May 13, 2015); *Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 80 FR at 49000.

products depend upon one another,<sup>839</sup> creating hedging opportunities across these markets.

These hedging opportunities mean that participants that are active in one market are likely to be active in the other. Commission staff's analysis of approximately 4,358 TIW accounts that participated in the market for single-name CDS in 2017 revealed that approximately 2,936 of those accounts, or 67%, also participated in the market for index CDS. Of the accounts that participated in both markets, data regarding transactions in 2017 suggests that, contingent upon an account transacting in notional volume of index CDS in the top third of accounts, the probability of the same account landing in the top third of accounts in terms of single-name CDS notional volume is approximately 38%; by contrast, the probability of the same account landing in the bottom third of accounts in terms of single-name CDS notional volume is only 5.4%.

The CFTC has adopted recordkeeping and reporting requirements that apply to registered swap dealers. The Commission estimates that approximately 46 of the 50 expected security-based swap dealers will be dually registered with the CFTC and therefore be subject to CFTC requirements.<sup>840</sup> Accordingly, the recordkeeping baseline for entities that are currently registered with the CFTC as swap dealers or major swap participants includes the activities related to compliance with the CFTC's recordkeeping and reporting requirements for swaps.

<sup>839</sup> "Correlation" typically refers to linear relationships between variables; "dependence" captures a broader set of relationships that may be more appropriate for certain swaps and security-based swaps. See, e.g., George Casella and Roger L. Berger, *Statistical Inference* 171 (2002).

<sup>840</sup> See, e.g., *Swap Data Recordkeeping and Reporting Requirements: Pre-Enactment and Transition Swaps (Final Rule)*, 77 FR 35200 (June 12, 2012); *Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules*, 77 FR 20128 (Apr. 3, 2012).

Additionally, based on an analysis of TIW data and filings with the Commission, the Commission estimates that 16 market participants that will register as security-based swap dealers have already registered with the Commission as broker-dealers and are thus subject to Exchange Act and FINRA requirements applicable to such entities. As the Commission discusses below, some registered dealers may also be subject to similar requirements in one or more foreign jurisdictions.

Finally, the Commission also notes that it has adopted rules for the registration of security-based swap dealers and major security-based swap participants, although market participants are not yet required to comply with those rules. Thus, there are not yet any security-based swap dealers or major security-based swap participants registered with the Commission.

#### b. Security-Based Swap Market Activity

As already noted, firms that act as dealers play a central role in the security-based swap market. Based on an analysis of 2017 single-name CDS data in TIW, accounts of those firms that are likely to exceed the security-based swap dealer *de minimis* thresholds and trigger registration requirements intermediated transactions with a gross notional amount of approximately \$2.9 trillion, approximately 55% of which was intermediated by the top five dealer accounts.<sup>841</sup>

These dealers transact with hundreds or thousands of counterparties. Approximately 21% of accounts of firms expected to register as security-based dealers and observable in TIW have entered into security-based swaps with over 1,000 unique counterparty accounts as of year-end 2017.<sup>842</sup>

<sup>841</sup> The Commission staff analysis of TIW transaction records indicates that approximately 99% of single-name CDS price-forming transactions in 2017 involved an ISDA-recognized dealer.

<sup>842</sup> Many dealer entities and financial groups transact through numerous accounts. Given that individual accounts may transact with hundreds of

Another 25% of these accounts transacted with 500 to 1,000 unique counterparty accounts; 29% transacted with 100 to 500 unique accounts; and 25% of these accounts intermediated security-based swaps with fewer than 100 unique counterparties in 2017. The median dealer account transacted with 495 unique accounts (with an average of approximately 570 unique accounts). Non-dealer counterparties transacted almost exclusively with these dealers. The median non-dealer counterparty transacted with two dealer accounts (with an average of approximately three dealer accounts) in 2017.

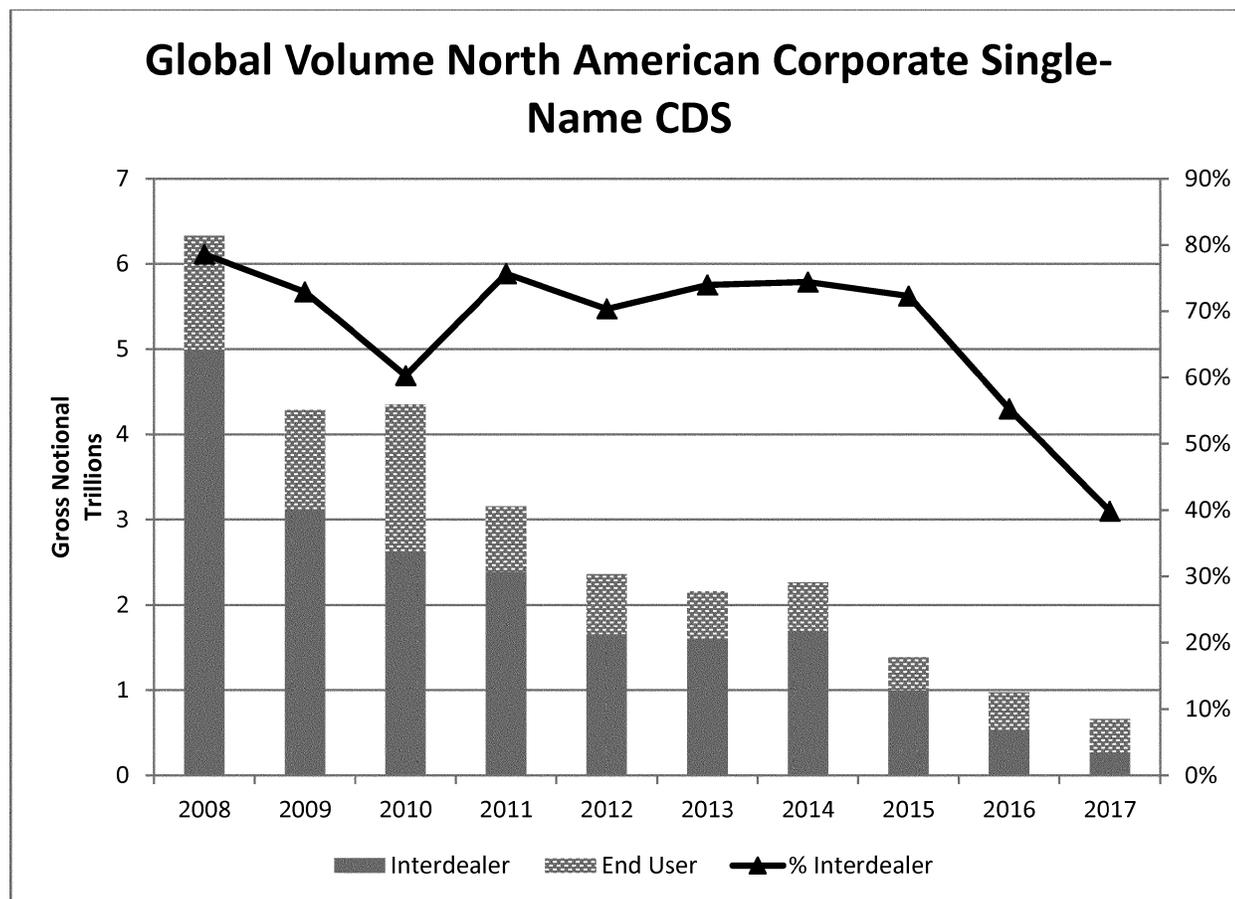
Figure 2 below describes the percentage of global, notional transaction volume in North American corporate single-name CDS reported to TIW between January 2008 and December 2017, separated by whether transactions are between two ISDA-recognized dealers (interdealer transactions) or whether a transaction has at least one non-dealer counterparty. Figure 2 also shows that the portion of the notional volume of North American corporate single-name CDS represented by interdealer transactions has remained fairly constant through 2015 before falling from approximately 72% in 2015 to approximately 40% in 2017. This fall corresponds to the availability of clearing to non-dealers. Interdealer transactions continue to represent a significant fraction of trading activity, even as notional volume has declined over the past ten years,<sup>843</sup> from more than \$6 trillion in 2008 to less than \$700 billion in 2017.<sup>844</sup>

counterparties, the Commission may infer that entities and financial groups may transact with at least as many counterparties as the largest of their accounts.

<sup>843</sup> The start of this decline predates the enactment of the Dodd-Frank Act and the proposal of rules thereunder, which is important to note for the purpose of understanding the economic baseline for this rulemaking.

<sup>844</sup> This estimate is lower than the gross notional amount of \$4.6 trillion noted above as it includes only the subset of single-name CDS referencing North American corporate documentation.

**Figure 2: Global, notional trading volume in North American corporate single-name CDS by calendar year and the fraction of volume that is interdealer.**



The high level of interdealer trading activity reflects the central position of a small number of dealers, each of which intermediates trades with many hundreds of counterparties. While the Commission is unable to quantify the current level of trading costs for single-name CDS, these dealers appear to enjoy market power as a result of their small number and the large proportion of order flow that they privately observe.

Against this backdrop of declining North American corporate single-name CDS activity, about half of the trading activity in North American corporate single-name CDS reflected in the set of data that the Commission analyzed was between counterparties domiciled in the United States and counterparties domiciled abroad, as shown in Figure 3 below. Using the self-reported registered office location of the TIW accounts as a proxy for domicile, the Commission estimates that only 12% of the global transaction volume by notional volume between 2008 and 2017 was between two U.S.-domiciled counterparties, compared to 49% entered into between one U.S.-domiciled counterparty and a

foreign-domiciled counterparty and 39% entered into between two foreign-domiciled counterparties.<sup>845</sup>

If the Commission instead considers the number of cross-border transactions from the perspective of the domicile of the corporate group (e.g., by classifying a foreign bank branch or foreign subsidiary of a U.S. entity as domiciled in the United States), the percentages shift significantly. Under this approach, the fraction of transactions entered into between two U.S.-domiciled counterparties increases to 34%, and to 51% for transactions entered into between a U.S.-domiciled counterparty and a foreign-domiciled counterparty. By contrast, the proportion of activity between two foreign-domiciled

<sup>845</sup> For purposes of this discussion, the Commission has assumed that the registered office location reflects the place of domicile for the fund or account, but this domicile does not necessarily correspond to the location of an entity's sales or trading desk. See *Security-Based Swap Transactions Connected With a Non-U.S. Person's Dealing Activity That Are Arranged, Negotiated, or Executed by Personnel Located in a U.S. Branch or Office of an Agent; Security-Based Swap Dealer De Minimis Exception*, 81 FR at 8607, n. 83.

counterparties drops from 39% to 15%. This change in respective shares based on different classifications suggests that the activity of foreign subsidiaries of U.S. firms and foreign branches of U.S. banks accounts for a higher percentage of security-based swap activity than U.S. subsidiaries of foreign firms and U.S. branches of foreign banks. It also demonstrates that financial groups based in the United States are involved in an overwhelming majority (approximately 85%) of all reported transactions in North American corporate single-name CDS.

Financial groups based in the United States are also involved in a majority of interdealer transactions in North American corporate single-name CDS. Of the 2017 transactions on North American corporate single-name CDS between two ISDA-recognized dealers and their branches or affiliates, 94% of transaction notional volume involved at least one account of an entity with a U.S. parent. The Commission notes, in addition, that a majority of North American corporate single-name CDS transactions occur in the interdealer

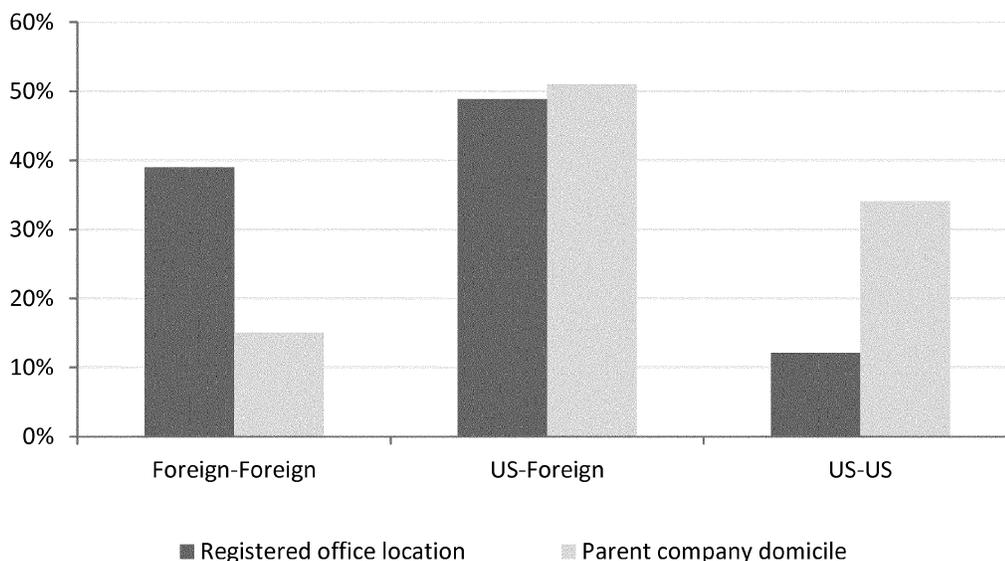
market or between dealers and foreign non-dealers, with the remaining portion of the market consisting of transactions between dealers and U.S.-person non-dealers. Specifically, 60% of North

American corporate single-name CDS transactions involved either two ISDA-recognized dealers or an ISDA-recognized dealer and a foreign non-dealer. Approximately 39% of such

transactions involved an ISDA-recognized dealer and a U.S.-person non-dealer.

**Figure 3: The fraction of notional volume in North American corporate single-name CDS between (1) two U.S.-domiciled accounts; (2) one U.S.-domiciled account and one non-U.S.-domiciled account; and (3) two non-U.S.-domiciled accounts, computed from January 2008 through December 2017.**

**Single Name CDS Transactions by Domicile  
(% of notional volume, 2008 - 2017)**



**c. Participation of Banks and Broker-Dealers**

A high degree of concentration is equally prevalent in derivatives activity within the U.S. banking system: According to the OCC, at the end of the fourth quarter of 2017, derivatives activity in the U.S. banking system continues to be dominated by a small

group of large financial institutions. Four large commercial banks represent 89.4% of the total banking industry notional amounts and 85.9% of industry net current credit exposure.<sup>846</sup> This concentration largely appears to reflect the fact that larger entities are well-capitalized and therefore possess competitive advantages in engaging in

dealing activities by providing potential counterparties with adequate assurances of financial performance.<sup>847</sup>

Other than OTC derivatives dealers, which are subject to significant limitations on their activities, broker-dealers historically have not participated in a significant way in security-based swap trading.

**TABLE 1—THE NUMBER AND PERCENTAGE OF ACCOUNT HOLDERS—BY TYPE—WHO PARTICIPATE IN THE SECURITY-BASED SWAP MARKET THROUGH A REGISTERED INVESTMENT ADVISER, AN UNREGISTERED INVESTMENT ADVISER, OR DIRECTLY AS A TRANSACTING AGENT, FROM NOVEMBER 2006 THROUGH DECEMBER 2017**

Account holders by type	Number	Represented by a registered investment adviser		Represented by an unregistered investment adviser		Participant is transacting agent <sup>848</sup>	
Private Funds .....	3,857	1,973	51%	1,859	48%	25	1%
DFA Special Entities .....	1,319	1,262	96%	37	3%	20	2%
Registered Investment Companies .....	1,159	1,082	93%	73	6%	4	0%
Banks (non-ISDA-recognized dealers) .....	349	20	6%	8	2%	321	92%

<sup>846</sup> See OCC, *Quarterly Report on Bank Trading and Derivatives Activities, Fourth Quarter 2017* (available at <https://www.occ.treas.gov/topics/capital-markets/financial-markets/derivatives/public-derivatives-quarterly-qtr4-2017.pdf>).

<sup>847</sup> See, e.g., Craig Pirrong, *Rocket Science, Default Risk and The Organization of Derivatives*

*Markets*, (Working Paper 17–18, 2006), available at <http://www.cba.uh.edu/spirrong/Derivorg1.pdf> (noting that counterparties seek to reduce risk of default by engaging in credit derivative transactions with well-capitalized firms). See also *Further Definitions of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major*

*Security-Based Swap Participant” and “Eligible Contract Participant,”* 77 FR at 30739–42.

<sup>848</sup> This column reflects the number of participants who are also trading for their own accounts.

TABLE 1—THE NUMBER AND PERCENTAGE OF ACCOUNT HOLDERS—BY TYPE—WHO PARTICIPATE IN THE SECURITY-BASED SWAP MARKET THROUGH A REGISTERED INVESTMENT ADVISER, AN UNREGISTERED INVESTMENT ADVISER, OR DIRECTLY AS A TRANSACTING AGENT, FROM NOVEMBER 2006 THROUGH DECEMBER 2017—Continued

Account holders by type							
Insurance Companies .....	301	196	65%	34	11%	71	24%
ISDA-Recognized Dealers ...	91	0	0%	0	0%	91	100%
Foreign Sovereigns .....	83	63	76%	3	4%	17	20%
Non-Financial Corporations ..	75	52	69%	4	5%	19	25%
Finance Companies .....	20	11	55%	0	0%	9	45%
Other/Unclassified .....	5,883	3,745	64%	1,887	32%	251	4%
All .....	13,137	8,404	64%	3,905	30%	828	6%

3. Existing Regulation of OTC Derivatives Market Participants and Broker-Dealers

As discussed above, the adopted rules and amendments will apply to various different entities that the Commission anticipates will register as SBSBs or MSBSPs, including stand-alone firms, banks, and registered broker-dealers. In addition, the adopted amendments will also apply to certain stand-alone broker-dealers that do not register as an SBSB or MSBSP but nonetheless still engage in security-based swap transactions. For all of these entities, the economic baseline includes the reports and records these firms currently generate in the ordinary course of their business and in anticipation of regulatory reporting requirements, such as Regulation SBSR’s requirement for SBSBs and MSBSPs to report each security-based swap transaction to a registered SDR<sup>849</sup> and to establish, maintain, and enforce written policies and procedures that are designed to ensure compliance with security-based swap transaction reporting obligations.<sup>850</sup> Because compliance with registration rules for SBSBs and MSBSPs is not yet required,<sup>851</sup> however, there are no entities of any type currently registered as SBSBs or MSBSPs and the Commission can only arrive at an estimate of the number and type of these registrants based on an analysis of the 2017 single-name CDS data.<sup>852</sup>

<sup>849</sup> See *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information*, 81 FR 53545. While the Commission recognizes that SBSBs and MSBSPs are not yet required to comply with Regulation SBSR, the Commission nevertheless believes that these firms have invested in reporting infrastructure in anticipation of future regulatory reporting requirements.

<sup>850</sup> See *id.*  
<sup>851</sup> See *Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants*, 80 FR 48964.

<sup>852</sup> See section V.B.2.a. of this release for the Commission’s estimates of the potential number of registrants based on an analysis of the 2017 single-name CDS data.

Below, the Commission summarizes, based on available information, the current recordkeeping, reporting, notification, and securities count practices of these various entities, including those practices that are required by regulation and those that have been independently adopted by the entities.

a. Stand-Alone SBSBs and MSBSPs

Certain firms that are neither banks nor broker-dealers that participate in the market for security-based swaps will register with the Commission as stand-alone SBSBs and MSBSPs. The Commission believes that firms engaged in the security-based swap market currently produce, as part of their ordinary business practices, financial reports such as a balance sheet and a quarterly and year-end income statement that are included in the financial reporting requirements the Commission is adopting in this document. Such firms may not, however, produce annual audited financial statements, as required under the adopted rules. The Commission also believes that firms engaged in the security-based swap business currently maintain records documenting the firms’ derivatives positions to facilitate, among other things, effective risk management. The Commission expects that these firms maintain these records for the duration for which they hold a given position and for some period of time thereafter. Moreover, the Commission believes that firms that eventually register with the Commission as SBSBs or as MSBSPs will likely create transaction records to submit to registered SDRs as a result of their anticipated reporting obligations under Regulation SBSR and will likely have order management systems in place to record information that is required to be submitted under Regulation SBSR.

Given that the Commission has not previously regulated these firms, the Commission does not have information

regarding the recordkeeping and reporting costs these nonbank and non-broker-dealer firms presently incur in the ordinary course of business. As noted above, the Commission believes that these firms, however, maintain some records documenting their business activities as a matter of routine business practice and maintain some transaction records in anticipation of their reporting obligations under Regulation SBSR. Any new costs imposed by the new rules should be incremental to the costs currently being incurred by these entities.

b. Bank SBSBs and MSBSPs

In addition to stand-alone SBSBs and MSBSPs, the Commission expects certain banks to register as SBSBs and MSBSPs. The economic baseline for banks that participate in the security-based swap market includes the existing recordkeeping, record retention, reporting, and notification requirements that are imposed on banks by their relevant prudential regulator as well as the reports and records these firms currently generate in the ordinary course of their business.

Prudential regulators already subject banks to recordkeeping and retention requirements.<sup>853</sup> In addition, banks must file financial statements and supporting schedules known as “call reports” with their prudential regulator.<sup>854</sup> The Commission believes that the most common form of call report for a bank that will register as an SBSB or MSBSP is FFIEC Form 031.<sup>855</sup> Like the FOCUS Report, FFIEC Form 031 elicits financial and operational information about a bank, which is entered into uniquely numbered line

<sup>853</sup> See, e.g., 12 CFR 12.3 (Department of Treasury); 12 CFR 219.21 through 219.24 (FDIC); 12 CFR 344.4 (FDIC).

<sup>854</sup> See 12 U.S.C. 324; 12 U.S.C. 1817; 12 U.S.C. 161; 12 U.S.C. 1464.

<sup>855</sup> FFIEC Form 031 is filed by banks with domestic and foreign offices, which the Commission believes will characterize most bank SBSBs.

items. A bank must report details about its assets, liabilities, and equity capital on Schedule RC to FFIEC Form 031.<sup>856</sup> A bank must also report details about its regulatory capital on Schedule RC–R to FFIEC Form 031.<sup>857</sup> The information elicited on Schedule RC–R is designed to facilitate an analysis of the bank’s regulatory capital. A bank must report details about its income (loss) and expenses on Schedule RI to FFIEC Form 031.<sup>858</sup>

The Commission has estimated the cost of the existing recordkeeping, record retention, reporting, and notification requirements that are applicable to nationally chartered banks under existing regulations issued by the OCC. The Commission arrived at the estimate by examining PRA collections to which national banks are subject and selecting those that are analogous to the recordkeeping, record retention, reporting, and notification rules the Commission is adopting herein.<sup>859</sup> The Commission then estimated that

reporting burdens generate approximately \$79/hour of cost for national banks and that recordkeeping burdens generate approximately \$30/hour of cost for national banks.<sup>860</sup> The Commission estimates that national banks currently incur annual costs of \$55,982,398 to comply with the OCC’s financial reporting, notification and recordkeeping rules.<sup>861</sup> The OCC’s rules generally relate to banking activities, not securities and security-based swap activities. The Commission thus recognizes that some of the costs reflected in the OCC’s rules may not be analogous to costs that may be imposed by the Commission’s new rules. Nonetheless, these cost estimates may help provide context and cost ranges with respect to the nationally chartered banks impacted by the Commission’s new rules.

c. Broker-Dealers, SBSB Broker-Dealers, and MSBSP Broker-Dealers

As noted above, the Commission expects some broker-dealers to register as broker-dealer SBSBs or broker-dealer MSBSPs, while other broker-dealers engaging in security-based swap transactions may be subject to regulation as stand-alone broker dealers. A broker-dealer that engages in security-based swap activities is currently subject to existing regulatory requirements, including capital, margin, segregation, recordkeeping, reporting, notification, and securities count requirements.<sup>862</sup> Specifically, the existing broker-dealer capital requirements make it relatively costly for broker-dealers to conduct security-based swap activities in broker-dealers.<sup>863</sup> Instead of occurring at broker-dealers, security-based swap dealing activity is currently mostly concentrated in entities that are affiliated with broker-dealers, but not in broker-dealers themselves.<sup>864</sup>

Reporting/recordkeeping	Annual hourly industry burden	Compensation rate (per hour)	Estimated annual cost
Interagency Call Report (FFIEC 031 and 041) .....	406,141	\$79	\$32,085,139
Foreign Branch Call Report (FFIEC 041) .....	4,651	79	367,429
Country Exposure Report (FFIEC 009) .....	8,384	79	662,336
Exchange Act Disclosures Reported to the OCC .....	523	79	41,317
Recordkeeping Requirements for Securities Transactions .....	6,944	30	208,320
Disclosure of Financial and Other Information .....	669	79	52,851
Interagency Guidance on Asset Securitization Activities .....	778	30	23,340
Advanced Capital Adequacy Framework Reporting .....	137,500	79	10,862,500
Liquidity Risk Report .....	43,992	79	3,475,368
General Reporting and Recordkeeping by Savings Associations .....	61,362	30	1,840,860
Notice or Application for Capital Distributions .....	546	79	43,134
Annual Stress Test Rule and Stress Test Reporting Templates .....	73,876	79	5,836,204
Recordkeeping and Disclosure Provisions Associated with Stress Testing Guidance .....	16,120	30	483,600
<b>Total Costs .....</b>			<b>55,982,398</b>

As of December 31, 2018, there were 3,764 broker-dealers registered with the Commission. The broker-dealers

registered with the Commission vary significantly in terms of their size, business activities, and the complexity

of their operations.<sup>865</sup> The Commission estimates that as of December 31, 2018, ten broker-dealers dominated the

<sup>856</sup> See FFIEC Form 031, Schedule RC, *Balance Sheet*, Lines 1–29. Schedule RC also has a Memoranda section that which elicits information about bank’s external auditors and fiscal year end date. See FFIEC Form 031, Schedule RC, *Balance Sheet*, Memoranda, Lines 1–2.

<sup>857</sup> See FFIEC Form 031, Schedule RC–R, *Regulatory Capital*, Lines 1–62. Schedule RC–R also has a “Memoranda” section that elicits detail about derivatives. See FFIEC Form 031, Schedule RC–R, *Regulatory Capital*, Memoranda, Lines 1–2.

<sup>858</sup> See FFIEC Form 031, Schedule RI, *Income Statement*, Lines 1–14. Schedule RI also has a “Memoranda” section that elicits further detail about income (loss). See FFIEC Form 031, Schedule RI, *Income Statement*, Memoranda, Lines 1–14.

<sup>859</sup> PRA collections for OCC-regulated national banks, together with PRA collections for other Federal regulatory agency rules, are available at [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Given that different banks comply with different prudential

regulations, the Commission recognizes that the estimate based on OCC regulations represents one estimate of the costs imposed on banks by currently applicable recordkeeping, record retention, reporting and notification requirements.

<sup>860</sup> This assumption is derived from OCC staff’s description of the hourly costs it estimates in connection with Paperwork Reduction Act burdens. For the purposes of this Economic Analysis, the Commission assumes that reporting burdens will be performed 5% by clerical staff at \$20 an hour, 10% by managerial or technical staff at \$40 an hour, 55% by senior management at \$80 an hour, and 30% by legal counsel at \$100 an hour, which, in the aggregate, equals \$79 an hour. The Commission assumes that recordkeeping burdens will be performed 70% by clerical staff at \$20 an hour, 20% by managerial or technical staff at \$40 an hour, and 10% by senior management at \$80 an hour, which in the aggregate, equals \$30 an hour.

<sup>861</sup> The Commission derived the estimates of the hourly burden associated with these OCC rules from the number of hours approved for information collection purposes by the OMB. See the chart below for a representation of the calculation methodology:

<sup>862</sup> OTC derivatives dealers are a special class of broker-dealers that are exempt from certain broker-dealer requirements, including membership in an SRO, regular broker-dealer margin rules, and application of SIPA. OTC derivatives dealers are subject to special requirements, including limitations on the scope of their securities activities, specific internal risk management control systems, recordkeeping obligations, and reporting responsibilities. They are also subject to alternative net capital treatment. See 17 CFR 240.15a–1.

<sup>863</sup> See *Capital, Margin, and Segregation Proposing Release*, 77 FR at 70217–257.

<sup>864</sup> See *ISDA Margin Survey 2015*.

<sup>865</sup> See *Broker-Dealer Reports*, 78 FR at 51967.

broker-dealer industry, holding over half of all the capital held by broker-dealers.<sup>866</sup>

Broker-dealers registered with the Commission are currently subject to recordkeeping, reporting, notification, and securities count requirements. The baseline for the economic analysis for registered broker-dealers includes Rules 17a-3, 17a-4, 17a-5, 17a-11, and 17a-12 as they existed prior to these amendments as well as any reports and records these firms currently generate in the ordinary course of their business. Below, the Commission discusses the obligations these existing rules currently place on registered broker-dealers.

#### i. Existing Rules 17a-3 and 17a-4

The Commission is adopting amendments to Rules 17a-3 and 17a-4 to establish additional recordkeeping requirements for broker-dealer SBSBs, broker-dealer MSBSPs,<sup>867</sup> and broker-dealers that conduct security-based swap activities but are not registered as SBSBs.<sup>868</sup> Under existing Rule 17a-3, broker-dealers must make and keep certain books and records. The Commission estimates that Rule 17a-3 currently imposes \$218,361,917 of annual costs on broker-dealers.<sup>869</sup> Rule 17a-4 currently requires that firms preserve the records made and kept under Rule 17a-3, as well as additional records, including written agreements, communications relating to its business as such, and records reflecting inputs into the FOCUS Report. The rule also establishes retention periods for all records required under Rule 17a-3 and required to be preserved under Rule 17a-4, along with storage media requirements for those firms that preserve records electronically. The Commission estimates that current Rule 17a-4 imposes \$86,220,558 of annual costs on broker-dealers.<sup>870</sup>

<sup>866</sup> Using data from FOCUS Reports filed by broker-dealers in 2018, total aggregate capital summed across 3,764 broker-dealer was \$391,515 million of which the ten largest broker-dealers totaled \$206,736 million, or 52.8%. This is consistent with estimates previous reported by the Commission. See *Broker-Dealer Reports*, 78 FR at 51968.

<sup>867</sup> See section II.A.2. of this release.

<sup>868</sup> The amendments to the recordkeeping and reporting rules will apply to all broker-dealers that conduct security-based swap activities. The *de minimis* exception applies solely to registration as an SBSB. See 17 CFR 240.3a71-2(a)(1).

<sup>869</sup> (2,763,612 hours × \$63 per hour national hourly rate for a compliance clerk) + \$44,254,361 in external costs = \$218,361,917. See Commission, *Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Rule 17a-3* (Mar 9, 2017), available at <https://www.reginfo.gov/public/do/DownloadDocument?objectID=72125401>.

<sup>870</sup> (1,042,866 hours × \$63 per hour national hourly rate for a compliance clerk) + \$20,520,000

#### ii. Existing Rule 17a-5

The existing broker-dealer financial reporting requirements appear in Rule 17a-5. The baseline for this economic analysis with respect to the amendments to Rule 17a-5 is the broker-dealer financial reporting requirements as they exist prior to the amendments being adopted in this document. The Commission estimates that current Rule 17a-5 imposes \$140,225,396 of annual costs on broker-dealers.<sup>871</sup>

Rule 17a-5 has two main elements: (1) Broker-dealers must file periodic unaudited reports containing information about their financial and operational condition on a FOCUS Report; and (2) broker-dealers must annually file financial statements and certain reports and a report covering the financial statements and reports prepared by an independent public accountant registered with the PCAOB in accordance with PCAOB standards.<sup>872</sup> In addition to these two main elements, a few other aspects of Rule 17a-5 are described below.

##### a. Periodic Reports

Broker-dealers periodically report information about their financial and operational condition on FOCUS Report Part II, Part IIA, Part IIB, or Part II CSE. Each version of the report is designed for a particular type of broker-dealer and the information to be reported is tailored to the type of broker-dealer.<sup>873</sup>

##### b. Annual Audited Reports and Related Notifications

Under paragraphs (d) and (g) of Rule 17a-5, a broker-dealer is required to, among other things, annually file reports with the Commission that are audited by a PCAOB-registered independent public accountant, disclose certain financial information to

in external costs = \$86,220,058. See Commission, *Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Rule 17a-4* (Oct. 19, 2016), available at <https://www.reginfo.gov/public/do/DownloadDocument?objectID=68823501>.

<sup>871</sup> (353,509 hours × \$269 per hour national hourly rate for a compliance manager) + \$45,131,475 in external costs = \$140,225,396. See *Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Rule 17a-5* (May. 26, 2017), available at <https://www.reginfo.gov/public/do/DownloadDocument?objectID=74209001>.

<sup>872</sup> See *id.* These requirements are described in more detail below.

<sup>873</sup> A broker-dealer that holds customer funds or securities completes and files FOCUS Report Part II. A broker-dealer that does not hold customer funds or securities completes and files FOCUS Report Part IIA. An OTC derivatives dealer completes and files FOCUS Report Part IIB. An ANC broker-dealer completes and files FOCUS Report Part II CSE.

customers, notify the Commission of a change of accountant, and notify the Commission of a change in its fiscal year.<sup>874</sup> Paragraph (h) of Rule 17a-5 also requires the independent public accountant to notify the broker-dealer if the accountant discovers an instance of non-compliance with certain broker-dealer rules or determines that any material weakness exists.

##### c. Customer Statements

Paragraph (c) of Rule 17a-5 requires, among other things, that certain broker-dealers annually send their customers audited and unaudited statements regarding their financial condition. Under paragraph (c)(5), a broker-dealer is exempt from sending the statement of financial condition to customers if the broker-dealer, among other things: (1) Sends its customers semi-annual statements relating to the firm's net capital and, if applicable, the identification of any material weaknesses; and (2) makes the statement of financial condition described above available on the broker-dealer's website home page and maintains a toll-free number that customers can call to request a copy of the statement.

##### d. Additional ANC Broker-Dealer Reports

Paragraph (a)(6) of Rule 17a-5 requires ANC broker-dealers to periodically file certain reports with the Commission. The reports contain information related to the ANC broker-dealers' use of internal models to calculate market and credit risk charges when computing net capital.

#### iii. Existing Rule 17a-11

The existing broker-dealer notice requirements are contained in Rule 17a-11. The baseline for this economic analysis with respect to the amendments to Rule 17a-11 is the broker-dealer notification requirements as they exist today. Rule 17a-11 specifies the circumstances under which a broker-dealer must notify the Commission and other securities regulators about its financial or operational condition, as well as the form that the notice must take. The Commission estimates that current Rule 17a-11 imposes \$90,115 of annual costs on broker-dealers in the aggregate.<sup>875</sup>

<sup>874</sup> Paragraph (n)(2) of Rule 17a-5 requires that the notice contain a detailed explanation for the reasons for the change and requires that changes in the filing period for the annual reports be approved in writing by the broker-dealer's DEA.

<sup>875</sup> 335 hours × \$269 per hour national hourly rate for a compliance manager = \$90,115. See *Supporting Statement for the Paperwork Reduction*

#### a. Failure To Meet Minimum Capital Requirements

Paragraph (b) of Rule 17a–11 requires a broker-dealer to notify the Commission if the firm's net capital or, if applicable, tentative net capital declines below the minimum amount required under Rule 15c3–1.

#### b. Early Warning of Potential Capital or Model Problem

Paragraph (b)(2) of Rule 17a–11 requires an OTC derivatives dealer or an ANC broker-dealer to notify the Commission when its tentative net capital falls below the minimum required for these types of broker-dealers. Paragraph (c) of Rule 17a–11 specifies four events that, if they occur, trigger a requirement that a broker-dealer send notice promptly (but within twenty-four hours) to the Commission. These notices are designed to provide the Commission with an “early warning” that the broker-dealer may experience financial difficulty.<sup>876</sup> The events triggering the early warning notification requirements are:

- The computation of a broker-dealer subject to the aggregate indebtedness standard of Rule 15c3–1 shows that the firm's aggregate indebtedness is in excess of 1,200% of its net capital;<sup>877</sup>
- The computation of a broker-dealer which has elected to use the alternative standard of calculating net capital under Rule 15c3–1 shows that the firm's net capital is less than 5% of aggregate debit items computed in accordance with Exhibit A of Rule 15c3–3;<sup>878</sup>
- A broker-dealer's net capital computation shows that its total net capital is less than 120% of its required minimum level of net capital or of its required minimum level of tentative net

capital, in the case of an OTC derivatives dealer;<sup>879</sup>

- With respect to an OTC derivatives dealer, the occurrence of the fourth and each subsequent backtesting exception under 17 CFR 240.15c3–1f (appendix F of Rule 15c3–1) during any 250 business days measurement period.<sup>880</sup>

#### c. Failure To Make and Keep Current Books and Records

Paragraph (d) of Rule 17a–11 requires a broker-dealer that fails to make and keep current the books and records required under Rule 17a–3 to notify the Commission of this fact on the same day that the failure arises. The notice must specify the books and records which have not been made or which are not current. A broker-dealer is required to report to the Commission within 48 hours of the original notice what the broker or dealer has done or is doing to correct the situation.

#### d. Material Weakness

Paragraph (e) of Rule 17a–11 requires a broker-dealer to provide notification about a material weakness as that term is defined in Rule 17a–5. Specifically, paragraph (e) provides that, whenever a broker-dealer discovers or is notified by an independent public accountant of a material weakness as defined in Rule 17a–5, the broker-dealer must: (1) Give notice to the Commission within twenty-four hours of the discovery or notification of the material weakness; and (2) transmit a report within forty-eight hours of the notice indicating what the broker-dealer has done or is doing to correct the situation.<sup>881</sup>

#### e. Failure To Make a Required Reserve Deposit

An additional broker-dealer notification is required under Exchange Act Rule 15c3–3, rather than Rule 17a–11. Specifically, under paragraph (i) of Rule 15c3–3, a broker-dealer is required to notify the Commission and its DEA if it fails to make a required deposit into its customer reserve account under Rule 15c3–3.

#### iv. Existing Rule 17a–12

The Commission is adopting amendments to Rule 17a–12 to require OTC derivatives dealers to file revised FOCUS Report Part II instead of FOCUS Report Part IIB as required by current

Rule 17a–12.<sup>882</sup> The baseline for this economic analysis with respect to amendments to Rule 17a–12 is current Rule 17a–12. The Commission estimates that current Rule 17a–12 imposes an annual burden of \$568,320 in the aggregate.<sup>883</sup>

#### 4. Regulation SBSR

Regulation SBSR implements requirements for regulatory reporting and public dissemination of security-based swap transactions set forth in Title VII of the Dodd-Frank Act. Regulation SBSR assigns the reporting side<sup>884</sup> the obligation of reporting primary and secondary trade information about the transaction to a registered SDR or to the Commission, in the event that there is no registered SDR to accept the report.<sup>885</sup>

Based on historical data the Commission estimated that 300 entities would be required to report transaction information under Regulation SBSR,<sup>886</sup> including all 50 potential registered SBSDs and all 5 potential registered MSBSPs. As a result of the Regulation SBSR reporting hierarchy, the Commission expected all these SBSDs and MSBSPs to incur reporting obligations because at least one of these 55 potential registrants appeared on either side of the majority of security-based swap transactions.<sup>887</sup>

The Commission believes that SBSDs and MSBSPs will have incurred three categories of costs to comply with Regulation SBSR. First, they would likely have had to establish and maintain an internal order management system (“OMS”) capable of capturing relevant security-based swap transaction information in order for it to be reported. Second, they would have had to implement reporting mechanisms.

<sup>882</sup> See section IV.A.5. of this release.

<sup>883</sup> 1,080 hours × \$269 per hour national hourly rate for a compliance manager = \$290,520 aggregate compliance costs per year and \$277,800 aggregate reporting costs per year. See *Supporting Statement for the Paperwork Reduction Act Information Collection Submission for Rule 17a–12/Form X–17A–5 Part IIB* (Feb. 5, 2019), available at <https://www.reginfo.gov/public/do/DownloadDocument?objectID=88964601>.

<sup>884</sup> Rule 901(a) of Regulation SBSR establishes a reporting hierarchy that specifies the side that has the duty to report a security-based swap to a registered SDR. This entity refers to the “reporting side.” See *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information*, 80 FR at 14566–67.

<sup>885</sup> In addition, any security-based swap that is accepted for clearing by a registered clearing agency having its principal place of business in the United States must be reported to a registered SDR, regardless of the registration status or U.S. person status of the counterparties and regardless of where the transaction is executed. See *id.* at 14568.

<sup>886</sup> See *id.* at 14674.

<sup>887</sup> See *id.*

*Act Information Collection Submission for Rule 17a–11* (Jul. 28, 2017), available at <https://www.reginfo.gov/public/do/DownloadDocument?objectID=75553601>.

<sup>876</sup> See *Early Warning Rule*, Exchange Act Release No. 32586 (July 7, 1993), 58 FR 37655 (July 13, 1993).

<sup>877</sup> See paragraph (c)(1) of Rule 17a–11. For certain types of broker-dealers, the minimum net capital requirement is the greater of a fixed-dollar amount specified in the rule and an amount determined by applying a 15-to-1 aggregate indebtedness to net capital ratio. See paragraph (a)(1)(i) of Rule 15c3–1. Consequently, requiring notification when a broker-dealer has a 12-to-1 aggregate indebtedness to net capital ratio provides notice before the firm reaches the minimum 15-to-1 requirement.

<sup>878</sup> See paragraph (c)(2) of Rule 17a–11. For certain types of broker-dealers, the minimum net capital requirement is the greater of a fixed-dollar amount specified in the rule and an amount determined by applying a 2% of aggregate debit items ratio. See paragraph (a)(1)(i) of Rule 15c3–1. Consequently, requiring notification when a broker-dealer has net capital equal to 5% of aggregate debit items provides notice before the firm reaches the 2% minimum requirement.

<sup>879</sup> See paragraph (c)(2) of Rule 17a–11.

<sup>880</sup> See paragraph (c)(4) of Rule 17a–11.

<sup>881</sup> See also *Broker-Dealer Reports*, 78 FR at 51939 (discussing amendment of material weakness standard in Rule 17a–5). As discussed above in section II.B.3.a. of this release, the Commission is using the concept of material weakness in Rule 18a–7.

Third, given that manual processes would likely have been incapable of capturing and reporting the numerous data elements relating to security-based swaps required by Regulation SBSR, SBSDs and MSBSPs would have had to establish an appropriate compliance program and support for operating any OMS and reporting mechanism capable of reporting data within the timeframe set forth by Regulation SBSR.<sup>888</sup>

To the extent that the same or similar information is needed to comply with the recordkeeping and reporting rules being adopted in this document, market participants can use the infrastructure already in place in anticipation of Regulation SBSR to comply with their recordkeeping and reporting obligations under the current rulemaking. Consistent with prior releases, the Commission believes that once a respondent's reporting infrastructure and compliance systems are in place the marginal burden of reporting transactions would be *de minimis* when compared to the costs of putting those systems in place and maintaining them over time.<sup>889</sup> Thus the changes implemented in anticipation of compliance with Regulation SBSR are likely to substantially reduce certain compliance related burdens emanating from the recordkeeping, reporting, notification, and securities count rules and rule amendments being adopted in this document. As a result, the Commission's estimates of these burdens<sup>890</sup> should be viewed as an upper bound of the potential costs of these rules and rule amendments.

##### 5. Global Regulatory Efforts

The global security-based swap market is highly interconnected and highly concentrated.<sup>891</sup> This interconnectedness allows U.S. market participants to use security-based swaps as a tool for sharing financial and commercial risks and to access liquidity across jurisdictional boundaries.<sup>892</sup>

However, these opportunities for risk sharing also represent channels for risk transmission to the U.S. financial system: Because dealers facilitate the majority of security-based swap transactions, with bilateral relationships that extend to potentially thousands of counterparties, deficiencies in SBSD records and reports may have outcomes that affect a large number of counterparties and have potentially significant cross-border implications.<sup>893</sup>

In 2009, the G20 Leaders—whose membership includes the United States, 18 other countries, and the European Union (“EU”)—addressed global improvements in the OTC derivatives markets. They expressed their view on a variety of issues relating to OTC derivatives contracts. In subsequent summits, the G20 Leaders have returned to OTC derivatives regulatory reform and encouraged international consultation in developing standards for these markets.<sup>894</sup>

Many SBSDs will likely already be subject to foreign regulation of their security-based swap activities that are similar to regulations that may apply to them pursuant to Title VII, even if the relevant foreign jurisdictions do not classify certain market participants as “dealers” for regulatory purposes. Some of these regulations may duplicate, and in some cases conflict with, certain elements of the Title VII regulatory framework including the recordkeeping and reporting rules being adopted in this document.

##### C. Analysis of the Adopted Program and Alternatives

In determining appropriate recordkeeping, reporting, notification, and securities count requirements, the Commission assessed and considered a number of different costs and benefits, and the determinations it has made may have a variety of economic consequences for the relevant firms, markets, and the financial system as a whole. As an initial matter, the recordkeeping, reporting, notification, and securities count rules and rule amendments being adopted in this document represent the manner in which SBSDs and MSBSPs will document, report, and retain evidence of their compliance with, among other things, the Commission's capital, margin, and segregation rules. The

Commission believes that these rules, by their nature, will have a more limited economic impact as compared to the Commission's capital, margin, and segregation rules.

With respect to the likely benefits of the adopted rules and amendments, the recordkeeping, reporting, notification, and securities count requirements are broadly intended to facilitate effective oversight of SBSD and MSBSPs. Requiring registered firms to comply with recordkeeping and reporting rules should help ensure more effective regulatory oversight. The new rules and rule amendments should further help the Commission determine whether an SBSD or MSBSP is operating in compliance with the Exchange Act and the rules thereunder.

The Commission further believes that the required annual audit of nonbank SBSDs' and nonbank MSBSPs' financial statements and the public availability of firms' Statement of Financial Condition will provide customers and counterparties access to financial information that will permit them to better assess the financial condition of firms. While it is difficult to quantify the extent to which lack of information about the financial conditions of other market participants reduces willingness to participate in the security-based swap market, the Commission staff's experience is that market participants' willingness to engage in activities increases when such participants are better able to understand the financial condition of other market participants and counterparties.

The Commission also recognizes that there will be costs associated with the new rules and rule amendments. These costs include the costs of complying with the new rules and rule amendments, for example one-time and ongoing financial reporting costs, and costs associated with ongoing record maintenance. To the extent that costs associated with the new rules and amendments arise from complying with the new requirements, these costs are discussed below in section V.C.2. of this release.

The Commission believes that the new rules and rule amendments will require improvements in technology to meet minimum standards for recordkeeping and reporting. SBSDs and MSBSPs that do not have the technology to store and maintain the information required by the new rules and rule amendments will likely need to invest in technology. While investments in new technology will entail costs for SBSDs and MSBSPs, these technological investments may generate benefits for financial markets at large by helping

<sup>888</sup> See *id.* at 14701.

<sup>889</sup> See *id.* at 14702.

<sup>890</sup> See section IV.E. of this release.

<sup>891</sup> See *Security-Based Swap Transactions Connected With a Non-U.S. Person's Dealing Activity That Are Arranged, Negotiated, or Executed by Personnel Located in a U.S. Branch or Office or in a U.S. Branch or Office of an Agent; Security-Based Swap Dealer De Minimis Exception*, 81 FR 8598. See also Application of “Security-Based Swap Dealer” and “Major Security-Based Swap Participant” Definitions to Cross-Border Security-Based Swap Activities, 79 FR at 47283.

<sup>892</sup> See *Security-Based Swap Transactions Connected With a Non-U.S. Person's Dealing Activity That Are Arranged, Negotiated, or Executed by Personnel Located in a U.S. Branch or Office or in a U.S. Branch or Office of an Agent; Security-Based Swap Dealer De Minimis Exception*, 81 FR 8598. See also Application of “Security-

*Based Swap Dealer” and “Major Security-Based Swap Participant” Definitions to Cross-Border Security-Based Swap Activities*, 79 FR at 47283.

<sup>893</sup> See *id.*

<sup>894</sup> See, e.g., G20 Leaders' Final Declaration para. 24 (Nov. 2011), available at [https://g20.org/wp-content/uploads/2014/12/Declaration\\_eng\\_Cannes.pdf](https://g20.org/wp-content/uploads/2014/12/Declaration_eng_Cannes.pdf).

regulators to more effectively track trading and risk exposure in security-based swaps. Moreover, to the extent that improvements in technology required by the rule and rule amendments also enable SBSBs and MSBSPs to more effectively track their trading and risk exposure in security-based swaps, the cost of these improvements for these entities may be partially offset.

In addition, the rules being adopted in this document, in conjunction with other requirements established under the Dodd-Frank Act, could have a substantial impact on international commerce and the relative competitive position of intermediaries operating in multiple jurisdictions. For example, intermediaries operating in other jurisdictions could be advantaged relative to U.S. competitors if corresponding requirements are not established in other jurisdictions or if the Commission's rules are substantially more stringent and costly than corresponding requirements in other jurisdictions. This could affect the ability of intermediaries and other market participants based in the U.S. to participate in non-U.S. markets and the propensity of non-U.S.-based intermediaries and other market participants to participate in U.S. markets or perform market-facing activities using personnel located in the United States. Accordingly, the reporting, recordkeeping, notification, and security count requirements for security-based swaps being adopted in this document could entail substantial differences in the costs of compliance between the U.S. and foreign jurisdictions and could therefore have international implications in terms of the extent of market participation in U.S. versus non-U.S. jurisdictions.<sup>895</sup>

In certain instances it is difficult to quantify the potential benefits and costs of the new rules and rule amendments. For example, firms that choose to register in some capacity as an SBSB or MSBSP may not currently be subject to Commission, CFTC, or prudential regulation. The Commission does not have comprehensive information about such firms' current recordkeeping, reporting, notification, and securities count practices with respect to their security-based swap activities and thus it is difficult to reliably gauge the economic effect of the new rules and rules amendments on these firms. With regard to entities that are currently

regulated by the Commission and that are likely to be affected by the rules and rule amendments being adopted in this document, the Commission staff's experience with broker-dealers under the existing recordkeeping, reporting, notification, and securities count rules gives it a better understanding of the compliance-related costs (such as those related to retaining attorneys, accountants, and other professionals), and in such cases the Commission has prepared below a summary of its estimate of these costs.<sup>896</sup>

The benefits and costs of each adopted rule and amendment, as well as the reasonable alternatives, are discussed in further detail below.

#### 1. Benefits of Recordkeeping, Reporting, Notification, and Securities Count Requirements

##### a. Requirements To Make and Keep Records

##### i. Broker-Dealer SBSBs, Broker-Dealer MSBSPs, and Stand-Alone Broker-Dealers (Amendments to Rule 17a-3)

The Commission is amending existing Rule 17a-3 to account for security-based swap activities of broker-dealers, including broker-dealer SBSBs and MSBSPs.<sup>897</sup> The Commission believes that the amendments to Rule 17a-3 will generate valuable information that will assist the Commission to improve the regulatory oversight and documentation of the security-based swap activities of stand-alone broker-dealers, broker-dealer SBSBs and MSBSPs. For example, requiring these firms to record the UIC of the counterparties in their security-based swap transactions will assist the Commission in accurately determining which parties are involved in the specific security-based swap transactions and will thereby improve the Commission's analysis of the firms' credit and counterparty risk exposures as well as assist in the accurate determination of the firms' aggregate financial exposure to the related parties.

As noted above in section II.A.2. of this release, in practice, the Commission's adoption of a requirement to use UICs for the purposes of Rules 17a-3 and 18a-5 means that until such time as the Commission recognizes any other IRSS, registrants will be required to use LEIs as requested by commenters.<sup>898</sup> As the Commission

noted in the Regulation SBSR adopting release, requiring the use of UICs will provide a streamlined way of reporting, disseminating, and interpreting security-based swap information.<sup>899</sup> The Commission believes Rules 17a-3 and 18a-5 will require few entities that are not already required to obtain UICs under Regulation SBSR to obtain UICs.<sup>900</sup>

The records generated as a result of amendments to Rule 17a-3 will also constitute an important means of determining compliance of market participants with securities laws such as the capital, margin, and segregation rules applicable to SBSBs and MSBSPs. The amendments to Rule 17a-3 will therefore facilitate more effective oversight and surveillance of the participants in and the market for security-based swaps.

##### ii. Stand-Alone SBSBs, Stand-Alone MSBSPs, Bank SBSBs, and Bank MSBSPs (New Rule 18a-5)

The Commission is adopting new Rule 18a-5—which is modeled on Rule 17a-3, as amended—to require stand-alone SBSBs, stand-alone MSBSPs, bank SBSBs, and bank MSBSPs to make and keep current certain records.<sup>901</sup> As with Rule 17a-3, under Rule 18a-5, firms are required to document specific attributes of their security-based swap transactions (e.g., the contract price of the security-based swap; the type of security-based swap; the reference security, index or obligor etc.). However, not all of the provisions of Rule 17a-3 are being included as part of Rule 18a-5 because some of Rule 17a-3's provisions relate to activities that are not expected or permitted of stand-alone SBSBs and MSBSPs not dually registered as a broker-dealer. Similarly, and as described above, the new requirements that apply to bank SBSBs and MSBSPs under new Rule 18a-5 are more limited than the new requirements that apply to stand-alone SBSBs and MSBSPs under the same rule because the Commission's authority under Section 15F(f)(1)(B)(i) of the Exchange Act is limited to activities related to their business as an SBSB or MSBSP and because banks are already subject to the existing recordkeeping requirements from prudential regulators who are responsible for capital, margin, and

adopted in this document do not preclude the use of UICs issued by any other organization that is recognized as an IRSS in the future.

<sup>899</sup> Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, 80 FR 14563.

<sup>900</sup> See section V.B.4. of this release.

<sup>901</sup> See section II.A.2.a. of this release (describing Rule 18a-5, as adopted).

<sup>896</sup> See section V.C.2. of this release.

<sup>897</sup> See, e.g., paragraph (a)(1) of Rule 17a-3, as amended (addition of information that must be included in security-based swap purchase and sale blotters). See also section II.A.2. of this release for a discussion of the specific requirements in the amendments.

<sup>898</sup> While the Commission to date has only recognized the GLEIS as an IRSS, the rules being

<sup>895</sup> See *Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to Registration of Security-Based Dealers and Major Security-Based Swap Participants*, 78 FR at 31034.

other prudential requirements applicable to bank SBSBs and MSBSBs.

The Commission believes that new Rule 18a-5 will provide for improved regulatory oversight of the security-based swap activities of stand-alone SBSBs, stand-alone MSBSBs, bank SBSBs, and bank MSBSBs. As with the records generated by broker-dealer SBSBs and MSBSBs under the amendments to Rule 17a-3, records generated as a result of new Rule 18a-5 will also constitute an important means of determining compliance of non-broker-dealer SBSBs and MSBSBs with securities laws such as the capital, margin, and segregation rules applicable to SBSBs and MSBSBs and will facilitate the Commission's regulation of the security-based swap market.<sup>902</sup>

#### b. Requirements To Preserve Records

##### i. Broker-Dealer SBSBs, Broker-Dealer MSBSBs, and Stand-Alone Broker-Dealers (Amendments to Rule 17a-4)

The Commission is adopting amendments to existing Rule 17a-4—which contains requirements for broker-dealers subject to Rule 17a-3 to preserve certain types of records required to be made and kept current under Rule 17a-3 and prescribes the duration for which and the manner in which these records must be preserved—to account for the security-based swap activities of broker-dealers, including broker-dealer SBSBs and MSBSBs, as well as certain non-substantive amendments.

For example, and as discussed above,<sup>903</sup> the Commission is adopting amendments to certain provisions in paragraph (b) of existing Rule 17a-4 to account for security-based swap transactions, and is adopting amendments that require broker-dealers, including broker-dealer SBSBs and MSBSBs, to preserve certain additional records related to security-based swap activities. Further, the Commission is amending the preservation requirement in paragraph (b)(4) of existing Rule 17a-4 to include “recordings of telephone calls required to be maintained pursuant to section 15F(g)(1) of the [Exchange] Act.” The amendment establishes a requirement to preserve for three years telephone calls that a covered firm chooses to record to the extent that the calls are required to be maintained pursuant to Section 15F(g)(1) of the Exchange Act.

The Commission believes that by keeping current, preserving and ensuring ready access to the records required under Rule 17a-3, as amended,

the amendments to Rule 17a-4 will support the benefits emanating from the amendments to Rule 17a-3. These benefits primarily include improving the Commission's regulatory oversight by ensuring its ability to monitor and review documentation of the security-based swap activities of stand-alone broker-dealers, broker-dealer SBSBs and MSBSBs.

##### ii. Stand-Alone SBSBs, Stand-Alone MSBSBs, Bank SBSBs, and Bank MSBSBs (New Rule 18a-6)

With respect to stand-alone SBSBs, stand-alone MSBSBs, bank SBSBs, and bank MSBSBs, the Commission is adopting new Rule 18a-6 to establish record preservation requirements for these categories of potential registrants. New Rule 18a-6 is modeled on the record preservation requirements of Rule 17a-4, as amended, but contains modifications to account for the differences applicable to stand-alone SBSBs, stand-alone MSBSBs, bank SBSBs and MSBSBs consistent with their anticipated business activities related to security-based swaps.<sup>904</sup> Many, but not all, of the same record preservation requirements that are applicable to broker-dealer SBSBs and MSBSBs under the amendments to Rule 17a-4 will also apply to stand-alone SBSBs, stand-alone MSBSBs, bank SBSBs, and bank MSBSBs under new Rule 18a-6. For example, analogous to paragraph (a) of Rule 17a-4, as amended<sup>905</sup> paragraph (a) of new Rule 18a-6 requires that certain records required to be created and maintained under Rule 18a-5 be preserved for a period of not less than six years, the first two in an easily accessible place.<sup>906</sup>

In response to comments received to the proposing release, the Commission is modifying Rule 18a-6 to eliminate the requirement that the electronic storage system preserve records exclusively in a non-rewriteable and non-erasable format.<sup>907</sup> The Commission believes that the removal of these requirements will reduce the likelihood that stand-alone or banks SBSBs and MSBSBs will need to maintain an extra set of records, and avoid the associated costs of maintaining those extra records, in order to comply with the rule.<sup>908</sup> For

SBSBs and MSBSBs that are also registered with the CFTC as swap dealers and major swap participants, these modifications to the rule will also eliminate a potential conflict with the requirements of the CFTC.

The Commission believes that by keeping current, preserving, and ensuring ready access to the records required under new Rule 18a-5, new Rule 18a-6 will support the benefits stemming from new Rule 18a-5 without increasing the costs associated with keeping records. These benefits primarily include improving the Commission's regulatory oversight by ensuring its ability to monitor and review documentation of the security-based swap activities of non-broker-dealer SBSBs and MSBSBs.

#### c. Reporting

The Commission is adopting amendments to existing Rule 17a-5—which contains requirements for broker-dealers to file periodic unaudited reports containing information about their financial and operational condition and for broker-dealers to file annual financial statements, certain reports and a report covering these financial statements and reports prepared by an independent public accountant registered with the PCAOB in accordance with PCOAB standards<sup>909</sup>—to account for the security-based swap activities of broker-dealers, including broker-dealer SBSBs and MSBSBs, as well as certain non-substantive amendments. Further, the Commission is adopting new Rule 18a-7—which is modeled on Rule 17a-5, as amended—to establish reporting requirements for stand-alone SBSBs, SBSBs also registered as OTC derivatives dealers, stand-alone MSBSBs, bank SBSBs, and bank MSBSBs. The Commission believes that the economic effects associated with the new reporting requirements will depend upon the nature of the filings that potential registrants make today based upon their current registration status (e.g., broker-dealer vs. non-broker-dealer).

non-erasable format may be substantial. In April 2018, SIFMA reported the results of anonymous survey of a group of its members about the costs of implementing such a system. Of the 25 respondents, 16 firms had implemented such a system in the previous three years at an average cost of \$6 million with several firms reporting costs in excess of \$25 million. See *Petition for Rulemaking to Amend Exchange Act Rule 17a-4(f)—Addendum* (available at: <https://www.sec.gov/rules/petitions/2018/ptn4-713-addendum.pdf>).

<sup>909</sup> See section II.B.2. of this release (discussing Rule 17a-5 reporting requirements).

<sup>902</sup> See section II.A.3.a. of this release (discussing Rule 17a-4, as amended, and Rule 18a-6, as adopted).

<sup>903</sup> See *id.* (discussing Rule 17a-4 record retention requirements).

<sup>904</sup> See *id.* (discussing requirements for stand-alone SBSBs, stand-alone MSBSBs, bank SBSBs and MSBSBs to maintain and preserve records).

<sup>905</sup> See section II.A.3.a. of this release (discussing Rule 18a-6 electronic storage requirements).

<sup>906</sup> The costs to implement an electronic storage system to preserve records in a non-rewriteable and

<sup>902</sup> See section V.C.1.a.i. of this release.

<sup>903</sup> See section II.A.3.a. of this release (discussing paragraph (b) of Rule 17a-4, as amended).

i. Stand-Alone Broker-Dealers  
(Amendments to Rule 17a–5)

As described above, under these rules and rule amendments, stand-alone broker-dealers (including stand-alone OTC derivatives dealers and stand-alone ANC broker-dealers) that engage in security-based swap activities but that do not register with the Commission as an SBSB or MSBSP will be required to complete revised FOCUS Report Part II.<sup>910</sup> FOCUS Report Part II, as amended, largely retains the structure and line items of the FOCUS Report Part II that existed prior to these amendments, but also includes new line items and schedules tailored specifically to security-based swap activities.<sup>911</sup> It also largely elicits the same information as FOCUS Report Parts IIB and II CSE.<sup>912</sup> Consequently, broker-dealers that filed the FOCUS Report Part II prior to these amendments, ANC broker-dealers that filed the FOCUS Report Part II CSE, and OTC derivatives dealers that filed the FOCUS Report Part IIB will need to enter into the FOCUS Report Part II, as amended, substantively the same information as was required of them prior to these amendments.

The Commission believes that the information elicited from stand-alone broker-dealers on their security-based swap activities will assist the Commission and the DEAs of these entities to examine them more effectively. The reporting requirements for stand-alone broker-dealers on account of their security-based swap related activities are also expected to promote transparency of the financial and operational condition of these entities to the Commission.

ii. Broker-Dealer SBSBs and MSBSPs  
(Amendments to Rule 17a–5)

The Commission has designed FOCUS Report Part II, as amended, to elicit the information that it believes it needs to effectively oversee the financial condition of broker-dealer SBSBs and MSBSPs. The Commission has carefully considered FOCUS Report Part II, as amended, in light of its experience with broker-dealer regulation and in relation to its new statutory responsibilities under Section 15F of the Exchange Act. The Commission believes that the information elicited in FOCUS Report Part II, as amended, will promote compliance of the relevant regulated entities with Rules 15c3–1 and 15c3–3 and will assist the Commission, SROs,

<sup>910</sup> See *id.* (discussing broker-dealer SBSBs' and broker-dealer MSBSPs' use of revised FOCUS Report Part II).

<sup>911</sup> See section II.B.1. of this release.

<sup>912</sup> See *id.*

state securities regulators and the regulated entities' DEAs in conducting effective examinations of these entities. Additionally, the broker-dealer SBSB and broker-dealer MSBSP reporting requirements related to their security-based swap activities should promote transparency of the financial and operational condition of the broker-dealer to the Commission and the firms' DEA. This may, in turn, improve the Commission's ability to value the relevant registrants' security-based swap exposures and assist the Commission in assessing these entities' compliance with rules related to capital requirements.

iii. Stand-Alone SBSBs and MSBSPs  
(New Rule 18a–7)

As described in more detail above,<sup>913</sup> stand-alone SBSBs and MSBSPs will be required to file FOCUS Report Part II, as amended, with the Commission or its designee on a monthly basis.<sup>914</sup> With respect to their security-based swap activities, stand-alone SBSBs and MSBSPs are required to report information similar to that required of broker-dealer SBSBs. However, these entities are not required to complete the sections applicable only to broker-dealers.

In addition, stand-alone MSBSPs will be required to complete a simpler Computation of Tangible Net Worth, compared to the much longer and more complex Computation of Net Capital and Computation of Minimum Regulatory Capital Requirements sections that stand-alone SBSBs are required to complete.<sup>915</sup> Moreover, stand-alone MSBSPs will not be required to complete the sections in FOCUS Report Part II, as amended, that require firms to compute the amount that must be maintained in the security-based swap customer reserve account or the section relating to information for the possession or control requirements for security-based swap customers because stand-alone MSBSPs generally will not be subject to those requirements under Rule 18a–4.<sup>916</sup> Furthermore, stand-alone MSBSPs will not be required to complete and file a number

<sup>913</sup> See section II.B.2. of this release.

<sup>914</sup> The Commission estimates that 9 of the approximately 50 entities that it anticipates to register with the Commission as SBSBs will be stand-alone SBSBs.

<sup>915</sup> Compare FOCUS Report Part II, as amended, *Computation of Tangible Net Worth*, with FOCUS Report Part II, as amended, *Computation of Net Capital (Filer Authorized to Use Models)* and FOCUS Report Part II, as amended, *Computation of Minimum Regulatory Capital Requirements (Non-Broker-Dealer SBSB)*.

<sup>916</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 44071–76.

of sections of FOCUS Report Part II, as amended, that relate to the operational data related to the firm; specifically, they will not be required to complete and file the Capital Withdrawals, Capital Withdrawals Recap, and the Financial and Operational Data sections of FOCUS Report Part II, as amended.<sup>917</sup> The Commission therefore believes that the economic effects associated with the reporting requirements on stand-alone MSBSPs will be significantly less than the economic effects of the reporting requirements on stand-alone SBSBs.

In addition, stand-alone SBSBs and MSBSPs will be required to generate and file their financial report and, in the case of stand-alone SBSBs, compliance report or exemption report, with the Commission on an annual basis.<sup>918</sup> While the Commission expects that stand-alone SBSBs and MSBSPs currently prepare financial statements that encompass their security-based swap activity, under the new rules, these entities will be required to prepare a financial report in a format consistent with FOCUS Report Part II, as amended, which includes numerous entries, computations, and schedules that a stand-alone SBSB may not currently prepare as a part of its business practices.

For stand-alone SBSBs approved to use models, there will be a number of additional monthly and quarterly reporting requirements, independent of those on FOCUS Report Part II, as amended.<sup>919</sup> The additional reports required of stand-alone SBSBs approved to use models are modeled on parallel reporting requirements for ANC broker-dealers.<sup>920</sup> Consequently, stand-alone SBSBs approved to use models will be required to file the same types of additional reports relating to their use of internal models as ANC broker-dealers, including ANC broker-dealer SBSBs.

The Commission believes that using the new reporting requirements will help the Commission to evaluate whether stand-alone SBSBs and MSBSPs are operating in compliance with the Exchange Act and the rules thereunder. The Commission also believes that the availability of FOCUS Report Part II, as amended, will greatly enhance the Commission's ability to oversee the financial condition of the relevant registrants, and that the public

<sup>917</sup> See FOCUS Report Part II, as amended, *Capital Withdrawals*, *Capital Withdrawals—Recap*, and *Financial and Operational Data*.

<sup>918</sup> See paragraph (c) of Rule 18a–7, as adopted.

<sup>919</sup> See section II.B.3.a. of this release. See also paragraph (a)(3) of Rule 18a–7, as adopted.

<sup>920</sup> Compare paragraph (a)(3) of Rule 18a–7, as adopted, with paragraph (a)(5) of Rule 17a–5, as amended.

availability of a firm's audited Statement of Financial Condition and net capital computations will facilitate the public's evaluation of the firm's financial health.

In response to comments received to the proposing release, the Commission is modifying Rule 18a–7 so that stand-alone SBSDs and MSBSPs, as well as SBSDs also registered as an OTC derivatives dealers, may engage an independent public accountant that is not registered with the PCAOB, and that the accountant may prepare its reports in accordance with GAAS in the United States or PCAOB standards.<sup>921</sup> The Commission estimates that of the 9 stand-alone SBSDs, 3 will make use of the full alternative compliance mechanism.<sup>922</sup> The Commission estimates that of the 5 MSBSPs, one will also be registered as an FCM. As with Commission registered broker-dealers, CFTC-registered FCMs are required to use independent accountants that are registered with the PCAOB.<sup>923</sup>

The Commission estimates that there will be 6 stand-alone SBSDs and 4 MSBSPs that may engage an independent public accountant as a result of Rule 18a–7.<sup>924</sup> The Commission estimates the total cost to these 10 entities to engage an accountant as required by Rule 18a–7 to be \$3,018,000.<sup>925</sup> Providing these options to these types of SBSDs and MSBSPs will not change the requirement to engage an independent public accountant but will increase the number of accountants that could potentially be hired. The Commission believes this could result in lower costs to this group of firms.

#### iv. Bank SBSDs and MSBSPs (New Rule 18a–7)

As described above,<sup>926</sup> bank SBSDs and MSBSPs will be required to periodically complete and file FOCUS Report Part IIC with the Commission. Relative to what broker-dealer SBSDs, broker-dealer MSBSPs, stand-alone SBSDs, and stand-alone MSBSPs will report in FOCUS Report Part II, as

amended, bank SBSDs and MSBSPs will report less information on FOCUS Report Part IIC because FOCUS Report Part IIC is tailored specifically to a bank's activities as an SBSD or an MSBSP. Further, FOCUS Report Part IIC elicits financial information that largely derives from the information that banks already report on the call reports that they file with their prudential regulators.<sup>927</sup> Finally, unlike broker-dealer SBSDs, broker-dealer MSBSPs, stand-alone SBSDs and MSBSPs, bank SBSDs and MSBSPs will not be required to complete and file an annual audited financial report because this set of potential registrants are currently subject to the reporting requirements administered by their prudential regulators. These reporting requirements include filing of annual audited financial reports.

Consistent with the directive in Section 15F(f) of the Exchange Act, bank SBSDs and MSBSPs will also be required to report, in FOCUS Report Part IIC, details relating to their security-based swap activities. To this end bank SBSDs and MSBSPs will be required to create and maintain additional relevant details about their security-based swap positions. In relation to reporting details about bank SBSDs' or bank MSBSPs' security-based swap positions, the Commission has limited the number of schedules required to be completed and filed by these entities in FOCUS Report Part IIC to one schedule that elicits details about their security-based swap positions. This schedule is also largely derived from the banks' call report.

The Commission believes that the reporting requirements for bank SBSDs and MSBSPs will help the Commission and other regulators ensure that registrants follow applicable capital, margin, and segregation rules. The Commission believes that such capital, margin, and segregation rules are an integral part of ensuring that security-based swap activity is conducted in a financially responsible manner.

#### d. Notification Requirements

##### i. Broker-Dealer SBSDs and MSBSPs (Amendments to Rule 17a–11)

The Commission is adopting amendments to existing Rule 17a–11—which specifies the circumstances under which a broker-dealer must notify the Commission and other securities regulators about its financial or operational condition, as well as the form that the notice must take—to

account for the security-based swap activities of broker-dealer SBSDs and MSBSPs.<sup>928</sup> Specifically, a broker-dealer SBSD will be required to notify the Commission when it fails to make a deposit in its security-based swap customer account.<sup>929</sup>

The Commission believes that the amendments to Rule 17a–11 will result in improving Commission and DEA oversight of broker-dealer SBSDs' and broker-dealer MSBSPs' security-based swap activities, including activities and financial conditions that suggest a material level of risk to the firm.

##### ii. Stand-Alone SBSDs, Stand-Alone MSBSPs, Bank SBSDs, and Bank MSBSPs (New Rule 18a–8)

The Commission is adopting new Rule 18a–8—which is modeled on Rule 17a–11, as amended—to establish notification requirements for stand-alone SBSDs, stand-alone MSBSPs, bank SBSDs, and bank MSBSPs.<sup>930</sup> New Rule 18a–8 is modeled closely upon the requirements applicable to broker-dealer SBSDs and MSBSPs. For example, the Commission has included a net capital deficiency and tentative net capital deficiency notification requirement in paragraph (a)(1) of Rule 18a–8 applicable to stand-alone SBSDs that is modeled on the notification requirements applicable to broker-dealers, over-the-counter derivatives dealers, and ANC broker-dealers that appear in paragraph (a) of Rule 17a–11, as amended.<sup>931</sup> The Commission has also included “early warning” notification requirements in paragraph (b) of Rule 18a–8 that will be applicable to stand-alone SBSDs and MSBSPs and that are modeled after the relevant early warning provisions applicable to broker-dealers in paragraph (b) of Rule 17a–11, as amended.<sup>932</sup> Likewise, the requirement for a bank SBSD, bank MSBSP, stand-alone SBSD, or stand-alone MSBSP to notify the Commission in the event that it fails to make and keep current its required books and records is modeled on a similar requirement for broker-dealers.<sup>933</sup>

These notification requirements serve an important role in the context of the reporting and recordkeeping rules for broker-dealer SBSDs, broker-dealer

<sup>921</sup> See section II.B.3.a. of this release for a discussion of why the Commission believes this option is appropriate for stand-alone SBSDs and MSBSPs but not for SBSDs and MSBSPs that are also registered as broker-dealers.

<sup>922</sup> See section IV.C. of this release.

<sup>923</sup> See 17 CFR 1.16(b).

<sup>924</sup> See section IV.C. of this release.

<sup>925</sup> (\$300,000 per stand-alone MSBSP × 4) + \$303,000 per stand-alone SBSD exempt from Rule 18a–4 × 6) = \$3,018,000. See section IV.D.3. of this release (PRA estimate of the total initial and annual recordkeeping and reporting burden for amendments to Rule 17a–5, as amended, and Rule 18a–7, as adopted).

<sup>926</sup> See section II.B.2. of this release.

<sup>927</sup> See section II.B.2.b.ii. of this release. See also 12 U.S.C. 324; 12 U.S.C. 1817; 12 U.S.C. 161; 12 U.S.C. 1464.

<sup>928</sup> See paragraphs (b)(5), (e), and (f) of Rule 17a–11, as amended.

<sup>929</sup> See paragraph (f) of Rule 17a–11, as amended.

<sup>930</sup> See Rule 18a–8, as adopted.

<sup>931</sup> Compare paragraph (a)(1) of Rule 18a–8, as adopted, with paragraph (a) of Rule 17a–11, as amended.

<sup>932</sup> Compare paragraph (b) of Rule 18a–8, with paragraph (b) of Rule 17a–11, as amended.

<sup>933</sup> Compare paragraph (d) of Rule 18a–8, as adopted, with paragraph (c) Rule 17a–11, as amended.

MSBSPs, stand-alone SBSBs, stand-alone MSBSPs, bank SBSBs, and bank MSBSPs because they serve to alert the Commission to the fact that certain events are occurring at a registrant that are highly relevant to the registrant's overall ability to continue to meet its obligations to customers and counterparties. For example, a report of a capital deficiency will alert the Commission to the fact that a registrant may lack sufficient capital to continue to operate its business and to meet its obligations to customers and counterparties. The notification requirements are thus critical to helping the Commission fulfill its statutory responsibility to monitor whether SBSBs and MSBSPs are operating in compliance with the Exchange Act and the rules thereunder.<sup>934</sup>

e. Quarterly Securities Count Requirement for Stand-Alone SBSBs (New Rule 18a-9)

As discussed in greater detail above,<sup>935</sup> the Commission is establishing a securities count program for SBSBs under Sections 15F and 17(a) of the Exchange Act that is modeled on Rule 17a-13's securities count program for broker-dealers. More specifically, stand-alone SBSBs will be subject to new Rule 18a-9. For reasons explained above, new Rule 18a-9 will not apply to stand-alone MSBSPs, bank SBSBs, or bank MSBSPs.<sup>936</sup> Rule 18a-9 applies substantially all the same affirmative obligations to stand-alone SBSBs that apply to broker-dealers under Rule 17a-13.<sup>937</sup>

As discussed in the Recordkeeping and Reporting Proposing Release, Rule 17a-13, the model for Rule 18a-9, arose in the aftermath of the 1967-1970 securities industry crisis where deficiencies in broker-dealers' internal controls and procedures for, among other things, adequately checking and counting securities created a serious "paperwork crisis" in the securities markets.<sup>938</sup> The Commission believes that instituting a parallel provision will help to avoid a similar problem for stand-alone SBSBs. Moreover, the Commission believes that to the extent a stand-alone SBSB has not invested in the technology necessary to help ensure

that it can accurately track and safeguard securities, the rule will require such investments to be made,<sup>939</sup> which could improve the quality of such tracking and safeguarding.

2. Costs of the Recordkeeping, Reporting, Notification, and Securities Count Requirements

Compliance with the new rules and rule amendments will impose certain implementation-related costs on SBSBs and MSBSPs, as well as on stand-alone broker-dealers engaged in security-based swap activities. These costs may include start-up costs, including other costs such as those related to personnel and technology. The Commission understands that entities that engage in security-based swap transactions currently already incur costs during their normal business activities and that the new rules and rule amendments will impose incremental costs on such entities. While these incremental costs are not negligible, the Commission believes that they are unlikely to be material.

Based on section IV.D. of this release, the Commission has estimated the implementation-related costs of the new rules and rule amendments for SBSBs, MSBSPs, and stand-alone broker-dealers that engage in security-based swap activities.<sup>940</sup> The Commission estimates that across all potential SBSBs and MSBSP registrants including stand-alone broker-dealers that engage in security-based swap transactions, the initial implementation costs are approximately \$10 million and the ongoing annual costs of implementation are approximately \$9 million.

The following is a breakdown of the estimates of the costs imposed by the different rules and rule amendments being adopted in this document on each of the affected parties.<sup>941</sup>

a. Requirements To Make and Keep Records

i. Broker-Dealer SBSBs, Broker-Dealer MSBSPs, and Stand-Alone Broker-Dealers (Amendments to Rule 17a-3)

Amendments to Rule 17a-3 are estimated to impose a one-time initial cost of approximately \$1,151,320<sup>942</sup> and

an annual ongoing cost of approximately \$216,657<sup>943</sup> across the entire industry that includes broker-dealer SBSBs, broker-dealer MSBSPs and stand-alone broker-dealers engaged in security-based swap activities.

ii. Stand-Alone SBSBs, Stand-Alone MSBSPs, Bank SBSBs, and Bank MSBSPs (New Rule 18a-5)

The Commission estimates that new Rule 18a-5 will result in a total initial industry cost of \$2,554,740 for non-broker-dealer SBSBs and MSBSPs.<sup>944</sup> On an ongoing annual basis, the Commission estimates that new Rule 18a-5 will result in \$791,475 of total industry costs for non-broker-dealer SBSBs and MSBSPs.<sup>945</sup>

The Commission believes that requiring non-broker-dealer SBSBs and MSBSPs to comply with more limited recordkeeping requirements relative to broker-dealer SBSBs and MSBSPs, in keeping with the former entities' more restricted SBS-related business activities, will reduce compliance costs for these entities without compromising the effectiveness of the regulatory oversight achieved by the adopted rules.

Additionally, the Commission has attempted to reduce compliance burdens and to allow firms subject to Rule 18a-5 to take advantage of potential efficiencies by basing new Rule 18a-5 upon existing Rule 17a-3 rather than starting with a wholly new rule. The Commission believes that many non-broker-dealer SBSBs and non-broker-dealer MSBSPs will be affiliates of broker-dealers that already have familiarity with Rule 17a-3 upon

The \$269 per hour figure for a compliance manager is from the Securities Industry and Financial Market Association ("SIFMA")'s *Management & Professional Earnings in the Securities Industry 2012*, as modified by Commission staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

<sup>943</sup> 3,439 hours × \$63 per hour national hourly rate for a compliance clerk = \$216,657. See section IV.D.1. of this release (PRA estimate of the total initial and annual recordkeeping and reporting burden for amendments to Rule 17a-3). The \$63 per hour figure for a compliance clerk is from SIFMA's *Management & Professional Earnings in the Securities Industry 2012*, as modified by Commission staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

<sup>944</sup> (9,460 hours × \$269 per hour national hourly rate for a compliance manager) + \$10,000 in external costs = \$2,554,740. See section IV.D.1. of this release (PRA estimate of the total initial and annual recordkeeping and reporting burden for Rule 18a-5, as adopted).

<sup>945</sup> (11,825 hours × \$63 per hour national hourly rate for a compliance clerk) + \$46,500 in external costs = \$791,475. See section IV.D.1. of this release (PRA estimate of the total initial and annual recordkeeping and reporting burden for Rule 18a-5, as adopted).

<sup>934</sup> See 15 U.S.C. 78o-10(f).

<sup>935</sup> See section II.D.1. of this release.

<sup>936</sup> See *id.*

<sup>937</sup> Compare Rule 18a-9, as adopted, with Rule 17a-13. Rule 18a-9 omits the exemptions from applicability of the rule that appear in paragraphs (a)(1) through (3) and (e) of Rule 17a-13 because those exemptions relate to broker-dealer-specific functions and broker-dealer registration status.

<sup>938</sup> See *Recordkeeping and Reporting Proposing Release*, 79 FR at 25247.

<sup>939</sup> See section V.C.2. of this release.

<sup>940</sup> See section IV.D. of this release (discussing total initial and annual recordkeeping and reporting burdens of the new rules and rule amendments).

<sup>941</sup> The Commission is also adopting technical amendments which it estimates will not impose material additional costs.

<sup>942</sup> 4,280 hours × \$269 per hour national hourly rate for a compliance manager = \$1,151,320. See section IV.D.1. of this release (PRA estimate of the total initial and annual recordkeeping and reporting burden for proposed amendments to Rule 17a-3).

which new Rule 18a–5 is modeled. Greater familiarity with the rule should reduce compliance burdens and costs for these entities. However, the Commission does acknowledge that with respect to entities not so affiliated, this approach is much less likely to ease compliance burdens.

#### b. Requirements To Preserve Records

##### i. Broker-Dealer SBSBs, Broker-Dealer MSBs, and Stand-Alone Broker-Dealers (Amendments to Rule 17a–4)

The Commission estimates that the amendments to Rule 17a–4 will result in a total initial industry cost of \$1,338,896 to broker-dealers.<sup>946</sup> On an ongoing annual basis, the Commission estimates that the amendments to Rule 17a–4 will result in \$164,704 in industry costs to broker-dealers.<sup>947</sup>

##### ii. Stand-Alone SBSBs, Stand-Alone MSBs, Bank SBSBs, and Bank MSBs (New Rule 18a–6)

The Commission estimates that new Rule 18a–6 will result in \$3,634,864 in terms of initial costs to the industry<sup>948</sup> and \$750,615 in terms of annual ongoing costs to the industry.<sup>949</sup>

#### c. Reporting Requirements

##### i. Broker-Dealer SBSBs, Broker-Dealer MSBs, and Stand-Alone Broker-Dealers (Amendments to Rule 17a–5)

The Commission anticipates that there may be additional costs associated with stand-alone broker dealers, broker-dealer SBSBs or broker-dealer MSBs completing and filing the annual reports required under paragraph (d) of Rule 17a–5, as amended. For example, the amendments will increase the cost of completing the annual compliance report filed by a broker-dealer SBSB because the compliance report for such firms will include statements about the

firms' compliance with Rule 18a–4, the customer segregation rule that will apply to broker-dealer SBSBs.<sup>950</sup> Similarly, an ANC broker-dealer that currently files FOCUS Report Part II CSE and that registers with the Commission as an SBSB or MSBSP will experience a marginal impact on its reporting obligations due to new line items and schedules tailored to specifically elicit details about security-based swap activities.<sup>951</sup>

The Commission also anticipates that the cost of auditing the annual reports filed by stand-alone broker-dealers, broker-dealer SBSBs and MSBs will rise.<sup>952</sup> Currently, and as described in more detail above, broker-dealers are required to engage a PCAOB-registered independent public accountant to conduct an annual audit of their annual reports.<sup>953</sup> The Commission believes the additional required components of the financial report and the compliance report will increase the costs of ongoing compliance as well as those of the annual audit for these entities.

However, the Commission believes that overall the additional costs imposed by the amendments will be insubstantial because the FOCUS Report Part II, as amended, largely retains the same structure as it existed prior to the amendments. This will reduce uncertainty and avoid additional compliance costs that could stem from devising an entirely new reporting form and rules. Furthermore, the scope of the additional information—generally related to the firms' security-based swap activities—requested in FOCUS Report Part II, as amended, is circumscribed by what broker-dealer SBSBs and MSBs report currently in FOCUS Report Part II, Part II CSE, or Part IIB. The Commission believes that the economic effects associated with the requirement to file FOCUS Report Part II, as amended, will accordingly be circumscribed by the relevant registrants' current reporting obligations.

The Commission estimates that the amendments to Rule 17a–5 will result in an initial total cost of \$291,865 to broker-dealers.<sup>954</sup> On an ongoing annual

basis, the Commission estimates that the amendments to Rule 17a–5 will result in total costs of \$1,862,556 per year to broker-dealers.<sup>955</sup>

##### ii. Stand-Alone SBSBs, Stand-Alone MSBs, Bank SBSBs, and Bank MSBs (New Rule 18a–7)

New Rule 18a–7 as adopted will require stand-alone SBSBs and MSBs to file FOCUS Report Part II, as amended, with the Commission or its designee on a monthly basis. Given that stand-alone SBSBs and MSBs are not broker-dealers, these firms do not have experience filing the FOCUS Report, and thus reporting on FOCUS Report Part II, as amended, could represent a significant undertaking for them.

Relative to the information these firms generate now, FOCUS Report Part II, as amended, likely elicits greater detail about the registrants' security-based swap positions. In order to be able to provide the security-based swap information elicited by FOCUS Report Part II, as amended, registrants will need to have the requisite additional details regarding their security-based swap positions. While the Commission expects that stand-alone SBSBs and MSBs currently prepare financial statements that encompass their security-based swap activity, reporting on FOCUS Report Part II, as amended, may require these firms to establish new systems that facilitate their reporting of the required information. While these upgrades are likely to entail costs for firms, firms may also use these upgrades towards more efficiently tracking their trading and security-based swap exposures.

Moreover, since many of the entities that the Commission expects will register as stand-alone SBSBs and MSBs are currently not regulated, they are likely to be unaccustomed to completing and filing detailed reports with financial regulators. Therefore the Commission anticipates that stand-alone SBSBs and MSBs will bear substantial costs in connection with completing and filing FOCUS Report Part II, as amended.

Rule 18a–7 as adopted further requires stand-alone SBSBs to generate and file their financial report and their

<sup>946</sup> 4,264 hours × \$314 per hour national hourly rate for a senior database administrator = \$1,338,896. See section IV.D.2. of this release (PRA estimate of the total initial and annual recordkeeping and reporting burden for amendments to Rule 17a–4). The \$314 per hour figure for a senior database administrator is from SIFMA's *Management & Professional Earnings in the Securities Industry 2012*, as modified by Commission staff to account for a 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

<sup>947</sup> (1,968 hours × \$63 per hour national hourly rate for a compliance clerk) + \$40,720 in external costs = \$164,704. See section IV.D.2. of this release (PRA estimate of the total initial and annual recordkeeping and reporting burden for amendments to Rule 17a–4, as amended).

<sup>948</sup> 11,576 hours × \$314 per hour national hourly rate for a senior database administrator = \$3,634,864.

<sup>949</sup> (8,770 hours × \$63 per hour national hourly rate for a compliance clerk) + (35 hours × \$379 per hour national hourly rate for an attorney) + \$184,840 in external costs = \$750,615.

<sup>950</sup> See section II.B.3.a. of this release.

<sup>951</sup> See *id.*

<sup>952</sup> See *id.*

<sup>953</sup> See section II.B.1. of this release.

<sup>954</sup> 1,085 hours × \$269 per hour national hourly rate for a compliance manager = \$291,865. See section IV.D.3. of this release (PRA estimate of the total initial and annual recordkeeping and reporting burden for amendments to Rule 17a–5, as amended). The majority of costs that broker-dealers will incur as a result of the amendments to Rule 17a–5, as amended, are expected to result from the additional information required in FOCUS Report Part II, as amended, as compared to the parts of the

FOCUS Report currently being filed by broker-dealers. Because broker-dealers (other than broker-dealers required to file Part IIA) will be required to file FOCUS Report Part II, as amended, on an ongoing basis, it is characterized as an annual cost, rather than an initial cost.

<sup>955</sup> 6,924 hours × \$269 per hour national hourly rate for a compliance manager = \$1,862,556. See section IV.D.3. of this release (PRA estimate of the total initial and annual recordkeeping and reporting burden for amendments to Rule 17a–5, as amended).

compliance report or exemption report with the Commission on an annual basis. The compliance report contains several statements and descriptions related to the firms' compliance with the financial responsibility rules. The exemption report contains several statements regarding the firms' exemption from Rule 18a-4. These details will be entirely new for most stand-alone SBSB registrants. Finally, Rule 18a-7 requires stand-alone SBSBs and MSBSPs to file an annual audited report with the Commission. Stand-alone SBSBs and MSBSPs will be required to hire an independent public accountant to perform the audit and to prepare the annual audit report. The Commission is modifying Rule 18a-7 to permit stand-alone SBSBs and MSBSPs the option to engage an independent public accountant that is not registered with the PCAOB, and to permit the accountant to use GAAS in the United States or PCAOB Standards.<sup>956</sup>

The Commission believes that this will entail compliance-related costs for these entities. Specifically, the Commission believes that stand-alone SBSBs approved to use models may incur compliance costs related to, among other things, preparing and filing the additional reports that will be required under the new rules. The Commission estimates that all stand-alone MSBSPs will incur costs stemming from the requirement to engage an auditor. The Commission anticipates that stand-alone MSBSPs will incur fewer costs in complying with these requirements as compared to stand-alone SBSBs because stand-alone MSBSPs will not be required to file the compliance report or the exemption report. The Commission believes the additional reports that stand-alone SBSBs approved to use models will be required to file with the Commission will give rise to less substantial compliance costs relative to the other costs generated by the reporting requirements. This is the case because the additional reporting obligations for stand-alone SBSBs approved to use models are relatively few and are generally closely related to their use of internal models approved by the Commission to calculate market and credit risk. Stand-alone SBSBs approved to use models will incur the majority of the costs associated with these internal models in designing and operating the models themselves rather than in filing the reports arising from these models.

<sup>956</sup> See section II.B.3.a. of this release (discussing the requirement to file annual reports and the qualifications of independent public accountants).

While the Commission understands that stand-alone SBSBs and MSBSPs may not currently be registered as broker-dealers and thus may not currently be filing the FOCUS Report (and thus have no familiarity with it), many stand-alone SBSBs and MSBSPs may be affiliated with, or be part of, a larger financial firm that contains a broker-dealer, thus providing a source of experience with the FOCUS Report that is internal to the firm and reducing compliance-related costs. Moreover, the accounting and legal communities are familiar with the FOCUS Report so the Commission believes that this familiarity should mitigate the compliance costs for stand-alone SBSBs and MSBSPs insofar as they have access to external assistance that has experience with the FOCUS Report. At the same time, the Commission acknowledges that there may be stand-alone SBSBs and MSBSPs affiliated with, for example, FCMs, and such firms would conceivably benefit from rules based upon or similar to CFTC rules.

Furthermore, the information required to be reported by bank SBSBs and MSBSPs on the FOCUS Report Part IIC largely would be information that banks are already required to provide in call reports. Thus, the Commission does not believe that FOCUS Report Part IIC will require substantial additional effort to complete.<sup>957</sup>

The Commission estimates that Rule 18a-7 will result in an initial industry cost of \$597,180.<sup>958</sup> The Commission further estimates that Rule 18a-7 will result in an ongoing annual industry cost of \$3,169,083.50.<sup>959</sup>

#### d. Notification Requirements

The Commission believes that costs of the notification requirement will be

<sup>957</sup> Whenever possible, the Commission has adopted the same line item numbers as are used for the call report (but appended with the letter "b" in FOCUS Report Part IIC) to facilitate a bank SBSB's or bank MSBSP's use of data from the call report.

<sup>958</sup> 2,220 hours × \$269 per hour national hourly rate for a compliance manager = \$597,180. See section IV.D.3. of this release (PRA estimate of the total initial and annual recordkeeping and reporting burden for amendments to Rule 17a-5, as amended, and Rule 18a-7, as adopted). The majority of the costs that SBSBs and MSBSPs will incur as a result of Rule 18a-7 are expected to result from the requirements to elicit information in Form SBS and to conduct an annual audit. Because the additional information in the Form SBS and the annual audit will be required on an ongoing basis, the Commission is characterizing them as sources of ongoing costs.

<sup>959</sup> (2,397 hours × \$63 per hour national hourly rate for a compliance clerk) + \$3,018,072.5 in external costs = \$3,169,083.50. See section IV.D.3. of this release (PRA estimate of the total initial and annual recordkeeping and reporting burden Rule 18a-7, as adopted).

incidental to the related underlying substantive obligation.

#### i. Broker-Dealer MSBSPs and Stand-Alone Broker-Dealers (Amendments to Rule 17a-11)

The Commission believes that most of the costs stemming from the notification requirements contained in amendments to Rule 17a-11 will arise from preparing and filing the notices. In the aggregate, the Commission estimates the amendments to Rule 17a-11 to result in an ongoing annual industry cost of \$28,245 to broker-dealer SBSBs and MSBSPs.<sup>960</sup>

#### ii. Stand-Alone SBSBs, Stand-Alone MSBSPs, Bank SBSBs, and Bank MSBSPs (New Rule 18a-8)

The Commission estimates that the notification requirements contained in new Rule 18a-8 for non-broker-dealer SBSBs and MSBSPs will result in an ongoing annual industry-wide costs of \$1,237.<sup>961</sup>

#### e. Quarterly Securities Count Requirement (New Rule 18a-9)

The Commission believes that the costs and any larger economic effects associated with new Rule 18a-9 should be similar to the costs associated with existing Rule 17a-13 on which new Rule 18a-9 is modeled. These costs will primarily be related to the development and maintenance of internal procedures and controls and the investment in technology. The Commission estimates that Rule 18a-9 will impose an initial industry-wide cost of \$51,150<sup>962</sup> and an industry-wide ongoing annual cost of \$75,600.<sup>963</sup>

<sup>960</sup> (105 hours) × \$269 per hour national hourly rate for a compliance manager = \$28,245. See section IV.D.4. of this release (PRA estimate of the total initial and annual recordkeeping and reporting burden for amendments to Rule 17a-11, as amended, and Rule 18a-8, as adopted).

<sup>961</sup> 4.6 hours × \$269 per hour national hourly rate for a compliance manager = \$1,237. See section IV.D.4. of this release (PRA estimate of the total initial and annual recordkeeping and reporting burden for amendments to Rule 17a-11, as amended, and Rule 18a-8, as adopted).

<sup>962</sup> 150 hours × \$341 per hour national hourly rate for a senior operations manager = \$51,150. See section IV.D.5. of this release (PRA estimate of the total initial and annual recordkeeping and reporting burden for Rule 18a-9). The \$341 per hour figure for a senior operations manager is from SIFMA's *Management & Professional Earnings in the Securities Industry 2012*, as modified by Commission staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

<sup>963</sup> 600 hours × \$126 per hour national hourly rate for an operations specialist = \$75,600. See section IV.D.5. of this release (PRA estimate of the total initial and annual recordkeeping and reporting burden for Rule 18a-9). The \$126 per hour figure for an operations specialist is from SIFMA's

### 3. Economic Effects of the Approach to Recordkeeping, Reporting, Notification, and Securities Count Requirements

In addition to the costs and benefits of the specific rules and amendments discussed above, certain economic effects arise from the Commission's overall approach in adopting recordkeeping, reporting, notification, and securities count requirements. Generally, the new requirements being adopted in this document are based upon the existing comprehensive system of recordkeeping, reporting, notification, and securities count rules applicable to broker-dealers, as modified to capture and document the security-based swap activities of broker-dealers, SBSBs, and MSBSPs. As discussed in Section II. above, the current broker-dealer recordkeeping, reporting, notification, and securities count requirements served as the template for the new rules and rule amendments for several reasons. The financial markets in which entities expected to register as SBSBs and MSBSPs operate are similar to the financial markets in which broker-dealers currently operate in that the markets are driven in significant part by dealers that buy and sell on a regular basis and take principal risk.

The Commission believes that adopting a similar regulatory approach for similar markets is likely to mitigate the cost borne by market participants. Broker-dealers and third-party service providers that assist broker-dealers in meeting their recordkeeping, reporting, and notification requirements are familiar with Commission recordkeeping, reporting, and notification rules for broker-dealers. To the extent that these entities become subject to these final rules or provide services to entities that become subject to these final rules, consistency with the existing recordkeeping, reporting, and notification requirements for broker-dealers will likely reduce the costs associated with compliance with these rules. The Commission believes that these efficiencies could be realized even by firms that are not currently registered as broker-dealers given that some of the new registrants will likely be part of larger financial firms that have a broker-dealer affiliate, thus providing a source of in-house experience with the Commission's broker-dealer rules. However, the Commission

*Management & Professional Earnings in the Securities Industry 2012*, as modified by Commission staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead.

acknowledges that these reductions in compliance costs may be much more limited for firms that are not currently broker-dealers and are not affiliated with broker-dealers.

In addition, Commission staff consulted with staff from fellow regulators regarding the new rules and rule amendments, as those regulators may have analogous regulations. The Commission believes the final rules may benefit security-based swap markets by applying recordkeeping and reporting requirements that are consistent with similar requirements in other jurisdictions. In considering whether there were other practicable regulatory alternatives, the Commission also examined existing rules of the prudential regulators. For example, the OCC has promulgated rules governing recordkeeping and confirmation requirements for securities transactions effected by national banks.<sup>964</sup> Paragraph (a)(1) of the OCC rule governing the record that a national bank effecting securities transactions for customers must maintain (Rule 12.3) appears broadly consistent with paragraph (a)(6) of Rule 17a-3, as amended, as well as with paragraph (b)(7) of Rule 18a-5.<sup>965</sup> Consistency with prudential regulators' requirements may mitigate compliance burdens for bank SBSBs and MSBSPs that become subject to the adopted rules.

The Commission also believes the new rules and rule amendments herein are broadly consistent with the approach taken by the CFTC. The CFTC's final rules were modeled on existing rules promulgated by both the CFTC and the Commission.<sup>966</sup> As noted above,<sup>967</sup> entities that are active participants in the security-based swap market also tend to be active participants in the CFTC-regulated swap market, and the Commission estimated that approximately 35 of the 50 expected SBSBs will be dually registered with the CFTC and therefore be subject to CFTC recordkeeping, reporting, and notification requirements.

The recordkeeping rules the Commission is adopting are similar to those of the CFTC in terms of their level of prescriptiveness. For example, paragraph (a)(1) of existing Rule 17a-3

sets forth the requirement that a broker-dealer make and keep current a trade blotter, while paragraphs (a)(1) and (b)(1) of Rule 18a-5 include parallel blotter requirements for stand-alone SBSBs and MSBSPs and bank-SBSBs and bank-MSBSPs respectively.<sup>968</sup> In comparison, the CFTC's rule 202 ("Daily Trading Records"), which corresponds to the Commission's Rules 17a-3 and 18a-5, prescribes that swap dealers and major swap participants must make and keep trade execution records that are very similar to the records required to be made and kept by Rules 17a-3 and 18a-5.<sup>969</sup> Because the Commission is adopting requirements that are similar to CFTC requirements, entities that are already registered with the CFTC may experience relatively lower costs to become compliant with the adopted rules.

Further, as the Commission has noted in other releases, regulatory consistency can also reduce the likelihood of regulatory arbitrage. The new requirements applicable to stand-alone SBSBs and MSBSPs seek to regulate these firms' security-based swap activity in a manner consistent with the regulation of security-based swap activities conducted at broker-dealers and at banks, while reflecting the business model of such entities.<sup>970</sup> As a result, the final rules mitigate the risk that bank SBSBs and MSBSPs restructure their activities in order to take advantage of differences in prudential regulators' recordkeeping and reporting requirements and those adopted by the Commission.

The Commission believes that applying consistent requirements across all entities that engage in security-based swap activity will facilitate competition between these entities on similar terms insofar as firms operating in different jurisdictions will incur similar compliance costs. The Commission is seeking to provide all security-based swap activity, irrespective of the entity within which such activity is conducted, a level regulatory playing field while being cognizant of the fact that firms with a more limited security-based swap business should also be subject to an appropriately circumscribed set of regulations.

<sup>964</sup> See 12 CFR 12.3.

<sup>965</sup> Compare 12 CFR 12.3(a), with paragraph (a)(6) of Rule 17a-3, as amended, and paragraph (b)(7) of Rule 18a-5, as adopted.

<sup>966</sup> See CFTC, *Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules*, 77 FR at 20171 (stating swap dealer and major swap participant rules are modeled on existing rules as well as those of the Commission).

<sup>967</sup> See section V.B.2.a. of this release.

<sup>968</sup> See section II.A.2.a. of this release.

<sup>969</sup> See 17 CFR 23.202(a)(2) (Rule 202).

<sup>970</sup> In this regard, the Commission notes the new rules exclude a number of recordkeeping requirements for bank SBSBs and MSBSPs. As discussed above in section I of this release, Section 15F(f)(1)(B) of the Exchange Act requires such institutions to keep only those books and records of all activities related to the conduct of business as an SBSB or MSBSP.

In response to a commenter's concerns regarding harmonization with the CFTC's recordkeeping requirements as well as to promote harmonization with CFTC requirements,<sup>971</sup> the Commission is also adopting a limited alternative compliance mechanism that—subject to certain requirements<sup>972</sup>—allows registrants to employ a single recordkeeping system for swap and security-based swap transactions and positions and to follow a single set of recordkeeping requirements while helping to ensure that the requisite records are promptly available to the Commission staff in a format that readily permits examination. The limited alternative compliance mechanism could thereby ease compliance burdens—particularly initial burdens—for registrants that have already devoted substantial resources towards complying with the CFTC's recordkeeping requirements for swap transactions and positions and will not be required to incur afresh the costs of the recordkeeping system software needed to comply with the Commission's new recordkeeping requirements for security-based swap transactions and positions. The limited alternative compliance mechanism should also afford the relevant registrants greater flexibility in the manner in which they record security-based swap transactions and positions.<sup>973</sup>

Finally, the Commission is amending the full alternative compliance mechanism in existing Rule 18a–10 that permits certain SBSDs that are registered as swap dealers and that predominantly engage in a swaps business to elect to comply with the capital, margin, and segregation requirements of the CEA and the CFTC's rules in lieu of complying with the capital, margin, and segregation requirements in Rules 18a–1, 18a–3, and 18a–4. The amendments to Rule 18a–10 will permit firms that will operate under Rule 18a–10 to elect to comply with the recordkeeping and reporting requirements of the CEA and the CFTC's rules in lieu of complying with Rules 18a–5, 18a–6, 18a–7, 18a–8, and 18a–9. The Commission believes the availability of the full alternative compliance mechanism will promote

harmonization with CFTC requirements and reduce compliance costs for eligible SBSDs and MSBSPs. The Commission estimates that in the absence of the full alternative compliance mechanism, the initial industry compliance costs could be as much as \$827,715 higher and the ongoing annual industry compliance could be as much as \$1,292,637 higher.<sup>974</sup>

#### 4. Cross-Border Application and Substituted Compliance

As discussed above,<sup>975</sup> the Commission treats the adopted recordkeeping and reporting requirements as entity-level requirements. Entity-level requirements apply to all the security-based swap transactions of the registered entity regardless of the U.S. person status of the entity or the U.S. person status of the entity's counterparty to any particular transactions. The Commission believes that the concentration of global security-based swap activity within a small group of large entities makes entity level regulation—thereby not exempting certain transactions from the recordkeeping, reporting, notification, and securities count requirements being adopted in this document—critical to advancing the policy objectives of Title VII.

Classifying security-based swap recordkeeping and reporting requirements as entity-level requirements may facilitate and strengthen Commission oversight of registered SBSDs and enhance compliance with the full range of obligations under Federal securities laws and Commission rules regardless of the location of counterparties or personnel. Title VII security-based swap recordkeeping and reporting requirements may enhance the Commission's ability to evaluate foreign SBSDs and MSBSPs' records for evidence of market manipulation or other abusive practices within the United States. Moreover, since the marginal cost of keeping daily trading records and confirmations is likely to be low for SBSDs and MSBSPs, the Commission does not believe that the

savings associated with limited application of these requirements to a subset of an SBSD's or MSBSP's transactions is likely to be high.

In considering the scope of the entities that will be included within the ambit of the new recordkeeping, reporting, notification, and securities count requirements being adopted in this document, the Commission is aware that market participants may respond to entity-level requirements by restructuring their business or exiting markets to reduce the likelihood of incurring an obligation to register with the Commission. Compliance with the recordkeeping and reporting requirements will increase costs for SBSDs and MSBSPs, including those that are non-U.S. persons. To the extent that foreign SBSDs and MSBSPs have market power, they may pass the costs of these requirements through to U.S. persons in the form of higher transaction costs. Furthermore, to the extent that non-U.S. persons avoid transacting with U.S. persons to avoid registration requirements, U.S. persons may implicitly bear the costs of compliance through reduced access to liquidity provided by non-U.S. persons.<sup>976</sup>

Given that security-based swap markets are global and the Commission expects registered SBSDs and MSBSPs to transact across multiple jurisdictions, some registered SBSDs may be subject to duplicative or mutually conflicting recordkeeping and reporting requirements in multiple foreign jurisdictions. This may impede the entry of foreign SBSDs and MSBSPs into the U.S. security-based swap market, disrupt existing business relationships, and, more generally, reduce competition and market efficiency. As discussed above, the Commission is amending Rule 3a71–6 to provide non-U.S. SBSDs and non-U.S. MSBSPs with the potential to utilize substituted compliance with comparable foreign requirements to satisfy the recordkeeping and reporting requirements of Section 15F of the Exchange Act and Rules 18a–5, 18a–6, 18a–7, 18a–8, and 18a–9 thereunder.<sup>977</sup>

Allowing for the possibility of substituted compliance is expected to help achieve the benefits of the recordkeeping and reporting requirements being adopted in this document in a manner that avoids the costs that foreign registrants would have

<sup>974</sup> This estimate is based on the Commission's estimate that 3 stand-alone SBSDs will take advantage of the full alternative compliance mechanism. See section IV.D.7 of this release. The increase in initial industry compliance costs in the absence of full alternative compliance for Rules 18a–5, 18a–6, 18a–7, 18a–8, and 18a–9 are \$261,240, \$395,640, \$145,260, \$0.00, and \$25,575, respectively. The corresponding increases in ongoing compliance costs are \$89,550, \$79,088, \$1,114,549, \$0.00, and \$9,450, respectively. See section IV.D.1. through section IV.D.4. and section IV.D.6. of this release.

<sup>975</sup> See section II.F.1. of this release.

<sup>976</sup> See *Application of "Security-Based Swap Dealer" and "Major Security-Based Swap Participant" Definitions to Cross-Border Security-Based Swap Activities*, 79 FR at 47343.

<sup>977</sup> See section II.F.2. of this release.

<sup>971</sup> See Nomura Letter.

<sup>972</sup> See section II.A.1. of this release.

<sup>973</sup> See section II.A.2. of this release. As stated above, however, the Commission is making the conservative estimate that no firms will use the limited alternative compliance mechanism. However, the Commission believes that providing the limited alternative compliance mechanism could ease compliance burdens for some firms already registered with the CFTC.

to bear due to regulatory duplication or conflict. A substituted compliance determination could thus preserve the access of foreign registrants into U.S. security-based swap markets and hence promote market efficiency and enhance competition therein while also generally facilitating a well-functioning global security-based swap market. Further, as the availability of substituted compliance lowers the potential costs to non-U.S. SBSBs and non-U.S. MSBSPs of complying with the rules being adopted in this document, the costs of completing security-based swap transactions may be lower, relative to the case where substituted compliance is not available and counterparties, including non-dealer counterparties, may bear lower transactions costs as a result. At the same time, the process of making substituted compliance requests may cause foreign registrants to incur additional costs of applying for a substituted compliance determination. These substituted compliance requests will be made on a voluntary basis, and foreign registrants will only make such requests when the anticipated costs of relying on substituted compliance are lower than the costs of complying directly with the final rules being adopted in this document. Further, after a substituted compliance determination is made, foreign registrants will choose substituted compliance only if their expected private benefits from participating in U.S. security-based swap markets exceed expected private costs, including any conditions the Commission may attach to the substituted compliance determination.

The Commission also recognizes that these costs and the overall economic effects of allowing substituted compliance for the final recordkeeping and reporting rules will depend on, among other things: Whether and to what extent substituted compliance requests will be granted for jurisdictions in which some of the most active foreign registrants are currently regulated and supervised; the costs of potential relocation, business restructuring, or direct compliance by foreign registrants that may be denied substituted compliance requests; the relevant information required to demonstrate consistency between the foreign regulatory requirements and the Commission's recordkeeping and reporting rules; the relevant information required to demonstrate the adequacy of the foreign regime's compliance and enforcement mechanisms; the fraction of foreign registrants in a given jurisdiction that may choose to make substituted compliance requests; and

whether substituted compliance determinations for subsequent applications are more likely to be granted after an initial affirmative substituted compliance determination for the first applicant from a given jurisdiction. Nevertheless, the potential for the duplication of recordkeeping and reporting compliance costs on foreign registrants may be more significant in cases where the foreign jurisdictions' regulatory regimes impose less stringent recordkeeping and reporting requirements than the requirements being adopted in this document or when other prerequisites for substituted compliance have not been satisfied. The Commission thus recognizes that there will be limits to the availability of substituted compliance, including the possibility that substituted compliance may be permitted with regard to some requirements and not with regard to others, or that, in certain circumstances, substituted compliance may not be permitted with respect to any requirements of a particular jurisdiction.

#### *D. Impact on Efficiency, Competition, and Capital Formation*

Section 3(f) of the Exchange Act provides that whenever the Commission engages in rulemaking under the Exchange Act and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition.<sup>978</sup> Section 23(a)(2) of the Exchange Act also prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

In the aggregate, the recordkeeping, reporting, and notification rules are an integral part of the financial responsibility rules governing security-based swaps which, in turn, are part of the regulatory regime for OTC derivatives markets established by Title VII of the Dodd-Frank Act. As stated above, the Commission believes that the recordkeeping, reporting, notification, and securities count rules and rule amendments being adopted in this document address, among other things, the documentation, reporting, and evidence of compliance with the capital,

margin, and segregation rules. Thus, the Commission believes that these rules, by their nature, will have a more limited economic impact as compared to the Commission's capital, margin, and segregation rules.<sup>979</sup>

Similarly, while the Commission expects that the adoption of these rules and rule amendments, and their attendant benefits and costs, will affect competition, efficiency, and capital formation, the Commission believes that such impact will be more limited than the impact from the capital, margin, and segregation rules. In most instances, the Commission believes the costs of the new rules and rule amendments will be implementation-related and the benefits will stem from enabling the Commission to evaluate whether SBSBs and MSBSPs are in compliance with the financial responsibility rules governing security-based swap activities. The Commission's belief that the costs of the rule and rule amendments will be implementation-related is supported by the results of a broker-dealer survey conducted prior to the finalization of the OTC derivatives rules.<sup>980</sup> According to this survey even though the majority, *i.e.*, 57.5% of surveyed broker-dealers, stated that they expected to be "highly impacted" by the regulation of OTC derivatives markets under Title VII of the Dodd-Frank Act,<sup>981</sup> the specific areas that were anticipated as representing top operational challenges were all implementation-related. Thus, the majority, *i.e.*, 61.9% of surveyed broker-dealers, indicated that their top anticipated challenge from Title VII regulations for OTC derivatives markets was "documenting compliance with suitability requirements when making recommendations to counterparties" followed by 59.5%, who cited the "need for subject matter expertise to derivatives and the disclosure obligations set forth in the CFTC's recently proposed rules." In terms of the areas that the survey respondents anticipated would represent the most significant operational challenges emerging from the Dodd-Frank Act, 45.3% indicated "regulatory inquiries and exams" followed by 35.7% for

<sup>979</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43968–44040.

<sup>980</sup> See Harvard Law School Forum on Corporate Governance and Financial Regulation, *Broker-Dealers Respond to Dodd-Frank and FINRA* (Oct. 8, 2011), available at <https://corpgov.law.harvard.edu/2011/10/08/broker-dealers-respond-to-dodd-frank-and-finra/>.

<sup>981</sup> The survey considered the following specific initiatives of the Dodd-Frank Act: (1) The uniform fiduciary standard; (2) The Volcker Rule regulating proprietary trading under Dodd-Frank Title VI and (iii) the regulation of the OTC derivatives markets under Title VII of the Dodd-Frank Act.

<sup>978</sup> See 15 U.S.C. 78w(a)(2).

“trade reporting” and 19% for “disclosures and reporting requirements.”

The rules are designed to provide greater regulatory transparency into the business activities of firms that engage in security-based swap activities and to assist the Commission and other regulators in reviewing and determining compliance with the capital, margin, and segregation requirements. As the Commission has discussed in its associated release,<sup>982</sup> the capital, margin, and segregation requirements have the potential to enhance efficiency and capital formation in financial markets through their impact on competition. In general, the Commission believes that the new rules and rule amendments will thus help ensure that firms that engage in security-based swap activities do so in a financially responsible manner. The Commission further believes that the new rules and rule amendments, by improving its ability to monitor the financial condition of the relevant registrants, could increase the willingness of market participants that value regulatory oversight of the security-based swap market to engage in security-based swap activities. Additional participation in the security-based swap market could lead to increased competition between suppliers of security-based swap liquidity and increased efficiency, through both lower transactions costs and reduced search costs. These, in turn, may have a positive effect on capital formation, to the extent that they improve opportunities for risk sharing using security-based swaps.

The Commission is cognizant, however, that it must be sensitive to the costs and burdens imposed by its rules on both individual firms and financial markets as a whole. For example, overly restrictive or costly recordkeeping requirements could reduce the willingness of firms to engage in security-based swap trading. This could, in turn, increase transaction costs for market participants and dampen liquidity in the market. Even if the costs of overly restrictive recordkeeping, reporting, notification, and securities count requirements were shouldered only by those market participants that are subject to them, the regulations will impose additional costs on capital markets at large since the resources used to comply with the regulations will not be available for potentially more efficient uses, thereby distorting capital allocation and, in turn, adversely affecting capital formation. Similarly,

the additional costs of the new recordkeeping, reporting, securities count, and notification requirements could represent barriers to entry for potential market participants; however, the Commission believes that these rules and rule amendments are unlikely to increase the barriers to entry in this market in a material way. Notwithstanding this belief, the Commission has taken steps, where appropriate, to reduce compliance costs for some SBSs and MSBSPs by establishing the limited and full alternative compliance mechanisms.

As described in more detail above, broker-dealers historically have not participated in a significant way in security-based swap trading, in part, because the existing broker-dealer capital requirements make it relatively costly to conduct these activities in broker-dealers.<sup>983</sup> Thus, from among the 3,893 stand-alone broker-dealers registered with the Commission as of December 31, 2017, the Commission estimates that approximately twenty-five (or only 0.62%) will be engaged in security-based swap activities while not being required to register as SBSs or MSBSPs.<sup>984</sup>

To the extent that the new rules or rule amendments are burdensome or costly, they may induce market participants to scale back their activities or exposures to avoid incurring the obligation to register as SBSs or MSBSPs. This reduction in scale could adversely impact competition between liquidity suppliers leading to lower liquidity, impeded price discovery, and higher transaction costs, all of which are characteristics of reduced levels of efficiency in the market. Moreover, it is possible that increased costs could lead certain market participants to cease engaging altogether in security-based swap trading or to restructure their activities in ways that allow them to avoid registration with the Commission and entity-level requirements under Title VII.

The Commission is particularly cognizant of the impacts of restructuring in financial markets that are global in scope. Competitive disparities in regulations across different jurisdictions coupled with SBSs' flexibility to restructure their businesses and operations may result in market fragmentation.<sup>985</sup> The outcome of such

restructuring could be a large pool of security-based swap liquidity consisting of transactions that are carried out by unregistered non-U.S.-person dealers with non-U.S.-person counterparties using personnel outside of the United States and a smaller pool consisting of transactions involving U.S. persons or using personnel located in a U.S. branch or office. Such fragmentation could make it more difficult for U.S. persons to find liquidity in the United States, and those U.S. persons that might otherwise use security-based swaps to hedge financial and commercial risks may reduce their hedging activity and assume an inefficient amount of risk, or engage in precautionary savings by accumulating capital to mitigate the effects of market risks, which would inhibit capital formation. The Commission notes, however, that the type of restructuring necessary to avoid counting security-based swap dealing activity towards *de minimis* thresholds which will trigger requirements to register as an SBS will likely be costly for non-U.S. persons,<sup>986</sup> and these costs may reduce the likelihood that non-U.S. persons restructure in response to the requirements being adopted in this release. In particular, to the extent that the costs of restructuring are larger than the costs of complying with Commission recordkeeping, reporting, and notification rules, they may reduce the likelihood of market fragmentation and the associated impacts on competition, efficiency, and capital formation that might otherwise result from counterparties seeking to avoid complying with these rules.

In addition to the competitive effects of compliance burdens discussed above, the approach to substituted compliance may impact competition between U.S. and non-U.S. entities. Substituted compliance for recordkeeping and reporting requirements may reduce burdens for foreign SBSs and MSBSPs and may promote competition if it reduces the likelihood that foreign SBSs and MSBSPs exit the U.S. security-based swap market. Moreover, substituted compliance could improve efficiency by reducing the potential that a fragmented market develops, in which

competitive disparities stemming from Title VII regulation is more likely to occur within this subset of the market because these dealers currently operate from locations throughout the world and enjoy a volume of business that is more likely to make such restructuring profitable.

<sup>986</sup> See *Security-Based Swap Transactions Connected With a Non-U.S. Person's Dealing Activity That Are Arranged, Negotiated, or Executed by Personnel Located in a U.S. Branch or Office or in a U.S. Branch or Office of an Agent; Security-Based Swap Dealer De Minimis Exception*, 81 FR at 8633.

<sup>983</sup> See section IV.C. of this release.

<sup>984</sup> See *id.*

<sup>985</sup> Analysis of TIW data shows that 79.5% of North American corporate single-name CDS transactions in 2014 involved either two ISDA-recognized dealers or an ISDA-recognized dealer and a non-U.S.-person non-dealer. The Commission believes that restructuring as a response to

<sup>982</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 44033–40.

U.S. persons cannot easily access liquidity provided by foreign SBSBs and MSBSPs.

*E. Alternatives to the Adopted Recordkeeping, Reporting, Notification, and Securities Count Rules*

The Commission recognizes that there may be other appropriate approaches to establishing recordkeeping, reporting, and notification requirements. In the course of preparing and considering the new rules and rule amendments it is adopting in this document, Commission staff reviewed and analyzed analogous rule sets utilized by the Commission's fellow Federal regulators, with a view towards determining whether there may be other practicable alternatives.

One alternative would be for all SBSBs and MSBSPs to keep and report the same records and other financial reports. While technically possible and arguably simpler to implement and administer, the Commission does not believe such a requirement would be justified given the different capital, margin, and segregation requirements that apply to each participant. For example, since a stand-alone MSBSP is not subject to a minimum net capital requirement under the capital rules applicable to SBSBs and MSBSPs (it is subject to a positive tangible net worth standard instead),<sup>987</sup> it may be unduly burdensome to require stand-alone MSBSPs to calculate and report in FOCUS Report Part II, as amended, the amount of net capital they hold. Hence, while the Commission considered this approach, the Commission believes that such an approach would be confusing and unduly burdensome for firms required to complete and file FOCUS Report Part II, as amended, and would introduce significant compliance challenges beyond those imposed by the new rules and rule amendments.

Another alternative to the new rules and rule amendments the Commission is adopting would be rules that are less prescriptive. Under such rules, detailed record production and retention requirements could be replaced by more general references to the types of information the firm needs to document and retain for examination purposes. This approach could promote a consistent view and management of recordkeeping and reporting obligations within a large financial firm that has numerous subsidiaries. This approach would also likely have the advantage of being less costly, as the firm would be more able to bring recordkeeping practices at its subsidiaries into

conformity with existing recordkeeping practices at the parent. While this approach has its benefits, the financial markets and transactions in which SBSBs and MSBSPs are expected to operate and engage in, respectively, are similar to the financial markets and transactions in which broker-dealers operate, and the Commission believes these similarities argue for a consistent regulatory approach.<sup>988</sup> In addition, as discussed above, the objectives of these broker-dealer requirements are similar to the objectives underlying the new rules and rule amendments regarding security-based swaps.<sup>989</sup>

The Commission considered modifying the electronic storage requirements in Rule 17a-4 to remove the requirement that the electronic storage system preserve records exclusively in a non-rewriteable and non-erasable format similar to the modification made to Rule 18a-6 in response to comments that it received. The Commission concluded that any such modification to Rule 17a-4 would affect a large number of broker-dealers that are not likely to register either as SBSBs or MSBSPs and may raise issues that are distinct from those raised by stand-alone or bank SBSBs and MSBSPs. Accordingly, the Commission believes that any change to these requirements should be addressed in a separate rulemaking.<sup>990</sup>

The Commission has also considered alternatives to the financial reporting rules being adopted. For example, with respect to bank SBSBs and MSBSPs, one alternative would be to permit these firms to use the existing financial reports made with their respective prudential regulators. This approach would allow the firms to avoid creating and filing an additional financial report with the Commission, and would likely result in fewer compliance-related costs. The Commission is aware of the burdens and costs associated with preparing an additional regulatory submission such as FOCUS Report Part IIC, but Rule 18a-7(a) is designed to lower burdens that bank SBSBs and MSBSPs may face to meet reporting requirements by aligning certain Commission reporting requirements with requirements these entities already face because they are subject to prudential regulators' reporting requirements. While FOCUS Report Part

IIC seeks certain specific transaction and position data regarding bank SBSBs' and bank MSBSPs' security-based swap activities, the other required financial data in FOCUS Report Part IIC for bank SBSBs and MSBSPs are likely readily available because these come directly from the filings these firms are already required to make with their respective prudential regulators.<sup>991</sup>

The Commission has also considered alternative financial reporting arrangements for stand-alone SBSBs or stand-alone MSBSPs. For example, the Commission is aware that the CFTC proposed that stand-alone swap dealers and stand-alone major swap participants be required to submit monthly unaudited financial statements within 17 business days of the end of the month, as well as GAAP financial statements within 60 days of the end of the fiscal year.<sup>992</sup> The Commission believes that the information elicited by FOCUS Report Part II, as amended, should assist the Commission and the firms' DEAs to conduct effective examinations of broker-dealer SBSBs and MSBSPs. The broker-dealer SBSD and broker-dealer MSBSP reporting requirements should promote transparency of the financial and operational condition of these entities to both the Commission and the public.

The Commission has also considered alternatives to the notification and securities count rules.<sup>993</sup> An alternative to the notification rule would be to not have such a rule, or to have fewer events give rise to the requirement for a notification. Similarly, with respect to the quarterly securities count rule, the Commission believes the alternative would be to specify a less frequent count or to omit altogether the requirement for securities count.

The Commission adopted the notification and securities count rules because it believes that the rules are an appropriate component of its oversight of the financial responsibility of firms engaged in the security-based swap business. The broker-dealer recordkeeping, reporting, notification, and securities count requirements are part of the broker-dealer financial responsibility rules.<sup>994</sup> The financial responsibility rules are designed to work together to establish a comprehensive regulatory program designed to promote the prudent

<sup>987</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43906-08.

<sup>988</sup> See *Capital, Margin, and Segregation Adopting Release*, 84 FR at 43881 (stating a similar rationale for basing the proposed capital, margin, and segregation requirements for SBSBs on the broker-dealer capital, margin, and segregation requirements).

<sup>989</sup> See section I of this release.

<sup>990</sup> See section IIA.3.a. of this release.

<sup>991</sup> See section IIB.2.b.ii. of this release.

<sup>992</sup> See *Capital Requirements of Swap Dealers and Major Swap Participants*, 81 FR 91252, 91276 (Dec. 16, 2016) (discussion of proposed CFTC Regulation 23.105).

<sup>993</sup> See section IID.1. of this release (summarizing rationale underlying Rule 17a-13).

<sup>994</sup> See 17 CFR 240.3a40-1.

operation of broker-dealers and the safeguarding of customer securities and funds held by broker-dealers. In this regard, the notification and securities count rules (in conjunction with the recordkeeping and reporting rules) are designed to promote compliance with the capital, margin, and segregation requirements for broker-dealers. The recordkeeping, reporting, notification, and securities count requirements applicable to SBSBs and MSBSPs, along with the capital, margin, and segregation requirements for these registrants, are designed to establish a comprehensive financial responsibility program for SBSBs and MSBSPs. Like the broker-dealer rules, the recordkeeping, reporting, notification, and securities count requirements applicable to SBSBs and MSBSPs are designed to promote compliance with the capital, margin, and segregation requirements applicable to SBSBs and MSBSPs. Omitting such rules would create regulatory disparities between broker-dealers, banks, stand-alone SBSBs, and stand-alone MSBSPs. For these reasons, the Commission believes that alternative approaches would not be as effective in helping to ensure compliance with the capital, margin, and segregation requirements applicable to SBSBs and MSBSPs.

## VI. Other Matters

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Pursuant to the Congressional Review Act,<sup>995</sup> the Office of Information and Regulatory Affairs has designated these rules as “[not a major rule],” as defined by 5 U.S.C. 804(2).

## VII. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (“RFA”)<sup>996</sup> requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Pursuant to Section 605(b) of the RFA,<sup>997</sup> the Commission certified in the Proposing Release and the Cross-Border Proposing Release that the proposed amendments to Rules 17a-3, 17a-4, 17a-5, and 17a-11 and new Rules 3a71-6 and 18a-5 through 18a-9 would not have a significant economic impact on

any “small entity”<sup>998</sup> for purposes of the RFA.<sup>999</sup>

For purposes of Commission rulemaking in connection with the RFA, a small entity includes: (1) When used with reference to an “issuer” or a “person,” other than an investment company, an “issuer” or “person” that, on the last day of its most recent fiscal year, had total assets of \$5 million or less,<sup>1000</sup> or (2) a broker-dealer with 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 paragraph (d) of Rule 17a-5, or, if not required to file such statements, a broker-dealer with 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 is not affiliated with any person (other than a natural person) that is not a small business or small organization.<sup>1001</sup>

Based on available information about the security-based swap market, the market, while broad in scope, is largely dominated by entities such as those that will be covered by the SBSB and MSBSP definitions. Based on feedback from industry participants about the security-based swap markets, the Commission continues to believe that (1) 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;<sup>1002</sup> and (2) the types of entities that may have security-based swap positions above the level required to register as “major security-based swap participants” would not be “small entities” for purposes of the RFA. Thus, the Commission believes that it is unlikely that the requirements applicable to SBSBs and MSBSPs that

<sup>998</sup> Although Section 601(b) of the RFA defines the term “small entity,” the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term “small entity” for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in 17 CFR 240.0-10 (“Rule 0-10”). See *Statement of Management on Internal Accounting Control*, Exchange Act Release No. 18451 (Jan. 28, 1982), 47 FR 5215 (Feb. 4, 1982).

<sup>999</sup> See *Recordkeeping and Reporting Proposing Release: Capital Rule for Certain Security-Based Swap Dealers*, 79 FR at 25296-25297; *Cross-Border Proposing Release*, 78 FR at 31204-31205.

<sup>1000</sup> See 17 CFR 240.0-10(a).

<sup>1001</sup> See 17 CFR 240.0-10(c).

<sup>1002</sup> The amendments are discussed in detail in section II of this release. The Commission discusses the economic impact, including the compliance costs and burdens, of the amendments in sections IV and V of this release.

are being established under the amendments to Rules 3a71-6, 17a-3, 17a-4, 17a-5, 17a-11, and 17a-12 and new Rules 18a-5, 18a-6, 18a-7, 18a-8, and 18a-9, will have a significant economic impact on any small entity.

The Commission estimates that as of December 31, 2018 there are approximately 996 broker-dealers that are “small” for the purposes Rule 0-10. While the amendments to Rules 17a-3, 17a-4, and 17a-5 relating to making and keeping records that include details about security-based swaps and swaps and reporting information about security-based swaps and swaps will apply to all broker-dealers with such positions, it is unlikely that these amendments will have any impact on small broker-dealers, since most, if not all, of these firms generally do not hold these types of positions. In addition, the technical amendments to Rules 17a-3, 17a-4, 17a-5, 17a-11, and 17a-12 will apply to all broker-dealers, including broker-dealers that are small. However, these amendments will have no impact on broker-dealers, including small broker-dealers, because they will not establish new substantive requirements.

For the foregoing reasons, the Commission certifies that the amendments to Rules 3a71-6, 17a-3, 17a-4, 17a-5, 17a-11, and 17a-12 and new Rules 18a-5 through 18a-9, will not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

## VIII. Statutory Basis

The Commission is revising Rules 30-3, 17a-3, 17a-4, 17a-5, 17a-11, 17a-12, and 3a71-6 under the Exchange Act (17 CFR 200.30-3, 17 CFR 240.17a-3, 17 CFR 240.17a-4, 17 CFR 240.17a-5, 17 CFR 240.17a-11, 17 CFR 240.17a-12, and 17 CFR 240.3a71-6), Part II of Form X-17A-5 and the instructions thereto (17 CFR 249.617), and Part III of Form X-17A-5 (17 CFR 249.617), and adding new Rules 18a-5, 18a-6, 18a-7, 18a-8, and 18a-9 under the Exchange Act (17 CFR 240.18a-5, 17 CFR 240.18a-6, 17 CFR 240.18a-7, 17 CFR 240.18a-8, and 17 CFR 240.18a-9), and Part IIC of Form X-17A-5 and the instructions thereto (17 CFR 249.617) pursuant to the authority conferred by the Exchange Act, including Sections 15F, 17, and 23(a).

## List of Subjects

### 17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government agencies), Civil rights, Classified information, Conflicts of interest, Environmental impact

<sup>995</sup> 5 U.S.C. 801 *et seq.*

<sup>996</sup> See 5 U.S.C. 601 *et seq.*

<sup>997</sup> See 5 U.S.C. 605(b).

statements, Equal employment opportunity, Federal buildings and facilities, Freedom of information, Government securities, Organization and functions (Government agencies), Privacy, Reporting and recordkeeping requirements, Sunshine Act.

17 CFR Part 240

Brokers, Confidential business information, Fraud, Reporting and recordkeeping requirements, Securities.

17 CFR Part 249

Brokers, Recordkeeping and reporting requirements, Securities.

Text of Rules and Rule Amendments

For the reasons set out in the preamble, the Commission is amending title 17, chapter II, of the Code of Federal Regulations as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

Subpart A—Organization and Program Management

■ 1. The authority citation for part 200, subpart A, continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77o, 77s, 77z-3, 77sss, 78d, 78d-1, 78d-2, 78o-4, 78w, 78ll(d), 78mm, 80a-37, 80b-11, 7202, and 7211 et seq., unless otherwise noted.

\* \* \* \* \*

Section 200.30-3 is also issued under 15 U.S.C. 78b, 78d, 78f, 78k-1, 78q, 78s, and 78eee.

\* \* \* \* \*

■ 2. Section 200.30-3 is amended by revising paragraphs (a)(5) and (30) and (a)(65)(i) to read as follows:

§ 200.30-3 Delegation of authority to Director of Division of Trading and Markets.

\* \* \* \* \*

(a) \* \* \*

(5) Pursuant to § 240.17a-5(m)(3) of this chapter (Rule 17a-5(m)(3)), to consider applications by brokers and dealers for exemptions from, and extension of time within which to file, reports required by § 240.17a-5 of this chapter (Rule 17a-5) and to grant, and to authorize the issuance of orders denying, such applications, provided applicant is advised of his right to have such denial reviewed by the Commission.

\* \* \* \* \*

(30) Pursuant to section 17(a) of the Act, 15 U.S.C. 78q, to approve amendments to the plans which are consistent with the reporting structure of §§ 240.17a-5(a)(2) and 240.17a-10(b) of this chapter (Rules 17a-5(a)(2) and

17a-10(b)) filed by self-regulatory organizations pursuant to §§ 240.17a-5(a)(3) and 240.17a-10(b) of this chapter (Rules 17a-5(a)(3) and 17a-10(b)).

\* \* \* \* \*

(65) \* \* \*

(i) To authorize the issuance of orders requiring over-the-counter (OTC) derivatives dealers to file, pursuant to § 240.17a-12(a)(1)(ii) of this chapter, monthly, or at least at such times as shall be specified, Part II of Form X-17A-5 (§ 249.617 of this chapter) and such other financial and operational information as shall be specified.

\* \* \* \* \*

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 3. The general authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 et seq., and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

\* \* \* \* \*

■ 4. Amend § 240.3a71-6 by adding paragraph (d)(6) to read as follows:

§ 240.3a71-6 Substituted compliance for security-based swap dealers and major security-based swap participants.

\* \* \* \* \*

(d) \* \* \*

(6) Recordkeeping and reporting. The recordkeeping and reporting requirements of Section 15F of the Act (15 U.S.C. 78o-10) and §§ 240.18a-5 through 240.18a-9; provided, however, that prior to making such a substituted compliance determination the Commission intends to consider (in addition to any conditions imposed), whether the foreign financial regulatory system's required records and reports, the timeframes for recording or reporting information, the accounting standards governing the records and reports, and the required format of the records and reports are comparable to applicable provisions arising under the Act and its rules and regulations and would permit the Commission to examine and inspect regulated firms' compliance with the applicable securities laws.

■ 5. Amend § 240.17a-3 by:

- a. Adding introductory text;
■ b. Revising paragraphs (a) introductory text, (a)(1) and (3), (a)(4)(vi) and (vii), (a)(5) through (11), (a)(12)(i) introductory text, and (a)(12)(i)(A) and (E) through (H);
■ c. Removing the undesignated paragraph following paragraph (a)(12)(i);
■ d. Adding paragraph (a)(12)(i)(I);
■ e. Revising paragraph (a)(12)(ii);
■ f. In paragraphs (a)(16)(ii)(A) and (B), removing the phrase "shall mean" and adding in its place "means";
■ g. In paragraphs (a)(17)(i)(A) and (a)(17)(i)(B)(1), removing the word "shall" and adding in its place "must" wherever it appears;
■ h. In paragraphs (a)(17)(i)(C) and (D), removing the word "shall" and adding in its place "will" wherever it appears;
■ i. In paragraphs (a)(18)(i) and (a)(19)(i), removing the word "shall" and adding in its place "must" wherever it appears;
■ j. Adding paragraphs (a)(25) through (30);
■ k. Revising paragraphs (b) through (g); and
■ l. Removing paragraph (h).

The additions and revisions read as follows:

§ 240.17a-3 Records to be made by certain exchange members, brokers and dealers.

This section applies to the following types of entities: A member of a national securities exchange who transacts a business in securities directly with others than members of a national securities exchange; a broker or dealer who transacts a business in securities through the medium of a member of a national securities exchange; a broker or dealer, including an OTC derivatives dealer as that term is defined in § 240.3b-12, registered pursuant to section 15 of the Act (15 U.S.C. 78o); a security-based swap dealer registered pursuant to section 15F of the Act (15 U.S.C. 78o-10) that is also a broker or dealer, including an OTC derivatives dealer, registered pursuant to section 15 of the Act; and a major security-based swap participant registered pursuant to section 15F of the Act that is also a broker or dealer, including an OTC derivatives dealer, registered pursuant to section 15 of the Act. Section 240.18a-5 (rather than this section) applies to the following types of entities: A security-based swap dealer registered pursuant to section 15F of the Act that is not also a broker or dealer, including an OTC derivatives dealer, registered pursuant to section 15 of the Act; and a major security-based swap participant registered pursuant to section 15F of the Act that is not also a broker or dealer, including an OTC

derivatives dealer, registered pursuant to section 15 of the Act.

(a) Every member of a national securities exchange who transacts a business in securities directly with others than members of a national securities exchange, every broker or dealer who transacts a business in securities through the medium of any such member, and every broker or dealer registered pursuant to section 15 of the Act (15 U.S.C. 78o) must make and keep current the following books and records relating to its business:

(1) Blotters (or other records of original entry) containing an itemized daily record of all purchases and sales of securities (including security-based swaps), all receipts and deliveries of securities (including certificate numbers), all receipts and disbursements of cash and all other debits and credits. Such records must show the account for which each such purchase or sale was effected, the name and amount of securities, the unit and aggregate purchase or sale price, if any (including the financial terms for security-based swaps), the trade date, and the name or other designation of the person from whom such securities were purchased or received or to whom sold or delivered. For security-based swaps, such records must also show, for each transaction, the type of security-based swap, the reference security, index, or obligor, the date and time of execution, the effective date, the scheduled termination date, the notional amount(s) and the currenc(ies) in which the notional amount(s) is expressed, the unique transaction identifier, and the counterparty's unique identification code.

\* \* \* \* \*

(3) Ledger accounts (or other records) itemizing separately as to each cash, margin, or security-based swap account of every customer and of such member, broker or dealer and partners thereof, all purchases, sales, receipts and deliveries of securities (including security-based swaps) and commodities for such account, and all other debits and credits to such account; and, in addition, for a security-based swap, the type of security-based swap, the reference security, index, or obligor, the date and time of execution, the effective date, the scheduled termination date, the notional amount(s) and the currenc(ies) in which the notional amount(s) is expressed, the unique transaction identifier, and the counterparty's unique identification code.

(4) \* \* \*

(vi) All long and all short securities record differences arising from the

examination, count, verification, and comparison pursuant to §§ 240.17a-5, 240.17a-12, 240.17a-13, and 240.18a-7, as applicable (by date of examination, count, verification, and comparison showing for each security the number of long or short count differences); and (vii) Repurchase and reverse repurchase agreements.

(5) A securities record or ledger reflecting separately for each:

(i) Security, other than a security-based swap, as of the clearance dates all "long" or "short" positions (including securities in safekeeping and securities that are the subjects of repurchase or reverse repurchase agreements) carried by such member, broker or dealer for its account or for the account of its customers or partners, or others, and showing the location of all securities long and the offsetting position to all securities short, including long security count differences and short security count differences classified by the date of the physical count and verification in which they were discovered, and in all cases the name or designation of the account in which each position is carried.

(ii) Security-based swap, the reference security, index, or obligor, the unique transaction identifier, the counterparty's unique identification code, whether it is a "bought" or "sold" position in the security-based swap, whether the security-based swap is cleared or not cleared, and if cleared, identification of the clearing agency where the security-based swap is cleared.

(6)(i) A memorandum of each brokerage order, and of any other instruction, given or received for the purchase or sale of a security, except for the purchase or sale of a security-based swap, whether executed or unexecuted.

(A) The memorandum must show the terms and conditions of the order or instructions and of any modification or cancellation thereof, the account for which entered, the time the order was received, the time of entry, the price at which executed, the identity of each associated person, if any, responsible for the account, the identity of any other person who entered or accepted the order on behalf of the customer, or, if a customer entered the order on an electronic system, a notation of that entry; and, to the extent feasible, the time of execution or cancellation. The memorandum need not show the identity of any person, other than the associated person responsible for the account, who may have entered or accepted the order if the order is entered into an electronic system that generates the memorandum and if that system is not capable of receiving an entry of the

identity of any person other than the responsible associated person; in that circumstance, the member, broker or dealer must produce upon request by a representative of a securities regulatory authority a separate record which identifies each other person. An order entered pursuant to the exercise of discretionary authority by the member, broker or dealer, or associated person thereof, must be so designated. The term *instruction* must include instructions between partners and employees of a member, broker or dealer. The term *time of entry* means the time when the member, broker or dealer transmits the order or instruction for execution.

(B) The memorandum need not be made as to a purchase, sale or redemption of a security on a subscription way basis directly from or to the issuer, if the member, broker or dealer maintains a copy of the customer's or non-customer's subscription agreement regarding a purchase, or a copy of any other document required by the issuer regarding a sale or redemption.

(ii) A memorandum of each brokerage order, and of any other instruction, given or received for the purchase or sale of a security-based swap, whether executed or unexecuted. The memorandum must show the terms and conditions of the order or instructions and of any modification or cancellation thereof; the account for which entered; the time the order was received; the time of entry; the price at which executed; the identity of each associated person, if any, responsible for the account; the identity of any other person who entered or accepted the order on behalf of the customer, or, if a customer entered the order on an electronic system, a notation of that entry; and, to the extent feasible, the time of cancellation, if applicable. The memorandum also must include the type of the security-based swap, the reference security, index, or obligor, the date and time of execution, the effective date, the scheduled termination, the notional amount(s) and the currenc(ies) in which the notional amount(s) is expressed, the unique transaction identifier, and the counterparty's unique identification code. An order entered pursuant to the exercise of discretionary authority must be so designated.

(7)(i) A memorandum of each purchase or sale of a security, other than for the purchase or sale of a security-based swap, for the account of the member, broker or dealer showing the price and, to the extent feasible, the time of execution; and, in addition, where the purchase or sale is with a customer other than a broker or dealer,

a memorandum of each order received, showing the time of receipt; the terms and conditions of the order and of any modification thereof; the account for which it was entered; the identity of each associated person, if any, responsible for the account; the identity of any other person who entered or accepted the order on behalf of the customer, or, if a customer entered the order on an electronic system, a notation of that entry. The memorandum need not show the identity of any person other than the associated person responsible for the account who may have entered the order if the order is entered into an electronic system that generates the memorandum and if that system is not capable of receiving an entry of the identity of any person other than the responsible associated person. In the circumstance in the preceding sentence, the member, broker or dealer must produce upon request by a representative of a securities regulatory authority a separate record that identifies each other person. An order with a customer other than a member, broker or dealer entered pursuant to the exercise of discretionary authority by the member, broker or dealer, or associated person thereof, must be so designated.

(ii) A memorandum of each purchase or sale of a security-based swap for the account of the member, broker or dealer showing the price; and, in addition, where the purchase or sale is with a customer other than a broker or dealer, a memorandum of each order received, showing the time of receipt; the terms and conditions of the order and of any modification thereof; the account for which it was entered; the identity of any other person who entered or accepted the order on behalf of the customer, or, if a customer entered the order on an electronic system, a notation of that entry. The memorandum must also include the type of security-based swap, the reference security, index, or obligor, the date and time of execution, the effective date, the scheduled termination date, the notional amount(s) and the curren(ies) in which the notional amount(s) is expressed, the unique transaction identifier, and the counterparty's unique identification code. An order entered pursuant to the exercise of discretionary authority must be so designated.

(8)(i) With respect to a security other than a security-based swap, copies of confirmations of all purchases and sales of securities, including all repurchase and reverse repurchase agreements, and copies of notices of all other debits and credits for securities, cash and other

items for the account of customers and partners of such member, broker or dealer.

(ii) With respect to a security-based swap, copies of the security-based swap trade acknowledgment and verification made in compliance with § 240.15Fi-2.

(9) A record with respect to each cash, margin, and security-based swap account with such member, broker or dealer indicating, as applicable:

(i) The name and address of the beneficial owner of such account;

(ii) Except with respect to exempt employee benefit plan securities as defined in § 240.14a-1(d), but only to the extent such securities are held by employee benefit plans established by the issuer of the securities, whether or not the beneficial owner of securities registered in the name of such members, brokers or dealers, or a registered clearing agency or its nominee objects to disclosure of his or her identity, address, and securities positions to issuers;

(iii) In the case of a margin account, the signature of such owner; provided that, in the case of a joint account or an account of a corporation, such records are required only in respect of the person or persons authorized to transact business for such account; and

(iv) For each security-based swap account, a record of the unique identification code of such counterparty, the name and address of such counterparty, and a record of the authorization of each person the counterparty has granted authority to transact business in the security-based swap account.

(10) A record of all puts, calls, spreads, straddles, and other options in which such member, broker or dealer has any direct or indirect interest or which such member, broker or dealer, has granted or guaranteed, containing, at least, an identification of the security, and the number of units involved. An OTC derivatives dealer must also keep a record of all eligible OTC derivative instruments as defined in § 240.3b-13 in which the OTC derivatives dealer has any direct or indirect interest or which it has written or guaranteed, containing, at a minimum, an identification of the security or other instrument, the number of units involved, and the identity of the counterparty.

(11) A record of the proof of money balances of all ledger accounts in the form of trial balances and a record of the computation of aggregate indebtedness and net capital, as of the trial balance date, pursuant to § 240.15c3-1 or § 240.18a-1, as applicable. The computation need not be made by any member, broker or dealer

unconditionally exempt from § 240.15c3-1 pursuant to § 240.15c3-1(b)(1) or (3). Such trial balances and computations must be prepared currently at least once a month.

(12)(i) A questionnaire or application for employment executed by each *associated person* as that term is defined in paragraph (g)(4) of this section of the member, broker or dealer, which questionnaire or application must be approved in writing by an authorized representative of the member, broker or dealer and must contain at least the following information with respect to the associated person:

(A) The associated person's name, address, social security number, and the starting date of the associated person's employment or other association with the member, broker or dealer;

\* \* \* \* \*

(E) A record of any denial, suspension, expulsion, or revocation of membership or registration of any member, broker or dealer with which the associated person was associated in any capacity when such action was taken;

(F) A record of any permanent or temporary injunction entered against the associated person, or any member, broker, dealer, security-based swap dealer or major security-based swap participant with which the associated person was associated in any capacity at the time such injunction was entered;

(G) A record of any arrest or indictment for any felony, or any misdemeanor pertaining to securities, commodities, banking, insurance or real estate (including, but not limited to, acting or being associated with a broker or dealer, investment company, investment adviser, futures sponsor, bank, or savings and loan association), fraud, false statements or omissions, wrongful taking of property or bribery, forgery, counterfeiting, or extortion, and the disposition of the foregoing; and

(H) A record of any other name or names by which the associated person has been known or which the associated person has used.

(I) Provided, however, that if such associated person has been registered as a registered representative of such member, broker or dealer with, or the associated person's employment has been approved by a registered national securities association or a registered national securities exchange, then retention of a full, correct, and complete copy of any and all applications for such registration or approval will be deemed to satisfy the requirements of this paragraph (a)(12)(i).

(ii) A record listing every associated person of the member, broker or dealer

which shows, for each associated person, every office of the member, broker or dealer, where the associated person regularly conducts the business of handling funds or securities or effecting any transactions in, or inducing or attempting to induce the purchase or sale of any security for the member, broker or dealer and the Central Registration Depository number, if any, and every internal identification number or code assigned to that person by the member, broker or dealer.

\* \* \* \* \*

(25) A record of the daily calculation of the current exposure and, if applicable, the initial margin amount for each account of a counterparty required under § 240.18a-3(c).

(26) A record of compliance with possession or control requirements under § 240.15c3-3(p)(2).

(27) A record of the reserve computation required under § 240.15c3-3(p)(3).

(28) A record of each security-based swap transaction that is not verified under § 240.15Fi-2 within five business days of execution that includes, at a minimum, the unique transaction identifier and the counterparty's unique identification code.

(29) A record documenting that the broker or dealer has complied with the business conduct standards as required under § 240.15Fh-6.

(30) A record documenting that the broker or dealer has complied with the business conduct standards as required under §§ 240.15Fh-1 through 240.15Fh-5 and 240.15Fk-1.

\* \* \* \* \*

(b) A broker or dealer may comply with the recordkeeping requirements of the Commodity Exchange Act and chapter I of this title applicable to swap dealers and major swap participants in lieu of complying with paragraphs (a)(1), (3), and (5) of this section solely with respect to required information regarding security-based swap transactions and positions if:

(1) The broker or dealer is registered as a security-based swap dealer or major security-based swap participant pursuant to section 15F of the Act (15 U.S.C. 78o-10);

(2) The broker or dealer is registered as a swap dealer or major swap participant pursuant to section 4s of the Commodity Exchange Act and chapter I of this title;

(3) The broker or dealer is subject to 17 CFR 23.201, 23.202, 23.402, and 23.501 with respect to its swap-related books and records;

(4) The broker or dealer preserves all of the data elements necessary to create

the records required by paragraphs (a)(1), (3), and (5) of this section as they pertain to security-based swap and swap transactions and positions;

(5) The broker or dealer upon request furnishes promptly to representatives of the Commission the records required by paragraphs (a)(1), (3), and (5) of this section as well as the records required by 17 CFR 23.201, 23.202, 23.402, and 23.501 as they pertain to security-based swap and swap transactions and positions in the format applicable to that category of record as set forth in this section; and

(6) The broker or dealer provides notice of its intent to utilize this paragraph (b) by notifying in writing the Commission, both at the principal office of the Commission in Washington, DC, and at the regional office of the Commission for the region in which the registrant has its principal place of business, as well as by notifying in writing the registrant's designated examining authority.

(c) A member of a national securities exchange, or a broker or dealer registered pursuant to section 15 of the Act (15 U.S.C. 78o), that introduces accounts on a fully-disclosed basis, is not required to make or keep such records of transactions cleared for such member, broker or dealer as are made and kept by a clearing broker or dealer pursuant to the requirements of this section and § 240.17a-4. Nothing in this paragraph (c) will be deemed to relieve such member, broker or dealer from the responsibility that such books and records be accurately maintained and preserved as specified in this section and § 240.17a-4.

(d) For purposes of transactions in municipal securities by municipal securities brokers and municipal securities dealers, compliance with Rule G-8 of the Municipal Securities Rulemaking Board or any successor rule will be deemed to be in compliance with this section.

(e) The provisions of this section will not apply to security futures product transactions and positions in a *futures account* (as that term is defined in § 240.15c3-3(a)(15)); provided, that the Commodity Futures Trading Commission's recordkeeping rules apply to those transactions and positions.

(f) Every member, broker or dealer must make and keep current, as to each office, the books and records described in paragraphs (a)(1), (6), (7), (12), and (17), (a)(18)(i), and (a)(19) through (22) of this section.

(g) When used in this section:

(1) The term *office* means any location where one or more associated persons

regularly conduct the business of handling funds or securities or effecting any transactions in, or inducing or attempting to induce the purchase or sale of, any security.

(2) The term *principal* means any individual registered with a registered national securities association as a principal or branch manager of a member, broker or dealer or any other person who has been delegated supervisory responsibility over associated persons by the member, broker or dealer.

(3) The term *securities regulatory authority* means the Commission, any self-regulatory organization, or any securities commission (or any agency or office performing like functions) of the States.

(4) The term *associated person* means a "person associated with a broker or dealer" or "person associated with a security-based swap dealer or major security-based swap participant" as defined in sections 3(a)(18) and (70) of the Act (15 U.S.C. 78c(a)(18) and (70)) respectively, but does not include persons whose functions are solely clerical or ministerial.

\* \* \* \* \*

■ 6. Amend § 240.17a-4 by:

■ a. Adding introductory text;

■ b. Revising paragraphs (a), (b) introductory text, (b)(1), (3) through (5), and (7), (b)(8) introductory text, (b)(8)(i), (v) through (viii), and (xii) through (xv);

■ c. Adding paragraphs (b)(8)(xvi) and (xvii);

■ d. Revising paragraph (b)(9);

■ e. In paragraph (b)(11), removing the word "shall" and adding in its place the word "must";

■ f. Revising paragraphs (b)(12) and (13);

■ g. Adding paragraphs (b)(14) through (16);

■ h. Revising paragraphs (c), (d), (e) introductory text, and (e)(1) through (4) and (6);

■ i. In the last sentence of paragraph (e)(8), removing the word "shall" and adding in its place the word "must";

■ j. In paragraph (f) introductory text, removing the word "paragraph," and adding in its place the word "section";

■ k. In paragraphs (f)(2) introductory text and (f)(3) introductory text, removing the word "shall" and adding in its place the word "must";

■ l. In paragraph (f)(3)(iv)(B), removing the phrase "each index." and adding in its place the phrase "the index.";

■ m. In paragraph (f)(3)(vi), removing the phrase "the self-regulatory organizations" and adding in its place the phrase "any self-regulatory organization";

- n. Revising paragraphs (f)(3)(vii) and (g);
- o. In paragraph (h), adding the phrase “or any successor rule” after the word “Board”;
- p. Revising paragraph (i) and removing the undesignated paragraph following paragraph (i);
- q. In paragraph (j), removing the word “shall” and adding in its place the word “must”;
- r. In paragraph (k)(1), removing the word “shall” and adding in its place the word “must” wherever it appears;
- s. In paragraph (l), removing “§ 240.17a-3(g)” and adding in its place “§ 240.17a-3(e)”;
- t. Revising paragraphs (m)(1) through (4); and
- u. Adding paragraph (m)(5).

The additions and revisions read as follows:

**§ 240.17a-4 Records to be preserved by certain exchange members, brokers and dealers.**

This section applies to the following types of entities: A member of a national securities exchange who transacts a business in securities directly with others than members of a national securities exchange; a broker or dealer who transacts a business in securities through the medium of a member of a national securities exchange; a broker or dealer, including an *OTC derivatives dealer* as that term is defined in § 240.3b-12, registered pursuant to section 15 of the Act (15 U.S.C. 78o); a security-based swap dealer registered pursuant to section 15F of the Act (15 U.S.C. 78o-10) that is also a broker or dealer, including an *OTC derivatives dealer*, registered pursuant to section 15 of the Act; and a major security-based swap participant registered pursuant to section 15F of the Act that is also a broker or dealer, including an *OTC derivatives dealer*, registered pursuant to section 15 of the Act. Section 240.18a-6 (rather than this section) applies to the following types of entities: A security-based swap dealer registered pursuant to section 15F of the Act that is not also a broker or dealer, including an *OTC derivatives dealer*, registered pursuant to section 15 of the Act; and a major security-based swap participant registered pursuant to section 15F of the Act that is not also a broker or dealer, including an *OTC derivatives dealer*, registered pursuant to section 15 of the Act.

(a) Every member, broker or dealer subject to § 240.17a-3 must preserve for a period of not less than 6 years, the first two years in an easily accessible place, all records required to be made pursuant to § 240.17a-3(a)(1) through (3), (5), and

(21) and (22), and analogous records created pursuant to § 240.17a-3(d).

(b) Every member, broker or dealer subject to § 240.17a-3 must preserve for a period of not less than three years, the first two years in an easily accessible place:

(1) All records required to be made pursuant to § 240.17a-3(a)(4), (6) through (11), (16), (18) through (20), and (25) through (30), and analogous records created pursuant to § 240.17a-3(e).

(3) All bills receivable or payable (or copies thereof), paid or unpaid, relating to the member, broker or dealer’s business as such.

(4) Originals of all communications received and copies of all communications sent (and any approvals thereof) by the member, broker or dealer (including inter-office memoranda and communications) relating to its business as such, including all communications which are subject to rules of a self-regulatory organization of which the member, broker or dealer is a member regarding communications with the public. As used in this paragraph (b)(4), the term *communications* includes sales scripts and recordings of telephone calls required to be maintained pursuant to section 15F(g)(1) of the Act (15 U.S.C. 78o-10(g)(1)).

(5) All trial balances, computations of aggregate indebtedness and net capital (and working papers in connection therewith), financial statements, branch office reconciliations, and internal audit working papers, relating to the member, broker or dealer’s business as such.

(7) All written agreements (or copies thereof) entered into by such member, broker or dealer relating to its business as such, including agreements with respect to any account. Written agreements with respect to a security-based swap customer or non-customer, including governing documents or any document establishing the terms and conditions of the customer’s or non-customer’s security-based swaps must be maintained with the customer’s or non-customer’s account records.

(8) Records which contain the following information in support of amounts included in the report prepared as of the fiscal year end on Part II or IIA of Form X-17A-5 (§ 249.617 of this chapter), as applicable, and in the annual financial statements filed with the Commission required by § 240.17a-5(d), § 240.17a-12(b), or § 240.18a-7(c), as applicable:

(i) Money balance and position, long or short, including description,

quantity, price, and valuation of each security including contractual commitments in customers’ accounts, in cash and fully secured accounts, partly secured accounts, unsecured accounts, and in securities accounts payable to customers;

(v) Description of futures commodity contracts or swaps, contract value on trade date, market value, gain or loss, and liquidating equity or deficit in customers’ and non-customers’ accounts;

(vi) Description of futures commodity contracts or swaps, contract value on trade date, market value, gain or loss, and liquidating equity or deficit in trading and investment accounts;

(vii) Description, money balance, quantity, price, and valuation of each spot commodity, and swap position or commitments in customers’ and non-customers’ accounts;

(viii) Description, money balance, quantity, price, and valuation of each spot commodity, and swap position or commitments in trading and investment accounts;

(xii) Description, settlement date, contract amount, quantity, market price, and valuation for each aged failed to deliver requiring a charge in the Computation of Net Capital pursuant to § 240.15c3-1 or § 240.18a-1, as applicable;

(xiii) Detail relating to information for possession or control requirements under § 240.15c3-3 or § 240.18a-4, as applicable and reported in Part II or IIA of Form X-17A-5 (§ 249.617 of this chapter), as applicable;

(xiv) Detail relating to information for security-based swap possession or control requirements under § 240.15c3-3 or § 240.18a-4, as applicable, and reported in Part II or IIA of Form X-17A-5 (§ 249.617 of this chapter);

(xv) Detail of all items, not otherwise substantiated, which are charged or credited in the Computation of Net Capital pursuant to § 240.15c3-1 or § 240.18a-1, as applicable, such as cash margin deficiencies, deductions related to securities values and undue concentration, aged securities differences, and insurance claims receivable;

(xvi) Detail relating to the calculation of the risk margin amount pursuant to § 240.15c3-1(c)(17) or § 240.18a-1(c)(6), as applicable; and

(xvii) Other schedules which are specifically prescribed by the Commission as necessary to support information reported as required by §§ 240.17a-5, 240.17a-12, and 240.18a-7, as applicable.

(9) The records required to be made pursuant to § 240.15c3-3(d)(5) and (o) or § 240.18a-4, as applicable.

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(12) The records required to be made pursuant to § 240.15c3-1e(c)(4)(vi) or § 240.18a-1(e)(2)(iii)(F)(2), as applicable.

(13) The written policies and procedures the broker-dealer establishes, documents, maintains, and enforces to assess creditworthiness for the purpose of § 240.15c3-1(c)(2)(vi)(E), (c)(2)(vi)(F)(1) and (2), and (c)(2)(vi)(H) or § 240.18a-1(c)(1)(vi)(2), as applicable.

(14) A copy of information required to be reported under §§ 242.901 through 242.909 of this chapter (Regulation SBSR).

(15) Copies of documents, communications, disclosures, and notices related to business conduct standards as required under §§ 240.15Fh-1 through 240.15Fh-6 and 240.15Fk-1.

(16) Copies of documents used to make a reasonable determination with respect to special entities, including information relating to the financial status, the tax status, the investment or financing objectives of the special entity as required under section 15F(h)(4)(C) and (5)(A) of the Act (15 U.S.C. 78o-10(h)(4)(C) and (5)(A)).

(c) Every member, broker or dealer subject to § 240.17a-3 must preserve for a period of not less than six years after the closing of any customer's account any account cards or records which relate to the terms and conditions with respect to the opening and maintenance of the account.

(d) Every member, broker or dealer subject to § 240.17a-3 must preserve during the life of the enterprise and of any successor enterprise all partnership articles or, in the case of a corporation, all articles of incorporation or charter, minute books, and stock certificate books (or, in the case of any other form of legal entity, all records such as articles of organization or formation, and minute books used for a purpose similar to those records required for corporations or partnerships), all Forms BD (§ 249.501 of this chapter), all Forms BDW (§ 249.501a of this chapter), all Forms SBSE-BD (§ 249.1600b of this chapter), all Forms SBSE-C (§ 249.1600c of this chapter), all Forms SBSE-W (§ 249.1601 of this chapter), all amendments to these forms, and all licenses or other documentation showing the registration of the member, broker or dealer with any securities regulatory authority or the Commodity Futures Trading Commission.

(e) Every member, broker or dealer subject to § 240.17a-3 must maintain

and preserve in an easily accessible place:

(1) All records required under § 240.17a-3(a)(12) until at least three years after the associated person's employment and any other connection with the member, broker or dealer has terminated.

(2) All records required under § 240.17a-3(a)(13) until at least three years after the termination of employment or association of those persons required by § 240.17f-2 to be fingerprinted.

(3) All records required pursuant to § 240.17a-3(a)(15) during the life of the enterprise.

(4) All records required pursuant to § 240.17a-3(a)(14) for three years.

\* \* \* \* \*

(6) Each report which a securities regulatory authority or the Commodity Futures Trading Commission has requested or required the member, broker or dealer to make and furnish to it pursuant to an order or settlement, and each securities regulatory authority, Commodity Futures Trading Commission, or prudential regulator examination report until three years after the date of the report.

\* \* \* \* \*

(f) \* \* \*

(3) \* \* \*

(vii) For every member, broker or dealer exclusively using electronic storage media for some or all of its record preservation under this section, at least one third party (the undersigned), who has access to and the ability to download information from the member's, broker's or dealer's electronic storage media to any acceptable medium under this section, must file with the designated examining authority for the member, broker or dealer the following undertakings with respect to such records:

The undersigned hereby undertakes to furnish promptly to the U.S. Securities and Exchange Commission ("Commission"), its designees or representatives, any self-regulatory organization of which it is a member, or any State securities regulator having jurisdiction over the member, broker or dealer, upon reasonable request, such information as deemed necessary by the staffs of the Commission, any self-regulatory organization of which it is a member, or any State securities regulator having jurisdiction over the member, broker or dealer to download information kept on the member's, broker's or dealer's electronic storage media to any medium acceptable under § 240.17a-4. Furthermore, the undersigned hereby undertakes to take reasonable steps to provide access to information contained on the member's, broker's or dealer's electronic storage media, including, as appropriate, arrangements for the downloading of any

record required to be maintained and preserved by the member, broker or dealer pursuant to §§ 240.17a-3 and 240.17a-4 in a format acceptable to the staffs of the Commission, any self-regulatory organization of which it is a member, or any State securities regulator having jurisdiction over the member, broker or dealer. Such arrangements will provide specifically that in the event of a failure on the part of a member, broker or dealer to download the record into a readable format and after reasonable notice to the broker or dealer, upon being provided with the appropriate electronic storage medium, the undersigned will undertake to do so, as the staffs of the Commission, any self-regulatory organization of which it is a member, or any State securities regulator having jurisdiction over the member, broker or dealer may request.

(g) If a person who has been subject to § 240.17a-3 ceases to transact a business in securities directly with others than members of a national securities exchange, or ceases to transact a business in securities through the medium of a member of a national securities exchange, or ceases to be registered pursuant to section 15 of the Act (15 U.S.C. 78o) such person must, for the remainder of the periods of time specified in this section, continue to preserve the records which it theretofore preserved pursuant to this section.

\* \* \* \* \*

(i)(1) If the records required to be maintained and preserved pursuant to the provisions of §§ 240.17a-3 and 240.17a-4 are prepared or maintained by an outside service bureau, depository, bank which does not operate pursuant to § 240.17a-3(b)(2), or other recordkeeping service on behalf of the member, broker or dealer required to maintain and preserve such records, such outside entity must file with the Commission a written undertaking in form acceptable to the Commission, signed by a duly authorized person, to the effect that such records are the property of the member, broker or dealer required to maintain and preserve such records and will be surrendered promptly on request of the member, broker or dealer and including the following provision:

With respect to any books and records maintained or preserved on behalf of [BD], the undersigned hereby undertakes to permit examination of such books and records at any time or from time to time during business hours by representatives or designees of the Securities and Exchange Commission, and to promptly furnish to said Commission or its designee true, correct, complete and current hard copy of any or all or any part of such books and records.

(2) Agreement with an outside entity will not relieve such member, broker or dealer from the responsibility to prepare

and maintain records as specified in this section or in § 240.17a–3.

\* \* \* \* \*

(m) \* \* \*

(1) The term *office* has the meaning set forth in § 240.17a–3(g)(1).

(2) The term *principal* has the meaning set forth in § 240.17a–3(g)(2).

(3) The term *securities regulatory authority* has the meaning set forth in § 240.17a–3(g)(3).

(4) The term *associated person* has the meaning set forth in § 240.17a–3(g)(4).

(5) The term *business as such* includes security-based swap activity.

\* \* \* \* \*

■ 7. Section 240.17a–5 is amended by:

■ a. Adding introductory text;

■ b. Revising paragraph (a) heading and removing paragraph (a)(1);

■ c. Redesignating paragraphs (a)(2) through (7) as paragraphs (a)(1) through (6);

■ d. Revising newly redesignated paragraphs (a)(1)(ii) through (iv) and (a)(2) through (5);

■ e. In newly redesignated paragraph (a)(6), removing the word “shall” and adding in its place the word “will” wherever it appears;

■ f. Revising paragraph (b)(1);

■ g. In paragraphs (b)(3) through (5), removing the word “shall” and adding in its place the word “will” wherever it appears;

■ h. In paragraphs (c)(1) and (2), removing the word “shall” and adding in its place the word “must” wherever it appears;

■ i. Revising paragraph (c)(3);

■ j. In paragraph (c)(4)(iii), removing the word “shall” and adding in its place the word “must”;

■ k. Designate the undesignated paragraph following paragraph (c)(4)(iii) as paragraph (c)(4)(iv);

■ l. In paragraph (c)(5)(iii)(C), removing the word “Home” and adding in its place the word “home” wherever it appears;

■ m. In paragraph (d)(1)(i) introductory text, removing “(d)(1)(iv)” and adding “(iv)” in its place and adding “(15 U.S.C. 78o)” after the phrase “section 15 of the Act”;

■ n. Revising paragraphs (d)(1)(i)(B), (d)(2)(i) through (iii), (d)(3)(i)(A)(4) and (5), (d)(3)(i)(B) and (C), (d)(3)(iii), (d)(6), (e)(1)(ii), and (e)(2) through (4);

■ o. In the fifth sentence of paragraph (f)(3)(v)(B), adding the word “the” before the phrase “independent public accountant does not agree”;

■ p. Revising the note to paragraph (h);

■ q. In paragraph (k) introductory text, removing the word “shall” and adding in its place the word “must” wherever it appears and removing the phrase

“Market Regulation” and adding in its place the phrase “Trading and Markets”;

■ r. In paragraph (l), removing “(1)” and “(2)”, removing the phrase “Securities Exchange Act of 1934” and adding in its place the word “Act”, and removing the word “shall” and adding in its place the word “must”;

■ s. In paragraph (m)(1), removing the word “shall” and adding in its place the word “must”;

■ t. In paragraph (m)(2), removing “(48 Stat. 882; 15 U.S.C. 78c)” and “(78 Stat. 565; 15 U.S.C. 78c)” and adding in their place “(15 U.S.C. 78c)”;

■ u. In paragraph (m)(4), removing the word “shall” and adding in its place the word “will”;

■ v. In paragraph (n)(2), removing the word “shall” and adding in its place the word “must”;

■ and

■ w. Revising paragraph (o).

The additions and revisions read as follows:

**§ 240.17a–5 Reports to be made by certain brokers and dealers.**

This section applies to the following types of entities: Except as provided in this introductory text, a broker or dealer, including an *OTC derivatives dealer* as that term is defined in § 240.3b–12 registered pursuant to section 15 of the Act (15 U.S.C. 78o); a broker or dealer, other than an OTC derivatives dealer, registered pursuant to section 15 of the Act that is also a security-based swap dealer registered pursuant to section 15F of the Act (15 U.S.C. 78o–10); and a broker or dealer, including an OTC derivatives dealer, registered pursuant to section 15 of the Act that is also a major-security-based swap participant registered pursuant to section 15F of the Act. Section 240.18a–7 (rather than this section) applies to the following types of entities: A security-based swap dealer registered pursuant to section 15F of the Act that is not also a broker or dealer, other than an OTC derivatives dealer, registered pursuant to section 15 of the Act; a security-based swap dealer registered pursuant to section 15F of the Act that is also an OTC derivatives dealer; and a major security-based swap participant registered pursuant to section 15F of the Act that is not also a broker or dealer, including an OTC derivatives dealer, registered pursuant to section 15 of the Act.

(a) *Monthly and quarterly reports*—(1)

\* \* \*  
(ii) Every broker or dealer subject to this paragraph (a) who clears transactions or carries customer accounts and every broker or dealer that is registered as a security-based swap

dealer or major security-based swap participant under section 15F of the Act (15 U.S.C. 78o–10) must file with the Commission an executed Part II of Form X–17A–5 (§ 249.617 of this chapter) within 17 business days after the end of the calendar quarter and within 17 business days after the end of the fiscal year of the broker or dealer where that date is not the end of a calendar quarter. Certain of such brokers or dealers must file with the Commission an executed Part IIA in lieu thereof if the nature of their business is limited as described in the instructions to Part II of Form X–17A–5 (§ 249.617 of this chapter).

(iii) Every broker or dealer that neither clears transactions nor carries customer accounts and that is not registered as a security-based swap dealer or major security-based swap participant under section 15F of the Act (15 U.S.C. 78o–10) must file with the Commission an executed Part IIA of Form X–17A–5 (§ 249.617 of this chapter) within 17 business days after the end of each calendar quarter and within 17 business days after the end of the fiscal year of the broker or dealer where that date is not the end of a calendar quarter.

(iv) Upon receiving written notice from the Commission or the examining authority designated pursuant to section 17(d) of the Act (15 U.S.C. 78q(d)) (“designated examining authority”), a broker or dealer who receives such notice must file with the Commission on a monthly basis, or at such times as will be specified, an executed Part II or Part IIA of Form X–17A–5 (§ 249.617 of this chapter), and such other financial or operational information as will be required by the Commission or the designated examining authority.

(2) The reports provided for in this paragraph (a) that must be filed with the Commission will be considered filed when received at the Commission’s principal office in Washington, DC, and the regional office of the Commission for the region in which the broker or dealer has its principal place of business. All reports filed pursuant to this paragraph (a) will be deemed to be confidential.

(3) The provisions of paragraph (a)(1) of this section will not apply to a member of a national securities exchange or a registered national securities association if said exchange or association maintains records containing the information required by Part I, Part II, or Part IIA of Form X–17A–5 (§ 249.617 of this chapter), as to such member, and transmits to the Commission a copy of the applicable parts of Form X–17A–5 (§ 249.617 of this chapter) as to such member,

pursuant to a plan, the procedures and provisions of which have been submitted to and declared effective by the Commission. Any such plan filed by a national securities exchange or a registered national securities association may provide that when a member is also a member of one or more national securities exchanges, or of one or more national securities exchanges and a registered national securities association, the information required to be submitted with respect to any such member may be submitted by only one specified national securities exchange or registered national securities association. For the purposes of this section, a plan filed with the Commission by a national securities exchange or a registered national securities association will not become effective unless the Commission, having due regard for the fulfillment of the Commission's duties and responsibilities under the provisions of the Act, declares the plan to be effective. Further, the Commission, in declaring any such plan effective, may impose such terms and conditions relating to the provisions of the plan and the period of its effectiveness as may be deemed necessary or appropriate in the public interest, for the protection of investors, or to carry out the Commission's duties and responsibilities under the Act.

(4) Every broker or dealer subject to this paragraph (a) must file Form Custody (§ 249.639 of this chapter) with its designated examining authority within 17 business days after the end of each calendar quarter and within 17 business days after the end of the fiscal year of the broker or dealer where that date is not the end of a calendar quarter. The designated examining authority must maintain the information obtained through the filing of Form Custody and must promptly transmit that information to the Commission at such time as it transmits the applicable part of Form X-17A-5 (§ 249.617 of this chapter) as required in paragraph (a)(2) of this section.

(5) Broker-dealers that have been authorized by the Commission to compute net capital pursuant to § 240.15c3-1e must file the following additional reports with the Commission:

(i) For each product for which the broker or dealer calculates a deduction for market risk other than in accordance with § 240.15c3-1e(b)(1) or (3), the product category and the amount of the deduction for market risk within 17 business days after the end of the month;

(ii) A graph reflecting, for each business line, the daily intra-month

value at risk within 17 business days after the end of the month;

(iii) The aggregate value at risk for the broker or dealer within 17 business days after the end of the month;

(iv) For each product for which the broker or dealer uses scenario analysis, the product category and the deduction for market risk within 17 business days after the end of the month;

(v) Credit risk information on derivatives exposures within 17 business days after the end of the month, including:

(A) Overall current exposure;

(B) Current exposure (including commitments) listed by counterparty for the 15 largest exposures;

(C) The ten largest commitments listed by counterparty;

(D) The broker's or dealer's maximum potential exposure listed by counterparty for the 15 largest exposures;

(E) The broker's or dealer's aggregate maximum potential exposure;

(F) A summary report reflecting the broker's or dealer's current and maximum potential exposures by credit rating category; and

(G) A summary report reflecting the broker's or dealer's current exposure for each of the top ten countries to which the broker or dealer is exposed (by residence of the main operating group of the counterparty);

(vi) Regular risk reports supplied to the broker's or dealer's senior management in the format described in the application, within 17 business days after the end of the month;

(vii) [Reserved]

(viii) A report identifying the number of business days for which the actual daily net trading loss exceeded the corresponding daily VaR within 17 business days after the end of each calendar quarter; and

(ix) The results of backtesting of all internal models used to compute allowable capital, including VaR and credit risk models, indicating the number of backtesting exceptions within 17 business days after the end of the calendar quarter.

\* \* \* \* \*

(b) \* \* \*

(1) If a broker or dealer holding any membership interest in a national securities exchange or registered national securities association ceases to be a member in good standing of such exchange or association, such broker or dealer must, within two business days after such event, file with the Commission Part II or Part IIA of Form X-17A-5 (§ 249.617 of this chapter) as determined by the standards set forth in

paragraphs (a)(1)(ii) through (iv) of this section as of the date of such event. The report must be filed at the Commission's principal office in Washington, DC, and with the regional office of the Commission for the region in which the broker or dealer has its principal place of business; *provided, however*, that such report need not be made or filed if the Commission, upon written request or upon its own motion, exempts such broker or dealer, either unconditionally or on specified terms and conditions, from such requirement; *provided, further*, that the Commission may, upon request of the broker or dealer, grant extensions of time for filing the report specified herein for good cause shown.

\* \* \* \* \*

(c) \* \* \*

(3) *Unaudited statements to be furnished.* Unaudited statements dated 6 months after the date of the audited statements required to be furnished by paragraphs (c)(1) and (2) of this section must be furnished within 65 days after the date of the unaudited statements. The unaudited statements may be furnished 70 days after that time limit has expired if the broker or dealer sends them with the next mailing of the broker's or dealer's quarterly customer statements of account. In that case, the broker or dealer must include a statement in that mailing of the amount of the broker's or dealer's net capital and its required net capital in accordance with § 240.15c3-1, as of a fiscal month end that is within the 75-day period immediately preceding the date the statements are sent to customers. The unaudited statements must contain the information specified in paragraphs (c)(2)(i) and (ii) of this section.

\* \* \* \* \*

(d) \* \* \*

(1)(i) \* \* \*

(B)(1) If the broker or dealer did not claim it was exempt from § 240.15c3-3 throughout the most recent fiscal year or the broker or dealer is subject to § 240.15c3-3(p), a compliance report as described in paragraph (d)(3) of this section executed by the person who makes the oath or affirmation under paragraph (e)(2) of this section; or

(2) If the broker or dealer did claim it was exempt from § 240.15c3-3 throughout the most recent fiscal year and the broker or dealer is not subject to § 240.15c3-3(p), an exemption report as described in paragraph (d)(4) of this section executed by the person who makes the oath or affirmation under paragraph (e)(2) of this section;

\* \* \* \* \*

(2) \* \* \*

(i) A Statement of Financial Condition, a Statement of Income, a Statement of Cash Flows, a Statement of Changes in Stockholders' or Partners' or Sole Proprietor's Equity, and a Statement of Changes in Liabilities Subordinated to Claims of General Creditors. The statements must be prepared in accordance with U.S. generally accepted accounting principles and must be in a format that is consistent with the statements contained in Part II or Part IIA of Form X-17A-5 (§ 249.617 of this chapter), as applicable. If the Statement of Financial Condition filed in accordance with instructions to Part II or Part IIA of Form X-17A-5 (§ 249.617 of this chapter), as applicable, is not consolidated, a summary of financial data, including the assets, liabilities, and net worth or stockholders' equity, for subsidiaries not consolidated in the applicable Part II or Part IIA as filed by the broker or dealer must be included in the notes to the financial statements reported on by the independent public accountant.

(ii) Supporting schedules that include, from Part II or Part IIA of Form X-17A-5 (§ 249.617 of this chapter), a Computation of Net Capital under § 240.15c3-1, a Computation for Determination of Customer Reserve Requirements under § 240.15c3-3a (Exhibit A of § 240.15c3-3), a Computation for Determination of PAB Requirements under Exhibit A of § 240.15c3-3, a Computation for Determination of Security-Based Swap Customer Reserve Requirements under § 240.15c3-3b (Exhibit B of § 240.15c3-3), Information Relating to the Possession or Control Requirements for Customers under § 240.15c3-3, and Information Relating to the Possession or Control Requirements for Security-Based Swap Customers under § 240.15c3-3, as applicable.

(iii) If any of the Computation of Net Capital under § 240.15c3-1, the Computation for Determination of Customer Reserve Requirements Under Exhibit A of § 240.15c3-3, or the Computation for Determination of Security-Based Swap Customer Reserve Requirements under Exhibit B of § 240.15c3-3, as applicable, in the financial report is materially different from the corresponding computation in the most recent Part II or Part IIA of Form X-17A-5 (§ 249.617 of this chapter), as applicable, filed by the broker or dealer pursuant to paragraph (a) of this section, a reconciliation, including appropriate explanations, between the computation in the financial report and the computation in the most recent Part II or Part IIA of Form X-17A-5, as applicable, filed by

the broker or dealer. If no material differences exist, a statement so indicating must be included in the financial report.

(3) \* \* \*  
(i) \* \* \*  
(A) \* \* \*

(4) The broker or dealer was in compliance with §§ 240.15c3-1, 240.15c3-3(e) and, if applicable, 240.15c3-3(p)(3) as of the end of the most recent fiscal year; and

(5) The information the broker or dealer used to state whether it was in compliance with §§ 240.15c3-1, 240.15c3-3(e) and, if applicable, 240.15c3-3(p)(3) was derived from the books and records of the broker or dealer.

(B) If applicable, a description of each identified material weakness in the Internal Control Over Compliance of the broker or dealer during the most recent fiscal year.

(C) If applicable, a description of an instance of non-compliance with § 240.15c3-1, § 240.15c3-3(e), or, if applicable, § 240.15c3-3(p)(3) as of the end of the most recent fiscal year.

(iii) The broker or dealer is not permitted to conclude that its Internal Control Over Compliance was effective during the most recent fiscal year if there were one or more material weaknesses in its Internal Control Over Compliance during the most recent fiscal year. The broker or dealer is not permitted to conclude that its Internal Control Over Compliance was effective as of the end of the most recent fiscal year if there were one or more material weaknesses in its internal control as of the end of the most recent fiscal year. A *material weakness* is a deficiency, or a combination of deficiencies, in Internal Control Over Compliance such that there is a reasonable possibility that non-compliance with § 240.15c3-1, § 240.15c3-3(e), or § 240.15c3-3(p)(3) will not be prevented or detected on a timely basis or that non-compliance to a material extent with § 240.15c3-3, except for paragraph (e), § 240.15c3-3(p), except for paragraph (p)(3), § 240.17a-13, or any Account Statement Rule will not be prevented or detected on a timely basis. A deficiency in Internal Control Over Compliance exists when the design or operation of a control does not allow the management or employees of the broker or dealer, in the normal course of performing their assigned functions, to prevent or detect on a timely basis non-compliance with § 240.15c3-1, § 240.15c3-3, or § 240.17a-13, or any Account Statement Rule.

\* \* \* \* \*

(6) *Filing of annual reports.* The annual reports must be filed with the Commission at the regional office of the Commission for the region in which the broker or dealer has its principal place of business and to the Commission's principal office in Washington, DC, or the annual reports may be filed with the Commission electronically in accordance with directions provided on the Commission's website. The annual reports must also be filed at the principal office of the designated examining authority for the broker or dealer and with the Securities Investor Protection Corporation ("SIPC") if the broker or dealer is a member of SIPC. Copies of the reports must be provided to all self-regulatory organizations of which the broker or dealer is a member, unless the self-regulatory organization by rule waives the requirement in this paragraph (d)(6).

\* \* \* \* \*

(e) \* \* \*  
(1) \* \* \*

(ii) A broker or dealer that files an annual report under paragraph (d) of this section that is not covered by a report prepared by an independent public accountant must include in the oath or affirmation required by paragraph (e)(2) of this section a statement of the facts and circumstances relied upon as a basis for exemption from the requirement that the annual report filed under paragraph (d) of this section be covered by reports prepared by an independent public accountant.

(2) The broker or dealer must attach to the financial report an oath or affirmation that, to the best knowledge and belief of the person making the oath or affirmation:

(i) The financial report is true and correct; and

(ii) Neither the broker or dealer, nor any partner, officer, director, or equivalent person, as the case may be, has any proprietary interest in any account classified solely as that of a customer. The oath or affirmation must be made before a person duly authorized to administer such oaths or affirmations. If the broker or dealer is a sole proprietorship, the oath or affirmation must be made by the proprietor; if a partnership, by a general partner; if a corporation, by a duly authorized officer; or if a limited liability company or limited liability partnership, by the chief executive officer, chief financial officer, manager, managing member, or those members vested with management authority for the limited liability company or limited liability partnership.

(3) The annual reports filed under paragraph (d) of this section are not

confidential, except that, if the Statement of Financial Condition in a format that is consistent with Part II or Part IIA of Form X-17A-5 (§ 249.617 of this chapter) is bound separately from the balance of the annual reports filed under paragraph (d) of this section, and each page of the balance of the annual reports is stamped “confidential,” then the balance of the annual reports will be deemed confidential to the extent permitted by law. However, the annual reports, including the confidential portions, will be available for official use by any official or employee of the U.S. or any State, by national securities exchanges and registered national securities associations of which the broker or dealer filing such a report is a member, by the Public Company Accounting Oversight Board, and by any other person if the Commission authorizes disclosure of the annual reports to that person as being in the public interest. Nothing contained in this paragraph (e)(3) may be construed to be in derogation of the rules of any registered national securities association or national securities exchange that give to customers of a broker or dealer the right, upon request to the broker or dealer, to obtain information relative to its financial condition.

(4) The broker or dealer must file with SIPC a report on the SIPC annual general assessment reconciliation or exclusion from membership forms that contains such information and is in such format as determined by SIPC by rule and approved by the Commission.

\* \* \* \* \*

(h) \* \* \*

**Note 1 to paragraph (h):** The attention of the broker or dealer and the independent public accountant is called to the fact that under § 240.17a-11(a)(1), among other things, a broker or dealer whose net capital declines below the minimum required pursuant to § 240.15c3-1 must give notice of such deficiency that same day in accordance with § 240.17a-11(h) and the notice must specify the broker or dealer’s net capital requirement and its current amount of net capital. The attention of the broker or dealer and accountant also is called to the fact that under § 240.15c3-3(i), if a broker or dealer fails to make a reserve bank account or special reserve account deposit, as required by § 240.15c3-3, the broker or dealer must immediately notify the Commission and the regulatory authority for the broker or dealer, which examines such broker or dealer as to financial responsibility and must promptly thereafter confirm such notification in writing.

\* \* \* \* \*

(i) **Filing requirements.** For purposes of filing requirements as described in this section, filing will be deemed to have been accomplished upon receipt at

the Commission’s principal office in Washington, DC, with duplicate originals simultaneously filed at the locations prescribed in the particular paragraph of this section which is applicable.

\* \* \* \* \*

■ 8. Section 240.17a-11 is amended by:

- a. Adding introductory text;
- b. Removing paragraph (a);
- c. Redesignating paragraphs (b) through (i) as paragraphs (a) through (d) and (g) through (j);
- d. Revising newly redesignated paragraphs (a), (b) introductory text, (c), and (d);
- e. Adding new reserved paragraph (e) and paragraph (f); and
- f. Revising newly redesignated paragraphs (g) through (j).

The revisions and additions read as follows:

**§ 240.17a-11 Notification provisions for brokers and dealers.**

This section applies to the following types of entities: Except as provided in this introductory text, a broker or dealer, including an *OTC derivatives dealer* as that term is defined in § 240.3b-12, registered pursuant to section 15 of the Act (15 U.S.C. 78o); a broker or dealer, other than an OTC derivatives dealer, registered pursuant to section 15 of the Act that is also a security-based swap dealer registered pursuant to section 15F of the Act (15 U.S.C. 78o-10); and a broker or dealer, including an OTC derivatives dealer, registered pursuant to section 15 of the Act that is also a major-security-based swap participant registered pursuant to section 15F of the Act. Section 240.18a-8 (rather than this section) applies to the following types of entities: A security-based swap dealer registered pursuant to section 15F of the Act that is not also a broker or dealer, other than an OTC derivatives dealer, registered pursuant to section 15 of the Act; a security-based swap dealer registered pursuant to section 15F of the Act that is also an OTC derivatives dealer; and a major security-based swap participant registered pursuant to section 15F of the Act that is not also a broker or dealer, including an OTC derivatives dealer, registered pursuant to section 15 of the Act.

(a)(1) Every broker or dealer whose net capital declines below the minimum amount required pursuant to § 240.15c3-1, or is insolvent as that term is defined in § 240.15c3-1(c)(16), must give notice of such deficiency that same day in accordance with paragraph (h) of this section. The notice must specify the broker or dealer’s net capital requirement and its current amount of net capital. If a broker or dealer is

informed by its designated examining authority or the Commission that it is, or has been, in violation of § 240.15c3-1 and the broker or dealer has not given notice of the capital deficiency under this section, the broker or dealer, even if it does not agree that it is, or has been, in violation of § 240.15c3-1, must give notice of the claimed deficiency, which notice may specify the broker’s or dealer’s reasons for its disagreement.

(2) In addition to the requirements of paragraph (b)(1) of this section, an OTC derivatives dealer or broker or dealer permitted to compute net capital pursuant to the alternative method of § 240.15c3-1e must also provide notice if its tentative net capital falls below the minimum amount required pursuant to § 240.15c3-1. The notice must specify the tentative net capital requirements, and current amount of net capital and tentative net capital, of the OTC derivatives dealer or the broker or dealer permitted to compute net capital pursuant to the alternative method of § 240.15c3-1e.

(b) Every broker or dealer must send notice promptly (but within 24 hours) after the occurrence of the events specified in paragraphs (b)(1) through (5) of this section in accordance with paragraph (h) of this section:

\* \* \* \* \*

(c) Every broker or dealer that fails to make and keep current the books and records required by § 240.17a-3, must give notice of this fact that same day in accordance with paragraph (h) of this section, specifying the books and records which have not been made or which are not current. The broker or dealer must also transmit a report in accordance with paragraph (h) of this section within 48 hours of the notice stating what the broker or dealer has done or is doing to correct the situation.

(d) Whenever any broker or dealer discovers, or is notified by an independent public accountant under § 240.17a-12(i)(2), of the existence of any material inadequacy as defined in § 240.17a-12(f)(2), or whenever any broker or dealer discovers, or is notified by an independent public accountant under § 240.17a-5(h), of the existence of any material weakness as defined in § 240.17a-5(d)(3)(iii), the broker or dealer must:

(1) Give notice, in accordance with paragraph (h) of this section, of the material inadequacy or material weakness within 24 hours of the discovery or notification of the material inadequacy or material weakness; and

(2) Transmit a report in accordance with paragraph (h) of this section, within 48 hours of the notice stating

what the broker or dealer has done or is doing to correct the situation.

(e) [Reserved]

(f) If a broker-dealer fails to make in its special reserve account for the exclusive benefit of security-based swap customers a deposit, as required by § 240.15c3-3(p), the broker-dealer must give immediate notice in writing in accordance with paragraph (h) of this section.

(g) Every national securities exchange or national securities association that learns that a broker or dealer has failed to send notice or transmit a report as required by this section, even after being advised by the securities exchange or the national securities association to send notice or transmit a report, must immediately give notice of such failure in accordance with paragraph (h) of this section.

(h) Every notice or report required to be given or transmitted by this section must be given or transmitted to the principal office of the Commission in Washington DC and the regional office of the Commission for the region in which the broker or dealer has its principal place of business, or to an email address provided on the Commission’s website, and to the designated examining authority of which such broker or dealer is a member, and to the Commodity Futures Trading Commission (CFTC) if the broker or dealer is registered as a futures commission merchant with the CFTC. The report required by paragraph (c) or (d)(2) of this section may be transmitted by overnight delivery.

(i) Other notice provisions relating to the Commission’s financial responsibility or reporting rules are contained in §§ 240.15c3-1, 240.15c3-1d, 240.15c3-3, 240.17a-5, and 240.17a-12.

(j) The provisions of this section will not apply to a broker or dealer registered pursuant to section 15(b)(11)(A) of the Act (15 U.S.C. 78o(b)(11)(A)) that is not a member of either a national securities exchange pursuant to section 6(a) of the Act (15 U.S.C. 78f(a)) or a national securities association registered pursuant to section 15A(a) of the Act (15 U.S.C. 78o-3(a)).

**§ 240.17a-12 [Amended]**

■ 9. Section 240.17a-12 is amended by removing “Part IIB” and adding in its place “Part II” each time it appears.

■ 10. Section 240.18a-1 is amended by adding paragraphs (d)(9)(iii)(A) and (B) to read as follows:

**§ 240.18a-1 Net capital requirements for security-based swap dealers for which there is not a prudential regulator.**

\* \* \* \* \*

(d) \* \* \*

(9) \* \* \*

(iii) \* \* \*

(A) The security-based swap dealer fails to meet the reporting requirements set forth in § 240.18a-7;

(B) Any event specified in § 240.18a-8 occurs;

\* \* \* \* \*

■ 11. Section 240.18a-5 is added to read as follows:

**§ 240.18a-5 Records to be made by certain security-based swap dealers and major security-based swap participants.**

This section applies to the following types of entities: A security-based swap dealer registered pursuant to section 15F of the Act (15 U.S.C. 78o-10) that is not also a broker or dealer, including an *OTC derivatives dealer* as that term is defined in § 240.3b-12, registered pursuant to section 15 of the Act (15 U.S.C. 78o); and a major security-based swap participant registered pursuant to section 15F of the Act that is not also a broker or dealer, including an *OTC derivatives dealer*, registered pursuant to section 15 of the Act. Section 240.17a-3 (rather than this section) applies to the following types of entities: A member of a national securities exchange who transacts a business in securities directly with others than members of a national securities exchange; a broker or dealer who transacts a business in securities through the medium of a member of a national securities exchange; a broker or dealer, including an *OTC derivatives dealer*, registered pursuant to section 15 of the Act; and a major security-based swap participant registered pursuant to section 15F of the Act that is also a broker or dealer, including an *OTC derivatives dealer*, registered pursuant to section 15 of the Act.

(a) This paragraph (a) applies only to security-based swap dealers and major security-based swap participants registered under section 15F of the Act for which there is no prudential regulator. Each security-based swap dealer and major security-based swap participant subject to this paragraph (a) must make and keep current the following books and records:

(1) Blotters (or other records of original entry) containing an itemized daily record of all purchases and sales

of securities (including security-based swaps), all receipts and deliveries of securities (including certificate numbers), all receipts and disbursements of cash and all other debits and credits. Such records must show the account for which each such purchase or sale was effected, the name and amount of securities, the unit and aggregate purchase or sale price, if any (including the financial terms for security-based swaps), the trade date, and the name or other designation of the person from whom such securities were purchased or received or to whom sold or delivered. For security-based swaps, such records must also show, for each transaction, the type of security-based swap, the reference security, index, or obligor, the date and time of execution, the effective date, the scheduled termination date, the notional amount(s) and the currenc(ies) in which the notional amount(s) is expressed, the unique transaction identifier, and the counterparty’s unique identification code.

(2) Ledgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts.

(3) Ledger accounts (or other records) itemizing separately as to each account for every customer or non-customer of such security-based swap dealer or major security-based swap participant, all purchases and sales, receipts and deliveries of securities (including security-based swaps) and commodities for such account and all other debits and credits to such account; and in addition, for a security-based swap, the type of security-based swap, the reference security, index, or obligor, the date and time of execution, the effective date, the scheduled termination date, the notional amount(s) and the currenc(ies) in which the notional amount(s) is expressed, the unique transaction identifier, and the counterparty’s unique identification code.

(4) A securities record or ledger reflecting separately for each:

(i) Security, other than a security-based swap, as of the clearance dates all “long” or “short” positions (including securities in safekeeping and securities that are the subjects of repurchase or reverse repurchase agreements) carried by such security-based swap dealer or major security-based swap participant for its account or for the account of its customers and showing the location of all securities long and the offsetting position to all securities short, including long security count differences and short security count differences classified by the date of the physical

count and verification in which they were discovered, and, in all cases the name or designation of the account in which each position is carried.

(ii) Security-based swap, the reference security, index, or obligor, the unique transaction identifier, the counterparty's unique identification code, whether it is a "bought" or "sold" position in the security-based swap, whether the security-based swap is cleared or not cleared, and if cleared, identification of the clearing agency where the security-based swap is cleared.

(5) A memorandum of each purchase or sale of a security-based swap for the account of the security-based swap dealer or major security-based swap participant showing the price. The memorandum must also include the type of security-based swap, the reference security, index, or obligor, the date and time of execution, the effective date, the scheduled termination date, the notional amount(s) and the currency(ies) in which the notional amount(s) is expressed, the unique transaction identifier, and the counterparty's unique identification code. An order entered pursuant to the exercise of discretionary authority must be so designated.

(6) With respect to a security other than a security-based swap, copies of confirmations of all purchases and sales of securities. With respect to a security-based swap, copies of the security-based swap trade acknowledgment and verification made in compliance with § 240.15Fi-2.

(7) For each security-based swap account, a record of the unique identification code of such counterparty, the name and address of such counterparty, and a record of the authorization of each person the counterparty has granted authority to transact business in the security-based swap account.

(8) A record of all puts, calls, spreads, straddles and other options in which such security-based swap dealer or major security-based swap participant has any direct or indirect interest or which such security-based swap dealer or major security-based swap participant has granted or guaranteed, containing, at least, an identification of the security, and the number of units involved.

(9) A record of the proof of money balances of all ledger accounts in the form of trial balances, and a record of the computation of net capital or tangible net worth, as applicable, as of the trial balance date, pursuant to § 240.18a-1 or § 240.18a-2, respectively. Such trial balances and computations

must be prepared currently at least once per month.

(10)(i) A questionnaire or application for employment executed by each "associated person" (as defined in paragraph (d) of this section) of the security-based swap dealer or major security-based swap participant who effects or is involved in effecting security-based swaps on the security-based swap dealer's or major security-based swap participant's behalf, which questionnaire or application must be approved in writing by an authorized representative of the security-based swap dealer or major security-based swap participant and must contain at least the following information with respect to the associated person:

(A) The associated person's name, address, social security number, and the starting date of the associated person's employment or other association with the security-based swap dealer or major security-based swap participant;

(B) The associated person's date of birth;

(C) A complete, consecutive statement of all the associated person's business connections for at least the preceding ten years, including whether the employment was part-time or full-time;

(D) A record of any denial of membership or registration, and of any disciplinary action taken, or sanction imposed, upon the associated person by any Federal or state agency, or by any national securities exchange or national securities association, including any finding that the associated person was a cause of any disciplinary action or had violated any law;

(E) A record of any denial, suspension, expulsion or revocation of membership or registration of any broker, dealer, security-based swap dealer or major security-based swap participant with which the associated person was associated in any capacity at the time such action was taken;

(F) A record of any permanent or temporary injunction entered against the associated person, or any broker, dealer, security-based swap dealer or major security-based swap participant with which the associated person was associated in any capacity at the time such injunction was entered;

(G) A record of any arrest or indictment for any felony, or any misdemeanor pertaining to securities, commodities, banking, insurance or real estate (including, but not limited to, acting or being associated with a broker or dealer, security-based swap dealer, major security-based swap participant, investment company, investment adviser, futures sponsor, bank, or savings and loan association), fraud,

false statements or omissions, wrongful taking of property or bribery, forgery, counterfeiting or extortion, and the disposition of the foregoing; and

(H) A record of any other name or names by which the associated person has been known or which the associated person has used.

(ii) A record listing every associated person of the security-based swap dealer or major security-based swap participant which shows, for each associated person, every office of the security-based swap dealer or major security-based swap participant where the associated person regularly conducts the business of handling funds or securities or effecting any transactions in, or inducing or attempting to induce the purchase or sale of any security, for the security-based swap dealer or major security-based swap participant and the Central Registration Depository number, if any, and every internal identification number or code assigned to that person by the security-based swap dealer or major security-based swap participant.

(11) [Reserved]

(12) A record of the daily calculation of the current exposure and, if applicable, the initial margin amount for each account of a counterparty required under § 240.18a-3(c).

(13) A record of compliance with possession or control requirements under § 240.18a-4(b).

(14) A record of the reserve computation required under § 240.18a-4(c).

(15) A record of each security-based swap transaction that is not verified under § 240.15Fi-2 within five business days of execution that includes, at a minimum, the unique transaction identifier and the counterparty's unique identification code.

(16) A record documenting that the security-based swap dealer has complied with the business conduct standards as required under § 240.15Fh-6.

(17) A record documenting that the security-based swap dealer or major security-based swap participant has complied with the business conduct standards as required under §§ 240.15Fh-1 through 240.15Fh-5 and 240.15Fk-1.

(18) [Reserved]

(b) This paragraph (b) applies only to security-based swap dealers and major security-based swap participants registered under section 15F of the Act for which there is a prudential regulator. Each security-based swap dealer and major security-based swap participant subject to this paragraph (b) must make and keep current the following books and records:

(1) For security-based swaps and any other positions related to the firm's business as such, blotters (or other records of original entry) containing an itemized daily record of all purchases and sales of securities (including security-based swaps), all receipts and deliveries of securities (including certificate numbers), all receipts and disbursements of cash and all other debits and credits. Such records must show, the account for which each such purchase and sale was effected, the name and amount of securities, the unit and aggregate purchase or sale price (if any, including the financial terms for security-based swaps), the trade date, and the name or other designation of the person from whom such securities were purchased or received or to whom sold or delivered. For security-based swaps, such records must also show, for each transaction, the type of security-based swap, the reference security, index, or obligor, the date and time of execution, the effective date, the scheduled termination date, the notional amount(s) and the currenc(ies) in which the notional amount(s) is expressed, the unique transaction identifier, and the counterparty's unique identification code.

(2) Ledger accounts (or other records) itemizing separately as to each account for every security-based swap customer or non-customer of such security-based swap dealer or major security-based swap participant, all purchases, sales, receipts and deliveries of securities (including security-based swaps) and commodities for such account and all other debits and credits to such account; and in addition, for a security-based swap, the type of security-based swap, the reference security, index, or obligor, the date and time of execution, the effective date, the scheduled termination date, the notional amount(s) and the currenc(ies) in which the notional amount(s) is expressed, the unique transaction identifier, and the counterparty's unique identification code.

(3) For security-based swaps and any securities positions related to the firm's business as a security-based swap dealer or a major security-based swap participant, a securities record or ledger reflecting separately for each:

(i) Security, other than a security-based swap, as of the clearance dates all "long" or "short" positions (including securities in safekeeping and securities that are the subjects of repurchase or reverse repurchase agreements) carried by such security-based swap dealer or major security-based swap participant for its account or for the account of its customers and showing the location of

all securities long and the offsetting position to all securities short, including long security count differences and short security count differences classified by the date of the physical count and verification in which they were discovered, and in all cases the name or designation of the account in which each position is carried.

(ii) Security-based swap, the reference security, index, or obligor, the unique transaction identifier, the counterparty's unique identification code, whether it is a "bought" or "sold" position in the security-based swap, whether the security-based swap is cleared or not cleared, and if cleared, identification of the clearing agency where the security-based swap is cleared.

(4) A memorandum of each brokerage order, and of any other instruction, given or received for the purchase or sale of a security-based swap, whether executed or unexecuted. The memorandum must show the terms and conditions of the order or instructions and of any modification or cancellation thereof; the account for which entered; the time the order was received; the time of entry; the price at which executed; the identity of each associated person, if any, responsible for the account; the identity of any other person who entered or accepted the order on behalf of the customer, or, if a customer entered the order on an electronic system, a notation of that entry; and, to the extent feasible, the time of execution or cancellation. The memorandum also must include the type of the security-based swap, the reference security, index, or obligor, the date and time of execution, the effective date, the scheduled termination date, the notional amount(s) and the currenc(ies) in which the notional amount(s) is expressed, the unique transaction identifier, and the counterparty's unique identification code. An order entered pursuant to the exercise of discretionary authority by the security-based swap dealer or major security-based swap participant, or associated person thereof, must be so designated. The term *instruction* must include instructions between partners and employees of a security-based swap dealer or major security-based swap participant. The term *time of entry* means the time when the security-based swap dealer or major security-based swap participant transmits the order or instruction for execution.

(5) A memorandum of each purchase or sale of a security-based swap for the account of the security-based swap dealer or major security-based swap participant showing the price. The memorandum must also include the

type of security-based swap, the reference security, index, or obligor, the date and time of execution, the effective date, the scheduled termination date, the notional amount(s) and the currenc(ies) in which the notional amount(s) is expressed, the unique transaction identifier, and the counterparty's unique identification code. An order entered pursuant to the exercise of discretionary authority must be so designated.

(6) With respect to a security other than a security-based swap, copies of confirmations of all purchases and sales of securities related to the business of a security-based swap dealer or major security-based swap participant. With respect to a security-based swap, copies of the security-based swap trade acknowledgment and verification made in compliance with § 240.15Fi-2.

(7) For each security-based swap account, a record of the counterparty's unique identification code, the name and address of such counterparty, and a record of the authorization of each person the counterparty has granted authority to transact business in the security-based swap account.

(8)(i) A questionnaire or application for employment executed by each "associated person" (as defined in paragraph (c) of this section) of the security-based swap dealer or major security-based swap participant who effects or is involved in effecting security-based swaps on the security-based swap dealer's or major security-based swap participant's behalf, which questionnaire or application must be approved in writing by an authorized representative of the security-based swap dealer or major security-based swap participant and must contain at least the following information with respect to the associated person:

(A) The associated person's name, address, social security number, and the starting date of the associated person's employment or other association with the security-based swap dealer or major security-based swap participant;

(B) The associated person's date of birth;

(C) A complete, consecutive statement of all the associated person's business connections for at least the preceding ten years, including whether the employment was part-time or full-time;

(D) A record of any denial of membership or registration, and of any disciplinary action taken, or sanction imposed, upon the associated person by any Federal or state agency, or by any national securities exchange or national securities association, including any finding that the associated person was a

cause of any disciplinary action or had violated any law;

(E) A record of any denial, suspension, expulsion or revocation of membership or registration of any broker, dealer, security-based swap dealer or major security-based swap participant with which the associated person was associated in any capacity at the time such action was taken;

(F) A record of any permanent or temporary injunction entered against the associated person, or any broker, dealer, security-based swap dealer or major security-based swap participant with which the associated person was associated in any capacity at the time such injunction was entered;

(G) A record of any arrest or indictment for any felony, or any misdemeanor pertaining to securities, commodities, banking, insurance or real estate (including, but not limited to, acting or being associated with a broker or dealer, security-based swap dealer, major security-based swap participant, investment company, investment adviser, futures sponsor, bank, or savings and loan association), fraud, false statements or omissions, wrongful taking of property or bribery, forgery, counterfeiting or extortion, and the disposition of the foregoing; and

(H) A record of any other name or names by which the associated person has been known or which the associated person has used.

(ii) A record listing every associated person of the security-based swap dealer or major security-based swap participant which shows, for each associated person, every office of the security-based swap dealer or major security-based swap participant where the associated person regularly conducts the business of handling funds or securities or effecting any transactions in, or inducing or attempting to induce the purchase or sale of any security, for the security-based swap dealer or major security-based swap participant and every internal identification number or code assigned to that person by the security-based swap dealer or major security-based swap participant.

(9) A record of compliance with possession or control requirements under § 240.18a-4(b).

(10) A record of the reserve computation required under § 240.18a-4(c).

(11) A record of each security-based swap transaction that is not verified under § 240.15Fi-2 within five business days of execution that includes, at a minimum, the unique transaction identifier and the counterparty's unique identification code.

(12) A record documenting that the security-based swap dealer has complied with the business conduct standards as required under § 240.15Fh-6.

(13) A record documenting that the security-based swap dealer or major security-based swap participant has complied with the business conduct standards as required under § 240.15Fh-1 through § 240.15Fh-5 and § 240.15Fk-1.

(14) [Reserved]

(c) A security-based swap dealer or major security-based swap participant may comply with the recordkeeping requirements of the Commodity Exchange Act and chapter I of this title applicable to swap dealers and major swap participants in lieu of complying with paragraphs (a)(1), (3), and (4) or paragraphs (b)(1) through (3) of this section, as applicable, solely with respect to required information regarding security-based swap transactions and positions if:

(1) The security-based swap dealer or major security-based swap participant is registered as a security-based swap dealer or major security-based swap participant pursuant to section 15F of the Act;

(2) The security-based swap dealer or major security-based swap participant is registered as a swap dealer or major swap participant pursuant to section 4s of the Commodity Exchange Act and chapter I of this title;

(3) The security-based swap dealer or major security-based swap participant is subject to 17 CFR 23.201, 23.202, 23.402, and 23.501 with respect to its swap-related books and records;

(4) The security-based swap dealer or major security-based swap participant preserves all of the data elements necessary to create the records required by paragraphs (a)(1), (3), and (4) or paragraphs (b)(1) through (3) of this section, as applicable, as they pertain to security-based swap and swap transactions and positions;

(5) The security-based swap dealer or major security-based swap participant upon request furnishes promptly to representatives of the Commission the records required by paragraphs (a)(1), (3), and (4) or paragraphs (b)(1) through (3) of this section, as applicable, as well as the records required by 17 CFR 23.201, 23.202, 23.402, and 23.501 as they pertain to security-based swap and swap transactions and positions in the format applicable to that category of record as set forth in this section; and

(6) The security-based swap dealer or major security-based swap participant provides notice of its intent to utilize this paragraph (c) by notifying in

writing the Commission, both at the principal office of the Commission in Washington, DC and at the regional office of the Commission for the region in which the registrant has its principal place of business.

(d)(1) The term *associated person* means for purposes of this section a *person associated with a security-based swap dealer or major security-based swap participant* as that term is defined in section 3(a)(70) of the Act (15 U.S.C. 78c(a)(70)).

(2) The term *associated person*, as to an entity supervised by a prudential regulator, includes only those persons whose activities relate to its business as a security-based swap dealer or major security-based swap participant.

■ 12. Section 240.18a-6 is added to read as follows:

**§ 240.18a-6 Records to be preserved by certain security-based swap dealers and major security-based swap participants.**

This section applies to the following types of entities: A security-based swap dealer registered pursuant to section 15F of the Act (15 U.S.C. 78o-10) that is not also a broker or dealer, including an *OTC derivatives dealer* as that term is defined in § 240.3b-12, registered pursuant to section 15 of the Act (15 U.S.C. 78o); and a major security-based swap participant registered pursuant to section 15F of the Act that is not also a broker or dealer, including an *OTC derivatives dealer*, registered pursuant to section 15 of the Act. Section 240.17a-4 (rather than this section) applies to the following types of entities: A member of a national securities exchange who transacts a business in securities directly with others than members of a national securities exchange; a broker or dealer who transacts a business in securities through the medium of a member of a national securities exchange; a broker or dealer, including an *OTC derivatives dealer*, registered pursuant to section 15 of the Act; a security-based swap dealer registered pursuant to section 15F of the Act that is also a broker or dealer, including an *OTC derivatives dealer*, registered pursuant to section 15 of the Act; and a major security-based swap participant registered pursuant to section 15F of the Act that is also a broker or dealer, including an *OTC derivatives dealer*, registered pursuant to section 15 of the Act.

(a)(1) Every security-based swap dealer and major security-based swap participant for which there is no prudential regulator must preserve for a period not less than six years, the first two years in an easily accessible place,

all records required to be made pursuant to § 240.18a-5(a)(1) through (4).

(2) Every security-based swap dealer and major security-based swap participant for which there is a prudential regulator must preserve for a period not less than six years, the first two years in an easily accessible place, all records required to be made pursuant to § 240.18a-5(b)(1) through (3).

(b)(1) Every security-based swap dealer and major security-based swap participant for which there is no prudential regulator must preserve for a period of not less than three years, the first two years in an easily accessible place:

(i) All records required to be made pursuant to § 240.18a-5(a)(5) through (9) and (12) through (17).

(ii) All check books, bank statements, cancelled checks, and cash reconciliations.

(iii) All bills receivable or payable (or copies thereof), paid or unpaid, relating to the business of such security-based swap dealer or major security-based swap participant, as such.

(iv) Originals of all communications received and copies of all communications sent (and any approvals thereof) by the security-based swap dealer or major security-based swap participant (including inter-office memoranda and communications) relating to its business as such. As used in this paragraph (b)(1)(iv), the term "communications" includes sales scripts and recordings of telephone calls required to be maintained pursuant to section 15F(g)(1) of the Act (15 U.S.C. 78o-10(g)(1)).

(v) All trial balances and computations of net capital or tangible net worth requirements (and working papers in connection therewith), as applicable, financial statements, branch office reconciliations, and internal audit working papers, relating to the business of such security-based swap dealer or major security-based swap participant as such.

(vi) All guarantees of security-based swap accounts and all powers of attorney and other evidence of the granting of any discretionary authority given in respect of any security-based swap account, and copies of resolutions empowering an agent to act on behalf of a corporation.

(vii) All written agreements (or copies thereof) entered into by such security-based swap dealer or major security-based swap participant relating to its business as such, including agreements with respect to any account. Written agreements with respect to a security-based swap customer or non-customer, including governing documents or any

document establishing the terms and conditions of the customer's or non-customer's security-based swaps must be maintained with the customer's or non-customer's account records.

(viii) Records which contain the following information in support of amounts included in the report prepared as of the audit date on Part II of Form X-17A-5 (§ 249.617 of this chapter) and in annual financial statements required by § 240.18a-7(d):

(A) Money balance and position, long or short, including description, quantity, price, and valuation of each security, including contractual commitments, in security-based swap customers' accounts, in fully secured accounts, partly secured accounts, unsecured accounts, and in securities accounts payable to security-based swap customers;

(B) Money balance and position, long or short, including description, quantity, price, and valuation of each security, including contractual commitments, in security-based swap non-customers' accounts, in fully secured accounts, partly secured accounts, unsecured accounts, and in security-based swap accounts payable to non-security-based swap customers;

(C) Position, long or short, including description, quantity, price, and valuation of each security, including contractual commitments, included in the Computation of Net Capital as commitments, securities owned, securities owned not readily marketable, and other investments owned not readily marketable;

(D) Description of futures commodity contracts or swaps, contract value on trade date, market value, gain or loss, and liquidating equity or deficit in customers' and non-customers' accounts;

(E) Description of futures commodity contracts or swaps, contract value on trade date, market value, gain or loss and liquidating equity or deficit in trading and investment accounts;

(F) Description, money balance, quantity, price, and valuation of each spot commodity and swap position or commitments in customers' and non-customers' accounts;

(G) Description, money balance, quantity, price, and valuation of each spot commodity and swap position or commitments in trading and investment accounts;

(H) Number of shares, description of security, exercise price, cost, and market value of put and call options, including short out of the money options having no market or exercise value, showing listed and unlisted put and call options separately;

(I) Quantity, price, and valuation of each security underlying the haircut for undue concentration made in the Computation of Net Capital pursuant to § 240.18a-1;

(J) Description, quantity, price, and valuation of each security and commodity position or contractual commitment, long or short, in each joint account in which the security-based swap dealer or major security-based swap participant has an interest, including each participant's interest and margin deposit;

(K) Description, settlement date, contract amount, quantity, market price, and valuation for each aged failed to deliver requiring a charge in the Computation of Net Capital pursuant to § 240.18a-1;

(L) Detail relating to information for possession or control requirements under § 240.18a-4 and reported on Part II of Form X-17A-5 (§ 249.617 of this chapter);

(M) Detail of all items, not otherwise substantiated, which are charged or credited in the Computation of Net Capital pursuant to §§ 240.18a-1 and 240.18a-2, such as cash margin deficiencies, deductions related to securities values and undue concentration, aged securities differences, and insurance claims receivable;

(N) Detail relating to the calculation of the risk margin amount pursuant to § 240.18a-1(c)(6); and

(O) Other schedules which are specifically prescribed by the Commission as necessary to support information reported as required by § 240.18a-7.

(ix) The records required to be made pursuant to § 240.15c3-4 and the results of the periodic reviews conducted pursuant to § 240.15c3-4(d).

(x) The records required to be made pursuant to § 240.18a-1(e)(2)(iv)(F)(1) and (2).

(xi) A copy of information required to be reported under §§ 242.901 through 242.909 of this chapter (Regulation SBSR).

(xii) Copies of documents, communications, disclosures, and notices related to business conduct standards as required under §§ 240.15Fh-1 through 240.15Fh-6 and 240.15Fk-1.

(xiii) Copies of documents used to make a reasonable determination with respect to special entities, including information relating to the financial status, the tax status, and the investment or financing objectives of the special entity as required under sections 15F(h)(4)(C) and (5)(A) of the Act (15 U.S.C. 78o-10(h)(4)(C) and (5)(A)).

(2) Every security-based swap dealer and major security-based swap participant for which there is a prudential regulator must preserve for a period of not less than three years, the first two years in an easily accessible place:

(i) All records required to be made pursuant to § 240.18a-5(b)(4) through (7) and (9) through (13).

(ii) Originals of all communications received and copies of all communications sent (and any approvals thereof) by the security-based swap dealer or major security-based swap participant (including inter-office memoranda and communications) relating to its business as a security-based swap dealer or major security-based swap participant. As used in this paragraph (b)(2)(ii), the term "communications" includes sales scripts and recordings of telephone calls required to be maintained pursuant to section 15F(g)(1) of the Act (15 U.S.C. 78o-10(g)(1)).

(iii) All guarantees of security-based swap accounts and all powers of attorney and other evidence of the granting of any discretionary authority given in respect of any security-based swap account, and copies of resolutions empowering an agent to act on behalf of a corporation.

(iv) All written agreements (or copies thereof) entered into by such security-based swap dealer or major security-based swap participant relating to its business as a security-based swap dealer or major security-based swap participant, including agreements with respect to any account. Written agreements with respect to a security-based swap customer or non-customer, including governing documents or any document establishing the terms and conditions of the customer's or non-customer's security-based swaps, must be maintained with the customer's or non-customer's account records.

(v) Detail relating to information for possession or control requirements under § 240.18a-4 and reported on Part IIC of Form X-17A-5 (§ 249.617 of this chapter) that is in support of amounts included in the report prepared as of the audit date on Part IIC of Form X-17A-5 (§ 249.617 of this chapter) and in the registrant's annual reports required by § 240.18a-7(c).

(vi) A copy of information required to be reported under Regulation SBSR (§§ 242.901 through 242.909 of this chapter).

(vii) Copies of documents, communications, disclosures, and notices related to business conduct standards as required under

§§ 240.15Fh-1 through 240.15Fh-6 and 240.15Fk-1.

(viii) Copies of documents used to make a reasonable determination with respect to special entities, including information relating to the financial status, the tax status, and the investment or financing objectives of the special entity as required under sections 15F(h)(4)(C) and (5)(A) of the Act.

(c) Every security-based swap dealer and major security-based swap participant subject to this section must preserve during the life of the enterprise and of any successor enterprise all partnership articles or, in the case of a corporation, all articles of incorporation or charter, minute books, and stock certificate books (or, in the case of any other form of legal entity, all records such as articles of organization or formation and minute books used for a purpose similar to those records required for corporations or partnerships), all Forms SBSE (§ 249.1600 of this chapter), all Forms SBSE-A (§ 249.1600a of this chapter), all Forms SBSE-C (§ 249.1600c of this chapter), all Forms SBSE-W (§ 249.1601 of this chapter), all amendments to these forms, and all licenses or other documentation showing the registration of the security-based swap dealer or major security-based swap participant with any securities regulatory authority or the Commodity Futures Trading Commission.

(d) Every security-based swap dealer and major security-based swap participant subject to this section must maintain and preserve in an easily accessible place:

(1) All records required under § 240.18a-5(a)(10) or (b)(8) until at least three years after the associated person's employment and any other connection with the security-based swap dealer or major security-based swap participant has terminated.

(2)(i) For security-based swap dealers and major security-based swap participants for which there is not a prudential regulator, each report which a securities regulatory authority or the Commodity Futures Trading Commission has requested or required the security-based swap dealer or major security-based swap participant to make and furnish to it pursuant to an order or settlement, and each securities regulatory authority or Commodity Futures Trading Commission examination report until three years after the date of the report.

(ii) For security-based swap dealers and major security-based swap participants for which there is a prudential regulator, each report related to security-based swap activities which

a securities regulatory authority, the Commodity Futures Trading Commission, or a prudential regulator has requested or required the security-based swap dealer or major security-based swap participant to make and furnish to it pursuant to an order or settlement, and each securities regulatory authority, Commodity Futures Trading Commission, or prudential regulator examination report until three years after the date of the report.

(3)(i) For security-based swap dealers and major security-based swap participants for which there is not a prudential regulator, each compliance, supervisory, and procedures manual, including any updates, modifications, and revisions to the manual, describing the policies and practices of the security-based swap dealer or major security-based swap participant with respect to compliance with applicable laws and rules, and supervision of the activities of each natural person associated with the security-based swap dealer or major security-based swap participant until three years after the termination of the use of the manual.

(ii) For security-based swap dealers and major security-based swap participants for which there is a prudential regulator, each compliance, supervisory, and procedures manual, including any updates, modifications, and revisions to the manual, describing the policies and practices of the security-based swap dealer or major security-based swap participant with respect to compliance with applicable laws and rules relating to security-based swap activities, and supervision of the activities of each natural person associated with the security-based swap dealer or major security-based swap participant until three years after the termination of the use of the manual.

(e) The records required to be maintained and preserved pursuant to §§ 240.18a-5 and 240.18a-6 may be immediately produced or reproduced by means of an *electronic storage system* (as defined in this paragraph (e)) that meets the conditions set forth in this paragraph (e) and be maintained and preserved for the required time in that form.

(1) For purposes of this section, the term *electronic storage system* means any digital storage system that meets the applicable conditions set forth in this paragraph (e).

(2) If an electronic storage system is used by a security-based swap dealer or major security-based swap participant, it must:

(j) Verify automatically the quality and accuracy of the electronic storage system recording process;

(ii) If applicable, serialize the original and duplicate units of the storage media, and time-date for the required period of retention the information placed in such electronic storage system; and

(iii) Have the capacity to readily download into a readable format indexes and records preserved in the electronic storage system.

(3) If a security-based swap dealer or major security-based swap participant uses an electronic storage system, it must:

(i) At all times have available, for examination by the staff of the Commission, facilities for immediate, easily readable projection or production of records or images maintained on the electronic storage system and for producing easily readable representations of those records or images.

(ii) Be ready at all times to immediately provide in a readable format any record or index stored on the electronic storage system which the staff of the Commission may request.

(iii) Store separately from the original a duplicate copy of a record stored on the electronic storage system for the time required.

(iv) Organize and index accurately all information maintained on both original and any duplicate storage system.

(A) At all times, a security-based swap dealer or major security-based swap participant must be able to have such indexes available for examination by the staff of the Commission.

(B) Each index must be duplicated and the duplicate copies must be stored separately from the original copy of each index.

(C) Original and duplicate indexes must be preserved for the time required for the indexed records.

(v) Have in place an audit system providing for accountability regarding inputting of records required to be maintained and preserved pursuant to §§ 240.18a-5 and 240.18a-6 to the electronic storage system and inputting of any changes made to every original and duplicate record maintained and preserved thereby.

(A) At all times the security-based swap dealer or major security-based swap participant must be able to have the results of such audit system available for examination by the staff of the Commission.

(B) The audit results must be preserved for the time required for the audited records.

(vi) The security-based swap dealer or major security-based swap participant must maintain, keep current, and provide promptly upon request by the staff of the Commission all information necessary to access records and indexes stored in the electronic storage system; or place in escrow and keep current a copy of the physical and logical file format of the electronic storage system, the field format of all different information types written on the electronic storage system and the source code, together with the appropriate documentation and information necessary to access records and indexes.

(f)(1) If the records required to be maintained and preserved pursuant to the provisions of §§ 240.18a-5 and 240.18a-6 are prepared or maintained by a third party on behalf of the security-based swap dealer or major security-based swap participant, the third party must file with the Commission a written undertaking in a form acceptable to the Commission, signed by a duly authorized person, to the effect that such records are the property of the security-based swap dealer or major security-based swap participant and will be surrendered promptly on request of the security-based swap dealer or major security-based swap participant and including the following provision:

With respect to any books and records maintained or preserved on behalf of [SBSD or MSBSP], the undersigned hereby undertakes to permit examination of such books and records at any time or from time to time during business hours by representatives or designees of the Securities and Exchange Commission, and to promptly furnish to said Commission or its designee true, correct, complete, and current hard copies of any or all or any part of such books and records.

(2) Agreement with an outside entity will not relieve such security-based swap dealer or major security-based swap participant from the responsibility to prepare and maintain records as specified in this section or in § 240.18a-5.

(g) Every security-based swap dealer and major security-based swap participant subject to this section must furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the security-based swap dealer or major security-based swap participant that are required to be preserved under this section, or any other records of the security-based swap dealer or major security-based swap participant subject to examination or required to be made or maintained pursuant to section 15F

of the Act that are requested by a representative of the Commission.

(h) When used in this section:

(1) The term *securities regulatory authority* means the Commission, any self-regulatory organization, or any securities commission (or any agency or office performing like functions) of the States.

(2) The term *associated person* has the meaning set forth in § 240.18a-5(d).

■ 13. Section 240.18a-7 is added to read as follows:

**§ 240.18a-7 Reports to be made by certain security-based swap dealers and major security-based swap participants.**

This section applies to the following types of entities: A security-based swap dealer registered pursuant to section 15F of the Act (15 U.S.C. 78o-10) that is not also a broker or dealer, other than an *OTC derivatives dealer* as that term is defined in § 240.3b-12, registered pursuant to section 15 of the Act (15 U.S.C. 78o); a security-based swap dealer registered pursuant to section 15F of the Act that is also an *OTC derivatives dealer* registered pursuant to section 15 of the Act; and a major security-based swap participant registered pursuant to section 15F of the Act that is not also a broker or dealer, including an *OTC derivatives dealer*, registered pursuant to section 15 of the Act. Section 240.17a-5 (rather than this section) applies to the following types of entities: Except as provided above, a broker or dealer, including an *OTC derivatives dealer*, registered pursuant to section 15 of the Act; a broker or dealer, other than an *OTC derivatives dealer*, registered pursuant to section 15 of the Act that is also a security-based swap dealer registered pursuant to section 15F of the Act; and a broker or dealer, including an *OTC derivatives dealer*, registered pursuant to section 15 of the Act that is also a major-security-based swap participant registered pursuant to section 15F of the Act.

(a) *Filing of reports.* (1) Every security-based swap dealer or major security-based swap participant for which there is no prudential regulator must file with the Commission or its designee Part II of Form X-17A-5 (§ 249.617 of this chapter) within 17 business days after the end of each month.

(2) Every security-based swap dealer or major security-based swap participant for which there is a prudential regulator must file with the Commission or its designee Part IIC of Form X-17A-5 (§ 249.617 of this chapter) within 30 calendar days after the end of each calendar quarter.

(3) Security-based swap dealers that have been authorized by the Commission to compute net capital pursuant to § 240.18a-1(d), must file the following additional reports with the Commission:

(i) For each product for which the security-based swap dealer calculates a deduction for market risk other than in accordance with § 240.18a-1(e)(1)(i) and (iii), the product category and the amount of the deduction for market risk within 17 business days after the end of the month;

(ii) A graph reflecting, for each business line, the daily intra-month value at risk within 17 business days after the end of the month;

(iii) The aggregate value at risk for the security-based swap dealer within 17 business days after end of the month;

(iv) For each product for which the security-based swap dealer uses scenario analysis, the product category and the deduction for market risk within 17 business days after the end of the month;

(v) Credit risk information on security-based swap, mixed swap and swap exposures, within 17 business days after the end of the month, including:

(A) Overall current exposure;

(B) Current exposure (including commitments) listed by counterparty for the 15 largest exposures;

(C) The ten largest commitments listed by counterparty;

(D) The broker's or dealer's maximum potential exposure listed by counterparty for the 15 largest exposures;

(E) The broker's or dealer's aggregate maximum potential exposure;

(F) A summary report reflecting the broker's or dealer's current and maximum potential exposures by credit rating category; and

(G) A summary report reflecting the broker's or dealer's current exposure for each of the top ten countries to which the broker or dealer is exposed (by residence of the main operating group of the counterparty);

(vi) Regular risk reports supplied to the security-based swap dealer's senior management in the format described in the application, within 17 business days after the end of the month;

(vii) [Reserved]

(viii) A report identifying the number of business days for which the actual daily net trading loss exceeded the corresponding daily VaR within 17 business days after the end of each calendar quarter; and

(ix) The results of backtesting of all internal models used to compute allowable capital, including VaR and

credit risk models, indicating the number of backtesting exceptions within 17 business days after the end of each calendar quarter.

(b) *Customer disclosures.* (1) Every security-based swap dealer or major security-based swap participant for which there is no prudential regulator must make publicly available on its website within 10 business days after the date the firm is required to file with the Commission the annual reports pursuant to paragraph (c) of this section:

(i) A Statement of Financial Condition with appropriate notes prepared in accordance with U.S. generally accepted accounting principles which must be audited;

(ii) A statement of the amount of the security-based swap dealer's net capital and its required net capital, computed in accordance with § 240.18a-1. Such statement must include summary financial statements of subsidiaries consolidated pursuant to § 240.18a-1c (appendix C to § 240.18a-1 (Rule 18a-1)), where material, and the effect thereof on the net capital and required net capital of the security-based swap dealer; and

(iii) If, in connection with the most recent annual reports required under paragraph (c) of this section, the report of the independent public accountant required under paragraph (c)(1)(i)(C) of this section covering the report of the security-based swap dealer required under paragraph (c)(1)(i)(B)(1) of this section identifies one or more material weaknesses, a copy of the report.

(2) Every security-based swap dealer or major security-based swap participant for which there is no prudential regulator must make publicly available on its website unaudited statements as of the date that is 6 months after the date of the most recent audited statements filed with the Commission under paragraph (c)(1) of this section. These reports must be made publicly available within 30 calendar days of the date of the statements.

(3) The information that is made publicly available pursuant to paragraphs (b)(1) and (2) of this section must also be made available in writing, upon request, to any person that has a security-based swap account. The security-based swap dealer or major security-based swap participant must maintain a toll-free telephone number to receive such requests.

(c) *Annual reports*—(1) *Reports required to be filed.* (i) Except as provided in paragraph (c)(1)(iii) of this section, every security-based swap dealer or major security-based swap participant registered pursuant to

section 15F of the Act for which there is no prudential regulator must file annually, as applicable:

(A) A financial report as described in paragraph (c)(2) of this section;

(B)(1) If the security-based swap dealer did not claim it was exempt from § 240.18a-4 throughout the most recent fiscal year, a compliance report as described in paragraph (c)(3) of this section executed by the person who makes the oath or affirmation under paragraph (d)(1) of this section; or

(2) If the security-based swap dealer did claim it was exempt from § 240.18a-4 throughout the most recent fiscal year, an exemption report as described in paragraph (c)(4) of this section executed by the person who makes the oath or affirmation under paragraph (d)(1) of this section; and

(C) A report prepared by an independent public accountant, under the engagement provisions in paragraph (e) of this section, covering each report required to be filed under paragraphs (c)(1)(i)(A) and (B) of this section, as applicable.

(ii) The reports required to be filed under this paragraph (c) must be as of the same fiscal year end each year, unless a change is approved in writing by the Commission. The original request for a change must be filed at the Commission's principal office in Washington, DC. A copy of the written approval must be sent to the regional office of the Commission for the region in which the security-based swap dealer or major security-based swap participant has its principal place of business.

(iii) A security-based swap dealer or major security-based swap participant succeeding to and continuing the business of another security-based swap dealer or major security-based swap participant need not file reports under this paragraph (c) as of a date in the fiscal year in which the succession occurs if the predecessor security-based swap dealer or major security-based swap participant has filed the reports in compliance with this paragraph (c) as of a date in such fiscal year.

(2) *Financial report.* The financial report must contain:

(i)(A) A Statement of Financial Condition, a Statement of Income, a Statement of Cash Flows, a Statement of Changes in Stockholders' or Partners' or Sole Proprietor's Equity, and Statement of Changes in Liabilities Subordinated to Claims of General Creditors. The statements must be prepared in accordance with U.S. generally accepted accounting principles and must be in a format that is consistent with the

statements contained in Part II of Form X-17A-5 (§ 249.617 of this chapter).

(B) If there is other comprehensive income in the period(s) presented, the financial report must contain a Statement of Comprehensive Income (as defined in § 210.1-02 of this chapter) in place of a Statement of Income.

(ii) Supporting schedules that include, from Part II of Form X-17A-5 (§ 249.617 of this chapter), a Computation of Net Capital under § 240.18a-1, a Computation of Tangible Net Worth under § 240.18a-2, a Computation for Determination of Security-Based Swap Customer Reserve Requirements under § 240.18a-4a (Exhibit A of § 240.18a-4), and Information Relating to the Possession or Control Requirements for Security-Based Swap Customers under § 240.18a-4, as applicable.

(iii) If any of the Computation of Net Capital under § 240.18a-1, the Computation of Tangible Net Worth under § 240.18a-2, or the Computation for Determination of Security-Based Swap Customer Reserve Requirements under Exhibit A of § 240.18a-4 in the financial report is materially different from the corresponding computation in the most recent Part II of Form X-17A-5 (§ 249.617 of this chapter) filed by the registrant pursuant to paragraph (a) of this section, a reconciliation, including appropriate explanations, between the computation in the financial report and the computation in the most recent Part II of Form X-17A-5 filed by the registrant. If no material differences exist, a statement so indicating must be included in the financial report.

(3) *Compliance report.* (i) The compliance report must contain:

(A) Statements as to whether:

(1) The security-based swap dealer has established and maintained Internal Control Over Compliance as that term is defined in paragraph (c)(3)(ii) of this section;

(2) The Internal Control Over Compliance of the security-based swap dealer was effective during the most recent fiscal year;

(3) The Internal Control Over Compliance of the security-based swap dealer was effective as of the end of the most recent fiscal year;

(4) The security-based swap dealer was in compliance with §§ 240.18a-1 and 240.18a-4(c) as of the end of the most recent fiscal year; and

(5) The information the security-based swap dealer used to state whether it was in compliance with §§ 240.18a-1 and 240.18a-4(c) was derived from the books and records of the security-based swap dealer.

(B) If applicable, a description of each identified material weakness in the Internal Control Over Compliance of the security-based swap dealer during the most recent fiscal year.

(C) If applicable, a description of an instance of non-compliance with § 240.18a-1 or § 240.18a-4(c) as of the end of the most recent fiscal year.

(ii) The term *Internal Control Over Compliance* means internal controls that have the objective of providing the security-based swap dealer with reasonable assurance that non-compliance with § 240.18a-1, § 240.18a-4(c), § 240.18a-9, or § 240.17a-13, as applicable, will be prevented or detected on a timely basis.

(iii) The security-based swap dealer is not permitted to conclude that its Internal Control Over Compliance was effective during the most recent fiscal year if there were one or more material weaknesses in its Internal Control Over Compliance during the most recent fiscal year. The security-based swap dealer is not permitted to conclude that its Internal Control Over Compliance was effective as of the end of the most recent fiscal year if there were one or more material weaknesses in its internal control as of the end of the most recent fiscal year. A *material weakness* is a deficiency, or a combination of deficiencies, in Internal Control Over Compliance such that there is a reasonable possibility that non-compliance with § 240.18a-1 or § 240.18a-4(c) will not be prevented, or detected on a timely basis or that non-compliance to a material extent with § 240.18a-4, except for paragraph (c), or § 240.18a-9 or § 240.17a-13, as applicable, will not be prevented or detected on a timely basis. A deficiency in Internal Control Over Compliance exists when the design or operation of a control does not allow the management or employees of the security-based swap dealer in the normal course of performing their assigned functions, to prevent or detect on a timely basis non-compliance with § 240.18a-1, § 240.18a-4, § 240.18a-9, or § 240.17a-13, as applicable.

(4) *Exemption report.* The exemption report must contain the following statements made to the best knowledge and belief of the security-based swap dealer:

(i) A statement that the security-based swap dealer met the exemption provisions in § 240.18a-4(f) throughout the most recent fiscal year without exception or that it met the exemption provisions in § 240.18a-4(f) throughout the most recent fiscal year except as described under paragraph (c)(4)(ii) of this section; and

(ii) If applicable, a statement that identifies each exception during the most recent fiscal year in meeting the exemption provisions in § 240.18a-4(f) and that briefly describes the nature of each exception and the approximate date(s) on which the exception existed.

(5) *Timing of filing.* The annual reports must be filed not more than sixty (60) calendar days after the end of the fiscal year of the security-based swap dealer or major security-based swap participant.

(6) *Location of filing.* The annual reports must be filed with the Commission at the regional office of the Commission for the region in which the security-based swap dealer or major security-based swap participant has its principal place of business and the Commission's principal office in Washington, DC, or the annual reports may be filed with the Commission electronically in accordance with directions provided on the Commission's website.

(d) *Nature and form of reports.* The annual reports filed pursuant to paragraph (c) of this section must be prepared and filed in accordance with the following requirements:

(1)(i) The security-based swap dealer or major security-based swap participant must attach to each of the confidential and non-confidential portions of the annual reports separately bound under paragraph (d)(2) of this section a complete and executed Part III of Form X-17A-5 (§ 249.617 of this chapter). The security-based swap dealer or major security-based swap participant must attach to the financial report an oath or affirmation that, to the best knowledge and belief of the person making the oath or affirmation:

(A) The financial report is true and correct; and

(B) Neither the registrant, nor any partner, officer, director, or equivalent person, as the case may be, has any proprietary interest in any account classified solely as that of a customer.

(ii) The oath or affirmation must be made before a person duly authorized to administer such oaths or affirmations. If the security-based swap dealer or major security-based swap participant is a sole proprietorship, the oath or affirmation must be made by the proprietor; if a partnership, by a general partner; if a corporation, by a duly authorized officer; or if a limited liability company or limited liability partnership, by the chief executive officer, chief financial officer, manager, managing member, or those members vested with management authority for the limited liability company or limited liability partnership.

(2) The annual reports filed under paragraph (c) of this section are not confidential, except that, if the Statement of Financial Condition is in a format that is consistent with Part II of Form X-17A-5 (§ 249.617 of this chapter), and is bound separately from the balance of the annual reports filed under paragraph (c) of this section, and each page of the balance of the annual report is stamped “confidential,” then the balance of the annual reports will be deemed confidential to the extent permitted by law. However, the annual reports, including the confidential portions, will be available for official use by any official or employee of the U.S. or any State, and by any other person if the Commission authorizes disclosure of the annual reports to that person as being in the public interest. Nothing contained in this paragraph (d)(2) may be construed to be in derogation of the right of customers of a security-based swap dealer or major security-based swap participant, upon request to the security-based swap dealer or major security-based swap participant, to obtain information relative to its financial condition.

(e) *Independent public accountant—(1) Qualifications of independent public accountant.* The independent public accountant must be qualified and independent in accordance with § 210.2-01 of this chapter.

(2) *Statement regarding independent public accountant.* (i) Every security-based swap dealer or major security-based swap participant that is required to file annual reports under paragraph (c) of this section must file no later than December 10 of each year (or 30 days after effective date of its registration as a security-based swap dealer or major security-based swap participant if earlier) a statement as prescribed in paragraph (e)(2)(ii) of this section with the Commission’s principal office in Washington, DC and the regional office of the Commission for the region in which its principal place of business is located. The statement must be dated no later than December 1 (or 20 calendar days after the effective date of its registration as a security-based swap dealer or major security-based swap participant, if earlier). If the engagement of an independent public accountant is of a continuing nature, providing for successive engagements, no further filing is required. If the engagement is for a single year, or if the most recent engagement has been terminated or amended, a new statement must be filed by the required date.

(ii) The statement must be headed “Statement regarding independent public accountant under Rule 18a-

7(e)(2)” and must contain the following information and representations:

(A) Name, address, telephone number and registration number of the security-based swap dealer or major security-based swap participant.

(B) Name, address, and telephone number of the independent public accountant.

(C) The date of the fiscal year of the annual reports of the security-based swap dealer or major security-based swap participant covered by the engagement.

(D) Whether the engagement is for a single year or is of a continuing nature.

(E) A representation that the independent public accountant has undertaken the items enumerated in paragraphs (f)(1) and (2) of this section.

(3) *Replacement of accountant.* A security-based swap dealer or major security-based swap participant must file a notice that must be received by the Commission’s principal office in Washington, DC and the regional office of the Commission for the region in which its principal place of business is located not more than 15 business days after:

(i) The security-based swap dealer or major security-based swap participant has notified the independent public accountant that provided the reports the security-based swap dealer or major security-based swap participant filed under paragraph (c)(1)(i)(C) of this section for the most recent fiscal year that the independent public accountant’s services will not be used in future engagements; or

(ii) The security-based swap dealer or major security-based swap participant has notified an independent public accountant that was engaged to provide the reports required under paragraph (c)(1)(i)(C) of this section that the engagement has been terminated; or

(iii) An independent public accountant has notified the security-based swap dealer or major security-based swap participant that the independent public accountant would not continue under an engagement to provide the reports required under paragraph (c)(1)(i)(C) of this section; or

(iv) A new independent public accountant has been engaged to provide the reports required under paragraph (c)(1)(i)(C) of this section without any notice of termination having been given to or by the previously engaged independent public accountant.

(v) The notice must include:

(A) The date of notification of the termination of the engagement or of the engagement of the new independent public accountant, as applicable; and

(B) The details of any issues arising during the 24 months (or the period of the engagement, if less than 24 months) preceding the termination or new engagement relating to any matter of accounting principles or practices, financial statement disclosure, auditing scope or procedure, or compliance with applicable rules of the Commission, which issues, if not resolved to the satisfaction of the former independent public accountant, would have caused the independent public accountant to make reference to them in the report of the independent public accountant. The issues required to be reported include both those resolved to the former independent public accountant’s satisfaction and those not resolved to the former accountant’s satisfaction. Issues contemplated by this section are those which occur at the decision-making level—that is, between principal financial officers of the security-based swap dealer or major security-based swap participant and personnel of the accounting firm responsible for rendering its report. The notice must also state whether the accountant’s report filed under paragraph (c)(1)(i)(C) of this section for any of the past two fiscal years contained an adverse opinion or a disclaimer of opinion or was qualified as to uncertainties, audit scope, or accounting principles, and must describe the nature of each such adverse opinion, disclaimer of opinion, or qualification. The security-based swap dealer or major security-based swap participant must also request the former independent public accountant to furnish the security-based swap dealer or major security-based swap participant with a letter addressed to the Commission stating whether the independent public accountant agrees with the statements contained in the notice of the security-based swap dealer or major security-based swap participant and, if not, stating the respects in which the independent public accountant does not agree. The security-based swap dealer or major security-based swap participant must file three copies of the notice and the accountant’s letter, one copy of which must be manually signed by the sole proprietor, or a general partner or a duly authorized corporate, limited liability company, or limited liability partnership officer or member, as appropriate, and by the independent public accountant, respectively.

(f) *Engagement of the independent public accountant.* The independent public accountant engaged by the security-based swap dealer or major security-based swap participant to

provide the reports required under paragraph (c)(1)(i)(C) of this section must, as part of the engagement, undertake the following, as applicable:

(1) To prepare an independent public accountant's report based on an examination of the financial report required to be filed by the security-based swap dealer or major security-based swap participant under paragraph (c)(1)(i)(A) of this section in accordance with generally accepted auditing standards in the United States or the standards of the Public Company Accounting Oversight Board; and

(2)(i) To prepare an independent public accountant's report based on an examination of the statements required under paragraphs (c)(3)(i)(A)(2) through (5) of this section in the compliance report required to be filed by the security-based swap dealer under paragraph (c)(1)(i)(B)(1) of this section in accordance with generally accepted auditing standards in the United States or the standards of the Public Company Accounting Oversight Board; or

(ii) To prepare an independent public accountant's report based on a review of the statements required under paragraphs (c)(4)(i) through (ii) of this section in the exemption report required to be filed by the security-based swap dealer under paragraph (c)(1)(i)(B)(2) of this section in accordance with generally accepted auditing standards in the United States or the standards of the Public Company Accounting Oversight Board.

(g) *Notification of non-compliance or material weakness.* If, during the course of preparing the independent public accountant's reports required under paragraph (c)(1)(i)(C) of this section, the independent public accountant determines that:

(1) A security-based swap dealer is not in compliance with § 240.18a-1, § 240.18a-4, § 240.18a-9, or § 240.17a-13, as applicable, or the independent public accountant determines that any material weaknesses (as defined in paragraph (c)(3)(iii) of this section) exist, the independent public accountant must immediately notify the chief financial officer of the security-based swap dealer of the nature of the non-compliance or material weakness. If the notice from the accountant concerns an instance of non-compliance that would require a security-based swap dealer to provide a notification under § 240.18a-8, or if the notice concerns a material weakness, the security-based swap dealer must provide a notification in accordance with § 240.18a-8, as applicable, and provide a copy of the notification to the independent public accountant. If the independent public

accountant does not receive the notification within one business day, or if the independent public accountant does not agree with the statements in the notification, then the independent public accountant must notify the Commission within one business day. The report from the accountant must, if the security-based swap dealer failed to file a notification, describe any instances of non-compliance that required a notification under § 240.18a-8 or any material weakness. If the security-based swap dealer filed a notification, the report from the accountant must detail the aspects of the notification of the security-based swap dealer with which the accountant does not agree; or

(2) A major security-based swap participant is not in compliance with § 240.18a-2, the independent public accountant must immediately notify the chief financial officer of the major security-based swap participant of the nature of the non-compliance. If the notice from the accountant concerns an instance of non-compliance that would require a major security-based swap participant to provide a notification under § 240.18a-8, the major security-based swap participant must provide a notification in accordance with § 240.18a-8 and provide a copy of the notification to the independent public accountant. If the independent public accountant does not receive the notification within one business day, or if the independent public accountant does not agree with the statements in the notification, then the independent public accountant must notify the Commission within one business day. The report from the accountant must, if the major security-based swap participant failed to file a notification, describe any instances of non-compliance that required a notification under § 240.18a-8. If the major security-based swap participant filed a notification, the report from the accountant must detail the aspects of the notification of the major security-based swap participant with which the accountant does not agree.

**Note 1 to paragraph (g):** The attention of the security-based swap dealer, major security-based swap participant, and the independent public accountant is called to the fact that under § 240.18a-8(a), among other things, a security-based swap dealer or major security-based swap participant whose net capital or tangible net worth, as applicable, declines below the minimum required pursuant to § 240.18a-1 or § 240.18a-2, as applicable, must give notice of such deficiency that same day in accordance with § 240.18a-8(h) and the notice must specify the security-based swap dealer's net capital requirement and its

current amount of net capital, or the extent of the major security-based swap participant's failure to maintain positive tangible net worth, as applicable.

(h) *Reports of the independent public accountant required under paragraph (c)(1)(i)(C) of this section—(1) Technical requirements.* The independent public accountant's reports must:

- (i) Be dated;
- (ii) Be signed manually;
- (iii) Indicate the city and state where issued; and
- (iv) Identify without detailed enumeration the items covered by the reports.

(2) *Representations.* The independent public accountant's reports must:

(i) State whether the examinations were made in accordance with generally accepted auditing standards in the United States or the standards of the Public Company Accounting Oversight Board; and

(ii) Identify any examination procedures deemed necessary by the independent public accountant under the circumstances of the particular case which have been omitted and the reason for their omission.

(iii) Nothing in this section may be construed to imply authority for the omission of any procedure that independent public accountants would ordinarily employ in the course of an examination for the purpose of expressing the opinions required under this section.

(3) *Opinion to be expressed.* The independent public accountant's reports must state clearly:

(i) The opinion of the independent public accountant with respect to the financial report required under paragraph (c)(1)(i)(C) of this section and the accounting principles and practices reflected in that report;

(ii) The opinion of the independent public accountant with respect to the financial report required under paragraph (c)(1)(i)(C) of this section, as to the consistency of the application of the accounting principles, or as to any changes in those principles which have a material effect on the financial statements; and

(iii)(A) The opinion of the independent public accountant with respect to the statements required under paragraphs (c)(3)(i)(A)(2) through (5) of this section in the compliance report required under paragraph (c)(1)(i)(B)(1) of this section; or

(B) The conclusion of the independent public accountant with respect to the statements required under paragraphs (c)(4)(i) and (ii) of this section in the exemption report required

under paragraph (c)(1)(i)(B)(2) of this section.

(4) *Exceptions.* Any matters to which the independent public accountant takes exception must be clearly identified, the exceptions must be specifically and clearly stated, and, to the extent practicable, the effect of each such exception on any related items contained in the annual reports required under paragraph (c) of this section must be given.

(i) *Notification of change of fiscal year.* (1) In the event any security-based swap dealer or major security-based swap participant for which there is no prudential regulator finds it necessary to change its fiscal year, it must file, with the Commission's principal office in Washington, DC and the regional office of the Commission for the region in which the security-based swap dealer or major security-based swap participant has its principal place of business, a notice of such change.

(2) Such notice must contain a detailed explanation of the reasons for the change. Any change in the filing period for the annual reports must be approved by the Commission.

(j) *Filing requirements.* For purposes of filing requirements as described in this section, filing will be deemed to have been accomplished upon receipt at the Commission's principal office in Washington, DC, with duplicate originals simultaneously filed at the locations prescribed in the particular paragraph of this section which is applicable.

■ 14. Section 240.18a-8 is added to read as follows:

**§ 240.18a-8 Notification provisions for security-based swap dealers and major security-based swap participants.**

This section applies to the following types of entities: A security-based swap dealer registered pursuant to section 15F of the Act (15 U.S.C. 78o-10) that is not also a broker or dealer, other than an *OTC derivatives dealer* as that term is defined in § 240.3b-12, registered pursuant to section 15 of the Act (15 U.S.C. 78o); a security-based swap dealer registered pursuant to section 15F of the Act that is also an *OTC derivatives dealer*; and a major security-based swap participant registered pursuant to section 15F of the Act that is not also a broker or dealer, including an *OTC derivatives dealer*, registered pursuant to section 15 of the Act. Section 240.17a-11 (rather than this section) applies to the following types of entities: Except as provided above, a broker or dealer, including an *OTC derivatives dealer*, registered pursuant to section 15 of the Act; a broker or

dealer, other than an *OTC derivatives dealer*, registered pursuant to section 15 of the Act that is also a security-based swap dealer registered pursuant to section 15F of the Act; and a broker or dealer, including an *OTC derivatives dealer*, registered pursuant to section 15 of the Act that is also a major security-based swap participant registered pursuant to section 15F of the Act.

(a)(1)(i) Every security-based swap dealer for which there is no prudential regulator whose net capital declines below the minimum amount required pursuant to § 240.18a-1 must give notice of such deficiency that same day in accordance with paragraph (h) of this section. The notice must specify the security-based swap dealer's net capital requirement and its current amount of net capital. If a security-based swap dealer is informed by the Commission that it is, or has been, in violation of § 240.18a-1 and the security-based swap dealer has not given notice of the capital deficiency under this section, the security-based swap dealer, even if it does not agree that it is, or has been, in violation of § 240.18a-1, must give notice of the claimed deficiency, which notice may specify the security-based swap dealer's reasons for its disagreement.

(ii) Every security-based swap dealer for which there is no prudential regulator whose tentative net capital declines below the minimum amount required pursuant to § 240.18a-1 must give notice of such deficiency that same day in accordance with paragraph (h) of this section. The notice must specify the security-based swap dealer's tentative net capital requirement and its current amount of tentative net capital. If a security-based swap is informed by the Commission that it is, or has been, in violation of § 240.18a-1 and the security-based swap dealer has not given notice of the capital deficiency under this section, the security-based swap dealer, even if it does not agree that it is, or has been, in violation of § 240.18a-1, must give notice of the claimed deficiency, which notice may specify the security-based swap dealer's reasons for its disagreement.

(2) Every major security-based swap participant for which there is no prudential regulator who fails to maintain a positive tangible net worth pursuant to § 240.18a-2 must give notice of such deficiency that same day in accordance with paragraph (h) of this section. The notice must specify the extent to which the firm has failed to maintain positive tangible net worth. If a major security-based swap participant is informed by the Commission that it is, or has been, in violation of

§ 240.18a-2 and the major security-based swap participant has not given notice of the capital deficiency under this section, the major security-based swap participant, even if it does not agree that it is, or has been, in violation of § 240.18a-2, must give notice of the claimed deficiency, which notice may specify the major security-based swap participant's reasons for its disagreement.

(b) Every security-based swap dealer or major security-based swap participant for which there is no prudential regulator must send notice promptly (but within 24 hours) after the occurrence of the events specified in paragraphs (b)(1) through (3) or paragraph (b)(4) of this section, as applicable, in accordance with paragraph (h) of this section:

(1) If a computation made by a security-based swap dealer pursuant to § 240.18a-1 shows that its total net capital is less than 120 percent of the security-based swap dealer's required minimum net capital;

(2) If a computation made by a security-based swap dealer authorized by the Commission to compute net capital pursuant to § 240.18a-1(d) shows that its total tentative net capital is less than 120 percent of the security-based swap dealer's required minimum tentative net capital;

(3) If the level of tangible net worth of a major security-based swap participant falls below \$20 million; and

(4) The occurrence of the fourth and each subsequent backtesting exception under § 240.18a-1(d)(9) during any 250 business day measurement period.

(c) Every security-based swap dealer that files a notice of adjustment of its reported capital category with the Federal Reserve Board, the Office of the Comptroller of the Currency or the Federal Deposit Insurance Corporation must give notice of this fact that same day by transmitting a copy notice of the adjustment of reported capital category in accordance with paragraph (h) of this section.

(d) Every security-based swap dealer or major security-based swap participant that fails to make and keep current the books and records required by § 240.18a-5 or § 240.17a-3, as applicable, must give notice of this fact that same day in accordance with paragraph (h) of this section, specifying the books and records which have not been made or which are not current. The security-based swap dealer or major security-based swap participant must also transmit a report in accordance with paragraph (h) of this section within 48 hours of the notice stating what the security-based swap dealer or major

security-based swap participant has done or is doing to correct the situation.

(e) Whenever any security-based swap dealer for which there is no prudential regulator discovers, or is notified by an independent public accountant under § 240.18a-7(g), of the existence of any material weakness, as defined in § 240.18a-7(c)(3)(iii), the security-based swap dealer must:

(1) Give notice, in accordance with paragraph (h) of this section, of the material weakness within 24 hours of the discovery or notification of the material weakness; and

(2) Transmit a report in accordance with paragraph (h) of this section, within 48 hours of the notice stating what the security-based swap dealer has done or is doing to correct the situation.

(f) [Reserved]

(g) If a security-based swap dealer fails to make in its special reserve account for the exclusive benefit of security-based swap customers a deposit, as required by § 240.18a-4(c), the security-based swap dealer must give immediate notice in writing in accordance with paragraph (h) of this section.

(h) Every notice or report required to be given or transmitted by this section must be given or transmitted to the principal office of the Commission in Washington, DC and the regional office of the Commission for the region in which the security-based swap dealer or major security-based swap participant has its principal place of business, or to an email address provided on the Commission's website, and to the Commodity Futures Trading Commission (CFTC) if the security-based swap dealer or major security-based swap participant is registered as a futures commission merchant with the CFTC. The report required by paragraph (d) or (e)(2) of this section may be transmitted by overnight delivery.

■ 15. Section 240.18a-9 is added to read as follows:

**§ 240.18a-9 Quarterly security counts to be made by certain security-based swap dealers.**

This section applies to a security-based swap dealer registered pursuant to section 15F of the Act (15 U.S.C. 78o-10) that does not have a prudential regulator and that is not also a broker or dealer, including an *OTC derivatives dealer* as that term is defined in § 240.3b-12, registered pursuant to section 15 of the Act (15 U.S.C. 78o). Section 240.17a-13 (rather than this section) applies to the following entities (if not exempt under the provisions of § 240.17a-13): A member of a national securities exchange who transacts a

business in securities directly with others than members of a national securities exchange; a broker or dealer who transacts a business in securities through the medium of a member of a national securities exchange; a broker or dealer, including an OTC derivatives dealer, registered pursuant to section 15 of the Act; a security-based swap dealer registered pursuant to section 15F of the Act that is also a broker or dealer, including an OTC derivatives dealer, registered pursuant to section 15 of the Act; and a major security-based swap participant that is also a broker or dealer, including an OTC derivatives dealer, registered pursuant to section 15 of the Act.

(a) Any security-based swap dealer that is subject to the provisions of this section must at least once in each calendar quarter-year:

(1) Physically examine and count all securities held including securities that are the subjects of repurchase or reverse repurchase agreements;

(2) Account for all securities in transfer, in transit, pledged, loaned, borrowed, deposited, failed to receive, failed to deliver, subject to repurchase or reverse repurchase agreements or otherwise subject to its control or direction but not in its physical possession by examination and comparison of the supporting detailed records with the appropriate ledger control accounts;

(3) Verify all securities in transfer, in transit, pledged, loaned, borrowed, deposited, failed to receive, failed to deliver, subject to repurchase or reverse repurchase agreements or otherwise subject to its control or direction but not in its physical possession, where such securities have been in said status for longer than thirty days;

(4) Compare the results of the count and verification with its records; and

(5) Record on the books and records of the security-based swap dealer all unresolved differences setting forth the security involved and date of comparison in a security count difference account no later than 7 business days after the date of each required quarterly security examination, count, and verification in accordance with the requirements provided in paragraph (b) of this section. *Provided, however,* that no examination, count, verification, and comparison for the purpose of this section is within 2 months of or more than 4 months following a prior examination, count, verification, and comparison made under this paragraph (a)(5).

(b) The examination, count, verification, and comparison may be made either as of a date certain or on a

cyclical basis covering the entire list of securities. In either case the recordation must be effected within 7 business days subsequent to the examination, count, verification, and comparison of a particular security. In the event that an examination, count, verification, and comparison is made on a cyclical basis, it may not extend over more than 1 calendar quarter-year, and no security may be examined, counted, verified, or compared for the purpose of this section within 2 months of or more than 4 months after a prior examination, count, verification, and comparison.

(c) The examination, count, verification, and comparison must be made or supervised by persons whose regular duties do not require them to have direct responsibility for the proper care and protection of the securities or the making or preservation of the subject records.

■ 16. Section 240.18a-10 is amended by revising paragraphs (a) introductory text and (b)(1) through (3), adding paragraphs (b)(4) and (5), and revising paragraphs (c) introductory text, (d)(2)(ii) introductory text, and (e) to read as follows:

**§ 240.18a-10 Alternative compliance mechanism for security-based swap dealers that are registered as swap dealers and have limited security-based swap activities.**

(a) A security-based swap dealer may comply with capital, margin, segregation, recordkeeping, and reporting requirements of the Commodity Exchange Act and chapter I of this title applicable to swap dealers in lieu of complying with §§ 240.18a-1 and 240.18a-3 through 240.18a-9 if:

\* \* \* \* \*

(b) \* \* \*

(1) Comply with capital, margin, segregation, recordkeeping, and reporting requirements of the Commodity Exchange Act and chapter I of this title applicable to swap dealers and treat security-based swaps or collateral related to security-based swaps as swaps or collateral related to swaps, as applicable, pursuant to those requirements to the extent the requirements do not specifically address security-based swaps or collateral related to security-based swaps;

(2) Disclose in writing to each counterparty to a security-based swap before entering into the first transaction with the counterparty after the date the security-based swap dealer begins operating under this section that the security-based swap dealer is operating under this section and is therefore complying with the applicable capital, margin, segregation, recordkeeping, and reporting requirements of the

Commodity Exchange Act and the rules promulgated by the Commodity Futures Trading Commission thereunder in lieu of complying with the capital, margin, segregation, recordkeeping, and reporting requirements promulgated by the Commission in §§ 240.18a-1 and 240.18a-3 through 240.18a-9;

(3) Immediately notify the Commission and the Commodity Futures Trading Commission in writing if the security-based swap dealer fails to meet a condition specified in paragraph (a) of this section;

(4) Simultaneously notify the Commission if the security-based swap dealer is required to send a notice concerning its capital, books and records, liquidity, margin operations, or segregation operations to the Commodity Futures Trading Commission by transmitting to the Commission a copy of the notice being sent to the Commodity Futures Trading Commission; and

(5) Furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the security-based swap dealer that are required to be preserved under the Commodity Exchange Act and chapter I of this title applicable to swap dealers, or any other records of the security-based swap dealer subject to examination pursuant to section 15F of the Act (15 U.S.C. 78o-10) that are requested by a representative of the Commission.

(c) A security-based swap dealer that fails to meet one or more of the conditions specified in paragraph (a) of

this section must begin complying with §§ 240.18a-1 and 240.18a-3 through 240.18a-9 no later than:

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

(ii) Continue to comply with §§ 240.18a-1 and 240.18a-3 through 240.18a-9 for at least:

\* \* \* \* \*

(e) The notices required by this section must be sent by facsimile transmission to the principal office of the Commission and the regional office of the Commission for the region in which the security-based swap dealer has its principal place of business or to an email address provided on the Commission's website, and to the principal office of the Commodity Futures Trading Commission in a manner consistent with the notification requirements of the Commodity Futures Trading Commission. The notice must include a brief summary of the reason for the notice and the contact information of an individual who can provide further information about the matter that is the subject of the notice.

\* \* \* \* \*

#### **PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934**

■ 17. The authority citation for part 249 continues to read, in part, as follows:

**Authority:** 15 U.S.C. 78a *et seq.* and 7201 *et seq.*; 12 U.S.C. 5461 *et seq.*; 18 U.S.C. 1350; Sec. 953(b), Pub. L. 111-203, 124 Stat. 1904; Sec. 102(a)(3), Pub. L. 112-106, 126 Stat. 309 (2012); Sec. 107, Pub. L. 112-106, 126 Stat.

313 (2012), and Sec. 72001, Pub. L. 114-94, 129 Stat. 1312 (2015), unless otherwise noted.

\* \* \* \* \*

■ 18. Subpart G is amended by revising the heading to read as follows:

#### **Subpart G—Forms for Reports To Be Made by Certain Exchange Members, Brokers, Dealers, Security-Based Swap Dealers, and Major Security-Based Swap Participants**

\* \* \* \* \*

■ 19. Section 249.617 is revised to read as follows:

**§ 249.617 Form X-17A-5, information required of certain brokers, dealers, security-based swap dealers, and major security-based swap participants pursuant to sections 15F and 17 of the Securities Exchange Act of 1934 and §§ 240.17a-5, 240.17a-10, 240.17a-11, 240.17a-12, and 240.18a-79 of this chapter, as applicable.**

Appropriate parts of Form X-17A-5, as applicable, shall be used by brokers, dealers, security-based swap dealers, and major security-based swap participants required to file reports under §§ 240.17a-5, 240.17a-10, 240.17a-11, 240.17a-12, and 240.18a-7 of this chapter, as applicable.

■ 20. Part III of Form X-17A-5 (referenced in § 249.617 of this chapter) is revised to read as follows:

**Note:** The text of Part III of Form X-17A-5 does not and this amendment will not appear in the Code of Federal Regulations.

**BILLING CODE 8011-01-P**

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

**ANNUAL REPORTS  
FORM X-17A-5  
PART III**

OMB APPROVAL
OMB Number: Expires: Estimated average burden hours per response:
SEC FILE NUMBER

FACING PAGE

Information Required Pursuant to Rules 17a-5, 17a-12, and 18a-7 under the Securities Exchange Act of 1934

FILING FOR THE PERIOD BEGINNING \_\_\_\_\_ AND ENDING \_\_\_\_\_  
MM/DD/YY MM/DD/YY

**A. REGISTRANT IDENTIFICATION**

NAME OF FIRM: \_\_\_\_\_

TYPE OF REGISTRANT (check all applicable boxes):

- Broker-dealer     Security-based swap dealer     Major security-based swap participant  
 Check here if respondent is also an OTC derivatives dealer

ADDRESS OF PRINCIPAL PLACE OF BUSINESS: (Do not use a P.O. box no.)

\_\_\_\_\_  
(No. and Street)

\_\_\_\_\_  
(City)

\_\_\_\_\_  
(State)

\_\_\_\_\_  
(Zip Code)

PERSON TO CONTACT WITH REGARD TO THIS FILING

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Area Code – Telephone Number)

\_\_\_\_\_  
(Email Address)

**B. ACCOUNTANT IDENTIFICATION**

INDEPENDENT PUBLIC ACCOUNTANT whose reports are contained in this filing\*

\_\_\_\_\_  
(Name – if individual, state last, first, and middle name)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(City)

\_\_\_\_\_  
(State)

\_\_\_\_\_  
(Zip Code)

\_\_\_\_\_  
(Date of Registration with PCAOB)(if applicable)

\_\_\_\_\_  
(PCAOB Registration Number, if applicable)

**FOR OFFICIAL USE ONLY**

\* Claims for exemption from the requirement that the annual reports be covered by the reports of an independent public accountant must be supported by a statement of facts and circumstances relied on as the basis of the exemption. See 17 CFR 240.17a-5(e)(1)(ii), if applicable.

Persons who are to respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB control number.

## OATH OR AFFIRMATION

I, \_\_\_\_\_, swear (or affirm) that, to the best of my knowledge and belief, the financial report pertaining to the firm of \_\_\_\_\_, as of \_\_\_\_\_, 20\_\_\_\_, is true and correct. I further swear (or affirm) that neither the company nor any partner, officer, director, or equivalent person, as the case may be, has any proprietary interest in any account classified solely as that of a customer.

Signature: \_\_\_\_\_  
Title: \_\_\_\_\_

\_\_\_\_\_  
Notary Public

**This filing\*\* contains (check all applicable boxes):**

- (a) Statement of financial condition.
- (b) Notes to consolidated statement of financial condition.
- (c) Statement of income (loss) or, if there is other comprehensive income in the period(s) presented, a statement of comprehensive income (as defined in § 210.1-02 of Regulation S-X).
- (d) Statement of cash flows.
- (e) Statement of changes in stockholders' or partners' or sole proprietor's equity.
- (f) Statement of changes in liabilities subordinated to claims of creditors.
- (g) Notes to consolidated financial statements.
- (h) Computation of net capital under 17 CFR 240.15c3-1 or 17 CFR 240.18a-1, as applicable.
- (i) Computation of tangible net worth under 17 CFR 240.18a-2.
- (j) Computation for determination of customer reserve requirements pursuant to Exhibit A to 17 CFR 240.15c3-3.
- (k) Computation for determination of security-based swap reserve requirements pursuant to Exhibit B to 17 CFR 240.15c3-3 or Exhibit A to 17 CFR 240.18a-4, as applicable.
- (l) Computation for Determination of PAB Requirements under Exhibit A to § 240.15c3-3.
- (m) Information relating to possession or control requirements for customers under 17 CFR 240.15c3-3.
- (n) Information relating to possession or control requirements for security-based swap customers under 17 CFR 240.15c3-3(p)(2) or 17 CFR 240.18a-4, as applicable.
- (o) Reconciliations, including appropriate explanations, of the FOCUS Report with computation of net capital or tangible net worth under 17 CFR 240.15c3-1, 17 CFR 240.18a-1, or 17 CFR 240.18a-2, as applicable, and the reserve requirements under 17 CFR 240.15c3-3 or 17 CFR 240.18a-4, as applicable, if material differences exist, or a statement that no material differences exist.
- (p) Summary of financial data for subsidiaries not consolidated in the statement of financial condition.
- (q) Oath or affirmation in accordance with 17 CFR 240.17a-5, 17 CFR 240.17a-12, or 17 CFR 240.18a-7, as applicable.
- (r) Compliance report in accordance with 17 CFR 240.17a-5 or 17 CFR 240.18a-7, as applicable.
- (s) Exemption report in accordance with 17 CFR 240.17a-5 or 17 CFR 240.18a-7, as applicable.
- (t) Independent public accountant's report based on an examination of the statement of financial condition.
- (u) Independent public accountant's report based on an examination of the financial report or financial statements under 17 CFR 240.17a-5, 17 CFR 240.18a-7, or 17 CFR 240.17a-12, as applicable.
- (v) Independent public accountant's report based on an examination of certain statements in the compliance report under 17 CFR 240.17a-5 or 17 CFR 240.18a-7, as applicable.
- (w) Independent public accountant's report based on a review of the exemption report under 17 CFR 240.17a-5 or 17 CFR 240.18a-7, as applicable.
- (x) Supplemental reports on applying agreed-upon procedures, in accordance with 17 CFR 240.15c3-1e or 17 CFR 240.17a-12, as applicable.
- (y) Report describing any material inadequacies found to exist or found to have existed since the date of the previous audit, or a statement that no material inadequacies exist, under 17 CFR 240.17a-12(k).
- (z) Other: \_\_\_\_\_

**\*\*To request confidential treatment of certain portions of this filing, see 17 CFR 240.17a-5(e)(3) or 17 CFR 240.18a-7(d)(2), as applicable.**

■ 21. Part II of Form X-17A-5 and the instructions thereto (referenced in

§ 249.617 of this chapter) are revised to read as follows:

**Note:** The text of Part II of Form X-17A-5 and the instructions thereto do not and this amendment will not appear in the Code of Federal Regulations.

Form X-17A-5  
FOCUS  
Report  
Part II  
Cover Page

UNITED STATES SECURITIES AND EXCHANGE COMMISSION  
FOCUS REPORT (FINANCIAL AND OPERATIONAL COMBINED UNIFORM SINGLE REPORT)  
Part II **11**

OMB APPROVAL  
OMB Number: 3235-0123  
Expires:  
Estimated average burden  
hours per response:

(Please read instructions before preparing Form)

This report is being filed by a/an:

- 1) Broker-dealer not registered as an SBSB or MSBSP  
(stand-alone broker-dealer) .....  **12000**
- 2) Broker-dealer registered as an SBSB (broker-dealer SBSB).....  **12001**
- 3) Broker-dealer registered as an MSBSP (broker-dealer MSBSP).....  **12002**
- 4) SBSB without a prudential regulator and not registered as a broker-dealer (stand-alone SBSB).....  **12003**
- 5) MSBSP without a prudential regulator and not registered as a broker-dealer (stand-alone MSBSP) .....  **12004**
- Check here if respondent is an OTC derivatives dealer .....  **12005**

This report is being filed by a: Firm authorized to use models  **12006** U.S. person  **12007** Non- U.S. person  **12008**

This report is being filed pursuant to (check applicable block(s)):

- 1) Rule 17a-5(a) .....  **16**
- 2) Rule 17a-5(b) .....  **17**
- 3) Special request by DEA or the Commission .....  **19**
- 4) Rule 18a-7 .....  **99**
- 5) Other (explain: \_\_\_\_\_) .....  **26**

NAME OF REPORTING ENTITY	SEC FILE NO.
ADDRESS OF PRINCIPAL PLACE OF BUSINESS (Do not use P.O. Box No.)	FIRM ID NO.
(No. and Street)	FOR PERIOD BEGINNING (MM/DD/YY)
(City) (State/Province) (Zip Code)	AND ENDING (MM/DD/YY)
(Country)	

NAME OF PERSON TO CONTACT IN REGARD TO THIS REPORT	EMAIL ADDRESS	(AREA CODE) TELEPHONE NO.
NAME(S) OF SUBSIDIARIES OR AFFILIATES CONSOLIDATED IN THIS REPORT	OFFICIAL USE	

Is this report consolidated or unconsolidated? ..... Consolidated  **198** Unconsolidated  **199**  
 Does respondent carry its own customer or security-based swap customer accounts? ..... Yes  **40** No  **41**  
 Check here if respondent is filing an audited report .....  **42**

**EXECUTION:** The registrant submitting this Form and its attachments and the person(s) by whom it is executed represent hereby that all information contained therein is true, correct and complete. It is understood that all required items, statements, and schedules are considered integral parts of this Form and that the submission of any amendment represents that all unamended items, statements, and schedules remain true, correct and complete as previously submitted.

Dated the \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_\_.

Signatures of:	Names of:
1) _____ Principal Executive Officer or Comparable Officer	_____ <b>12011</b> Principal Executive Officer or Comparable Officer
2) _____ Principal Financial Officer or Comparable Officer	_____ <b>12012</b> Principal Financial Officer or Comparable Officer
3) _____ Principal Operations Officer or Comparable Officer	_____ <b>12013</b> Principal Operations Officer or Comparable Officer

**ATTENTION:** Intentional misstatements and/or omissions of facts constitute federal criminal violations. (See 18 U.S.C. 1001 and 15 U.S.C. 78ff(a).)

Name of Firm: \_\_\_\_\_  
As of: \_\_\_\_\_

**Persons who are to respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB control number.**

FOCUS  
Report  
Part II

STATEMENT OF FINANCIAL CONDITION

Items on this page to be reported by a: Stand-Alone Broker-Dealer  
Stand-Alone SBSB  
Broker-Dealer SBSB  
Stand-Alone MSBSP  
Broker-Dealer MSBSP

<b>ASSETS</b>			
<b>Assets</b>	<b>Allowable</b>	<b>Non-Allowable</b>	<b>Total</b>
1. Cash.....	\$ 200	\$ 12014	\$ 750
2. Cash segregated in compliance with federal and other regulations.....	\$ 210		\$ 760
3. Receivables from brokers/dealers and clearing organizations			
A. Failed to deliver			
1. Includible in segregation requirement under 17 CFR 240.15c3-3 and its appendices or 17 CFR 240.18a-4 and 18a-4a.....	\$ 220		
2. Other.....	\$ 230		\$ 770
B. Securities borrowed			
1. Includible in segregation requirement under 17 CFR 240.15c3-3 and its appendices or 17 CFR 240.18a-4 and 18a-4a.....	\$ 240		
2. Other.....	\$ 250		\$ 780
C. Omnibus accounts			
1. Includible in segregation requirement under 17 CFR 240.15c3-3 and its appendices or 17 CFR 240.18a-4 and 18a-4a.....	\$ 260		
2. Other.....	\$ 270		\$ 790
D. Clearing organizations			
1. Includible in segregation requirement under 17 CFR 240.15c3-3 and its appendices or 17 CFR 240.18a-4 and 18a-4a, or the CEA.....	\$ 280		
2. Other.....	\$ 290		\$ 800
E. Other.....	\$ 300	\$ 550	\$ 810
4. Receivables from customers			
A. Securities accounts			
1. Cash and fully secured accounts.....	\$ 310		
2. Partly secured accounts.....	\$ 320	\$ 560	
3. Unsecured accounts.....		\$ 570	
B. Commodity accounts.....	\$ 330	\$ 580	
C. Allowance for doubtful accounts.....	\$ ( 335 )	\$ ( 590 )	\$ 820
5. Receivables from non-customers			
A. Cash and fully secured accounts.....	\$ 340		
B. Partly secured and unsecured accounts.....	\$ 350	\$ 600	\$ 830
6. Excess cash collateral pledged on derivative transactions.....	\$ 12015	\$ 12016	\$ 12017
7. Securities purchased under agreements to resell.....	\$ 360	\$ 605	\$ 840
8. Trade date receivable.....	\$ 292		\$ 802
9. Total net securities, commodities, and swaps positions.....	\$ 12019	\$ 12022	\$ 12024
10. Securities borrowed under subordination agreements and partners' individual and capital securities accounts, at market value			
A. Exempted securities.....	\$ 150		
B. Other.....	\$ 160	\$ 330	\$ 880
11. Secured demand notes – market value of collateral			
A. Exempted securities.....	\$ 170		
B. Other.....	\$ 180	\$ 640	\$ 890

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

STATEMENT OF FINANCIAL CONDITION

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Items on this page to be reported by a: Stand-Alone Broker-Dealer  
Stand-Alone SBSB  
Broker-Dealer SBSB  
Stand-Alone MSBSP  
Broker-Dealer MSBSP

<u>Assets</u>	<u>Allowable</u>	<u>Non-Allowable</u>	<u>Total</u>
12. Memberships in exchanges			
A. Owned, at market value..... \$ _____	190		
B. Owned at cost.....		\$ _____ 650	
C. Contributed for use of company, at market value.....		\$ _____ 660	\$ _____ 900
13. Investment in and receivables from affiliates, subsidiaries and associated partnerships.....	\$ _____ 480	\$ _____ 670	\$ _____ 910
14. Property, furniture, equipment, leasehold improvements and rights under lease agreements			
At cost (net of accumulated depreciation and amortization).....	\$ _____ 490	\$ _____ 680	\$ _____ 920
15. Other assets			
A. Dividends and interest receivable.....	\$ _____ 500	\$ _____ 690	
B. Free shipments.....	\$ _____ 510	\$ _____ 700	
C. Loans and advances.....	\$ _____ 520	\$ _____ 710	
D. Miscellaneous.....	\$ _____ 530	\$ _____ 720	
E. Collateral accepted under ASC 860.....	\$ _____ 536		
F. SPE Assets.....	\$ _____ 537		\$ _____ 930
16. TOTAL ASSETS.....	\$ _____ 540	\$ _____ 740	\$ _____ 940

**Note:** Stand-alone MSBSPs should only complete the Allowable and Total columns.

Name of Firm: \_\_\_\_\_  
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STATEMENT OF FINANCIAL CONDITION

Items on this page to be reported by a: Stand-Alone Broker-Dealer  
Stand-Alone SBSB  
Broker-Dealer SBSB  
Stand-Alone MSBSP  
Broker-Dealer MSBSP

**LIABILITIES AND OWNERSHIP EQUITY**

<u>Liabilities</u>	<u>A.I. Liabilities</u>	<u>Non-A.I. Liabilities</u>	<u>Total</u>
17. Bank loans payable			
A. Includible in segregation requirement under			
17 CFR 240.15c3-3 and its appendices or			
17 CFR 240.18a-4 and 18a-4a, or the CEA .....	\$ 1030	\$ 1240	\$ 1460
B. Other .....	\$ 1040	\$ 1250	\$ 1470
18. Securities sold under repurchase agreements .....		\$ 1260	\$ 1480
19. Payable to brokers/dealers and clearing organizations			
A. Failed to receive			
1. Includible in segregation requirement under			
17 CFR 240.15c3-3 and its appendices or			
17 CFR 240.18a-4 and 18a-4a .....	\$ 1050	\$ 1270	\$ 1490
2. Other .....	\$ 1060	\$ 1280	\$ 1500
B. Securities loaned			
1. Includible in segregation requirement under			
17 CFR 240.15c3-3 and its appendices or			
17 CFR 240.18a-4 and 18a-4a .....	\$ 1070		\$ 1510
2. Other .....	\$ 1080	\$ 1290	\$ 1520
C. Omnibus accounts			
1. Includible in segregation requirement under			
17 CFR 240.15c3-3 and its appendices or			
17 CFR 240.18a-4 and 18a-4a .....	\$ 1090		\$ 1530
2. Other .....	\$ 1095	\$ 1300	\$ 1540
D. Clearing organizations			
1. Includible in segregation requirement under			
17 CFR 240.15c3-3 and its appendices or			
17 CFR 240.18a-4 and 18a-4a, or the CEA .....	\$ 1100		\$ 1550
2. Other .....	\$ 1105	\$ 1310	\$ 1560
E. Other .....	\$ 1110	\$ 1320	\$ 1570
20. Payable to customers			
A. Securities accounts – including free credits of..... \$ 950	\$ 1120		\$ 1580
B. Commodities accounts .....	\$ 1130	\$ 1330	\$ 1590
21. Payable to non-customers			
A. Securities accounts .....	\$ 1140	\$ 1340	\$ 1600
B. Commodities accounts .....	\$ 1150	\$ 1350	\$ 1610
22. Excess cash collateral received on derivative transactions .....	\$ 12025	\$ 12026	\$ 12027
23. Trade date payable .....	\$ 12031	\$ 12037	\$ 1562
24. Total net securities, commodities, and swaps positions .....	\$ 12032	\$ 12038	\$ 12044
25. Accounts payable and accrued liabilities and expenses			
A. Drafts payable .....	\$ 1160		\$ 1630
B. Accounts payable .....	\$ 1170		\$ 1640
C. Income taxes payable .....	\$ 1180		\$ 1650
D. Deferred income taxes .....		\$ 1370	\$ 1660
E. Accrued expenses and other liabilities .....	\$ 1190		\$ 1670
F. Other .....	\$ 1200	\$ 1380	\$ 1680
G. Obligation to return securities .....	\$ 12033	\$ 1386	\$ 1686
H. SPE liabilities .....	\$ 12045	\$ 1387	\$ 1687

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

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STATEMENT OF FINANCIAL CONDITION

Items on this page to be reported by a: Stand-Alone Broker-Dealer  
Stand-Alone SBSD  
Broker-Dealer SBSD  
Stand-Alone MSBSP  
Broker-Dealer MSBSP

<u>Liabilities</u>	<u>A.I. Liabilities</u>	<u>Non-A.I. Liabilities</u>	<u>Total</u>
<b>26. Notes and mortgages payable</b>			
A. Unsecured.....	\$ 1210		\$ 1690
B. Secured.....	\$ 1211	\$ 1390	\$ 1700
<b>27. Liabilities subordinated to claims of creditors</b>			
<b>A. Cash borrowings.....</b>			
1. From outsiders .....	\$ 970		
2. Includes equity subordination (Rule 15c3-1(d) or Rule 18a-1(g)) of.....	\$ 980		
<b>B. Securities borrowings, at market value .....</b>			
1. From outsiders .....	\$ 990		
<b>C. Pursuant to secured demand note collateral agreements .....</b>			
1. From outsiders .....	\$ 1000		
2. Includes equity subordination (Rule 15c3-1(d) or Rule 18a-1(g)) of.....	\$ 1010		
D. Exchange memberships contributed for use of company, at market value.....		\$ 1430	\$ 1740
E. Accounts and other borrowings not qualified for net capital purposes .....	\$ 1220	\$ 1440	\$ 1750
<b>28. TOTAL LIABILITIES .....</b>	<b>\$ 1230</b>	<b>\$ 1450</b>	<b>\$ 1760</b>
<b><u>Ownership Equity</u></b>			
29. Sole proprietorship .....			\$ 1770
30. Partnership and limited liability company – including limited partners/members .....	\$ 1020		\$ 1780
<b>31. Corporation</b>			
A. Preferred stock .....		\$ 1791	
B. Common stock.....		\$ 1792	
C. Additional paid-in capital .....		\$ 1793	
D. Retained earnings .....		\$ 1794	
E. Accumulated other comprehensive income .....		\$ 1797	
F. Total .....			\$ 1795
G. Less capital stock in treasury.....			\$( 1796 )
<b>32. TOTAL OWNERSHIP EQUITY (sum of Line Items 1770, 1780, 1795, and 1796).....</b>			<b>\$ 1800</b>
<b>33. TOTAL LIABILITIES AND OWNERSHIP EQUITY (sum of Line Items 1760 and 1800) .....</b>			<b>\$ 1810</b>

Name of Firm: \_\_\_\_\_  
As of: \_\_\_\_\_

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Part II

COMPUTATION OF NET CAPITAL (FILER AUTHORIZED TO USE MODELS)

Items on this page to be reported by a: Stand-Alone Broker-Dealer (Authorized to use models)  
Stand-Alone SBSB (Authorized to use models)  
Broker-Dealer SBSB (Authorized to use models)  
Broker-Dealer MSBSP (Authorized to use models)

Computation of Net Capital

1. Total ownership equity from Item 1800 .....	\$		3480
2. Deduct ownership equity not allowable for net capital .....	\$	(	3490)
3. Total ownership equity qualified for net capital .....	\$		3500
4. Add:			
A. Liabilities subordinated to claims of creditors allowable in computation of net capital .....	\$		3520
B. Other (deductions) or allowable credits (list) .....	\$		3525
5. Total capital and allowable subordinated liabilities .....	\$		3530
6. Deductions and/or charges			
A. Total nonallowable assets from Statement of Financial Condition .....	\$		3540
1. Additional charges for customers' and non-customers' security accounts .....	\$		3550
2. Additional charges for customers' and non-customers' commodity accounts .....	\$		3560
3. Additional charges for customers' and non-customers' security-based swap accounts .....	\$		12047
4. Additional charges for customers' and non-customers' swap accounts .....	\$		12048
B. Aged fail-to-deliver .....	\$		3570
1. Number of items .....			3450
C. Aged short security differences – less			
reserve of .....	\$		3460
number of items .....	\$		3470
.....	\$		3580
D. Secured demand note deficiency .....	\$		3590
E. Commodity futures contracts and spot commodities – proprietary capital charges .....	\$		3600
F. Other deductions and/or charges .....	\$		3610
G. Deductions for accounts carried under Rules 15c3-1(a)(6) and (c)(2)(x) .....	\$		3615
H. Total deductions and/or charges (sum of Lines 6A-6G) .....	\$	(	3620)
7. Other additions and/or allowable credits (list) .....	\$		3630
8. Tentative net capital .....	\$		3640
9. Market risk exposure – for VaR firms (sum of Lines 9E, 9F, 9G, and 9H)			
A. Total value at risk (sum of Lines 9A1-9A5) .....	\$		3634
Value at risk components			
1. Fixed income VaR .....	\$		3638
2. Currency VaR .....	\$		3637
3. Commodities VaR .....	\$		3638
4. Equities VaR .....	\$		3639
5. Credit derivatives VaR .....	\$		3641
B. Diversification benefit .....	\$	(	3642)
C. Total diversified VaR (sum of Lines 9A and 9B) .....	\$		3643
D. Multiplication factor .....	\$		3645
E. Subtotal (Line 9C multiplied by Line 9D) .....	\$		3655
F. Deduction for specific risk, unless included in Lines 9A-9E above .....	\$		3646

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

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COMPUTATION OF NET CAPITAL (FILER AUTHORIZED TO USE MODELS)

Items on this page to be reported by a: Stand-Alone Broker-Dealer (Authorized to use models)  
Stand-Alone SBSD (Authorized to use models)  
Broker-Dealer SBSD (Authorized to use models)  
Broker-Dealer MSBSP (Authorized to use models)

G. Risk deduction using scenario analysis (sum of Lines 9G1-9G5)	\$	3647	
1. Fixed income	\$	3648	
2. Currency	\$	3649	
3. Commodities	\$	3651	
4. Equities	\$	3652	
5. Credit derivatives	\$	3653	
H. Residual marketable securities (see Rule 15c3-1(c)(2)(vi) or 18a-1(c)(1)(vii), as applicable)	\$	3665	
10. Market risk exposure – for Basel 2.5 firms (sum of Lines 10E, 10H, 10I, 10J, 10K, 10L, 10N, and 10O)	\$		12776
A. Total value at risk (sum of Lines 10A1-10A5)	\$	12762	
Value at risk components			
1. Fixed income VaR	\$	12758	
2. Currency VaR	\$	12759	
3. Commodities VaR	\$	12760	
4. Equities VaR	\$	12761	
5. Credit derivatives VaR	\$	12029	
B. Diversification benefit	\$ (		12763
C. Total diversified VaR (sum of Line 10A and 10B)	\$	12030	
D. Multiplication factor	\$	12764	
E. Subtotal (Line 10C is multiplied by Line 10D)	\$	12765	
F. Total stressed VaR (SVaR)	\$	12766	
G. Multiplication factor	\$	12767	
H. Subtotal (Line 10F multiplied by Line 10G)	\$	12768	
I. Incremental risk charge (IRC)	\$ (		12769
J. Comprehensive risk measure (CRM)	\$	12770	
K. Specific risk – standard specific market risk (SSMR)	\$	12771	
L. Specific risk – securitization (SFA / SSFA)	\$	12772	
M. Alternative method for equities under Appendix A to Rule 15c3-1 or Rule 18a-1a, as applicable	\$	12773	
N. Residual positions	\$	12774	
O. Other	\$	12775	
11. Credit risk exposure for certain counterparties (see Appendix E to Rule 15c3-1 or Rule 18a-1(e)(2), as applicable)			
A. Counterparty exposure charge (add Lines 11A1 and 11A2)	\$		3676
1. Net replacement value default, bankruptcy	\$	12049	
2. Credit equivalent amount exposure to the counterparty multiplied by the credit-risk weight of the counterparty multiplied by 8%	\$	12050	
B. Concentration charge	\$		3659
1. Credit risk weight ≤20%	\$	3656	
2. Credit risk weight >20% and ≤50%	\$	3657	
3. Credit risk weight >50%	\$	3658	
C. Portfolio concentration charge	\$		3678
12. Total credit risk exposure (add Lines 11A, 11B and 11C)	\$		3688
13. Net capital (for VaR firms, subtract Lines 9 and 12 from Line 8) (for Basel 2.5 firms, subtract Lines 10 and 12 from Line 8)	\$		3750

Name of Firm: \_\_\_\_\_  
As of: \_\_\_\_\_

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COMPUTATION OF NET CAPITAL (FILER NOT AUTHORIZED TO USE MODELS)

Items on this page to be reported by a: Stand-Alone Broker-Dealer (Not Authorized to use models)  
Stand-Alone SBSB (Not Authorized to use models)  
Broker-Dealer SBSB (Not Authorized to use models)  
Broker-Dealer MSBSP (Not Authorized to use models)

Computation of Net Capital

1. Total ownership equity from Item 1800 .....	\$		3480
2. Deduct ownership equity not allowable for net capital .....	\$	(	3490)
3. Total ownership equity qualified for net capital .....	\$		3500
4. Add:			
A. Liabilities subordinated to claims of creditors allowable in computation of net capital .....	\$		3520
B. Other (deductions) or allowable credits (list) .....	\$		3525
5. Total capital and allowable subordinated liabilities .....	\$		3530
6. Deductions and/or charges			
A. Total nonallowable assets from Statement of Financial Condition .....	\$		3540
1. Additional charges for customers' and non-customers' security accounts .....	\$		3550
2. Additional charges for customers' and non-customers' commodity accounts .....	\$		3560
3. Additional charges for customers' and non-customers' security-based swap accounts .....	\$		12051
4. Additional charges for customers' and non-customers' swap accounts .....	\$		12052
B. Aged fail-to-deliver .....	\$		3570
1. Number of items .....			3450
C. Aged short security differences-less reserve of .....	\$		3460
1. Number of items .....			3470
D. Secured demand note deficiency .....	\$		3590
E. Commodity futures contracts and spot commodities – proprietary capital charges .....	\$		3600
F. Other deductions and/or charges .....	\$		3610
G. Deductions for accounts carried under Rule 15c3-1(a)(6) and (c)(2)(x) .....	\$		3615
H. Total deductions and/or charges .....	\$	(	3620)
7. Other additions and/or allowable credits .....	\$		3630
8. Tentative net capital (net capital before haircuts) .....	\$		3640
9. Haircuts on securities other than security-based swaps			
A. Contractual securities commitments .....	\$		3660
B. Subordinated securities borrowings .....	\$		3670
C. Trading and investment securities			
1. Bankers' acceptances, certificates of deposit, commercial paper, and money market instruments .....	\$		3680
2. U.S. and Canadian government obligations .....	\$		3690
3. State and municipal government obligations .....	\$		3700
4. Corporate obligations .....	\$		3710
5. Stocks and warrants .....	\$		3720
6. Options .....	\$		3730
7. Arbitrage .....	\$		3732
8. Risk-based haircuts computed under 17 CFR 240.15c3-1a or 17 CFR 240.18a-1a .....	\$		12028
9. Other securities .....	\$		3734
D. Undue concentration .....	\$		3650
E. Other (List: _____) .....	\$		3736
10. Haircuts on security-based swaps .....	\$		12053
11. Haircuts on swaps .....	\$		12054
12. Total haircuts (sum of Lines 9A-9E, 10, and 11) .....	\$		3740
13. Net capital (Line 8 minus Line 12) .....	\$		3750

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

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COMPUTATION OF MINIMUM REGULATORY CAPITAL REQUIREMENTS

Items on this page to be reported by a: Stand-Alone Broker-Dealer  
Broker-Dealer SBSD (other than OTC Derivatives Dealer)  
Broker-Dealer MSBSP

Calculation of Excess Tentative Net Capital (If Applicable)

1. Tentative net capital .....	\$	3640
2. Minimum tentative net capital requirement .....	\$	12059
3. Excess tentative net capital (difference between Lines 1 and 2).....	\$	12056
4. Tentative net capital in excess of 120% of minimum tentative net capital requirement reported on Line 2 .....	\$	12057

Calculation of Minimum Net Capital Requirement

5. Ratio minimum net capital requirement		
A. 6 2/3% of total aggregate indebtedness (Line Item 3840) .....	\$	3756
B. 2% of aggregate debit items as shown in the Formula for Reserve Requirements pursuant to Rule 15c3-3 .....	\$	3870
i. Minimum CFTC net capital requirement (if applicable) .....	\$	7490
C. Percentage of risk margin amount computed under 17 CFR 240.15c3-1(a)(7)(i) or (a)(10) .....	\$	12058
D. For broker-dealers engaged in reverse repurchase agreements, 10% of the amounts in 17 CFR 240.15c3-1(a)(9)(i)-(iii) .....	\$	12059
E. Minimum ratio requirement (sum of Lines 5A, 5B, 5C, and/or 5D, as applicable) .....	\$	12060
6. Fixed-dollar minimum net capital requirement .....	\$	3880
7. Minimum net capital requirement (greater of Lines 5E and 6) .....	\$	3760
8. Excess net capital (Item 3750 minus Item 3760) .....	\$	3910
9. Net capital and tentative net capital in relation to early warning thresholds		
A. Net capital in excess of 120% of minimum net capital requirement reported on Line 7 .....	\$	12061
B. Net capital in excess of 5% of combined aggregate debit items as shown in the Formula for Reserve Requirements pursuant to Rule 15c3-3 .....	\$	3920

Computation of Aggregate Indebtedness (If Applicable)

10. Total aggregate indebtedness liabilities from Statement of Financial Condition (Item 1760) .....	\$	3790
11. Add:		
A. Drafts for immediate credit .....	\$	3800
B. Market value of securities borrowed for which no equivalent value is paid or credited .....	\$	3810
C. Other unrecorded amounts (list) .....	\$	3820
D. Total additions (sum of Line Items 3800, 3810, and 3820) .....	\$	3830
12. Deduct: Adjustment based on deposits in Special Reserve Bank Accounts (see Rule 15c3-1(c)(1)(vii)) .....	\$	3838
13. Total aggregate indebtedness (sum of Line Items 3790 and 3830) .....	\$	3840
14. Percentage of aggregate indebtedness to net capital (Item 3840 divided by Item 3750) .....	%	3850
15. Percentage of aggregate indebtedness to net capital <i>after</i> anticipated capital withdrawals (Item 3840 divided by Item 3750 less Item 4880) .....	%	3853

Calculation of Other Ratios

16. Percentage of net capital to aggregate debits (Item 3750 divided by Item 4470) .....	%	3851
17. Percentage of net capital, <i>after</i> anticipated capital withdrawals, to aggregate debits (Item 3750 less Item 4880, divided by Item 4470) .....	\$	3854
18. Percentage of debt to debt-to-equity total, computed in accordance with Rule 15c3-1(d) .....	%	3860
19. Options deductions/net capital ratio (1000% test) total deductions exclusive of liquidating equity under Rule 15c3-1(a)(6) and (c)(2)(x) divided by net capital .....	\$	3852

Name of Firm: \_\_\_\_\_  
As of: \_\_\_\_\_

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COMPUTATION OF MINIMUM REGULATORY CAPITAL REQUIREMENTS

Items on this page to be reported by a: Stand-Alone SBSB  
SBSB registered as an OTC Derivatives Dealer

Calculation of Excess Tentative Net Capital (If Applicable)

1. Tentative net capital .....	\$	3640
2. Fixed-dollar minimum tentative net capital requirement .....	\$	12062
3. Excess tentative net capital (difference between Lines 1 and 2) .....	\$	12063
4. Tentative net capital in excess of 120% of minimum tentative net capital requirements reported on Line 2 .....	\$	12064

Calculation of Minimum Net Capital Requirement

5. Ratio minimum net capital requirement – Percentage of risk margin amount computed under 17 CFR 240.18a-1(a)(1) .....	\$	12065
6. Fixed-dollar minimum net capital requirement .....	\$	3880
7. Minimum net capital requirement (greater of Lines 5 and 6) .....	\$	3760
8. Excess net capital (Item 3750 minus Item 3760) .....	\$	3910
9. Net capital in excess of 120% of minimum net capital requirement reported on Line 7 (Line Item 3750 – [Line Item 3760 x 120%]) .....	\$	12066

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

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COMPUTATION OF TANGIBLE NET WORTH

Items on this page to be reported by a: Stand-Alone MSBSP

1. Total ownership equity (from Item 1800).....	\$	1800
2. Goodwill and other intangible assets .....	\$	12067
3. Tangible net worth (Line 1 minus Line 2).....	\$	12068

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

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STATEMENT OF INCOME (LOSS) OR STATEMENT OF COMPREHENSIVE INCOME, AS APPLICABLE

Items on this page to be reported by a: Stand-Alone Broker-Dealer  
Stand-Alone SBSD  
Broker-Dealer SBSD  
Stand-Alone MSBSP  
Broker-Dealer MSBSP

REVENUE

1. Commissions		
A. Commissions on transactions in listed equity securities executed on an exchange .....	\$	3935
B. Commissions on transactions in exchange listed equity securities executed over-the-counter .....	\$	3937
C. Commissions on listed option transactions .....	\$	3938
D. All other securities commissions .....	\$	3939
E. Total securities commissions .....	\$	3940
2. Gains or losses on firm securities trading accounts		
A. From market making in over-the-counter equity securities .....	\$	3941
1. Includes gains or losses on OTC market making in exchange-listed equity securities .....	\$	3943
B. From trading in debt securities .....	\$	3944
C. From market making in options on a national securities exchange .....	\$	3945
D. From all other trading .....	\$	3949
E. Total gains or losses .....	\$	3950
3. Gains or losses from derivatives trading .....	\$	3926
4. Gains or losses on firm securities investment accounts		
A. Includes realized gains or losses .....	\$	4235
B. Includes unrealized gains or losses .....	\$	4236
C. Total realized and unrealized gains or losses .....	\$	3952
5. Gains or losses from underwriting and selling groups .....	\$	3955
A. Includes underwriting income from corporate equity securities .....	\$	4237
6. Margin interest .....	\$	3960
7. Revenue from sale of investment company shares .....	\$	3970
8. Fees for account supervision, investment advisory and administrative services .....	\$	3975
9. Revenue from research services .....	\$	3980
10. Gains or losses on commodities .....	\$	3990
11. Other revenue related to securities business .....	\$	3985
12. Other revenue .....	\$	3995
13. Total revenue .....	\$	4030

EXPENSES

14. Registered representatives' compensation .....	\$	4110
15. Clerical and administrative employees' expenses .....	\$	4040
16. Salaries and other employment costs for general partners, and voting stockholder officers .....	\$	4120
A. Includes interest credited to general and limited partners' capital accounts .....	\$	4130
17. Floor brokerage paid to certain brokers (see definition) .....	\$	4055
18. Commissions and clearance paid to all other brokers (see definition) .....	\$	4145
19. Clearance paid to non-brokers (see definition) .....	\$	4135
20. Communications .....	\$	4060
21. Occupancy and equipment costs .....	\$	4080
22. Promotional costs .....	\$	4150
23. Interest expense .....	\$	4075
A. Includes interest on accounts subject to subordination agreements .....	\$	4070
24. Losses in error account and bad debts .....	\$	4170
25. Data processing costs (including service bureau service charges) .....	\$	4186
26. Non-recurring charges .....	\$	4190

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

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STATEMENT OF INCOME (LOSS) OR STATEMENT OF COMPREHENSIVE INCOME, AS APPLICABLE

Items on this page to be reported by a: Stand-Alone Broker-Dealer  
Stand-Alone SBSD  
Broker-Dealer SBSD  
Stand-Alone MSBSP  
Broker-Dealer MSBSP

27. Regulatory fees and expenses.....\$ 4195  
28. Other expenses.....\$ 4100  
29. Total expenses.....\$ 4200

NET INCOME/COMPREHENSIVE INCOME

30. Income or loss before federal income taxes and items below (Line 13 less Line 29).....\$ 4210  
31. Provision for federal income taxes (for parent only).....\$ 4220  
32. Equity in earnings or losses of unconsolidated subsidiaries not included above.....\$ 4222  
    A. After federal income taxes of.....\$ 4238  
33. Net income or loss after federal income taxes.....\$ 4230  
34. Other comprehensive income (loss).....\$ 4226  
    A. After federal income taxes of.....\$ 4227  
35. Comprehensive income (loss).....\$ 4228

MONTHLY INCOME

36. Net income (current month only) before comprehensive income and provision for federal income taxes.....\$ 4211

Name of Firm: \_\_\_\_\_  
As of: \_\_\_\_\_

FOCUS  
Report  
Part II

CAPITAL WITHDRAWALS

Items on this page to be reported by a: Stand-Alone Broker-Dealer  
Stand-Alone SBSB  
Broker-Dealer SBSB  
Broker-Dealer MSBSP

OWNERSHIP EQUITY AND SUBORDINATED LIABILITIES MATURING OR PROPOSED TO BE WITHDRAWN WITHIN THE NEXT SIX MONTHS AND ACCRUALS, WHICH HAVE NOT BEEN DEDUCTED IN THE COMPUTATION OF NET CAPITAL

Type of Proposed Withdrawal or Accrual (See below for code to enter)	Name of Lender or Contributor	Insider or Outsider? (In or Out)	Amount to be Withdrawn (cash amount and/or Net Capital Value of Securities)	(MM/DD/YY) Withdrawal or Maturity Date	Expect to Renew (Yes or No)
4600	4601	4602	\$ 4603	4604	4605
4610	4611	4612	\$ 4613	4614	4615
4620	4621	4622	\$ 4623	4624	4625
4630	4631	4632	\$ 4633	4634	4635
4640	4641	4642	\$ 4643	4644	4645
4650	4651	4652	\$ 4653	4654	4655
4660	4661	4662	\$ 4663	4664	4665
4670	4671	4672	\$ 4673	4674	4675
4680	4681	4682	\$ 4683	4684	4685
4690	4691	4692	\$ 4693	4694	4695
			Total: \$	4699*	

\* To agree with the total on Recap (Line Item 4880)

Instructions: Detailed listing must include the total of items maturing during the six month period following the report date, regardless of whether or not the capital contribution is expected to be renewed. This section must also include proposed capital withdrawals scheduled within the six month period following the report date including the proposed redemption of stock and payments of liabilities secured by fixed assets (which are considered allowable assets in the capital computation, which could be required by the lender on demand or in less than six months.

- |              |                                          |
|--------------|------------------------------------------|
| <b>CODE:</b> | <b>DESCRIPTIONS:</b>                     |
| 1.           | Equity capital                           |
| 2.           | Subordinated liabilities                 |
| 3.           | Accruals                                 |
| 4.           | Assets not readily convertible into cash |

Name of Firm: \_\_\_\_\_  
As of: \_\_\_\_\_

FOCUS  
Report  
Part II

CAPITAL WITHDRAWALS  
RECAP

Items on this page to be reported by a: Stand-Alone Broker-Dealer  
Stand-Alone SBSB  
Broker-Dealer SBSB  
Broker-Dealer MSBSP

OWNERSHIP EQUITY AND SUBORDINATED LIABILITIES MATURING OR PROPOSED TO BE WITHDRAWN WITHIN THE NEXT SIX MONTHS  
AND ACCRUALS, WHICH HAVE NOT BEEN DEDUCTED IN THE COMPUTATION OF NET CAPITAL

1. Equity capital		
A. Partnership and limited liability company capital		
1. General partners .....	\$	4700
2. Limited partners and limited liability company members .....	\$	4710
3. Undistributed profits .....	\$	4720
4. Other (describe below) .....	\$	4730
5. Sole proprietorship .....	\$	4735
B. Corporation capital		
1. Common stock .....	\$	4740
2. Preferred stock .....	\$	4750
3. Retained earnings (dividends and other) .....	\$	4760
4. Other (describe below) .....	\$	4770
2. Subordinated liabilities		
A. Secured demand notes .....	\$	4780
B. Cash subordinates .....	\$	4790
C. Debentures .....	\$	4800
D. Other (describe below) .....	\$	4810
3. Other accrued withdrawals		
A. Bonuses .....	\$	4820
B. Voluntary contributions to pension or profit sharing plans .....	\$	4860
C. Other (describe below) .....	\$	4870
		Total (sum of Lines 1-3): \$ 4880
4. Description of Other		

STATEMENT OF CHANGES IN OWNERSHIP EQUITY  
(SOLE PROPRIETORSHIP, PARTNERSHIP, LLC OR CORPORATION)

1. Balance, beginning of period .....	\$	4240
A. Net income (loss) or comprehensive income (loss), as applicable .....	\$	4250
B. Additions (includes non-conforming capital of .....	\$	4263
C. Deductions (includes non-conforming capital of .....	\$	4272
2. Balance, end of period (from Line Item 1800) .....	\$	4290

STATEMENT OF CHANGES IN LIABILITIES  
SUBORDINATED TO CLAIMS OF CREDITORS

3. Balance, beginning of period .....	\$	4300
A. Increases .....	\$	4310
B. Decreases .....	\$	(4320)
4. Balance, end of period (from Item 3520) .....	\$	4330

Name of Firm: \_\_\_\_\_  
As of: \_\_\_\_\_

FOCUS  
Report  
Part II

FINANCIAL AND OPERATIONAL DATA

Items on this page to be reported by a: Stand-Alone Broker-Dealer  
Stand-Alone SBSB  
Broker-Dealer SBSB  
Broker-Dealer MSBSP

	<u>Valuation</u>	<u>Number</u>
1. Month end total number of stock record breaks		
A. Breaks long unresolved for more than three business days .....	\$ _____ <b>4890</b>	_____ <b>4900</b>
B. Breaks short unresolved for more than seven business days after discovery .....	\$ _____ <b>4910</b>	_____ <b>4920</b>
2. Is the firm in compliance with Rule 17a-13 or 18a-9, as applicable, regarding periodic count and verification of securities positions and locations at least once in each calendar quarter? (Check one).....	Yes <input type="checkbox"/> <b>4930</b>	No <input type="checkbox"/> <b>4940</b>
3. Personnel employed at end of reporting period		
A. Income producing personnel.....		_____ <b>4950</b>
B. Non-income producing personnel (all other).....		_____ <b>4960</b>
C. Total (sum of Lines 3A-3B).....		_____ <b>4970</b>
4. Actual number of tickets executed during the reporting period .....		_____ <b>4980</b>
5. Number of corrected customer confirmations sent after settlement date.....		_____ <b>4990</b>
	<u>No. of Items</u>	<u>Ledger Amount</u>
6. Failed to deliver 5 business days or longer (21 business days or longer in the case of municipal securities).....	_____ <b>5360</b>	\$ _____ <b>5361</b>
7. Failed to receive 5 business days or longer (21 business days or longer in the case of municipal securities).....	_____ <b>5363</b>	\$ _____ <b>5364</b>
8. Security (including security-based swap) concentrations		
A. Proprietary positions for which there is an undue concentration.....		\$ _____ <b>5370</b>
B. Customers' and security-based swap customers' accounts under Rules 15c3-3 or 18a-4, as applicable .....		\$ _____ <b>5374</b>
9. Total of personal capital borrowings due within six months .....		\$ _____ <b>5378</b>
10. Maximum haircuts on underwriting commitments during the reporting period.....		\$ _____ <b>5380</b>
11. Planned capital expenditures for business expansion during next six months .....		\$ _____ <b>5382</b>
12. Liabilities of other individuals or organizations guaranteed by respondent.....		\$ _____ <b>5384</b>
13. Lease and rentals payable within one year .....		\$ _____ <b>5386</b>
14. Aggregate lease and rental commitments payable for entire term of the lease		
A. Gross .....		\$ _____ <b>5388</b>
B. Net.....		\$ _____ <b>5390</b>

Name of Firm: \_\_\_\_\_  
As of: \_\_\_\_\_

FOCUS  
Report  
Part II

FINANCIAL AND OPERATIONAL DATA

Items on this page to be reported by a: Stand-Alone Broker-Dealer  
Stand-Alone SBSB  
Broker-Dealer SBSB  
Broker-Dealer MSBSP

Operational Deductions from Capital – Note A

	I No. of Items	II Debits (Short Value) (Omit 000's)	III Credits (Long Value) (Omit 000's)	IV Deductions in Computing Net Capital (Omit Pennies)
1. Money suspense and balancing differences .....		5610	5810	6010
2. Security suspense and differences with related money balances.....	L	5620	5820	6020
	S	5625	5825	6025
3. Market value of short and long security suspense and differences without related money balances (other than reported in Line 4, below) .....		5630	5830	6030
4. Market value of security record breaks.....		5640	5840	6040
5. Unresolved reconciling differences with others				
A. Correspondents, broker-dealers, SBSBs, and MSBSPs.....	L	5650	5850	6050
	S	5655	5855	6055
B. Depositories .....		5660	5860	6060
C. Clearing organizations .....	L	5670	5870	6070
	S	5675	5875	6075
D. Inter-company accounts.....		5680	5880	6080
E. Bank accounts and loans .....		5690	5890	6090
F. Other.....		5700	5900	6100
G. (Offsetting) Lines 5A through 5F .....		5720	5920	6120
TOTAL (Lines 5A-5G).....		5730	5930	6130
6. Commodity differences .....		5740	5940	6140
7. Open transfers and reorganization account items over 40 days not confirmed or verified.....		5760	5960	6160
8. TOTAL (Lines 1-7).....		5770	5970	6170
9. Lines 1-6 resolved subsequent to report date .....		5775	5975	6175
10. Aged fails – to deliver.....		5780	5980	6180
– to receive .....		5785	5985	6185

NOTE A - This section must be completed as follows:

- The filers must complete Column IV, Lines 1 through 8 and 10, reporting deductions from capital as of the report date whether resolved subsequently or not (see instructions relative to each line item).
- Columns I, II and III of Lines 1 through 8 must be completed only if the total deduction on Column IV of Line 8 equals or exceeds 25% of excess net capital as of the prior month end reporting date. All columns of Line 10 require completion.
- A response to Columns I through IV of Line 9 and the "Potential Operational Charges Not Deducted From Capital-Note B" are required only if:
  - The parameters cited in Note A-2 exist, and
  - The total deduction, Line 8, Column IV, for the current month exceeds the total deductions for the prior month by 50% or more.
- All columns and Lines 1 through 10 must be answered if required. If respondent has nothing to report, enter "0."

Other Operational Data (Items 1, 2 and 3 below require an answer)

- Item 1. Have the accounts enumerated on Lines 5A through 5F above been reconciled with statements received from others within 35 days for Lines 5A through 5D and 65 days for Lines 5E and 5F prior to the report date and have all reconciling differences been appropriately comprehended in the computation of net capital at the report date? If this has not been done in all respects, answer No.
- Yes \_\_\_\_\_ 5600  
No \_\_\_\_\_ 5601
- Item 2. Do the respondent's books reflect a concentrated position in commodities? If yes, report the totals (\$000 omitted) in accordance with the specific instructions. If No, answer "0" for:
- A. Firm trading and investment accounts ..... \$ \_\_\_\_\_ 5602  
B. Customers' and non-customers' and other accounts..... \$ \_\_\_\_\_ 5603
- Item 3. Does respondent have any planned operational changes? (Answer Yes or No based on specific instructions.) .....
- Yes \_\_\_\_\_ 5604  
No \_\_\_\_\_ 5605

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

FOCUS  
Report  
Part II

FINANCIAL AND OPERATIONAL DATA

Items on this page to be reported by a: Stand-Alone Broker-Dealer  
Stand-Alone SBSB  
Broker-Dealer SBSB  
Broker-Dealer MSBSP

Potential Operational Charges Not Deducted from Capital – Note B

	I No. of Items	II Debits (Short Value) (Report in Thousands)	III Credits (Long Value) (Report in Thousands)	IV Deductions in Computing Net Capital (Omit Pennies)
1. Money suspense and balancing differences.....		6210 \$	6410 \$	6610 \$ 6612
2. Security suspense and differences with related money balances.....	L	6220 \$	6420 \$	6620 \$ 6622
	S	6225 \$	6425 \$	6625 \$ 6627
3. Market value of short and long security suspense and differences without related money (other than reported in Line 4, below).....		6230 \$	6430 \$	6630 \$ 6632
4. Market value of security record breaks.....		6240 \$	6440 \$	6640 \$ 6642
5. Unresolved reconciling differences with others				
A. Correspondents, broker-dealers, SBSBs, and MSBSPs.....	L	6250 \$	6450 \$	6650 \$ 6652
	S	6255 \$	6455 \$	6655 \$ 6657
B. Depositories.....		6260 \$	6460 \$	6660 \$ 6662
C. Clearing organizations.....	L	6270 \$	6470 \$	6670 \$ 6672
	S	6275 \$	6475 \$	6675 \$ 6677
D. Inter-company accounts.....		6280 \$	6480 \$	6680 \$ 6682
E. Bank accounts and loans.....		6290 \$	6490 \$	6690 \$ 6692
F. Other.....		6300 \$	6500 \$	6700 \$ 6702
G. (Offsetting) Lines 5A through 5F.....		6310 \$(	6510 \$(	6710 6710
TOTAL (Lines 5A-5G).....		6330 \$	6530 \$	6730 \$ 6732
6. Commodity differences.....		6340 \$	6540 \$	6740 \$ 6742
7. TOTAL (Lines 1-6).....		6370 \$	6570 \$	6770 \$ 6772

NOTE B - This section must be completed as follows:

- Lines 1 through 6 and Columns I through IV must be completed only if:
  - The total deductions on Line 8, Column IV, of the "Operational Deductions From Capital-Note A" equal or exceed 25% of excess net capital as of the prior month end reporting date; and
  - The total deduction on Line 8, Column IV, of the "Operational Deductions From Capital-Note A" for the current month exceeds the total deductions for the prior month by 50% or more. If respondent has nothing to report, enter "0."
- Include only suspense and difference items open at the report date which were NOT required to be deducted in the computation of net capital AND which were not resolved seven (7) business days subsequent to the report date.
- Include in Column IV only additional deductions not comprehended in the computation of net capital at the report date.
- Include on Lines 5A through 5F unfavorable differences offset by favorable differences at the report date if resolution of the favorable items resulted in additional deductions in the computation of net capital subsequent to the report date.
- Exclude from Lines 5A through 5F new reconciling differences disclosed as a result of reconciling with the books of account statements received subsequent to the report date.
- Lines 1 through 5 above correspond to similar lines in the "Operational Deductions From Capital-Note A" and the same instructions should be followed except as stated in Notes B-1 through B-5 above.

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

FOCUS Report Part II

COMPUTATION FOR DETERMINATION OF CUSTOMER RESERVE REQUIREMENTS

Items on this page to be reported by a: Stand-Alone Broker-Dealer Broker-Dealer SBSB Broker-Dealer MSBSP

CREDIT BALANCES

Table with 11 rows for credit balances. Includes items like 'Free credit balances and other credit balances in customers' security accounts', 'Monies borrowed collateralized by securities carried for the accounts of customers', etc. Values range from 4340 to 4430.

DEBIT BALANCES

Table with 7 rows for debit balances. Includes items like 'Debit balances in customers' cash and margin accounts, excluding unsecured accounts and accounts doubtful of collection', 'Securities borrowed to effectuate short sales by customers and securities borrowed to make delivery on customers' securities failed to deliver', etc. Values range from 4440 to 4472.

RESERVE COMPUTATION

Table with 7 rows for reserve computation. Includes items like 'Excess of total debits over total credits (Line 20 less Line 11)', 'Excess of total credits over total debits (Line 11 less Line 20)', 'Amount held on deposit in "Reserve Bank Account(s)", including \$ value of qualified securities', etc. Values range from 4480 to 4540.

FREQUENCY OF COMPUTATION

28. Daily [4332] Weekly [4333] Monthly [4334]

\*\* In the event the net capital requirement is computed under the alternative method, this reserve formula must be prepared in accordance with the requirements of paragraph (a)(1)(ii) of Rule 15c3-1.

References to notes in this section refer to the notes to 17 CFR 240.15c3-1a.

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

FOCUS  
Report  
Part II

POSSESSION OR CONTROL FOR CUSTOMERS

Items on this page to be reported by a: Stand-Alone Broker-Dealer  
Broker-Dealer SBSB  
Broker-Dealer MSBSP

State the market valuation and number of items of:

1. Customers' fully paid securities and excess margin securities not in the respondent's possession or control as of the report date (for which instructions to reduce to possession or control had been issued as of the report date) but for which the required action was not taken by respondent within the time frames specified under Rule 15c3-3. Notes A and B..... \$ \_\_\_\_\_ **4586**  
 A. Number of items..... **4587**
2. Customers' fully paid securities and excess margin securities for which instructions to reduce to possession or control had not been issued as of the report date, excluding items arising from "temporary lags which result from normal business operations" as permitted under Rule 15c3-3. Notes B, C and D..... \$ \_\_\_\_\_ **4588**  
 A. Number of items..... **4589**
3. The system and procedures utilized in complying with the requirement to maintain physical possession or control of customers' fully paid and excess margin securities have been tested and are functioning in a manner adequate to fulfill the requirements of Rule 15c3-3..... Yes **4584** No **4585**

Notes:

- A – Do not include in Line 1 customers' fully paid and excess margin securities required by Rule 15c3-3 to be in possession or control but for which no action was required by the respondent as of the report date or required action was taken by respondent within the time frames specified under Rule 15c3-3.
- B – State separately in response to Lines 1 and 2 whether the securities reported in response thereto were subsequently reduced to possession or control by the respondent.
- C – Be sure to include in Line 2 only items not arising from "temporary lags which result from normal business operations" as permitted under Rule 15c3-3.
- D – Line 2 must be responded to only with a report which is filed as of the date selected for the broker's or dealer's annual audit of financial statements, whether or not such date is the end of a calendar quarter. The response to Line 2 should be filed within 60 calendar days after such date, rather than with the remainder of this report. This information may be required on a more frequent basis by the Commission or the designated examining authority in accordance with Rule 17a-5(a)(2)(iv).

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

FOCUS  
Report  
Part II

COMPUTATION FOR DETERMINATION OF PAB REQUIREMENTS

Items on this page to be reported by a: Stand-Alone Broker-Dealer  
Broker-Dealer SBSD  
Broker-Dealer MSBSP

CREDIT BALANCES

1. Free credit balances and other credit balances in PAB security accounts (see Note A) .....	\$	_____	2110
2. Monies borrowed collateralized by securities carried for the accounts of PAB (see Note B) .....	\$	_____	2120
3. Monies payable against PAB securities loaned (see Note C) .....	\$	_____	2130
4. PAB securities failed to receive (see Note D) .....	\$	_____	2140
5. Credit balances in firm accounts which are attributable to principal sales to PAB .....	\$	_____	2150
6. Market value of stock dividends, stock splits and similar distributions receivable outstanding over 30 calendar days .....	\$	_____	2152
7. **Market value of short security count differences over 30 calendar days old .....	\$	_____	2154
8. **Market value of short securities and credits (not to be offset by longs or by debits) in all suspense accounts over 30 calendar days .....	\$	_____	2156
9. Market value of securities which are in transfer in excess of 40 calendar days and have not been confirmed to be in transfer by the transfer agent or the issuer during the 40 days .....	\$	_____	2158
10. Other (List: _____) .....	\$	_____	2160
11. TOTAL PAB CREDITS (sum of Lines 1-10) .....	\$	_____	2170

DEBIT BALANCES

12. Debit balances in PAB cash and margin accounts, excluding unsecured accounts and accounts doubtful of collection (see Note E) .....	\$	_____	2180
13. Securities borrowed to effectuate short sales by PAB and securities borrowed to make delivery on PAB securities failed to deliver .....	\$	_____	2190
14. Failed to deliver of PAB securities not older than 30 calendar days .....	\$	_____	2200
15. Margin required and on deposit with Options Clearing Corporation for all option contracts written or purchased in PAB accounts (see Note F) .....	\$	_____	2210
16. Margin required and on deposit with a clearing agency registered with the Commission under section 17A of the Exchange Act (15 U.S.C. 78q-1) or a derivatives clearing organization registered with the Commodity Futures Trading Commission under section 5b of the Commodity Exchange Act (7 U.S.C. 7a-1) related to the following types of positions written, purchased or sold in PAB accounts: (1) security futures products and (2) futures contracts (and options thereon) carried in a securities account pursuant to an SRO portfolio margining rule (see Note G) .....	\$	_____	2215
17. Other (List: _____) .....	\$	_____	2220
18. TOTAL PAB DEBITS (sum of Lines 12-17) .....	\$	_____	2230

RESERVE COMPUTATION

19. Excess of total PAB debits over total PAB credits (Line 18 less Line 11) .....	\$	_____	2240
20. Excess of total PAB credits over total PAB debits (Line 11 less Line 18) .....	\$	_____	2250
21. Excess debits in customer reserve formula computation .....	\$	_____	2260
22. PAB reserve requirement (Line 20 less Line 21) .....	\$	_____	2270
23. Amount held on deposit in Reserve Bank Account(s) including \$ _____ 2275 value of qualified securities, at end of reporting period .....	\$	_____	2280
24. Amount of deposit (or withdrawal) including \$ _____ 2285 value of qualified securities .....	\$	_____	2290
25. New amount in Reserve Bank Account(s) after adding deposit or subtracting withdrawal including \$ _____ 2295 value of qualified securities .....	\$	_____	2300
26. Date of deposit (MM/DD/YY) .....		_____	2310

FREQUENCY OF COMPUTATION

27. Daily \_\_\_\_\_ 2315 Weekly \_\_\_\_\_ 2320 Monthly \_\_\_\_\_ 2330

\* See notes regarding PAB Reserve Bank Account Computation (Notes 1-10).

\*\* In the event the net capital requirement is computed under the alternative method, this reserve formula must be prepared in accordance with the requirements of paragraph (a)(1)(ii) of Rule 15c3-1.

References to notes in this section refer to the notes to 17 CFR 240.15c3-1a.

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

FOCUS  
Report  
Part II

CLAIMING AN EXEMPTION FROM RULE 15c3-3

Items on this page to be reported by a: Stand-Alone Broker-Dealer (if claiming an exemption from Rule 15c3-3)  
Broker-Dealer SBSB (if claiming an exemption from Rule 15c3-3)  
Broker-Dealer MSBSP (if claiming an exemption from Rule 15c3-3)

EXEMPTIVE PROVISION UNDER RULE 15c3-3

If an exemption from Rule 15c3-3 is claimed, identify below the section upon which such exemption is based (check all that apply):

- A. (k)(1) – \$2,500 capital category as per Rule 15c3-3..... 4550
- B. (k)(2)(i) – “Special Account for the Exclusive Benefit of Customers” maintained..... 4560
- C. (k)(2)(ii) – All customer transactions cleared through another broker-dealer on a fully disclosed basis  
Name of clearing firm: 4335 ..... 4570
- D. (k)(3) – Exempted by order of the Commission (include copy of letter) ..... 4580

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

FOCUS  
Report  
Part II

COMPUTATION FOR DETERMINATION OF SECURITY-BASED SWAP CUSTOMER RESERVE REQUIREMENTS

Items on this page to be reported by a: Stand-Alone Broker-Dealer  
Stand-Alone SBSB  
Broker-Dealer SBSB

**CREDIT BALANCES**

1. Free credit balances and other credit balances in the accounts carried for security-based swap customers (see Note A).....	\$	_____	12069
2. Monies borrowed collateralized by securities in accounts carried for security-based swap customers (see Note B).....	\$	_____	12070
3. Monies payable against security-based swap customers' securities loaned (see Note C).....	\$	_____	12071
4. Security-based swap customers' securities failed to receive (see Note D).....	\$	_____	12072
5. Credit balances in firm accounts attributable to principal sales to security-based swap customers.....	\$	_____	12073
6. Market value of stock dividends, stock splits and similar distributions receivable outstanding over 30 calendar days.....	\$	_____	12074
7. **Market value of short security count differences over 30 calendar days old.....	\$	_____	12075
8. **Market value of short securities and credits (not to be offset by longs or by debits) in all suspense accounts over 30 calendar days.....	\$	_____	12076
9. Market value of securities which are in transfer in excess of 40 calendar days and have not been confirmed to be in transfer by the transfer agent or the issuer during the 40 days.....	\$	_____	12077
10. Other (List: _____).....	\$	_____	12078
11. TOTAL CREDITS (sum of Lines 1-10).....	\$	_____	12089

**DEBIT BALANCES**

12. Debit balances in accounts carried for security-based swap customers, excluding unsecured accounts and accounts doubtful of collection (see Note E).....	\$	_____	12079
13. Securities borrowed to effectuate short sales by security-based swap customers and securities borrowed to make delivery on security-based swap customers' securities failed to deliver.....	\$	_____	12080
14. Failed to deliver of security-based swap customers' securities not older than 30 calendar days.....	\$	_____	12081
15. Margin required and on deposit with Options Clearing Corporation for all option contracts written or purchased in accounts carried for security-based swap customers (see Note F).....	\$	_____	12082
16. Margin related to security future products written, purchased or sold in accounts carried for security-based swap customers required and on deposit in a qualified clearing agency account at a clearing agency registered with the Commission under section 17A of the Exchange Act (15 U.S.C. 78q-1) or a derivative clearing organization registered with the Commodity Futures Trading Commission under section 5b of the Commodity Exchange Act (7 U.S.C. 7a-1) (see Note G).....	\$	_____	12083
17. Margin related to cleared security-based swap transactions in accounts carried for security-based swap customers required and on deposit in a qualified clearing agency account at a clearing agency registered with the Commission pursuant to section 17A of the Exchange Act (15 U.S.C. 78q-1).....	\$	_____	12084
18. Margin related to non-cleared security-based swap transactions in accounts carried for security-based swap customers required and held in a qualified registered security-based swap dealer account at another security-based swap dealer.....	\$	_____	12085
19. Other (List: _____).....	\$	_____	12086
20. **Aggregate debit items.....	\$	_____	12090
21. **TOTAL DEBITS (sum of Lines 12-19).....	\$	_____	12091

**RESERVE COMPUTATION**

22. Excess of total debits over total credits (Line 21 less Line 11).....	\$	_____	12092
23. Excess of total credits over total debits (Line 11 less Line 21).....	\$	_____	12093
24. Amount held on deposit in "Reserve Account(s)," including value of qualified securities, at end of reporting period.....	\$	_____	12094
25. Amount of deposit (or withdrawal) including \$ _____ 12087 value of qualified securities.....	\$	_____	12095
26. New amount in Reserve Account(s) after adding deposit or subtracting withdrawal including \$ _____ 12088 value of qualified securities.....	\$	_____	12096
27. Date of deposit (MM/DD/YY).....	\$	_____	12097

\*\* In the event the net capital requirement is computed under the alternative method, this reserve formula must be prepared in accordance with the requirements of paragraph (a)(1)(ii) of Rule 15c3-1.

References to notes in this section refer to the notes to 17 CFR 240.15c3-3b or 17 CFR 240.18a-4a, as applicable.

Name of Firm: \_\_\_\_\_  
As of: \_\_\_\_\_

FOCUS  
Report  
Part II

POSSESSION OR CONTROL FOR SECURITY-BASED SWAP CUSTOMERS

Items on this page to be reported by a: Stand-Alone Broker-Dealer  
Stand-Alone SBSB  
Broker-Dealer SBSB

State the market valuation and number of items of:

1. Security-based swap customers' excess securities collateral not in the respondent's possession or control as of the report date (for which instructions to reduce to possession or control had been issued as of the report date) but for which the required action was not taken by respondent within the time frame specified under Rule 15c3-3(p) or Rule 18a-4, as applicable. Notes A and B..... \$                      12098  
 A. Number of items.....                      12099
2. Security-based swap customers' excess securities collateral for which instructions to reduce possession or control had not been issued as of the report date under Rule 15c3-3(p) or Rule 18a-4, as applicable..... \$                      12100  
 A. Number of items.....                      12101
3. The system and procedures utilized in complying with the requirement to maintain physical possession or control of security-based swap customers' excess securities collateral have been tested and are functioning in a manner adequate to fulfill the requirements of Rule 15c3-3(p) or Rule 18a-4, as applicable ..... Yes                      12102 No                      12103

Notes:

- A – Do not include in Line 1 security-based swap customers' excess securities collateral required to be in possession or control but for which no action was required by the respondent as of the report date or required action was taken by respondent within the required time frames.
- B – State separately in response to Line 1 whether the securities reported in response thereto were subsequently reduced to possession or control by the respondent.

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

FOCUS  
Report  
Part II

CLAIMING AN EXEMPTION FROM RULE 18a-4

Items on this page to be reported by a: Stand-Alone SBSB (if claiming an exemption from Rule 18a-4)  
SBSB registered as an OTC Derivatives Dealer (if claiming an exemption from Rule 18a-4)

EXEMPTION FROM RULE 18a-4

If an exemption from Rule 18a-4 is claimed, check the box.....  12104

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

FOCUS  
Report  
Part II

COMPUTATION OF CFTC MINIMUM CAPITAL REQUIREMENTS

Items on this page to be reported by: Futures Commission Merchant

NET CAPITAL REQUIRED

A. Risk-based requirement

i. Amount of customer risk

Maintenance margin ..... \$ 7415

ii. Enter 8% of Line A.i ..... \$ 7425

iii. Amount of non-customer risk

Maintenance margin ..... \$ 7435

iv. Enter 8% of Line A.iii ..... \$ 7445

v. Enter the sum of Lines A.ii and A.iv ..... \$ 7455

B. Minimum dollar amount requirement ..... \$ 7465

C. Other NFA requirement ..... \$ 7475

D. Minimum CFTC net capital requirement

Enter the greatest of Lines A.v, B, or C ..... \$ 7490

Note: If amount on Line D is greater than the minimum net capital requirement computed on Item 3760, then enter this greater amount on Item 3760. The greater of the amount required by the SEC or CFTC is the minimum net capital requirement.

CFTC early warning level – enter the greatest of 110% of Line A.v, or 150% of Line B or 150% of Line C or \$375,000 ..... \$ 7495

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

FOCUS Report Part II

STATEMENT OF SEGREGATION REQUIREMENTS AND FUNDS IN SEGREGATION FOR CUSTOMERS TRADING ON U.S. COMMODITY EXCHANGES

Items on this page to be reported by a: Futures Commission Merchant

SEGREGATION REQUIREMENTS

Table with 2 columns: Description and Amount. Rows include: 1. Net ledger balance (A. Cash, B. Securities), 2. Net unrealized profit (loss) in open futures contracts, 3. Exchange traded options (A. Add: Market value of open option contracts, B. Deduct: Market value of open option contracts), 4. Net equity (deficit) (total of Lines 1, 2 and 3), 5. Accounts liquidating to a deficit and accounts with debit balances - gross amount, Less: amount offset by customer owned securities, 6. Amount required to be segregated (add Lines 4 and 5).

FUNDS IN SEGREGATED ACCOUNTS

Table with 2 columns: Description and Amount. Rows include: 7. Deposited in segregated funds bank accounts (A. Cash, B. Securities representing investments of customers' funds, C. Securities held for particular customers or option customers in lieu of cash), 8. Margin on deposit with derivative clearing organizations of contract markets (A. Cash, B. Securities representing investments of customers' funds, C. Securities held for particular customers or option customers in lieu of cash), 9. Net settlement from (to) derivative clearing organizations of contract markets, 10. Exchange traded options (A. Value of open long option contracts, B. Value of open short option contracts), 11. Net equities with other FCMs (A. Net liquidating equity, B. Securities representing investments of customers' funds, C. Securities held for particular customers or option customers in lieu of cash), 12. Segregated funds on hand (describe: \_\_\_\_\_), 13. Total amount in segregation (add Lines 7 through 12), 14. Excess (deficiency) funds in segregation (subtract Line 6 from Line 13), 15. Management target amount for excess funds in segregation, 16. Excess (deficiency) funds in segregation over (under) management target amount excess.

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

FOCUS  
Report  
Part II

STATEMENT OF CLEARED SWAPS CUSTOMER SEGREGATION REQUIREMENTS AND FUNDS IN CLEARED SWAPS CUSTOMER ACCOUNTS UNDER SECTION 40(F) OF THE COMMODITY EXCHANGE ACT

Items on this page to be reported by: Futures Commission Merchant

**CLEARED SWAPS CUSTOMER REQUIREMENTS**

1. Net ledger balance			
A. Cash .....	\$		8500
B. Securities (at market) .....	\$		8510
2. Net unrealized profit (loss) in open cleared swaps .....	\$		8520
3. Cleared swaps options			
A. Market value of open cleared swaps option contracts purchased .....	\$		8530
B. Market value of open cleared swaps option contracts granted (sold) .....	\$ (		8540)
4. Net equity (deficit) (add Lines 1, 2, and 3) .....	\$		8550
5. Accounts liquidating to a deficit and accounts with debit balances – gross amount .....	\$	8560	
Less: amount offset by customer owned securities .....	\$(	8570)	\$ 8580
6. Amount required to be segregated for cleared swaps customers (add Lines 4 and 5) .....	\$		8590

**FUNDS IN CLEARED SWAPS CUSTOMER SEGREGATED ACCOUNTS**

7. Deposited in cleared swaps customer segregated accounts at banks			
A. Cash .....	\$		8600
B. Securities representing investments of cleared swaps customers' funds (at market) .....	\$		8610
C. Securities held for particular cleared swaps customers in lieu of cash (at market) .....	\$		8620
8. Margins on deposit with derivatives clearing organizations in cleared swaps customer segregated accounts			
A. Cash .....	\$		8630
B. Securities representing investments of cleared swaps customers' funds (at market) .....	\$		8640
C. Securities held for particular cleared swaps customers in lieu of cash (at market) .....	\$		8650
9. Net settlement from (to) derivatives clearing organizations .....	\$		8660
10. Cleared swaps options			
A. Value of open cleared swaps long option contracts .....	\$		8670
B. Value of open cleared swaps short option contracts .....	\$ (		8680)
11. Net equities with other FCMs			
A. Net liquidating equity .....	\$		8690
B. Securities representing investments of cleared swaps customers' funds (at market) .....	\$		8700
C. Securities held for particular cleared swaps customers in lieu of cash (at market) .....	\$		8710
12. Cleared swaps customer funds on hand (describe: _____) .....	\$		8715
13. Total amount in cleared swaps customer segregation (add Lines 7 through 12) .....	\$		8720
14. Excess (deficiency) funds in cleared swaps customer segregation (subtract Line 6 from Line 13) .....	\$		8730
15. Management target amount for excess funds in cleared swaps segregated accounts .....	\$		8760
16. Excess (deficiency) funds in cleared swaps customer segregated accounts over (under) management target excess .....	\$		8770

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

FOCUS  
Report  
Part II

STATEMENT OF SEGREGATION REQUIREMENTS AND FUNDS IN SEGREGATION  
FOR CUSTOMERS' DEALER OPTIONS ACCOUNTS

Items on this page to be reported by a: Futures Commission Merchant

1. Amount required to be segregated in accordance with 17 CFR 32.6.....	\$	_____	7200
2. Funds/property in segregated accounts			
A. Cash.....	\$	_____	7210
B. Securities (at market value).....	\$	_____	7220
C. Total funds/property in segregated accounts.....	\$	_____	7230
3. Excess (deficiency) funds in segregation (subtract Line 2C from Line 1).....	\$	_____	7240

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

FOCUS  
Report  
Part II

STATEMENT OF SECURED AMOUNTS AND FUNDS HELD IN SEPARATE ACCOUNTS  
FOR FOREIGN FUTURES AND FOREIGN OPTIONS CUSTOMERS PURSUANT TO CFTC REGULATION 30.7

Items on this page to be reported by a: Futures Commission Merchant

FOREIGN FUTURES AND FOREIGN OPTIONS SECURED AMOUNTS

Amount required to be set aside pursuant to law, rule, or regulation of a foreign government or a rule of a self-regulatory organization authorized thereunder .....	\$	_____	7309
1. Net ledger balance – Foreign futures and foreign options trading – All customers			
A. Cash .....	\$	_____	7315
B. Securities (at market) .....	\$	_____	7317
2. Net unrealized profit (loss) in open futures contracts traded on a foreign board of trade .....	\$	_____	7325
3. Exchange traded options			
A. Market value of open option contracts purchased on a foreign board of trade .....	\$	_____	7335
B. Market value of open option contracts granted (sold) on a foreign board of trade .....	\$	_____	7337
4. Net equity (deficit) (add Lines 1, 2, and 3) .....	\$	_____	7345
5. Accounts liquidating to a deficit and accounts with debit balances – gross amount .....	\$	_____	7351
Less: Amount offset by customer owned securities .....	\$	_____	7352
6. Amount required to be set aside as the secured amount – Net liquidating equity method (add Lines 4 and 5) .....	\$	_____	7355
7. Greater of amount required to be set aside pursuant to foreign jurisdiction (above) or Line 6 .....	\$	_____	7360

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

FOCUS  
Report  
Part II

STATEMENT OF SECURED AMOUNTS AND FUNDS HELD IN SEPARATE ACCOUNTS  
FOR FOREIGN FUTURES AND FOREIGN OPTIONS CUSTOMERS PURSUANT TO CFTC REGULATION 30.7

Items on this page to be reported by: Futures Commission Merchant

FUNDS DEPOSITED IN SEPARATE 17 CFR. 30.7 ACCOUNTS

1. Cash in banks

A. Banks located in the United States ..... \$ 7500  
 B. Other banks qualified under 17 CFR. 30.7  
 Name(s): 7510 \$ 7520 \$ 7530

2. Securities

A. In safekeeping with banks located in the United States..... \$ 7540  
 B. In safekeeping with other banks designated by 17 CFR. 30.7  
 Name(s): 7550 \$ 7560 \$ 7570

3. Equities with registered futures commission merchants

A. Cash..... \$ 7580  
 B. Securities..... \$ 7590  
 C. Unrealized gain (loss) on open futures contracts..... \$ 7600  
 D. Value of long option contracts..... \$ 7610  
 E. Value of short option contracts..... \$ ( ) 7615 \$ 7620

4. Amounts held by clearing organizations of foreign boards of trade

Name(s): 7630  
 A. Cash..... \$ 7640  
 B. Securities..... \$ 7650  
 C. Amount due to (from) clearing organizations - daily variation..... \$ 7660  
 D. Value of long option contracts..... \$ 7670  
 E. Value of short option contracts..... \$ ( ) 7675 \$ 7680

5. Amounts held by members of foreign boards of trade

Name(s): 7690  
 A. Cash..... \$ 7700  
 B. Securities..... \$ 7710  
 C. Unrealized gain (loss) on open futures contracts..... \$ 7720  
 D. Value of long option contracts..... \$ 7730  
 E. Value of short option contracts..... \$ ( ) 7735 \$ 7740

6. Amounts with other depositories designated by a foreign board of trade

Name(s): 7750 \$ 7760

7. Segregated funds on hand (describe: \_\_\_\_\_)..... \$ 7765

8. Total funds in separate 17 CFR 30.7 accounts..... \$ 7770

9. Excess (deficiency) set aside funds for secured amount  
(Line Item 7770 minus Line Item 7360)..... \$ 7380

10. Management target amount for excess funds in separate  
17 CFR 30.7 accounts..... \$ 7780

11. Excess (deficiency) funds in separate 17 CFR 30.7 accounts  
over (under) management target excess..... \$ 7785

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

FOCUS  
Report  
Part II  
Schedule 1

SCHEDULE 1 – AGGREGATE SECURITIES, COMMODITIES, AND SWAPS POSITIONS

Items on this page to be reported by: Stand-Alone Broker-Dealer  
Stand-Alone SBSB  
Broker-Dealer SBSB  
Stand-Alone MSBSP  
Broker-Dealer MSBSP

Aggregate Securities, Commodities, and Swaps Positions	LONG/BOUGHT	SHORT/SOLD
1. U.S. treasury securities.....	\$ ..... 8200	\$ ..... 8201
2. U.S. government agency and U.S. government-sponsored enterprises.....	\$ ..... 8210	\$ ..... 8211
A. Mortgage-backed securities issued by U.S. government agency and U.S. government-sponsored enterprises .....	\$ ..... 18001	\$ ..... 18002
B. Debt securities issued by U.S. government agency and U.S. government-sponsored enterprises .....	\$ ..... 18003	\$ ..... 18004
3. Securities issued by states and political subdivisions in the U.S .....	\$ ..... 8220	\$ ..... 8221
4. Foreign securities		
A. Debt securities .....	\$ ..... 8230	\$ ..... 8231
B. Equity securities .....	\$ ..... 8235	\$ ..... 8236
5. Money market instruments.....	\$ ..... 8240	\$ ..... 8241
6. Private label mortgage backed securities.....	\$ ..... 8250	\$ ..... 8251
7. Other asset-backed securities .....	\$ ..... 8260	\$ ..... 8261
8. Corporate obligations.....	\$ ..... 8270	\$ ..... 8271
9. Stocks and warrants (other than arbitrage positions).....	\$ ..... 8280	\$ ..... 8281
10. Arbitrage.....	\$ ..... 8290	\$ ..... 8291
11. Spot commodities .....	\$ ..... 8330	\$ ..... 8331
12. Other securities and commodities .....	\$ ..... 8360	\$ ..... 8361
13. Securities with no ready market		
A. Equity.....	\$ ..... 8340	\$ ..... 8341
B. Debt.....	\$ ..... 8345	\$ ..... 8346
C. Other.....	\$ ..... 8350	\$ ..... 8351
D. Total securities with no ready market .....	\$ ..... 12777	\$ ..... 12782
14. Total net securities and spot commodities (sum of Lines 1-12 and 13D).....	\$ ..... 12778	\$ ..... 12783
15. Security-based swaps		
A. Cleared.....	\$ ..... 12106	\$ ..... 12114
B. Non-cleared.....	\$ ..... 12107	\$ ..... 12115
16. Mixed swaps		
A. Cleared.....	\$ ..... 12108	\$ ..... 12116
B. Non-cleared.....	\$ ..... 12109	\$ ..... 12117
17. Swaps		
A. Cleared.....	\$ ..... 12110	\$ ..... 12118
B. Non-cleared.....	\$ ..... 12111	\$ ..... 12119
18. Other derivatives and options.....	\$ ..... 8295	\$ ..... 8296
19. Counterparty netting .....	\$ ..... 12779	\$ ..... 12784
20. Cash collateral netting .....	\$ ..... 12780	\$ ..... 12785
21. Total derivative receivables and payables (sum of Lines 15-20).....	\$ ..... 12781	\$ ..... 12786
22. Total net securities, commodities, and swaps positions (sum of Lines 14 and 21).....	\$ ..... 8370	\$ ..... 8371

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

FOCUS  
Report  
Part II  
Schedule 2

SCHEDULE 2 – CREDIT CONCENTRATION REPORT FOR FIFTEEN LARGEST EXPOSURES IN DERIVATIVES

Items on this page to be reported by: Stand-Alone Broker-Dealer (Authorized to use models)  
Stand-Alone SBSB  
Broker-Dealer SBSB  
Stand-Alone MSBSP  
Broker-Dealer MSBSP

I. By Current Net Exposure

Counterparty Identifier	Gross Replacement Value		Net Replacement Value	Current Net Exposure	Current Net and Potential Exposure	Margin Collected
	Receivable (Gross Gain)	Payable (Gross Loss)				
1.	12120	12135	12151	12167	12183	12199
2.	12121	12136	12152	12168	12184	12200
3.	12122	12137	12153	12169	12185	12201
4.	12123	12138	12154	12170	12186	12202
5.	12124	12139	12155	12171	12187	12203
6.	12125	12140	12156	12172	12188	12204
7.	12126	12141	12157	12173	12189	12205
8.	12127	12142	12158	12174	12190	12206
9.	12128	12143	12159	12175	12191	12207
10.	12129	12144	12160	12176	12192	12208
11.	12130	12145	12161	12177	12193	12209
12.	12131	12146	12162	12178	12194	12210
13.	12132	12147	12163	12179	12195	12211
14.	12133	12148	12164	12180	12196	12212
15.	12134	12149	12165	12181	12197	12213
All other counterparties		12150	12166	12182	12198	12214
Totals:		7810	7811	7812	7813	7814

II. By Current Net and Potential Exposure

Counterparty Identifier	Gross Replacement Value		Net Replacement Value	Current Net Exposure	Current Net and Potential Exposure	Margin Collected
	Receivable (Gross Gain)	Payable (Gross Loss)				
1.	12232	12247	12264	12281	12315	12332
2.	12233	12248	12265	12282	12316	12333
3.	12234	12249	12266	12283	12317	12334
4.	12235	12250	12267	12284	12318	12335
5.	12236	12251	12268	12285	12319	12336
6.	12237	12252	12269	12286	12320	12337
7.	12238	12253	12270	12287	12321	12338
8.	12239	12254	12271	12288	12322	12339
9.	12240	12255	12272	12289	12323	12340
10.	12241	12256	12273	12290	12324	12341
11.	12242	12257	12274	12291	12325	12342
12.	12243	12258	12275	12292	12326	12343
13.	12244	12259	12276	12293	12327	12344
14.	12245	12260	12277	12294	12328	12345
15.	12246	12261	12278	12295	12329	12346
All other counterparties		12262	12279	12296	12330	12347
Totals:		12263	12280	12297	12314	12348

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

FOCUS  
Report  
Part II  
Schedule 3

SCHEDULE 3 – PORTFOLIO SUMMARY OF DERIVATIVES EXPOSURES BY INTERNAL CREDIT RATING

Items on this page to be reported by: Stand-Alone Broker-Dealer (Authorized to use models)  
Stand-Alone SBSB  
Broker-Dealer SBSB  
Stand-Alone MSBSP  
Broker-Dealer MSBSP

Internal Credit Rating	Gross Replacement Value		Net Replacement Value	Current Net Exposure	Current Net and Potential Exposure	Margin Collected	
	Receivable	Payable					
1.	12349	\$ 12386	\$ 12423	\$ 12460	\$ 12497	\$ 12534	\$ 12572
2.	12350	\$ 12387	\$ 12424	\$ 12461	\$ 12498	\$ 12535	\$ 12573
3.	12351	\$ 12388	\$ 12425	\$ 12462	\$ 12499	\$ 12536	\$ 12574
4.	12352	\$ 12389	\$ 12426	\$ 12463	\$ 12500	\$ 12537	\$ 12575
5.	12353	\$ 12390	\$ 12427	\$ 12464	\$ 12501	\$ 12538	\$ 12576
6.	12354	\$ 12391	\$ 12428	\$ 12465	\$ 12502	\$ 12539	\$ 12577
7.	12355	\$ 12392	\$ 12429	\$ 12466	\$ 12503	\$ 12540	\$ 12578
8.	12356	\$ 12393	\$ 12430	\$ 12467	\$ 12504	\$ 12541	\$ 12579
9.	12357	\$ 12394	\$ 12431	\$ 12468	\$ 12505	\$ 12542	\$ 12580
10.	12358	\$ 12395	\$ 12432	\$ 12469	\$ 12506	\$ 12543	\$ 12581
11.	12359	\$ 12396	\$ 12433	\$ 12470	\$ 12507	\$ 12544	\$ 12582
12.	12360	\$ 12397	\$ 12434	\$ 12471	\$ 12508	\$ 12545	\$ 12583
13.	12361	\$ 12398	\$ 12435	\$ 12472	\$ 12509	\$ 12546	\$ 12584
14.	12362	\$ 12399	\$ 12436	\$ 12473	\$ 12510	\$ 12547	\$ 12585
15.	12363	\$ 12400	\$ 12437	\$ 12474	\$ 12511	\$ 12548	\$ 12586
16.	12364	\$ 12401	\$ 12438	\$ 12475	\$ 12512	\$ 12549	\$ 12587
17.	12365	\$ 12402	\$ 12439	\$ 12476	\$ 12513	\$ 12550	\$ 12588
18.	12366	\$ 12403	\$ 12440	\$ 12477	\$ 12514	\$ 12551	\$ 12589
19.	12367	\$ 12404	\$ 12441	\$ 12478	\$ 12515	\$ 12552	\$ 12590
20.	12368	\$ 12405	\$ 12442	\$ 12479	\$ 12516	\$ 12553	\$ 12591
21.	12369	\$ 12406	\$ 12443	\$ 12480	\$ 12517	\$ 12554	\$ 12592
22.	12370	\$ 12407	\$ 12444	\$ 12481	\$ 12518	\$ 12555	\$ 12593
23.	12371	\$ 12408	\$ 12445	\$ 12482	\$ 12519	\$ 12556	\$ 12594
24.	12372	\$ 12409	\$ 12446	\$ 12483	\$ 12520	\$ 12557	\$ 12595
25.	12373	\$ 12410	\$ 12447	\$ 12484	\$ 12521	\$ 12558	\$ 12596
26.	12374	\$ 12411	\$ 12448	\$ 12485	\$ 12522	\$ 12559	\$ 12597
27.	12375	\$ 12412	\$ 12449	\$ 12486	\$ 12523	\$ 12560	\$ 12598
28.	12376	\$ 12413	\$ 12450	\$ 12487	\$ 12524	\$ 12561	\$ 12599
29.	12377	\$ 12414	\$ 12451	\$ 12488	\$ 12525	\$ 12562	\$ 12600
30.	12378	\$ 12415	\$ 12452	\$ 12489	\$ 12526	\$ 12563	\$ 12601
31.	12379	\$ 12416	\$ 12453	\$ 12490	\$ 12527	\$ 12564	\$ 12602
32.	12380	\$ 12417	\$ 12454	\$ 12491	\$ 12528	\$ 12565	\$ 12603
33.	12381	\$ 12418	\$ 12455	\$ 12492	\$ 12529	\$ 12566	\$ 12604
34.	12382	\$ 12419	\$ 12456	\$ 12493	\$ 12530	\$ 12567	\$ 12605
35.	12383	\$ 12420	\$ 12457	\$ 12494	\$ 12531	\$ 12568	\$ 12606
36.	12384	\$ 12421	\$ 12458	\$ 12495	\$ 12532	\$ 12569	\$ 12607
Unrated	12385	\$ 12422	\$ 12459	\$ 12496	\$ 12533	\$ 12570	\$ 12608
Totals:		\$ 7822	\$ 7823	\$ 7821	\$ 7820	\$ 12571	\$ 12609

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

FOCUS  
Report  
Part II  
Schedule 4

SCHEDULE 4 – GEOGRAPHIC DISTRIBUTION OF DERIVATIVES EXPOSURES FOR TEN LARGEST COUNTRIES

Items on this page to be reported by: Stand-Alone Broker-Dealer (Authorized to use models)  
Stand-Alone SBSB  
Broker-Dealer SBSB  
Stand-Alone MSBSP  
Broker-Dealer MSBSP

I. By Current Net Exposure

Country	Gross Replacement Value		Net Replacement Value	Current Net Exposure	Current Net and Potential Exposure	Margin Collected
	Receivable	Payable				
1.	12610	12620	12630	12640	12650	12661
2.	12611	12621	12631	12641	12651	12662
3.	12612	12622	12632	12642	12652	12663
4.	12613	12623	12633	12643	12653	12664
5.	12614	12624	12634	12644	12654	12665
6.	12615	12625	12635	12645	12655	12666
7.	12616	12626	12636	12646	12656	12667
8.	12617	12627	12637	12647	12657	12668
9.	12618	12628	12638	12648	12658	12669
10.	12619	12629	12639	12649	12659	12670
Totals:	7803	7804	7802	12660	7801	12681

II. By Current Net and Potential Exposure

Country	Gross Replacement Value		Net Replacement Value	Current Net Exposure	Current Net and Potential Exposure	Margin Collected
	Receivable	Payable				
1.	12682	12692	12703	12714	12725	12736
2.	12683	12693	12704	12715	12726	12737
3.	12684	12694	12705	12716	12727	12738
4.	12685	12695	12706	12717	12728	12739
5.	12686	12696	12707	12718	12729	12740
6.	12687	12697	12708	12719	12730	12741
7.	12688	12698	12709	12720	12731	12742
8.	12689	12699	12710	12721	12732	12743
9.	12690	12700	12711	12722	12733	12744
10.	12691	12701	12712	12723	12734	12745
Totals:	12702	12702	12713	12724	12735	12746

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

## OMB APPROVAL

OMB Number:  
Expires:  
Estimated average burden hours  
per response:

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

FOCUS REPORT PART II INSTRUCTIONS

**GENERAL INSTRUCTIONS**

Who Must File  
Filing Requirements  
Consolidated Reporting  
Currency  
Rounding  
U.S. Generally Accepted Accounting Principles  
Definitions

**SPECIFIC INSTRUCTIONS**

Cover Page  
Statement of Financial Condition  
Computation of Net Capital (Filer Authorized to Use Models)  
Computation of Net Capital (Filer Not Authorized to Use Models)  
Computation of Minimum Regulatory Capital Requirements (Broker-Dealer)  
Computation of Minimum Regulatory Capital Requirements (Non-Broker-Dealer SBSB)  
Computation of Tangible Net Worth  
Statement of Income (Loss) or Statement of Comprehensive Income  
Capital Withdrawals  
Capital Withdrawals – Recap  
Financial and Operational Data  
Computation for Determination of Customer Reserve Requirements  
Possession or Control for Customers  
Computation for Determination of PAB Requirements  
Claiming an Exemption from Rule 15c3-3  
Computation for Determination of Security-Based Swap Customer Reserve Requirements  
Possession or Control for Security-Based Swap Customers  
Computation of CFTC Minimum Capital Requirements  
Statement of Segregation Requirements and Funds in Segregation for Customers Trading on U.S. Commodity Exchanges  
Statement of Cleared Swaps Customer Segregation Requirements and Funds in Cleared Swaps Customer Accounts under Section 4d(f) of the Commodity Exchange Act  
Statement of Segregation Requirements and Funds in Segregation for Customers' Dealer Options Accounts  
Statement of Secured Amounts and Funds Held in Separate Accounts for Foreign Futures and Foreign Options Customers Pursuant to CFTC Regulation 30.7  
Schedule 1 – Aggregate Securities, Commodities, and Swaps Positions  
Schedule 2 – Credit Concentration Report for Fifteen Largest Exposures in Derivatives  
Schedule 3 – Portfolio Summary of Derivatives Exposures by Internal Credit Rating  
Schedule 4 – Geographic Distribution of Derivatives Exposures for Ten Largest Countries

**Persons who are to respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB control number**

**GENERAL INSTRUCTIONS**

FOCUS Report Part II ("Part II") is a report of the U.S. Securities and Exchange Commission ("Commission" or "SEC") that is required to be filed by the following:

- Brokers or dealers ("broker-dealers") registered with the Commission under section 15 of the Securities Exchange Act of 1934 ("Exchange Act") that are subject to paragraph (a)(1)(ii) of Exchange Act Rule 17a-5 or otherwise required to file Part II by their designated examining authority ("DEA") and OTC derivatives dealers subject to paragraph (a)(1)(i) of Exchange Act Rule 17a-12, that are not also registered with the Commission as security-based swap dealers ("SBSDs") or major security-based swap participants ("MSBSPs") under section 15F of the Exchange Act ("stand-alone broker-dealers");
- Broker-dealers that are also registered as SBSDs ("broker-dealer SBSDs");
- Broker-dealers that are also registered as MSBSPs ("broker-dealer MSBSPs");
- SBSDs not also registered with the Commission as broker-dealers or regulated by a prudential regulator ("stand-alone SBSDs");
- MSBSPs not also registered with the Commission as broker-dealers or regulated by a prudential regulator ("stand-alone MSBSPs");
- Futures Commission Merchants

The instructions issued from time to time must be used in preparing Part II and are considered an integral part of this report.

**Filing Requirements**

Part II must be filed within 17 business days after the end of each calendar quarter, within 17 business days after the end of the fiscal year where that date is not the end of a calendar quarter, and/or monthly, in accordance with 17 CFR 240.17a-5, 17 CFR 240.17a-12, or 17 CFR 240.18a-7, as applicable.

Part II generally must be filed with the firm's DEA, or if none, then with the Commission or its designee. The name of the firm and the report's effective date must be repeated on each sheet of the report submitted. If no response is made to a line item or subdivision of that item, it constitutes a representation that the firm has nothing to report.

**Consolidated Reporting**

In computing net capital, firms should consolidate their assets and liabilities in accordance with 17 CFR 240.5c3-1c or 18a-1c, as applicable.

**Currency**

Foreign currency may be expressed in terms of U.S. dollars at the rate of exchange as of the report's effective date and, where carried in conjunction with the U.S. dollar, balances for the same account holder may be consolidated with U.S. dollar balances and the gross or net position reported in its proper classification, provided the foreign currency is not subject to any restriction as to conversion.

**Rounding**

As a general rule, money amounts should be expressed in whole dollars. No valuation should be used which is higher than the actual valuation; for example, for \$170,000.85, use \$170,000 but not \$170,001. However, *for any or all-short valuations*, round the valuation *up* to the nearest dollar; for example, for \$180,000.17, use \$180,001 but not \$180,000.

**U.S. Generally Accepted Accounting Principles**

Financial statements must be prepared in conformity with U.S. generally accepted accounting principles, applied on a basis consistent with that of the preceding report and must include, in the basic statement or accompanying footnotes, all informative disclosures necessary to make the statement a clear expression of the organization's financial and operational condition. The firm must report all data after proper accruals have been made for income and expense not recorded in the books of account and adequate reserves have been provided for deficits in customer or broker accounts, unrecorded liabilities, security differences, dividends and similar items.

The amount of terms (including commitment fees and the conditions under which lines may be withdrawn) of unused lines of credit for short-term financing must be disclosed, if significant, in notes to the financial statements.

### **Definitions**

"Alternative standard" refers to the alternative standard for computing net capital based on aggregate debit items, in accordance with 17 CFR 240.15c3-1.

"Aggregate indebtedness" is defined in 17 CFR 240.15c3-1.

"Bona fide arbitrage" is defined in 17 CFR 240.15c3-1.

"Open contractual commitment" is defined in 17 CFR 240.15c3-1.

"Current net exposure" is defined as the net replacement value minus the fair market value of collateral collected that may be applied under applicable rules (e.g., taking into account haircuts to the fair market value of the collateral required under applicable rules).

"Current net and potential exposure" is defined as the sum of the following:

- The current net exposure,
- The amount of initial margin for cleared security-based swaps and swaps required by a clearing agency or derivatives clearing organization (regardless of whether the margin has been collected),
- The "margin amount" for non-cleared security-based swaps calculated under 17 CFR 240.18a-3,
- The "initial margin for non-cleared swaps" calculated under the rules of the Commodity Futures Trading Commission ("CFTC") (regardless of whether the margin has been collected), and
- The "maximum potential exposure" as defined in 17 CFR 240.15c3-1 or 18a-1, as applicable, for any over-the-counter derivatives not included above.

"Customer" and "non-customer" are defined in 17 CFR 240.15c3-1.

"Exempted securities" is defined in section 3 of the Exchange Act.

"Gross replacement value" and "Gross replacement value – receivable" are defined as the amount that would need to be paid to enter into identical contracts with respect to derivatives positions that have a positive mark-to-market value to the firm (i.e., are receivable positions of the firm), without applying any netting or collateral.

"Gross replacement value – payable" is defined as the amount that would need to be paid to enter into identical contracts with respect to derivatives positions that have a negative mark-to-market value to the firm (i.e., are payable positions of the firm), without applying any netting or collateral.

"Margin collected" is defined as the amount of margin collateral collected that can be applied against the firm's current net and potential exposure under applicable rules.

"Mixed swap" is defined in section 3(a)(68)(D) of the Exchange Act.

"Net capital" is defined in 17 CFR 240.15c3-1 or 18a-1, as applicable.

"Net replacement value" is defined as the amount of the "gross replacement value – receivable" minus the amount of the "gross replacement value – payable" that may be netted for each counterparty in accordance with applicable rules.

"Omnibus" refers to an arrangement whereby one firm settles transactions and holds securities in an account on behalf of another firm and its customers. The clearing firm only knows the other firm and does not know the customers of the carrying firm.

"Prudential regulator" is defined in section 3 of the Exchange Act.

"Ready market" is defined in 17 CFR 240.15c3-1 or 18a-1, as applicable.

"Secured demand note" ("SDN") is defined in 17 CFR 240.15c3-1d.

"Securities not readily marketable" is defined in 17 CFR 240.15c3-1 or 18a-1, as applicable.

"Security-based swap" is defined in section 3(a)(68) of the Exchange Act.

"Security-based swap customer" is defined in 17 CFR 240.15c3-3 or 240.18a-4, as applicable.

"Swap" is defined in section 3(a)(69) of the Exchange Act.

### SPECIFIC INSTRUCTIONS

#### Cover Page

The cover page must be completed in its entirety. If a line does not apply, the firm should write "None" or "N/A" on the line, as applicable.

- 13 Name of reporting entity. Provide the name of the firm filing Part II, as it is registered with the Commission. Do not use DBAs or divisional names. Do not abbreviate.
- 20-23, 12008 Address of principal place of business. Provide the physical address (not a post office box) of the firm's principal place of business.
- 30 Name of person to contact in regard to this report. The identified person need not be an officer or partner of the firm, but should be a person who can answer any questions concerning this report.
- 31 (Area code) Telephone no. Provide the direct telephone number of the contact person whose name appears on Line Item 30.
- 32, 34, 36, 38 Name(s) of subsidiaries or affiliates consolidated in this report. Provide the name of the subsidiaries or affiliate firms whose financial and operational data are combined in Part II with that of the firm filing Part II.
- 33, 35, 37, 39 Official use. This item is for use by regulatory staff only (leave it blank).

#### Statement of Financial Condition

This section must be prepared by stand-alone broker-dealers, stand-alone SBSs, broker-dealer SBSs, stand-alone MSBSPs, and broker-dealer MSBSPs. Firms should report their assets as allowable or non-allowable in accordance with 17 CFR 240.15c3-1, 17 CFR 240.18a-1, or 17 CFR 240.18a-2, as applicable. (Stand-alone MSBSPs should only complete the Allowable and Total columns.) With respect to liabilities, the columns titled "A.I. Liabilities" and "Non-A.I. Liabilities" should only be completed by broker-dealers electing to comply with the aggregate indebtedness standard under 17 CFR 240.15c3-1.

- 200 Allowable – cash. Report unrestricted cash balances. Do not report:
- Bank-negotiable certificates of deposits or similar bank money market instruments.
  - Petty cash.
  - Cash used to collateralize bank loans or other similar liabilities (compensating balances).
  - Overdrafts in unrelated banks.
- 210 Allowable – cash segregated in compliance with federal and other regulations. Report cash segregated pursuant to federal or state statutes or regulations, or the requirements of any foreign government or instrumentality of that government.
- 220 Allowable – receivables from brokers/dealers and clearing organizations – failed to deliver – includible in segregation requirement under 17 CFR 240.15c3-3 and its appendices or 17 CFR 240.18a-4 and 18a-4a. Do not report continuous net settlement ("CNS") fails to deliver here. Report them on Line Item 280.
- 230 Allowable – receivables from brokers/dealers and clearing organizations – failed to deliver – other. Do not report CNS fails to deliver here. Report them on Line Item 290.
- 260 Allowable – receivables from brokers/dealers and clearing organizations – omnibus accounts – includible in segregation requirement under 17 CFR 240.15c3-3 and its appendices or 17 CFR 240.18a-4 and 18a-4a or the Commodity Exchange Act ("CEA"). If applicable, report here net ledger balances and losses and gains on commodities future contracts.
- 270 Allowable – receivables from brokers/dealers and clearing organizations – omnibus accounts – other. If applicable, report here net ledger balances and losses and gains on commodities future contracts.
- 280 Allowable – receivables from brokers/dealers and clearing organizations – clearing organizations – includible in segregation requirement under 17 CFR 240.15c3-3 and its appendices or 17 CFR 240.18a-4 and 18a-4a or the CEA. Report CNS fails to

- deliver allocating to customers here. CNS balances may be reported on a net basis by category (i.e., customer, non-customer).
- 290 Allowable – receivables from brokers/dealers and clearing organizations – clearing organizations – other. Report CNS fails to deliver here. CNS balances may be reported on a net basis by category (i.e., customer, non-customer). Report deposits of cash with clearing organizations.
- 292 Allowable – trade date receivable. Report pending or unsettled trades that net to a receivable balance, as of trade date, across all counterparties.
- 300 Allowable – receivables from brokers/dealers and clearing organizations – other. Report other allowable receivables from brokers/dealers and clearing organizations, including floor brokerage, commissions, trade date adjustment, and all other allowable gross receivables from brokers/dealers and clearing organizations not already reported.
- 320 Allowable – receivables from customers – securities accounts – partly secured accounts. Report those portions of partly secured customer accounts that have been secured by securities deemed to have a ready market. The remaining portion of the ledger debit balance is considered nonallowable; report it as partly secured customer receivables (Line Item 560).
- 360 Allowable – securities purchased under agreements to resell. Report the gross contract value receivable (contract price) of reverse repurchase agreements that are deemed to be adequately secured. Contract price includes accrued interest on the contract at the repurchase agreement's rate (not the underlying securities). Buy-sell agreements are considered financing transactions and are reported on this line item. If a firm does not take possession of the collateral securing a reverse repurchase agreement, it will be treated as a nonallowable asset and reported on Line Item 605. Reverse repurchase deficits (including buy-sell deficits) should be reported on Line Item 3610.
- 480 Allowable – investment in and receivables from affiliates, subsidiaries and associated partnerships. This amount should not be netted against a payable from different affiliates, subsidiaries, and associated partnerships.
- 500 Allowable – other assets – dividends and interest receivable. Dividends receivable and payable should not be netted; they should be recorded in separate accounts.
- 520 Allowable – other assets – loans and advances. Report amounts related to loans and advances made to employees and others that are secured by readily marketable securities, and meet the margin requirements of Regulation T (12 CFR 220), 17 CFR 240.18a-3, and/or the firm's DEA, as applicable. Do not report loans and advances to partners, directors, and officers. Report them in the appropriate category under "Receivable from non-customers", on either Line Item 340 or Line Item 350.
- 530 Allowable – other assets – miscellaneous. Report allowable assets not readily classifiable into other previously identified categories. Examples of assets reported on this line item include: future income tax benefits arising as a result of unrealized losses; good faith deposits; and deferred organization expenses, prepaid expenses, and deferred charges.
- 536 Allowable – other assets – collateral accepted under ASC 860. Report here the market value of securities received that are required to be reported under ASC 860.
- Securities held as collateral for stock loan transactions are recognized as both an asset (Securities accepted under ASC 860 (Line Item 536)) and as a liability (Obligation to return securities (Line Item 1686)).
- Example: A firm loans 100 shares of stock valued at \$1050 and receives stock collateral valued at \$1000. The market value of the collateral received should be reported on the FOCUS as follows:
- |        |                 |                                   |        |
|--------|-----------------|-----------------------------------|--------|
| Debit  | FOCUS Item 536  | Securities accepted under ASC 860 | \$1000 |
| Credit | FOCUS Item 1686 | Obligation to return securities   | \$1000 |
- 537 Allowable – other assets – SPE assets. Report here financial assets that were previously transferred to a special purpose entity ("SPE") that do not qualify for sale treatment under ASC 860. Financial assets that have been transferred to a qualifying SPE do not need to be reported on Part II. Financial assets that have been transferred to a SPE that is not a qualifying SPE fail to qualify for sale treatment generally because effective control over the assets is still maintained.
- 550 Nonallowable – receivables from brokers/dealers and clearing organizations – other. Report nonallowable or aged receivables from brokers/dealers and clearing organizations including floor brokerage, commissions, trade date adjustment,

and all other nonallowable gross receivables from brokers/dealers and clearing organizations not already reported. Do not net unrelated receivables versus payables.

- 560 Nonallowable – receivables from customers – securities accounts – partly secured accounts. Report those portions of partly secured customer accounts that have not been secured by securities deemed to have a ready market. See 17 CFR 240.15c3-1 or 17 CFR 240.18a-1, as applicable. Report deficits in partly secured accounts of the introducing firm. Both the carrying broker and the introducing broker must report this if their clearing agreement states that such deficits are the liability of the introducing broker.
- 605 Nonallowable – securities purchased under agreements to resell. Report the gross contract value receivable (contract price) of reverse repurchase agreements that are not deemed to be adequately secured. If collateral that secures a reverse repurchase receivable is non-marketable or illiquid, then the amount receivable is nonallowable and should be reported here. Contract price includes accrued interest on the contract at the repurchase agreement's rate (not the underlying securities).
- 670 Nonallowable – investment in and receivables from affiliates, subsidiaries and associated partnerships. This amount should not be netted against payables from different affiliates or subsidiaries.
- 690 Nonallowable – other assets – dividends and interest receivable. Dividends receivable and payable are not to be netted; they should be recorded in separate accounts.
- 710 Nonallowable – other assets – loans and advances. Do not report unsecured loans and advances to partners, directors, and officers. Report them on Line Item 600.
- 750 Total – cash. This line item is equal to Line Item 200.
- 760 Total – cash segregated in compliance with federal and other regulations. This line item is equal to Line Item 210.
- 770 Total – receivables from brokers/dealers and clearing organizations – failed to deliver. This line item is the sum of Line Items 220 and 230.
- 780 Total – receivables from brokers/dealers and clearing organizations – securities borrowed. This line item is the sum of Line Items 240 and 250.
- 790 Total – receivables from brokers/dealers and clearing organizations – omnibus accounts. This line item is the sum of Line Items 260 and 270.
- 800 Total – receivables from brokers/dealers and clearing organizations – clearing organizations. This line item is the sum of Line Items 280 and 290.
- 802 Total – trade date receivable. This line item is equal to Line Item 292.
- 810 Total – receivables from brokers/dealers and clearing organizations – other. This line item is the sum of Line Items 300 and 550.
- 820 Total – receivables from customers. This line item is the sum of Line Items 310, 320, 330, 335, 560, 570, 580, and 590.
- 830 Total – receivables from non-customers. This line item is the sum of Line Items 340, 350, and 600.
- 840 Total – securities purchased under agreements to resell. This line item is the sum of Line Items 360 and 605.
- 880 Total – securities borrowed under subordination agreements and partners' individual and capital securities accounts. This line item is the sum of Line Items 460 and 630.
- 890 Total – secured demand notes. This line item is the sum of Line Items 470 and 640.
- 900 Total – memberships in exchanges. This line item is the sum of Line Items 650 and 660.
- 910 Total – investment in and receivables from affiliates, subsidiaries and associated partnerships. This line item is the sum of Line Items 480 and 670.
- 920 Total – property, furniture, equipment, leasehold improvements, and rights under lease agreements. This line item is the sum of Line Items 490 and 680.
- 930 Total – other assets. This line item is the sum of Line Items 500, 510, 520, 530, 536, 537, 690, 700, 710, and 720.

- 940 Total – assets. This line item is the sum of Line Items 540 and 740.
- 950 Payable to customers – securities accounts – including free credits. Do not report here funds in commodity accounts segregated in accordance with the Commodity Exchange Act. Do not report credits related to short sales of securities.
- 970 Liabilities subordinated to claims of creditors – cash borrowings – from outsiders. Report that portion of subordinated liabilities (cash borrowings) reported on Line Item 1710 that are owed to the firm's non-partners, non-members, or non-stockholders (outsiders).
- 980 Liabilities subordinated to claims of creditors – cash borrowings – includes equity subordination. Report that portion of subordinated liabilities (cash borrowings) reported on Line Item 1710 that are considered equity pursuant to 17 CFR 240.15c3-1 or 17CFR 240.18a-1, as applicable, for debt to debt-equity requirements. See also 17 CFR 240.15c3-1d and 17 CFR 240.18a-1d regarding events of acceleration and default.
- 990 Liabilities subordinated to claims of creditors – securities borrowings – from outsiders. This amount represents that portion of Line Item 1720 that is securities borrowing from the firm's non-partners, non-members, or non-stockholders (outsiders).
- 1000 Liabilities subordinated to claims of creditors – pursuant to secured demand note collateral agreements – from outsiders. Report that portion of liabilities subordinated pursuant to SDN collateral agreements (Line Item 1730) that are owed to the firm's non-partners, non-members, or non-stockholders (outsiders).
- 1010 Liabilities subordinated to claims of creditors – pursuant to secured demand note collateral agreements – includes equity subordination. Report that portion of liabilities subordinated pursuant to SDN collateral agreements (Line Item 1730) that are considered equity pursuant to 17CFR 240.15c3-1 or 17 CFR 240.18a-1, as applicable, for debt to debt-equity requirements. See also 17 CFR 240.15c3-1d and 17 CFR 240.18a-1d regarding events of acceleration and default.
- 1020 Partnership and LLC – including limited partners/members. Report that portion of Line Item 1780 that represents the capital contributions of limited partners/members to the limited partnership/limited liability company.
- 1480 Securities sold under repurchase agreements. Report here the gross contract value (contract price) of securities sold under repurchase agreements. Contract price includes accrued interest on the contract at the repurchase agreement's rate (not the underlying securities). Buy-sell agreements resembling repurchase agreements are also reported here.
- 1490 Payable to brokers/dealers and clearing organizations – failed to receive – includible in segregation requirement under 17 CFR 240.15c3-3 and its appendices or 17 CFR 240.18a-4 and 18a-4a. Do not report here CNS failed to receive relating to customers. Report them on Line Item 1550.
- 1500 Payable to brokers/dealers and clearing organizations – failed to receive – other. Do not report here CNS failed to receive relating to non-customers. Report them on Line Item 1560.
- 1530 Payable to brokers/dealers and clearing organizations – omnibus accounts – includible in segregation requirement under 17 CFR 240.15c3-3 and its appendices or 17 CFR 240.18a-4 and 18a-4a, or the CEA. Report here customer-related credit balances in accounts carried by other firms pursuant to omnibus agreements.
- 1540 Payable to brokers/dealers and clearing organizations – omnibus accounts – other. Report here non-customer and proprietary-related credit balances in accounts carried by other firms pursuant to omnibus agreements. FCMs should also report on this line item omnibus accounts used to clear proprietary and non-customer accounts that liquidate to a deficit (payable to the other FCM). An omnibus account that the reporting FCM carries at another FCM liquidating to a deficit should not be netted against omnibus accounts that liquidate to an equity.
- 1550 Payable to brokers/dealers and clearing organizations – clearing organizations – includible in segregation requirement under 17 CFR 240.15c3-3 and its appendices or 17 CFR 240.18a-4 and 18a-4a, or the CEA. CNS fails to receive allocating to customers are also included on this line item. CNS balances may be reported on a net basis by category (customers or non-customers); however, they should be allocated broadly for purposes of the formulas under 17 CFR 240.15c3-3a, 17 CFR 240.18a-4a, and the Commodity Exchange Act.
- 1560 Payable to brokers/dealers and clearing organizations – clearing organizations – other. CNS balances may be reported on a net basis by category (customers or non-customers).

- 1562 Trade date payable. Report here pending or unsettled trades that net to a payable balance as of trade date, across all counterparties.
- 1570 Payable to brokers/dealers and clearing organizations – other. Report here all other payables to broker/dealers including commissions, floor brokerage, and trade date or settlement date adjustments. When a firm is required to prepare its net capital computation on a trade date basis, any net receivables (or payables) resulting from adjusting proprietary positions to reflect the trade date basis of accounting should be reported here. Do not net payables and receivables with unrelated entities.
- 1686 Accounts payable and accrued liabilities and expenses – obligation to return securities. Report here the market value of securities that are required to be reported pursuant to ASC 860. Report here the market value of securities received in a stock loan transaction in which the firm lent out one security and received another security in lieu of cash.
- 1687 Accounts payable and accrued liabilities and expenses – SPE liabilities. Report here liabilities of SPEs that offset financial assets previously transferred to the SPE that do not qualify for sale treatment under ASC 860. Liabilities reported here contrast with the assets reported on Line Item 537.
- 1710 Liabilities subordinated to claims of creditors – cash borrowings. SBSBs should report here cash borrowings that are subordinated to the claims of creditors, and meet the minimum requirements of 17 CFR 240.15c3-1d or 17 CFR 240.18a-1d, if applicable. These liabilities are added to net worth in the computation of net capital (see Line Item 3520).

#### **Computation of Net Capital (Filer Authorized to Use Models)**

This section must be prepared by stand-alone broker-dealers, stand-alone SBSBs, broker-dealer SBSBs, and broker-dealer MSBSPs that are authorized by the Commission to calculate net capital using internal models in accordance with 17 CFR 240.15c3-1e and 240.18a-1(d), as applicable. Firms using the value at risk (VaR) model to compute market risk exposure should complete Line 9, while firms using Basel 2.5's standards to compute market risk exposure should complete Line 10.

- 3490 Deduct ownership equity not allowable for net capital. Report as a deduction any capital accounts, included as part of ownership equity on the Statement of Financial Condition, that are not allowable in the determination of net capital (i.e., partners' securities contributed to the firm through their individual and capital accounts).
- 3525 Other (deductions) or allowable credits. Report deductions or addbacks that are net of any related tax benefit.  
Reported amounts must also be reported on the section titled "Capital Withdrawals."  
Do not deduct from net worth or include in aggregate indebtedness any net receivables or payables resulting from the recording of proprietary positions on a trade date basis.
- 3610 Other deductions and/or charges. These charges include the following:
  - Securities borrowed deficits,
  - Stock loan deficits,
  - Repurchase and reverse repurchase deficits,
  - Aged fail-to-receive,
  - The 1% deduction for fails to deliver and stock borrows allocating to fails to receive that have been excluded from the customer reserve or deposit requirement formula, as applicable,
  - Other operational charges not comprehended elsewhere, and
  - The 1% deduction for stock borrows collateralized by an irrevocable letter of credit.
- 3630 Other additions and/or allowable credits. Report adjustments to ownership equity related to unrealized profit or loss and to deferred tax provisions, pursuant to 17 CFR 240.15c3-1 or 17 CFR 240.18a-1, as applicable. Report also any flow-through capital that has been approved by the Commission pursuant to 17 CFR 240.15c3-1c, if applicable.  
Unrealized losses on open contractual commitments are treated as charges when computing the net worth and the debt/equity total. See 17 CFR 240.15c3-1 or 17 CFR 240.18a-1, as applicable. Unrealized profits on open contractual commitments are allowed to reduce haircuts, but not to otherwise increase net worth or net capital.
- 3665 Residual marketable securities. This line item should include contractual securities commitments not accounted for in the firm's VaR model.

**Computation of Net Capital (Filer Not Authorized to Use Models)**

This section must be prepared by stand-alone broker-dealers, stand-alone SBSBs, broker-dealer SBSBs, and broker-dealer MSBSPs that are not authorized by the Commission to calculate net capital using internal models in accordance with 17 CFR 240.15c3-1e or 17 CFR 240.18a-1(d), as applicable.

Follow the instructions in the immediately preceding section titled "Computation of Net Capital (Filer Authorized to Use Models)" to the extent it contains instructions corresponding with the applicable line item number (unless contrary instructions are provided below).

- 3732 Haircuts on securities – arbitrage. Report the deduction applied to securities considered part of a bona fide arbitrage, pursuant to 17 CFR 240.15c3-1 or 17 CFR 240.18a-1, as applicable.
- 3734 Haircuts on securities – other securities. This line item should include deductions applied to securities of an investment company registered under the Investment Company Act of 1940.
- 3736 Haircuts on securities – other. The deductions reported here should include charges related to foreign currency exposure or charges related to swaps that are not computed under 17 CFR 240.15c3-1a or 17 CFR 240.18a-1a. Haircuts on swaps computed under 17 CFR 240.15c3-1a or 17 CFR 240.18a-1a should be reported on Line Item 12028.

**Computation of Minimum Regulatory Capital Requirements (Broker-Dealer)**

This section must be prepared by stand-alone broker-dealers, broker-dealer SBSBs, and broker-dealer MSBSPs. The calculation of excess tentative net capital should only be completed by broker-dealers that are authorized to calculate net capital using internal models.

3870 Ratio requirement – 2% of aggregate debit items. FCMs must report here the greater of:

- 2% of aggregate debit items, or
- 8% of funds required to be segregated pursuant to the Commodity Exchange Act.

**Computation of Minimum Regulatory Capital Requirements (Non-Broker-Dealer SBSB)**

This section must be prepared by stand-alone SBSBs. The calculation of excess tentative net capital should only be completed by stand-alone SBSBs that are authorized to calculate net capital using internal models.

**Computation of Tangible Net Worth**

This section must be prepared by stand-alone MSBSPs.

**Statement of Income (Loss) or Statement of Comprehensive Income (as defined in § 210.1-02 of Regulation S-X), as applicable**

This section must be prepared by stand-alone broker-dealers, stand-alone SBSBs, broker-dealer SBSBs, stand-alone MSBSPs, and broker-dealer MSBSPs.

If there are no items of other comprehensive income in the period presented, the firm is not required to report comprehensive income.

Commissions. Commission earned on equity, debt and commodity transactions including non-inventory principal transactions. Commission earned on introduced accounts carried by other broker-dealers and on omnibus accounts carried for other broker-dealers should be reported net.

Underwriting. Gross profit from underwriting transactions shall be determined as the difference between the proceeds of securities sold and their purchase price adjusted for discounts, commissions and allowances received from or given to other broker-dealers.

Any direct expense which can be associated with a specific underwriting may also be considered as a cost in determining gross profit or loss. In determining gross profit or loss any unrealized loss on securities unsold at the time the underwriting account was closed shall be considered as a deduction from the proceeds of securities sold.

In addition, report all fees earned from private placements, mergers and acquisitions and any other underwriting activity.

Interest and dividends. Report interest and dividend income earned on firm trading and investment accounts. Also report gross interest earned on customers' securities and commodities accounts.

Income from sale of investment company shares. Include income from sale of open-end investment company shares as retailer and as an underwriter including sales of periodic payment plans of the installment type and face amount certificates. Exclude income from sale and underwriting of shares of closed-end investment companies.

Other income. Report all other income including sale of investment company securities, investment advisory fees, proxy solicitation fees, service charges (including custodial fees), fees in connection with option transactions not excluded on an exchange, fees for solicitation of tenders on exchanges of securities, income from sale of insurance policies and all other income not specified above.

Employee compensation and benefits. Report all salaries, commissions, bonuses, profit sharing contributions, payroll taxes and benefits paid to or incurred for all employees of the reporting organization.

Commissions and floor brokerage. Include security and commodity commissions paid to others; clearance fees paid to clearing corporations, associations and depositories; fees paid to exchanges and floor brokerage paid to other broker-dealers.

Communications. Include the cost of telephones and leases wires, tickers and quotation equipment, postage, stationery, office supplies and forms.

Occupancy and equipment rental. Enter the cost of rent, heat, light and maintenance; depreciation and amortization; EDP equipment, rental and service bureau charges; all other equipment rental and general insurance.

Interest. Include interest paid to banks and on customers' accounts; on all other un-subordinated and subordinated borrowings.

Taxes other than income taxes. Include real estate taxes, personal property taxes, commercial rent and occupancy taxes, etc.

Other operating expenses. Report cost incurred for advertising, sales literature and promotional activities; travel and entertainment; subscriptions to periodicals, dues and assessments, losses in error accounts and bad debt, professional fees and all other expenses not specified above.

Income taxes. Include all unincorporated business taxes, franchise taxes, state and local income taxes and federal income taxes paid, accrued or refunded.

Equity in earnings of unconsolidated subsidiaries. The amount reported shall be stated net of any applicable tax provisions.

Comprehensive income. Comprehensive income is defined in § 210.1-02 of Regulation S-X.

#### **Capital Withdrawals**

This section must be prepared by stand-alone broker-dealers, stand-alone SBSs, broker-dealer SBSs, and broker-dealer MSBSs.

Name of lender or contributor. Report the name of the lender or contributor to whom the scheduled liability relates (i.e., name of partner, shareholder or subordinated lender). If an amount reported in this column relates to a discretionary liability or other addback to capital, include a description of the addback (i.e., "discretionary liability").

Amount to be withdrawn. These amounts can include:

- Equity capital that the firm expects to distribute within the next six months;
- Subordinated liabilities that are scheduled to mature within the next six months;
- Accruals and other addbacks to net capital that will not be eligible for inclusion in net capital within the next six months.

#### **Capital Withdrawals – Recap**

This section must be prepared by stand-alone broker-dealers, stand-alone SBSs, broker-dealer SBSs, and broker-dealer MSBSs.

With respect to Lines 1 through 4, report equity and subordinated liabilities maturing or proposed to be withdrawn within the next six months and accruals which have not been deducted in the computation of net capital.

**Financial and Operational Data**

This section must be prepared by stand-alone broker-dealers, stand-alone SBSs, broker-dealer SBSs, and broker-dealer MSBSPs. In addition to the specific instructions below, firms should refer to the instructions accompanying Notes A and B of this section on Part II itself.

- 4980 Actual number of tickets executed during the reporting period. For agency transactions, count both street side and customer side as one transaction. Count as one transaction multiple executions at the same price that result in one confirmation. In the case of principal transactions, count separately dealer-to-dealer and retail transactions. Carrying and clearing firms should include in the total ticket count transactions emanating from those firms for whom they clear on a fully disclosed basis. Firms that introduce accounts on a fully disclosed basis should include transactions introduced in their ticket count.
- 4990 Number of corrected customer confirmations sent after settlement date. Include confirmations for which the incorrect original was sent to the customer. Consider individually multiple corrections on confirmations.
- 5374 Customers' and security-based swap customers' accounts under Rules 15c3-3 or 18a-4, as applicable. Report the aggregate market value of specific securities, other than exempted securities, which exceeds 15% of the value of all securities which collateralize all margin receivables pursuant to Note E to 17 CFR 240.15c3-3a or Note E to 17 CFR 240.18a-1a, as applicable.
- 5378 Total of personal capital borrowings due within six months. Report the total borrowed cash and/or securities that, in computing net capital, are included as proprietary capital or subordinated debt.
- 5760 Open transfers and reorganization account items over 40 days not confirmed or verified – number of items. The term "reorganization account items" includes, but is not limited to, transactions in the following: (1) "rights" subscriptions, (2) warrants exercised, (3) stock splits, (4) redemptions, (5) conversions, (6) exchangeable securities, and (7) spin-offs.
- 5820 Security suspense and differences with related money balances – long – debits. When computing net capital, regard short positions and related credits as proprietary commitments if they remain unresolved seven business days after discovery.
- 5825 Security suspense and differences with related money balances – short – debits. When computing net capital, regard long positions and related debits as proprietary commitments if they remain unresolved seven business days after discovery.
- 5830 Market value of short and long security suspense and differences without related money – debits. When computing net capital, regard the market value of short security differences as deductions if they remain unresolved seven business days after discovery. Do not net unrelated differences in the same security or in other securities.
- 5840 Market value of security record breaks – debits. Report the market values of short security record breaks that are unresolved seven business days after discovery.
- 5850 Correspondents, broker-dealers, SBSs, and MSBSPs – long – debits. Report here the debit amount applicable to all unresolved reconciling items (favorable or unfavorable) with correspondents, broker-dealers, SBSs, and/or MSBSPs that are long and unresolved within seventeen business days from record date. Do not net these items.
- 5855 Correspondents, broker-dealers, SBSs, and MSBSPs – short – debits. Report here the debit amount applicable to all unresolved reconciling items (favorable or unfavorable) with correspondents, broker-dealers, SBSs, and/or MSBSPs that are short and unresolved within seventeen business days from record date. Do not net these items.
- 5860 Depositories – debits. Report here the debit amount or short value applicable to all unresolved reconciling items (favorable or unfavorable) with depositories that are unresolved within seven business days from the date of receipt of the statement of account from the carrying entity. Do not net these items.
- 5870 Clearing organizations – long – debits. Report here the debit amount applicable to all unresolved reconciling items (favorable or unfavorable) with clearing organizations that are long and unresolved within seven business days from the date of receipt of the statement of account from the carrying entity. Do not net these items.
- 5875 Clearing organizations – short – debits. Report here the debit value applicable to all unresolved reconciling items (favorable or unfavorable) with clearing organizations that are short and unresolved within seven business days from the date of receipt of the statement of account from the carrying entity. Do not net these items.
- 6012 Money suspense and balancing differences – deductions. A difference, open at the report date and unresolved for seven business days after discovery, must be deducted regardless of whether the difference is resolved prior to Part II's filing date.

- 6020 Security suspense and differences with related money balances – long – credits. When computing net capital, regard long positions and related credits as proprietary commitments if they remain unresolved seven business days after discovery.
- 6025 Security suspense and differences with related money balances – short – credits. When computing net capital, regard long positions and related credits as proprietary commitments if they remain unresolved seven business days after discovery.
- 6040 Market value of security record breaks – credits. Report the market values of long security record breaks that are unresolved seven business days after discovery.
- 6042 Market value of security record breaks – deductions. The market values of short security record breaks are deductions to net capital only if they remain unresolved seven business days after discovery.
- 6050 Correspondents, broker-dealers, SBSBs, and MSBSPs – long – credits. Report here the credit amount applicable to all unresolved reconciling items (favorable or unfavorable) with correspondents, broker-dealers, SBSBs, and/or MSBSPs that are long and unresolved within seventeen business days from record date.
- 6055 Correspondents, broker-dealers, SBSBs, and MSBSPs – short – credits. Report here the credit amount applicable to all unresolved reconciling items (favorable or unfavorable) with correspondents, broker-dealers, SBSBs, and/or MSBSPs that are short and unresolved within seventeen business days from record date. Do not net these items.
- 6060 Depositories – credits. Report here the credit amount or long value applicable to all unresolved reconciling items (favorable or unfavorable) with depositories that are unresolved within seven business days from the date of receipt of the statement of account from the carrying entity. Do not net these items.
- 6070 Clearing organizations – long – credits. Report here the credit amount applicable to all unresolved reconciling items (favorable or unfavorable) with clearing organizations that are long and unresolved within seven business days from the date of receipt of the statement of account from the carrying entity. Do not net these items.
- 6075 Clearing organizations – short – credits. Report here the credit value applicable to all unresolved reconciling items (favorable or unfavorable) with clearing organizations that are short and unresolved within seven business days from the date of receipt of the statement of account from the carrying entity. Do not net these items.
- 6160 Open transfers and reorganization account items over 40 days not confirmed or verified – credits. Report here credits relating to open transfers and reorganization account items that have not been confirmed or verified for over forty days. See the instructions accompanying Line Item 5760 for a discussion of the term "reorganization account items."
- 6162 Open transfers and reorganization account items over 40 days not confirmed or verified – deductions. Report here the total deductions relating to open transfers and reorganization account items that have not been confirmed or verified for over forty days. See the instructions accompanying Line Item 5760 for a discussion of the term "reorganization account items."
- 6182 Aged fails to deliver – deductions. Report deductions for fails to deliver that are five business days or longer (or 21 business days for municipal securities).
- 6187 Aged fails to receive – deductions. Report deductions for fails to receive that are outstanding for more than 30 calendar days.

#### **Computation for Determination of Customer Reserve Requirements**

This section must be prepared by stand-alone broker-dealers, broker-dealer SBSBs, and broker-dealer MSBSPs that are subject to Rule 15c3-3. See also the notes accompanying 17 CFR 240.15c3-3a.

Note that broker-dealer SBSBs must also complete the "Computation for Determination of Security-Based Swap Customer Reserve Requirements" with regard to security-based swap customers' accounts (while limiting this calculation under 17 CFR 240.15c3-3a to customers' accounts). The term "customer" is defined in 17 CFR 240.15c3-3.

#### **Possession or Control for Customers**

This section must be prepared by stand-alone broker-dealers, broker-dealer SBSBs, and broker-dealer MSBSPs.

Note that broker-dealer SBSBs must also complete Possession or Control for Security-Based Swap Customers with regard to security-based swap customers' security-based swap customers (while limiting this calculation to security customers).

#### **Computation for Determination of PAB Requirements**

This section must be prepared by stand-alone broker-dealers, broker-dealer SBSBs, and broker-dealer MSBs.

#### **Claiming an Exemption from Rule 15c3-3**

This section must be prepared by stand-alone broker-dealers, broker-dealer SBSBs, and broker-dealer MSBs that are claiming an exemption from Rule 15c3-3.

#### **Computation for Determination of Security-Based Swap Customer Reserve Requirements**

This section must be prepared by stand-alone broker-dealers, stand-alone SBSBs, and broker-dealer SBSBs. Stand-alone SBSBs that are exempt from 17 CFR 240.18a-4 are not required to complete this section. See also the notes accompanying 17 CFR 240.15c3-3a and 17 CFR 240.18a-4a, as applicable.

Note that broker-dealer SBSBs must also complete the "Computation for Determination of Customer Reserve Requirements" with regard to customers' accounts (while limiting this calculation to security-based swap customers' accounts).

#### **Possession or Control for Security-Based Swap Customers**

This section must be prepared by stand-alone broker-dealers, stand-alone SBSBs, and broker-dealer SBSBs. Stand-alone SBSBs that are exempt from 17 CFR 240.18a-4 are not required to complete this section.

Note that broker-dealer SBSBs must also complete Possession or Control for Customers with regard to customers' security customers (while limiting this calculation under 17 CFR 240.18a-4a to security-based swap customers).

#### **Computation of CFTC Minimum Capital Requirements**

This section must be prepared by nonbank broker-dealers, SBSBs, and MSBs registered with the CFTC as futures commission merchants pursuant to section 4d of the Commodity Exchange Act.

This section should be prepared in accordance with the Commodity Futures Trading Commission's Form 1-FR-FCM ("CFTC Instructions").

#### **Statement of Segregation Requirements and Funds in Segregation for Customers Trading on U.S. Commodity Exchanges**

This section must be prepared by nonbank broker-dealers, SBSBs, and MSBs registered with the CFTC as futures commission merchants pursuant to section 4d of the Commodity Exchange Act.

This section should be prepared in accordance with the CFTC Instructions.

#### **Statement of Cleared Swaps Customer Segregation Requirements and Funds in Cleared Swaps Customer Accounts under Section 4d(f) of the Commodity Exchange Act**

This section must be prepared by nonbank broker-dealers, SBSBs, and MSBs registered with the CFTC as futures commission merchants pursuant to section 4d of the Commodity Exchange Act.

This section should be prepared in accordance with the CFTC Instructions.

#### **Statement of Segregation Requirements and Funds in Segregation for Customers' Dealer Options Accounts**

This section must be prepared by nonbank broker-dealers, SBSBs, and MSBs registered with the CFTC as futures commission merchants pursuant to section 4d of the Commodity Exchange Act.

This section should be prepared in accordance with the CFTC Instructions.

#### **Statement of Secured Amounts and Funds Held in Separate Accounts for Foreign Futures and Foreign Options Customers Pursuant to CFTC Regulation 30.7**

This section must be prepared by nonbank broker-dealers, SBSBs, and MSBs registered with the CFTC as futures commission merchants pursuant to section 4d of the Commodity Exchange Act.

This section should be prepared in accordance with the CFTC Instructions.

#### **Schedule 1 – Aggregate Securities, Commodities, and Swaps Positions**

This schedule must be prepared by stand-alone broker-dealers, stand-alone SBSBs, broker-dealer SBSBs, stand-alone MSBs, and broker-dealer MSBs.

For security-based swaps, mixed swaps, and swaps, report the month-end gross replacement value for cleared and non-cleared receivables in the long/bought column, and report the month-end gross replacement value for cleared and non-cleared payables in the short/sold column. Reports totals on the "Total" row. The long/bought total in Schedule 1 (Line Item 8370) should equal total net securities, commodities, and swap positions in the assets section of the Statement of Financial Condition (Line Item 12024). The short/sold total in Schedule 1 (Line Item 8371) should equal total net securities, commodities, and swap positions in the liabilities section of the Statement of Financial Condition (Line Item 12044).

Terms may be defined by reference to other sections of the instructions accompanying Part II.

### **Schedule 2 – Credit Concentration Report for Fifteen Largest Exposures in Derivatives**

This schedule must be prepared by stand-alone broker-dealers that are authorized by the Commission to calculate net capital using internal models in accordance with 17 CFR 240.15c3-1e, and all stand-alone SBSs, broker-dealer SBSs, stand-alone MSBSPs, and broker-dealer MSBSPs.

On the next to last row of each table, titled "All other counterparties," report the requested information for all of the firm's counterparties except for the fifteen counterparties already listed on the applicable table.

**Counterparty identifier.** In the first table, list the fifteen counterparties to which the firm has the largest current net exposure, beginning with the counterparty to which the firm has the largest current net exposure.

In the second table, list the fifteen counterparties for which the firm has the largest current net and potential exposure, beginning with the counterparty for which the firm has the largest current net and potential exposure.

Identify each counterparty by its unique counterparty identifier.

**Gross replacement value – receivable.** For the applicable counterparty, report here the gross replacement value of the firm's derivatives receivable positions. Report total on the "Totals" row.

**Gross replacement value – payable.** For the applicable counterparty, report here the gross replacement value of the firm's derivatives payable positions. Report total on the "Totals" row.

**Net replacement value.** For the applicable counterparty, report here the net replacement value of the firm's derivative positions. Report total on the "Totals" row.

**Current net exposure.** For the applicable counterparty, report here the firm's current net exposure to derivative positions. Report total on the "Totals" row.

**Current net and potential exposure.** For the applicable counterparty, report here the firm's current and potential exposure to derivative positions. Report total on the "Totals" row.

**Margin collected.** For the applicable counterparty, report here the margin collected to cover the firm's derivative positions. Report total on the "Totals" row.

### **Schedule 3 – Portfolio Summary of Derivatives Exposures by Internal Credit Rating**

This schedule must be prepared by stand-alone broker-dealers that are authorized by the Commission to calculate net capital using internal models in accordance with 17 CFR 240.15c3-1e, and all stand-alone SBSs, broker-dealer SBSs, stand-alone MSBSPs, and broker-dealer MSBSPs.

**Internal credit rating.** Report here the firm's internal credit rating scale. Each row should contain a separate symbol, number, or score in the firm's rating scale to denote a credit rating category and notches within a category in descending order from the highest to the lowest notch. For example, the following symbols would each represent a notch in a rating scale in descending order: AAA, AA+, AA, AA-, A+, A, A-, BBB+, BBB, BBB-, BB+, BB, BB-, CCC+, CCC, CCC-, CC, C and D.

**Gross replacement value – receivable.** For the applicable internal credit rating notch, report here the gross replacement value of the firm's derivatives receivable positions with counterparties rated at that notch. Report total on the "Totals" row.

**Gross replacement value – payable.** For the applicable internal credit rating notch, report here the gross replacement value of the firm's derivatives payable positions with counterparties rated at that notch. Report total on the "Totals" row.

**Net replacement value.** For the applicable internal credit rating notch, report here the net replacement value of the firm's derivative

positions with counterparties rated at that notch. Report total on the "Totals" row.

Current net exposure. For the applicable internal credit rating notch, report here the firm's current net exposure to derivative positions with counterparties rated at that notch. Report total on the "Totals" row.

Current net and potential exposure. For the applicable internal credit rating notch, report here the firm's current net and potential exposure to derivative positions with counterparties rated at that notch. Report total on the "Totals" row.

Margin collected. For the applicable internal credit rating notch, report here the margin collected to cover the firm's derivative positions with counterparties rated at that notch. Report total on the "Totals" row.

#### **Schedule 4 – Geographic Distribution of Derivatives Exposures for Ten Largest Countries**

This schedule must be prepared by stand-alone broker-dealers that are authorized by the Commission to calculate net capital using internal models in accordance with 17 CFR 240.15c3-1e, and all stand-alone SBSBs, broker-dealer SBSBs, stand-alone MSBSPs, and broker-dealer MSBSPs.

Country. Identify the 10 largest countries according to the firm's current net exposure or current net and potential exposure in derivatives. In the first table, countries should be ordered according to the size of the firm's current net exposure in derivatives to them (beginning with the largest and ending with the smallest). In the second table, countries should be ordered according to the size of the firm's current net and potential exposure in derivatives to them (beginning with the largest and ending with the smallest). A firm's counterparty is deemed to reside in the country where its main operating company is located.

Gross replacement value – receivable. For the applicable country, report here the gross replacement value of the firm's derivatives receivable positions. Report total on the "Totals" row.

Gross replacement value – payable. For the applicable country, report here the gross replacement value of the firm's derivatives payable positions. Report total on the "Totals" row.

Net replacement value. For the applicable country, report here the net replacement value of the firm's derivative positions. Report total on the "Totals" row.

Current net exposure. For the applicable country, report here the firm's current net exposure to derivative positions. Report total on the "Totals" row.

Current net and potential exposure. For the applicable country, report here the firm's current net and potential exposure to derivative positions. Report total on the "Totals" row.

Margin collected. For the applicable country, report here the margin collected to cover the firm's derivative positions. Report total on the "Totals" row.

■ 22. Part IIC of Form X-17A-5 and the instructions thereto (referenced in § 249.617 of this chapter) are added to read as follows:

**Note:** The text of Part IIC of Form X-17A-5 and the instructions thereto will not appear in the Code of Federal Regulations.

Form X-17A-5  
 FOCUS  
 Report  
 Part IIC  
 Cover Page

UNITED STATES SECURITIES AND EXCHANGE COMMISSION  
 FOCUS REPORT (FINANCIAL AND OPERATIONAL COMBINED UNIFORM SINGLE REPORT)  
 Part IIC **11**

OMB APPROVAL  
 OMB Number:  
 Expires:  
 Estimated average burden  
 hours per response:

(Please read instructions before preparing Form)

This report is being filed by an:

- 1) SBSB with a prudential regulator (bank SBSB).....  **12758**
- 2) MSBSP with a prudential regulator (bank MSBSP).....  **12759**

This report is being filed by a:

U.S. person  **12760** Non-U.S. person  **12761**

This report is being filed pursuant to (check applicable block(s)):

- 1) Special request by the Commission.....  **19**
- 2) Rule 18a-7.....  **12762**
- 3) Other (explain: \_\_\_\_\_).....  **26**

NAME OF REPORTING ENTITY	SEC FILE NO. <b>13</b>
ADDRESS OF PRINCIPAL PLACE OF BUSINESS (Do not use P.O. Box No.)	FIRM ID NO. <b>14</b>
(No. and Street) <b>20</b>	FOR PERIOD BEGINNING (MM/DD/YY) <b>15</b>
(City) <b>21</b> (State/Province) <b>22</b> (Zip Code) <b>23</b>	AND ENDING (MM/DD/YY) <b>24</b>
(Country) <b>12763</b>	<b>25</b>

NAME OF PERSON TO CONTACT IN REGARD TO THIS REPORT	EMAIL ADDRESS <b>30</b>	(AREA CODE) TELEPHONE NO. <b>12764</b>
NAME(S) OF SUBSIDIARIES OR AFFILIATES CONSOLIDATED IN THIS REPORT	<b>32</b>	OFFICIAL USE <b>31</b>
	<b>34</b>	<b>33</b>
	<b>36</b>	<b>35</b>
	<b>38</b>	<b>37</b>
		<b>39</b>

Is this report consolidated or unconsolidated? ..... Consolidated  **198** Unconsolidated  **199**  
 Does respondent carry its own security-based swap customer accounts? ..... Yes  **40** No  **41**

**EXECUTION:** The registrant submitting this Form and its attachments and the person(s) by whom it is executed represent hereby that all information contained therein is true, correct and complete. It is understood that all required items, statements, and schedules are considered integral parts of this Form and that the submission of any amendment represents that all unamended items, statements, and schedules remain true, correct and complete as previously submitted.

Dated the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

Signatures of: 1) _____ Principal Executive Officer or Comparable Officer 2) _____ Principal Financial Officer or Comparable Officer 3) _____ Principal Operations Officer or Comparable Officer	Names of: _____ <b>12765</b> Principal Executive Officer or Comparable Officer _____ <b>12766</b> Principal Financial Officer or Comparable Officer _____ <b>12767</b> Principal Operations Officer or Comparable Officer
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

**ATTENTION:** Intentional misstatements and/or omissions of facts constitute federal criminal violations. (See 18 U.S.C. 1001 and 15 U.S.C. 78ff(a).)

Persons who are to respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB control number.

Name of Firm: \_\_\_\_\_  
 As of: \_\_\_\_\_

FOCUS  
Report  
Part IIC

BALANCE SHEET (INFORMATION AS REPORTED ON FFIEC FORM 031 – SCHEDULE RC)

Items on this page to be reported by a: Bank SBSB  
Bank MSBSP

<u>Assets</u>	<u>Totals</u>
1. Cash and balances due from depository institutions (from FFIEC Form 031's Schedule RC-A)	
A. Noninterest-bearing balances and currency and coin .....	\$ 0081b
B. Interest-bearing balances .....	\$ 0071b
2. Securities	
A. Held-to-maturity securities .....	\$ 1754b
B. Available-for-sale securities .....	\$ 1773b
3. Federal funds sold and securities purchased under agreements to resell	
A. Federal funds sold in domestic offices .....	\$ 0987b
B. Securities purchased under agreements to resell .....	\$ 0989b
4. Loans and lease financing receivables (from FFIEC Form 031's Schedule RC-C)	
A. Loans and leases held for sale .....	\$ 5369b
B. Loans and leases, net of unearned income .....	\$ 0528b
C. LESS: Allowance for loan and lease losses .....	\$ 0123b
D. Loans and leases, net of unearned income and allowance (Line 4B minus Line 4C) .....	\$ 0529b
5. Trading assets (from FFIEC Form 031's Schedule RC-D) .....	\$ 0545b
6. Premises and fixed assets (including capitalized leases) .....	\$ 2145b
7. Other real estate owned (from FFIEC Form 031's Schedule RC-M) .....	\$ 2150b
8. Investments in unconsolidated subsidiaries and associated companies .....	\$ 2130b
9. Direct and indirect investments in real estate ventures .....	\$ 0656b
10. Intangible assets	
A. Goodwill .....	\$ 0163b
B. Other intangible assets (from FFIEC Form 031's Schedule RC-M) .....	\$ 0426b
11. Other assets (from FFIEC Form 031's Schedule RC-F) .....	\$ 2160b
12. Total assets (sum of Lines 1 through 11) .....	\$ 2170b

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

FOCUS  
Report  
Part IIC

BALANCE SHEET (INFORMATION AS REPORTED ON FFIEC FORM 031 – SCHEDULE RC)

Items on this page to be reported by a: Bank SBSB  
Bank MSBSP

<u>Liabilities</u>	<u>Totals</u>
13. Deposits	
A. In domestic offices (sum of totals of Columns A and C from FFIEC Form 031's Schedule RC-E, part I) .....	\$ 2200b
1. Noninterest-bearing .....	\$ 6631b
2. Interest-bearing .....	\$ 6636b
B. In foreign offices, Edge and Agreement subsidiaries, and IBFs (from FFIEC Form 031's Schedule RC-E, part II) .....	\$ 2200b
1. Noninterest-bearing .....	\$ 6631b
2. Interest-bearing .....	\$ 6636b
14. Federal funds purchased and securities sold under agreements to repurchase	
A. Federal funds purchased in domestic offices .....	\$ 3993b
B. Securities sold under agreements to repurchase .....	\$ 3995b
15. Trading liabilities .....	\$ 3548b
16. Other borrowed money (includes mortgage indebtedness and obligations under capitalized leases) (from FFIEC Form 031's Schedule RC-M) .....	\$ 3190b
17. Not applicable.	
18. Not applicable.	
19. Subordinated notes and debentures .....	\$ 3200b
20. Other liabilities (from FFIEC Form 031's Schedule RC-G) .....	\$ 2930b
21. Total liabilities (sum of Lines 13 through 20) .....	\$ 2948b
22. Not applicable.	
<u>Equity Capital</u>	
23. Perpetual preferred stock and related surplus .....	\$ 3838b
24. Common stock .....	\$ 3230b
25. Surplus (exclude all surplus related to preferred stock) .....	\$ 3839b
26 A. Retained earnings .....	\$ 3632b
B. Accumulated other comprehensive income .....	\$ 3530b
C. Other equity capital components .....	\$ A130b
27A. Total bank equity capital (sum of Lines 23 through 26.C) .....	\$ 3210b
B. Non-controlling (minority) interests in consolidated subsidiaries .....	\$ 3000b
28. Total equity capital (sum of Lines 27A and 27B) .....	\$ G105b
29. Total liabilities and equity capital (sum of Lines 21 and 28) .....	\$ 3300b

Name of Firm: \_\_\_\_\_  
As of: \_\_\_\_\_

FOCUS  
Report  
Part IIC

REGULATORY CAPITAL (INFORMATION AS REPORTED ON FFIEC FORM 031 – SCHEDULE RC-R)

Items on this page to be reported by a: Bank SBSB  
Bank MSBSP

<u>Capital</u>	<u>Totals</u>
1. Total bank equity capital (from FFIEC Form 031's Schedule RC, Line 27A) .....	\$ <u>3210b</u>
2. Tier 1 capital .....	\$ <u>8274b</u>
3. Tier 2 capital .....	\$ <u>5311b</u>
4. Tier 3 capital allocated for market risk .....	\$ <u>1395b</u>
5. Total risk-based capital .....	\$ <u>3792b</u>
6. Total risk-weighted assets .....	\$ <u>A223b</u>
7. Total assets for the leverage ratio .....	\$ <u>A224b</u>

Capital Ratios (Column B is to be completed by all banks. Column A is to be completed by banks with financial subsidiaries.)

	<u>Column A</u>	<u>Column B</u>
8. Tier 1 leverage ratio .....	\$ <u>7204b</u>	
9. Tier 1 risk-based capital ratio .....	<u>7206b</u>	\$ <u>7206b</u>
10. Total risk-based capital ratio .....	<u>7205b</u>	\$ <u>7205b</u>

Name of Firm: \_\_\_\_\_  
As of: \_\_\_\_\_

FOCUS  
Report  
Part IIC

INCOME STATEMENT (INFORMATION AS REPORTED ON FFIEC FORM 031 – SCHEDULE RI)

Items on this page to be reported by a: Bank SBSD  
Bank MSBSP

	<b>Totals</b>
1. Total interest income.....	\$ 4107b
2. Total interest expense.....	\$ 4073b
3. Total noninterest income.....	\$ 4079b
4. Total noninterest expense.....	\$ 4093b
5. Realized gains (losses) on held-to-maturity securities.....	\$ 3521b
6. Realized gains (losses) on available-for-sale securities.....	\$ 3196b
7. Income (loss) before income taxes and extraordinary items and other adjustments.....	\$ 4301b
8. Net income (loss) attributable to bank.....	\$ 4340b
9. Trading revenue (from cash instruments and derivative instruments)	
A. Interest rate exposures.....	\$ 8757b
B. Foreign exchange exposures.....	\$ 8758b
C. Equity security and index exposures.....	\$ 8759b
D. Commodity and other exposures.....	\$ 8760b
E. Credit exposures.....	\$ F186b
<b>Lines 9F and 9G are to be completed by banks with \$100 billion or more in total assets that are required to complete lines 9A through 9E above.</b>	
F. Impact on trading revenue of changes in the creditworthiness of the bank's derivative counterparties on the bank's derivative assets).....	\$ K090b
G. Impact on trading revenue of changes in the creditworthiness of the bank on the bank's derivative liabilities.....	\$ K094b
10. Net gains (losses) recognized in earnings on credit derivatives that economically hedge credit exposures held outside the trading account	
A. Net gains (losses) on credit derivatives held for trading.....	\$ C889b
B. Net gains (losses) on credit derivatives held for purposes other than trading.....	\$ C890b
11. Credit losses on derivatives.....	\$ A251b

Name of Firm: \_\_\_\_\_  
As of: \_\_\_\_\_

FOCUS  
Report  
Part IIC

COMPUTATION FOR DETERMINATION OF SECURITY-BASED SWAP CUSTOMER RESERVE REQUIREMENTS

Items on this page to be reported by a: Bank SBSB (if not exempt from Rule 18a-4)

**CREDIT BALANCES**

1. Free credit balances and other credit balances in the accounts carried for security-based swap customers (see Note A).....	\$	12768	
2. Monies borrowed collateralized by securities in accounts carried for security-based swap customers (see Note B).....	\$	12769	
3. Monies payable against security-based swap customers' securities loaned (see Note C).....	\$	12770	
4. Security-based swap customers' securities failed to receive (see Note D).....	\$	12771	
5. Credit balances in firm accounts attributable to principal sales to security-based swap customers.....	\$	12772	
6. Market value of stock dividends, stock splits and similar distributions receivable outstanding over 30 calendar days.....	\$	12773	
7. Market value of short securities and credits (not to be offset by longs or by debits) in all suspense accounts over 30 calendar days.....	\$	12774	
8. Market value of securities which are in transfer in excess of 40 calendar days and have not been confirmed to be in transfer by the transfer agent or the issuer during the 40 days.....	\$	12775	
9. Other (List _____).....	\$	12776	
10. TOTAL CREDITS.....	\$		12785

**DEBIT BALANCES**

11. Debit balances in accounts carried for security-based swap customers, excluding unsecured accounts and accounts doubtful of collection (see Note E).....	\$	12777	
12. Securities borrowed to effectuate short sales by security-based swap customers and securities borrowed to make delivery on security-based swap customers' securities failed to deliver.....	\$	12778	
13. Failed to deliver of security-based swap customers' securities not older than 30 calendar days.....	\$	12779	
14. Margin required and on deposit with Options Clearing Corporation for all option contracts written or purchased in accounts carried for security-based swap customers (see Note F).....	\$	12780	
15. Margin related to security future products written, purchased or sold in accounts carried for security-based swap customers required and on deposit in a qualified clearing agency account at a clearing agency registered with the Commission under section 17A of the Exchange Act (15 U.S.C. 78q-1) or a derivative clearing organization registered with the Commodity Futures Trading Commission under section 5b of the Commodity Exchange Act (7 U.S.C. 7a-1) (see Note G).....	\$	12781	
16. Margin related to cleared security-based swap transactions in accounts carried for security-based swap customers required and on deposit in a qualified clearing agency account at a clearing agency registered with the Commission pursuant to section 17A of the Exchange Act (15 U.S.C. 78q-1).....	\$	12782	
17. Margin related to non-cleared security-based swap transactions in accounts carried for security-based swap customers required and held in a qualified registered security-based swap dealer account at another security-based swap dealer.....	\$	12783	
18. Other (List _____).....	\$	12784	
19. TOTAL DEBITS.....	\$		12786

**RESERVE COMPUTATION**

20. Excess of total debits over total credits (Line 19 less Line 10).....	\$		12787
21. Excess of total credits over total debits (Line 10 less Line 19).....	\$		12788
22. Amount held on deposit in "Reserve Account(s)," including value of qualified securities, at end of reporting period.....	\$		12789
23. Amount of deposit (or withdrawal) including \$ 12790 value of qualified securities.....	\$		12791
24. New amount in Reserve Account(s) after adding deposit or subtracting withdrawal including \$ 12792 value of qualified securities.....	\$		12793
25. Date of deposit (MM/DD/YY).....	\$		12794

References to notes in this section refer to the notes to 17 CFR 240.18a-4a.

Name of Firm: \_\_\_\_\_  
As of: \_\_\_\_\_

FOCUS  
Report  
Part IIC

POSSESSION OR CONTROL FOR SECURITY-BASED SWAP CUSTOMERS

Items on this page to be reported by a: Bank SBSB (if not exempt from Rule 18a-4)

State the market valuation and number of items of:

- 1. Security-based swap customers' excess securities collateral not in the respondent's possession or control as of the report date (for which instructions to reduce to possession or control had been issued as of the report date) but for which the required action was not taken by respondent within the time frame specified under Rule 18a-4. Notes A and B..... \$ 12795  
 A. Number of items..... 12796
- 2. Security-based swap customers' excess securities collateral for which instructions to reduce possession or control had not been issued as of the report date under Rule 18a-4. .... \$ 12797  
 A. Number of items..... 12798
- 3. The system and procedures utilized in complying with the requirement to maintain physical possession or control of security-based swap customers' excess securities collateral have been tested and are functioning in a manner adequate to fulfill the requirements of Rule 18a-4..... Yes 12799 No 12800

Notes:

A – Do not include in Line 1 security-based swap customers' excess securities collateral required by Rule 18a-4 to be in possession or control but for which no action was required by the respondent as of the report date or required action was taken by respondent within the time frames specified under Rule 18a-4.

B – State separately in response to Line 1 whether the securities reported in response thereto were subsequently reduced to possession or control by the respondent.

Name of Firm: \_\_\_\_\_

As of: \_\_\_\_\_

FOCUS  
Report  
Part IIC

CLAIMING AN EXEMPTION FROM RULE 18a-4

Items on this page to be reported by a: Bank SBSD

EXEMPTION FROM RULE 18a-4

If an exemption from Rule 18a-4 is claimed, check the box  12104

Name of Firm: \_\_\_\_\_  
As of: \_\_\_\_\_

FOCUS  
Report  
Part IIC  
Schedule 1

SCHEDULE 1 – AGGREGATE SECURITY-BASED SWAP AND SWAP POSITIONS

Items to be reported by: Bank SBSBs  
Bank MSBSPs

<u>Aggregate Positions</u>	<u>LONG/BOUGHT</u>	<u>SHORT/SOLD</u>
1. Security-based swaps		
A. Cleared .....	\$ ..... 12801	\$ ..... 12809
B. Non-cleared .....	\$ ..... 12802	\$ ..... 12810
2. Mixed swaps		
A. Cleared .....	\$ ..... 12803	\$ ..... 12811
B. Non-cleared .....	\$ ..... 12804	\$ ..... 12812
3. Swaps		
A. Cleared .....	\$ ..... 12805	\$ ..... 12813
B. Non-cleared .....	\$ ..... 12806	\$ ..... 12814
4. Other derivatives .....	\$ ..... 12807	\$ ..... 12815
5. Total (sum of Lines 1-4) .....	\$ ..... 12808	\$ ..... 12816

Name of Firm: \_\_\_\_\_  
As of: \_\_\_\_\_

## OMB APPROVAL

OMB Number:  
Expires:  
Estimated average burden hours  
per response:

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

## FOCUS REPORT PART IIC INSTRUCTIONS

**GENERAL INSTRUCTIONS**

Who Must File  
Filing Requirements  
Currency  
Rounding  
Definitions

**SPECIFIC INSTRUCTIONS**

Cover Page  
Balance Sheet (Information as Reported on FFIEC Form 031 – Schedule RC)  
Regulatory Capital (Information as Reported on FFIEC Form 031 – Schedule RC-R)  
Income Statement (Information as Reported on FFIEC Form 031 – Schedule RI)  
Computation for Determination of Security-Based Swap Customer Reserve Requirements  
Possession or Control for Security-Based Swap Customers  
Schedule 1 – Aggregate Security-Based Swap and Swap Positions

**GENERAL INSTRUCTIONS**

FOCUS Report Part IIC ("Part IIC") is a report of the U.S. Securities and Exchange Commission ("Commission") that is required to be filed by the following:

- Firms that are regulated by a prudential regulator, and also registered with the Commission as a security-based swap dealer ("bank SBSD")
- Firms that are regulated by a prudential regulator, and also registered with the Commission as a major security-based swap participant ("bank MSBSP").

The instructions issued from time to time must be used in preparing Part IIC and are considered an integral part of this report. **Filing Requirements**

Part IIC must be filed within 30 calendar days after the end of the calendar quarter in accordance with 17 CFR 240.18a-7.

Part IIC must be filed with the Commission or its designee. The name of the SBSD or MSBSP and the report's effective date must be repeated on each sheet of the report submitted. If no response is made to a line item or subdivision of a line item, it constitutes a representation that the SBSD or MSBSP has nothing to report.

**Currency**

Foreign currency may be expressed in terms of U.S. dollars at the rate of exchange as of the report's effective date and, where carried in conjunction with the U.S. dollar, balances for the same accountholder may be consolidated with U.S. dollar balances and the gross or net position reported in its proper classification, provided the foreign currency is not subject to any restriction as to conversion.

**Persons who are to respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB control number.**

**Rounding**

As a general rule, money amounts should be expressed in whole dollars. No valuation should be used which is higher than the actual valuation; for example, for \$170,000.85, use \$170,000 but not \$170,001. However, for *any or all short valuations*, round *up* the valuation to the nearest dollar; for example, for \$180,000.17, use \$180,001 but not \$180,000.

**Definitions**

"Prudential regulator" is defined in section 3 of the Securities Exchange Act of 1934 ("Exchange Act").

"Mixed swap" is defined in section 3(a)(68)(D) of the Exchange Act.

"Security-based swap" is defined in section 3(a)(68) of the Exchange Act.

"Security-based swap customer" is defined in 17 CFR 240.18a-4.

"Swap" is defined in section 3(a)(69) of the Exchange Act.

**SPECIFIC INSTRUCTIONS****Cover Page**

The cover page must be completed in its entirety. If a line does not apply, the firm should write "None" or "N/A" on the line, as applicable.

13 Name of reporting entity. Provide the name of the firm filing Part IIC, as it is registered with the Commission. Do not use DBAs or divisional names. Do not abbreviate.

20-23, 12763 Address of principal place of business. Provide the physical address (not a post office box) of the firm's principal place of business.

30 Name of person to contact in regard to this report. The identified person need not be an officer or partner of the firm, but should be a person who can answer any questions concerning this report.

31 (Area code) Telephone no. Provide the direct telephone number of the contact person whose name appears on Line Item 30.

32, 34, 36, 38 Name(s) of subsidiaries or affiliates consolidated in this report. Provide the name of the subsidiaries or affiliate firms whose financial and operational data are combined in Part IIC with that of the firm filing Part IIC.

33, 35, 37, 39 Official use. This item is for use by regulatory staff only (leave blank).

**Balance Sheet (Information as Reported on FFIEC Form 031 – Schedule RC)**

This section must be prepared by bank SBSDs and bank MSBSPs.

Notwithstanding the General Instructions above, this section should be prepared in accordance with the instructions accompanying FFIEC Form 031 ("FFIEC Instructions"), including "Schedule RC – Balance Sheet." Thus, dollar amounts should be reported in thousands.

**Regulatory Capital (Information as Reported on FFIEC Form 031 – Schedule RC-R)**

This section must be prepared by bank SBSDs and bank MSBSPs.

Notwithstanding the General Instructions above, this section should be prepared in accordance with the FFIEC Instructions, including "Schedule RC-R – Regulatory Capital." Thus, dollar amounts should be reported in thousands.

Note that the line numbers on this section and Schedule RC-R do not match, so firms should refer to the line item numbers (appended with the letter "b" in Part IIC) when matching Schedule RC-R's instructions with this section.

**Income Statement (Information as Reported on FFIEC Form 031 – Schedule RI)**

This section must be prepared by bank SBSBs and bank MSBs.

Notwithstanding the General Instructions above, this section should be prepared in accordance with the FFIEC Instructions, including "Schedule RI – Income Statement." Thus, dollar amounts should be reported in thousands.

Note that the line numbers on this section and Schedule RI do not match, so firms should refer to the line item numbers (appended with the letter "b" in Part IIC) when matching Schedule RI's instructions with this section.

**Computation for Determination of Security-Based Swap Customer Reserve Requirements**

This section must be prepared by bank SBSBs. Bank SBSBs that are exempt from 17 CFR 240.18a-4 are not required to complete this section. See also the notes accompanying 17 CFR 240.18a-4a.

**Possession or Control for Security-Based Swap Customers**

This section must be prepared by bank SBSBs. Bank SBSBs that are exempt from 17 CFR 240.18a-4 are not required to complete this section. This calculation under 17 CFR 240.18a-4a should be limited to security-based swap accounts.

**Schedule 1 – Aggregate Security-Based Swap and Swap Positions**

This schedule must be prepared by bank SBSBs and bank MSBs.

For the applicable security-based swap, mixed swap, or swap, report the quarter-end gross replacement value for cleared and non-cleared receivables in the long/bought column, and report the quarter-end gross replacement value for cleared and non-cleared payables in the short/sold column. Report the total on the "Total" row.

By the Commission.

Dated: September 19, 2019.

**Vanessa A. Countryman,**

*Secretary.*

[FR Doc. 2019-20678 Filed 12-13-19; 8:45 am]

**BILLING CODE 8011-01-C**



# FEDERAL REGISTER

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Part III

Department of Labor

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Wage and Hour Division

29 CFR Parts 548 and 778

Regular Rate Under the Fair Labor Standards Act; Final Rule

**DEPARTMENT OF LABOR****Wage and Hour Division****29 CFR Parts 548 and 778**

RIN 1235-AA24

**Regular Rate Under the Fair Labor Standards Act****AGENCY:** Wage and Hour Division, Department of Labor.**ACTION:** Final rule.

**SUMMARY:** The Fair Labor Standards Act (FLSA or Act) generally requires that covered, nonexempt employees receive overtime pay of at least one and one-half times their regular rate of pay for time worked in excess of 40 hours per workweek. The regular rate includes all remuneration for employment, subject to the exclusions outlined in section 7(e) of the FLSA. In this final rule, the Department of Labor (Department) updates a number of regulations on the calculation of overtime compensation both to provide clarity and to better reflect the 21st-century workplace. These changes will promote compliance with the FLSA, provide appropriate and updated guidance in an area of evolving law and practice, and encourage employers to provide additional and innovative benefits to workers without fear of costly litigation.

**DATES:** This final rule is effective on January 15, 2020.

**FOR FURTHER INFORMATION CONTACT:**

Amy DeBisschop, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Copies of this final rule may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling WHD's toll-free help line at (866) 4US-WAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local time zone, or visit WHD's website for a nationwide listing of WHD district and area offices at <http://www.dol.gov/whd/america2.htm>.

**SUPPLEMENTARY INFORMATION:****I. Executive Summary**

The FLSA generally requires covered employers to pay nonexempt employees overtime pay of at least one and one-half times their regular rate for hours worked in excess of 40 per workweek. The FLSA defines the regular rate as "all remuneration for employment paid to, or on behalf of, the employee"—subject to eight exclusions established in section 7(e).<sup>1</sup> Part 778 of CFR title 29 contains the regulations addressing the calculation of the regular rate of pay for overtime compensation under section 7 of the FLSA.

The Department promulgated the majority of part 778 of CFR title 29 more than 60 years ago, when typical compensation often consisted predominantly of traditional wages, paid time off for holidays and vacations, and contributions to basic medical, life insurance, and disability benefits plans.<sup>2</sup> Since that time, the workplace and the law have evolved, but the Department has only made minor updates to part 778 since 1950.<sup>3</sup>

First, employee compensation packages, including employer-provided benefits and "perks," have expanded significantly. The Bureau of Labor Statistics (BLS) estimated that fringe benefits comprised only 5 percent of employees' total compensation in 1950.<sup>4</sup>

<sup>1</sup> See 29 U.S.C. 207(e).

<sup>2</sup> See U.S. Bureau of Labor Statistics, *An Overview of Employee Benefits, Occupational Outlook Quarterly* (U.S. Bureau of Labor Statistics), Summer 2005, at 20, available at <https://www.bls.gov/careeroutlook/2005/summer/art02.pdf>.

<sup>3</sup> See, e.g., 33 FR 986 (Jan. 26, 1968) (codified at 29 CFR 778.0 through 778.603); 36 FR 4699 (Mar. 11, 1971) (updating 29 CFR 778.214 to clarify that advance approval by the Department is not required for plans providing benefits within the meaning of 29 U.S.C. 207(e)(4)); 36 FR 4981 (Mar. 16, 1971) (updating 29 CFR 778.117 to clarify commission payments that must be included in the regular rate); 46 FR 7308 (Jan. 23, 1981) (updating 29 CFR part 778 to increase the dollar amounts used as examples in the regulations, to respond to statutory amendments affecting other parts of the FLSA, and to modify § 778.320 to clarify that pay for nonworking time does not automatically convert such time into hours worked); 46 FR 33515-2 (June 30, 1981) (correcting errors in the January 1981 update in 29 CFR 778.323, 778.327, 778.501, 778.601); 56 FR 61100 (Nov. 29, 1991) (updating 29 CFR 778.603 to address statutory amendment adding section 7(q) regarding maximum-hour exemption for employees receiving remedial education); 76 FR 18832 (Apr. 5, 2011) (updating §§ 778.110, 778.111, 778.113, and 778.114 to reflect statutory changes to the minimum wage; updating § 778.200 to reflect amendments made by the Worker Economic Opportunity Act; updating § 778.208 from "seven" to "eight" types of remuneration excluded when computing the regular rate).

<sup>4</sup> Yung-Ping Chen, *The Growth of Fringe Benefits Implications for Social Security*, Monthly Labor Review Vol. 104 No. 11, November 1981, <https://www.bls.gov/opub/mlr/1981/11/art1full.pdf> ("cash payroll as a percentage of total compensation declined steadily over the last 30 years, falling from

Today, such benefits make up approximately one-third of total compensation.<sup>5</sup> Many employers, moreover, now offer various wellness benefits or perks, such as fitness classes, nutrition classes, weight loss programs, smoking cessation programs, health risk assessments, vaccination clinics, stress reduction programs, and training or coaching to help employees meet their health goals.

Both law and practice concerning more traditional benefits, such as sick leave, have likewise evolved in the decades since the Department first promulgated part 778. For example, instead of providing separate paid time off for illness and vacation, many employers now combine these and other types of leave into paid time off plans. Moreover, in recent years, a number of state and local governments have passed laws requiring employers to provide paid sick leave. In 2011, for example, Connecticut became the first state to require private-sector employers to provide paid sick leave to their employees.<sup>6</sup> Today, several states, the District of Columbia,<sup>7</sup> and various cities and counties<sup>8</sup> require paid sick leave, and many other states are considering similar requirements.

Recently, several states and cities have also begun considering and implementing scheduling laws. In the last 5 years, for example, New York, San Francisco, Seattle, and other cities have enacted laws imposing penalties on employers who change employees' schedules without the requisite notice, and various state governments are considering and beginning to pass

95 percent in 1950, to 92.2 percent in 1960, 89.7 percent in 1970, and 84.2 percent in 1980").

<sup>5</sup> Bureau of Labor Statistics News Release, *Employer Cost for Employee Compensation—March 2019*, June 18, 2019, ("Wages and salaries cost employers \$25.22 [per hour] while benefit costs were \$11.55."), <https://www.bls.gov/news.release/pdf/ceec.pdf>.

<sup>6</sup> See 2011 Conn. Legis. Serv. P.A. 11-52 (West).

<sup>7</sup> See Ariz. Rev. Stat. secs. 23-364, 23-371 *et seq.*; Cal. Lab. Code secs. 245, 2810.5; 2011 Conn. Legis. Serv. P.A. 11-52 (West); D.C. Code sec. 32-131.01 *et seq.*; Me. Rev. Stat. Ann. tit. 26, sec. 636 (2019) (effective Jan. 1, 2021); Md. Code Ann., Lab. & Empl. section 3-1301 *et seq.* (West 2019); Mass. Gen. Laws ch. 149, sec. 148C, 148D; Mich. Comp. Laws secs. 408.961-974; 2019 Nev. Legis. Serv. 592 (West) (to be codified at Nev. Rev. Stat. Ch. 608 (2019) (effective Jan. 1, 2020); N.J. Stat. Ann. sec. 34:11D-1 *et seq.*; Or. Rev. Stat. sec. 653.601 *et seq.*; 28 R.I. Gen. Laws sec. 28-57-1 *et seq.*; 21 Vt. Stat. secs. 384, 481-485, 345; Wash. Rev. Code secs. 49.46.005, 49.46.020, 49.46.090, 49.46.100.

<sup>8</sup> See, e.g., Austin, Tex., City Code ch. 4-19 (2018); Chi., Ill., Code ch. 1-24 (2017); Minneapolis, Minn., Admin. Code title 2, sec. 40.10 *et seq.* (2016); Phila., Pa., Code ch. 9-4100 (2015); N.Y.C., N.Y., Admin. Code sec. 20-911 (2013); Seattle, Wash., Mun. Code ch. 14.16 (2011); Westchester County, N.Y., Laws of Westchester County ch. 585 (2018).

similar scheduling legislation.<sup>9</sup> Some of these laws expressly exclude these penalties from the regular rate under state law,<sup>10</sup> but questions remain for employers determining how these and other penalties may affect regular rate calculations under federal law.

The Department published a notice of proposed rulemaking (NPRM) in the *Federal Register* on March 29, 2019 (84 FR 11888 (Mar. 29, 2019)), inviting comments about proposed updates to its regulations in part 778 to reflect changes in the modern workplace and to provide clarifications that reflect the statutory language and WHD's enforcement practices. Additionally, the Department proposed minor clarifications and updates to part 548 of title 29, which implements section 7(g)(3) of the FLSA. Section 7(g)(3) permits employers, under specific circumstances, to use a basic rate to compute overtime compensation rather than a regular rate.<sup>11</sup> Comments were initially due on or before May 28, 2019. In response to a request for an extension of the time period for filing written comments, the Department extended the deadline to June 12, 2019 (84 FR 21300 (May 14, 2019)). The Department received approximately 80 timely comments.

After considering the comments, the Department has decided to adopt the NPRM's proposed changes with some modifications. The final rule clarifies when payments for forgoing unused paid leave, payments for bona fide meal periods, reimbursements, benefit plan contributions, and certain ancillary benefits may be excluded from the regular rate. The final rule also revises certain sections of the existing regulation to more closely align with the Act. Additionally, the final rule incorporates, with modification, the proposed clarifications and updates to part 548. The final rule incorporates numerous suggestions from commenters, including adding examples of excludable state and local scheduling law payments to § 778.222, which addresses "other payments similar to call-back pay"; providing additional guidance in the preamble about how to

determine whether a bonus is discretionary or nondiscretionary; revising language at §§ 778.202 and 778.205 to reflect that excludable overtime premium payments may be made pursuant to a "written or unwritten employment contract, agreement, understanding, handbook, policy, or practice"; and referencing state or local minimum wage laws as well as Federal law in the regulations at part 548 of title 29 discussing the basic rate.

The Department's estimated economic impact of this final rule follows below. The Department qualitatively estimates the potential benefits associated with reduced litigation at \$281 million over 10 years, or \$28.1 million per year. The Department quantitatively estimates the one-time regulatory familiarization cost of this final rule at \$30.5 million, which results in a 10-year annualized cost of \$3.6 million at a discount rate of 3 percent or \$4.3 million at a discount rate of 7 percent.

This final rule is considered an Executive Order (E.O.) 13771 deregulatory action. Details on the estimated reduced burdens and cost savings of this final rule can be found in the rule's economic analysis.

## II. Background

### A. The FLSA and Regular Rate Regulatory History

Congress enacted the FLSA in 1938 to remedy "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers[.]" which burdened commerce and constituted unfair methods of competition.<sup>12</sup> In relevant part, section 7(a) of the FLSA requires employers to pay their employees overtime at one and one-half times their "regular rate" of pay for time worked in excess of 40 hours per workweek.<sup>13</sup> When enacted, however, the FLSA did not define the term "regular rate."

Later that year, WHD issued an interpretive bulletin addressing the meaning of "regular rate," which WHD later revised and updated in 1939, and again in 1940. The 1940 version of the bulletin stated, among other things, that an employer did not need to include extra compensation paid for overtime

work in regular rate calculations.<sup>14</sup> It also specified that the regular rate must be "the rate at which the employee is actually employed and paid and not . . . a fictitious rate which the employer adopts solely for bookkeeping purposes."<sup>15</sup>

In 1948, the Supreme Court in *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, addressed whether specific types of compensation may be excluded from the regular rate, or even credited towards an employer's overtime payment obligations. The Court held that an overtime premium payment, which it defined as "[e]xtra pay for work because of previous work for a specified number of hours in the workweek or workday whether the hours are specified by contract or statute," could be excluded from the computation of the regular rate.<sup>16</sup> Permitting an "overtime premium to enter into the computation of the regular rate would be to allow overtime premium on overtime premium—a pyramiding that Congress could not have intended."<sup>17</sup> The Court also held that "any overtime premium paid, even if for work during the first forty hours of the workweek, may be credited against any obligation to pay statutory excess compensation."<sup>18</sup> By contrast, the Court noted, "[w]here an employee receives a higher wage or rate because of undesirable hours or disagreeable work, such wage represents a shift differential or higher wages because of the character of work done or the time at which he is required to labor rather than an overtime premium. Such payments enter into the determination of the regular rate of pay."<sup>19</sup>

Following the *Bay Ridge* decision, in 1948, the Department promulgated 29 CFR part 778, concerning the regular rate.<sup>20</sup> This regulation codified the principles from *Bay Ridge* that extra payments for hours worked in excess of a daily or weekly standard established by contract or statute may be excluded from the regular rate and credited toward overtime compensation due, and that extra payments for work on Saturdays, Sundays, holidays, or at night that are made without regard to the number of hours or days previously worked in the day or workweek must be included in the regular rate and may not be credited toward the overtime owed.<sup>21</sup>

<sup>14</sup> See Interpretive Bulletin No. 4 ¶ 13 (Nov. 1940).

<sup>15</sup> *Id.* ¶ 18.

<sup>16</sup> 334 U.S. at 450 n.3, 465–66.

<sup>17</sup> *Id.* at 464.

<sup>18</sup> *Id.* at 464–65.

<sup>19</sup> *Id.* at 468–69.

<sup>20</sup> See 13 FR 4534 (Aug. 6, 1948).

<sup>21</sup> See 29 CFR 778.2 (1948).

<sup>9</sup> See Chi., Ill., Fair Workweek Ordinance (July 24, 2019) (effective July 1, 2020); N.Y.C., N.Y., Admin. Code 20–1222 (2017); Phila., Pa., Code ch. 9–4600 (2018) (effective Jan. 1, 2020); Seattle, Wash., Mun. Code ch. 14.22.050 (2017); SB 828, 79th Leg. Assemb., 2017 Reg. Sess. (Or. 2017); see also Emeryville, Cal., Mun. Code 5–39.01 (2017); S.F., Cal., Police Code art. 33G (2015).

<sup>10</sup> See, e.g., Or. Rev. Stat. Ann. sec. 653.412(7)(d) ("Regular rate of pay" does not include "[a]ny additional compensation an employer is required to pay an employee under ORS 653.442 [right to rest between work shifts] or 653.455 [compensation for work schedule changes].").

<sup>11</sup> See 29 U.S.C. 207(g)(3).

<sup>12</sup> 29 U.S.C. 202(a); see Fair Labor Standards Act of 1938, Public Law 75–718, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. 201–219).

<sup>13</sup> 29 U.S.C. 207(a). The statutory maximum in 1938 was 44 hours per workweek; in 1939, it was 42 hours per workweek; and in 1940, it was 40 hours per workweek. See Public Law 75–718, 52 Stat. at 1063.

It noted, however, that when extra payments for work on Saturdays, Sundays, holidays, or nights are contingent on the employee having previously worked a specified standard number of hours or days, such payments are true overtime premium payments that may be excluded from the regular rate and credited toward overtime compensation due.<sup>22</sup> The Department also explained that payments “that are not made for hours worked, such as payments . . . for idle holidays or for occasional absences due to vacation or illness or other similar cause” may be excluded from the regular rate, but could not be credited against statutory overtime compensation due.<sup>23</sup>

In 1949, Congress responded to the *Bay Ridge* decision by amending the FLSA to identify two categories of payments that could be both excluded from the regular rate and credited toward overtime compensation due.<sup>24</sup> The first category was extra compensation for work on Saturdays, Sundays, holidays, or the sixth or seventh day of the workweek paid at a premium rate of one and one-half times the rate paid for like work performed in nonovertime hours on other days. The second category was extra compensation paid pursuant to an applicable employment contract or collective bargaining agreement for work outside of the hours established therein as the normal workday (not exceeding eight hours) or workweek (not exceeding 40 hours) at a premium rate of one and one-half times the rate paid for like work performed during the workday or workweek.<sup>25</sup>

On October 26, 1949, Congress again amended the FLSA.<sup>26</sup> The amendments added, among other things, a comprehensive definition of the term “regular rate.”<sup>27</sup> “Regular rate” was defined to include “all remuneration for employment paid to, or on behalf of, the employee[.]”<sup>28</sup> with the exception of an exhaustive list of seven specific categories of payments that could be excluded from the regular rate.<sup>29</sup> Those categories of excludable payments were: (1) Gifts and payments on special occasions; (2) payments made for

occasional periods when no work is performed such as vacation or sick pay, reimbursements for work-related expenses, and other similar payments that are not compensation for hours of employment; (3) discretionary bonuses, payments to profit-sharing or thrift or savings plans that meet certain requirements, and certain talent fees; (4) contributions to a bona fide plan for retirement, or life, accident, or health insurance; (5) extra compensation provided by a premium rate for certain hours worked in excess of eight in a day, 40 hours in a workweek, or the employee’s normal working hours; (6) extra compensation provided by a premium rate for work on Saturdays, Sundays, regular days of rest, or the sixth or seventh days of the workweek; and (7) extra compensation provided by a premium rate pursuant to an employment contract or collective bargaining agreement for work outside of the hours established therein as the normal workday (not exceeding eight hours) or workweek (not exceeding 40 hours).<sup>30</sup> The October 1949 amendments also added a provision specifying that the last three of these categories are creditable against overtime compensation due.<sup>31</sup>

In 1950, the Department updated part 778 to account for the 1949 amendments to the FLSA.<sup>32</sup> These regulations explained general principles regarding overtime compensation and the regular rate, including the principle that each workweek stands on its own for purposes of determining the regular rate and overtime due.<sup>33</sup> The regulations also provided methods for calculating the regular rate under different compensation systems, such as salary and piecework compensation.<sup>34</sup> They further elaborated on the seven categories of payments that are excludable from regular rate calculations, and provided several examples.<sup>35</sup> The regulations also addressed special problems and pay plans designed to circumvent the FLSA.<sup>36</sup>

<sup>30</sup> See *id.* The excludable categories of payments in sections 7(d)(6) and (7) in the October 1949 amendments were essentially the same as those that had been added in the July 1949 amendments as sections 7(e)(1) and (2); the October 1949 amendments eliminated them from section 7(e).

<sup>31</sup> See *id.* Public Law 81–393, 63 Stat. at 915. This provision is currently codified at 29 U.S.C. 207(h) (payments described in sections 7(e)(5)–(7) are creditable).

<sup>32</sup> See 15 FR 623 (Feb. 4, 1950) (codified at 29 CFR 778.0 through 778.27).

<sup>33</sup> See 29 CFR 778.2 (1950).

<sup>34</sup> See 29 CFR 778.3(b) (1950).

<sup>35</sup> See 29 CFR 778.5 through 778.8 (1950).

<sup>36</sup> See 29 CFR 778.9.17, 778.21 through 778.23 (1950).

In 1961 and 1966, Congress made a few minor, non-substantive language changes and redesignated certain sections.<sup>37</sup> In 1968, the Department updated part 778, principally to clarify the statutory references, update the amounts used to illustrate pay computations, and reorganize the provisions in part 778.<sup>38</sup> Over the next several decades, the Department periodically made minor changes and updates to part 778.<sup>39</sup>

In 2000, Congress added another category of payments that could be excluded from the regular rate, currently contained in section 7(e)(8).<sup>40</sup> This amendment permitted an employer to exclude from the regular rate income derived from a stock option, stock appreciation right, or employee stock purchase plan, provided certain restrictions were met.<sup>41</sup> Congress also amended section 7(h) to state that, except for the types of extra compensation identified in sections 7(e)(5), (6), and (7), sums excluded from the regular rate are not creditable toward minimum wage or overtime compensation due.<sup>42</sup> In 2011, the Department updated part 778 to reflect the 2000 statutory amendments and to modify the wage rates used as examples to reflect the current minimum wage.<sup>43</sup>

Currently, the FLSA’s definition of “regular rate” and the eight categories of

<sup>37</sup> In 1961, Congress made non-substantive language changes to sections (d)(5) and (7). See Fair Labor Standards Amendments of 1961, Public Law 87–30, sec. 6, 75 Stat. 65, 70. In 1966, Congress redesignated section 7(d) as section 7(e). See Fair Labor Standards Amendments of 1966, Public Law 89–601, Title II, sec. 204(d)(1), 80 Stat. 830, 836. Additionally, section 7(g), which provided that extra compensation paid pursuant to sections 7(d)(5), (6), and (7) could be credited against overtime compensation due under section 7(a), was moved to section 7(h). See *id.*

<sup>38</sup> See 33 FR 986 (Jan. 26, 1968) (29 CFR 778.0 through 778.603).

<sup>39</sup> See 36 FR 4699 (Mar. 11, 1971) (updating § 778.214 to clarify that advance approval by the Department is not required for plans providing benefits within the meaning of section 7(e)(4)); 36 FR 4981 (Mar. 16, 1971) (updating § 778.117 to clarify commission payments that must be included in the regular rate); 46 FR 7308 (Jan. 23, 1981) (updating part 778 to increase the dollar amounts used as examples in the regulations, to respond to statutory amendments affecting other parts of the FLSA, and to modify § 778.320 to clarify that pay for nonworking time does not automatically convert such time into hours worked); 46 FR 33515–02 (June 30, 1981) (correcting errors in the January 1981 update in §§ 778.323, 778.327, 778.501, 778.601); 56 FR 61100 (Nov. 29, 1991) (updating § 778.603 to address statutory amendment adding section 7(g) regarding maximum-hour exemption for employees receiving remedial education).

<sup>40</sup> See Worker Economic Opportunity Act, Public Law 106–202, sec. 2(a)(3), 114 Stat. 308 (2000).

<sup>41</sup> See *id.*

<sup>42</sup> See *id.*

<sup>43</sup> See 76 FR 18832 (Apr. 5, 2011) (updating §§ 778.110, 778.111, 778.113, 778.114, 778.200, 778.208).

<sup>22</sup> See *id.*

<sup>23</sup> *Id.*

<sup>24</sup> See Public Law 81–177, ch. 352, 63 Stat. 446 (July 20, 1949). These provisions are currently codified at 29 U.S.C. 207(e)(6)–(7).

<sup>25</sup> See *id.*

<sup>26</sup> See Fair Labor Standards Amendments of 1949, Public Law 81–393, ch. 736, 63 Stat. 910.

<sup>27</sup> *Id.* Sec. 7, 63 Stat. at 913–14. This provision is currently codified at 29 U.S.C. 207(e).

<sup>28</sup> *Id.*

<sup>29</sup> See *id.* 63 Stat. at 913–14. These provisions are currently codified at 29 U.S.C. 207(e)(1)–(7).

excludable payments are contained in section 7(e) of the Act.<sup>44</sup> The Department's regulations concerning the regular rate requirements are contained in 29 CFR part 778. As noted above, the last comprehensive revision to part 778 was in 1968.<sup>45</sup>

While section 7(a) defines the general overtime entitlement in terms of an employee's regular rate, under certain circumstances, the FLSA permits employers to use a "basic rate," rather than the regular rate as defined in section 7(e), to calculate overtime compensation.<sup>46</sup> Congress added this provision, currently contained in section 7(g), in 1949—at the same time that Congress added the definition of "regular rate" to the FLSA.<sup>47</sup> The requirements an employer must meet to use a basic rate are set forth in that same section 7(g).<sup>48</sup>

In 1955, the Department promulgated 29 CFR part 548 to establish the requirements for authorized basic rates under section 7(g)(3).<sup>49</sup> It amended various sections of the part 548 regulations several times over the next 12 years to reflect statutory amendments to other parts of the FLSA, including increases to the minimum wage.<sup>50</sup> The Department has not updated any of the regulations in part 548 since 1967, more than a half-century ago.

### B. The Department's Proposal

On March 29, 2019, the Department issued its proposal to update and revise a number of regulations in parts 548 and 778.<sup>51</sup> The Department's proposal focused primarily on clarifying whether certain kinds of "perks," benefits, or other miscellaneous payments must be included in the regular rate. These clarifications included confirming that the cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts

on retail goods and services, and payments for tuition programs, such as reimbursement programs or repayment of educational debt, may be excluded from an employee's regular rate of pay. The Department also proposed to clarify that payments for unused paid leave, including paid sick leave, may be excluded from an employee's regular rate of pay; that reimbursed expenses need not be incurred "solely" for the employer's benefit for the reimbursements to be excludable from an employee's regular rate and that reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System and meet other regulatory requirements may be excluded from an employee's regular rate of pay; that employers do not need a prior formal contract or agreement with the employee(s) to exclude certain overtime premiums described in sections 7(e)(5) and (6) of the FLSA; and that pay for time that would not otherwise qualify as "hours worked," including bona fide meal periods, may be excluded from an employee's regular rate unless an agreement or established practice indicates that the parties have treated the time as hours worked. Additionally, the Department proposed to provide examples of discretionary bonuses that may be excluded from an employee's regular rate of pay under section 7(e)(3) of the FLSA and to clarify that the label given to a bonus does not determine whether it is discretionary. The Department also proposed to provide additional examples of benefit plans, including accident, unemployment, and legal services, that may be excluded from an employee's regular rate of pay under section 7(e)(4) of the FLSA.

The Department proposed two substantive changes to the existing regulations. First, the Department proposed to eliminate the restriction in 29 CFR 778.221 and 778.222 that "call-back" pay and other payments similar to call-back pay must be "infrequent and sporadic" to be excludable from an employee's regular rate, while maintaining that such payments must not be so regular that they are essentially prearranged. Second, the Department proposed to update its "basic rate" regulations, which are authorized under section 7(g)(3) of the FLSA, as an alternative to the regular rate under specific circumstances. Under the current regulations, employers using an authorized basic rate may exclude from the overtime computation any additional payment that would not increase total overtime

compensation by more than \$0.50 per week on average for overtime workweeks in the period for which the employer makes the payment. The Department proposed to update this regulation to change the \$0.50 limit to 40 percent of the Federal minimum wage—currently \$2.90.

In developing this rule, the Department was mindful of the Supreme Court's recent guidance that, to determine the scope of an exemption under the FLSA, the statutory text must be given a "fair reading" rather than a narrow reading because the FLSA's exemptions are "as much a part of the FLSA's purpose as the [minimum wage and] overtime-pay requirement[s]." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018). As the Third Circuit recently noted in a regular rate case, "that is as should be expected, because employees' rights are not the only ones at issue and, in fact, are not always separate from and at odds with their employers' interests." *U.S. Dep't of Labor v. Bristol Excavating, Inc.*, 935 F.3d 122, 135 (3d Cir. 2019).

Approximately 80 individuals and organizations timely commented on the NPRM during the 75-day extended comment period that ended on June 12, 2019. The Department received comments from a broad array of constituencies, including small business owners, employer and industry associations, individual workers, worker advocacy groups, unions, non-profit organizations, law firms, professional associations, and other interested members of the public. The majority of comments supported the Department's efforts to clarify the regular rate regulations. All timely received comments may be viewed on [www.regulations.gov](http://www.regulations.gov), docket ID WHD-2019-0002.

Some commenters appear to have mistakenly filed comments intended for this rulemaking into the dockets for the Department's rulemakings concerning overtime (docket ID WHD-2019-0001) or joint employer status (docket ID WHD-2019-0003) under the FLSA. The Department did not consider these misfiled comments in this rulemaking.

The Department has carefully considered the timely-submitted comments on the proposed changes. Some of the comments were general statements of support or opposition. See *Bloomin' Brands; International Bancshares Corporation (IBC); Independent Bakers Association (IBA); National Demolition Association (NDA); National Federation of Independent Businesses (NFIB); International Association of Firefighters (Association*

<sup>44</sup> See 29 U.S.C. 207(e). Additionally, section 7(h) states that only payments excludable from the regular rate pursuant to sections 7(e)(5), (6), and (7) may be credited against the employer's overtime obligation and that all other excludable payments (*i.e.*, payments that qualify as excludable under sections 7(e)(1), (2), (3), (4), and (8)) are not creditable). See 29 U.S.C. 207(h).

<sup>45</sup> See 33 FR 986 (29 CFR 778.0 through 778.603).

<sup>46</sup> 29 U.S.C. 207(g).

<sup>47</sup> See Public Law 81-393, 63 Stat. at 914-15. In 1966, Congress redesignated section 7(f) as section 7(g), with section numbers (1)-(3) remaining the same; no substantive changes were made. See Public Law 89-601, 80 Stat. at 836.

<sup>48</sup> 29 U.S.C. 207(g)(1)-(3).

<sup>49</sup> See *id.*

<sup>50</sup> See 20 FR 5678 (Aug. 6, 1955). The regulations interpreting sections 7(g)(1)-(2) are at 29 CFR 778.415 through 778.421.

<sup>51</sup> See 21 FR 338 (Jan. 18, 1956); 26 FR 7730 (Aug. 18, 1961); 28 FR 11266 (Oct. 22, 1963); 31 FR 6769 (May 6, 1966); 32 FR 3293 (Feb. 25, 1967).

<sup>52</sup> 84 FR 11888.

of Firefighters); and various individual commenters.

The Department received a number of comments that are beyond the scope of this rulemaking. These include, for example, a request to address whether restricted stock units are excludable under 29 U.S.C. 207(e)(8) of the Act, which permits an employer to exclude from the regular rate income derived from a stock option, stock appreciation right, or employee stock purchase plan. See Semiconductor Industry Association (SIA); National Association of Manufacturers (NAM); the Chamber of Commerce (Chamber); Partnership to Protect Workplace Opportunity (PPWO); ERISA Industry Committee (ERIC); American Benefits Council. Similarly, some commenters urged the Department to require that any payment that must be included in the regular rate must count towards the overtime salary threshold under 29 CFR part 541. See American Hotel and Lodging Association (AHLA); PPWO; College and University Professional Association for Human Resources (CUPA-HR). The Department did not raise these issues in its proposal, and they are therefore out of scope of this rulemaking.

Some commenters raised issues that are the subject of other on-going rulemaking efforts by the Department. For example, commenters raised concerns regarding the fluctuating workweek regulation at 29 CFR 778.114. See Associated Builders and Contractors; AHLA; Chamber. The Department is currently engaged in rulemaking to revise this specific regulation.<sup>52</sup> Therefore, the Department does not address these issues in this final rule.

Significant issues raised in the comments on the Department's proposal are discussed below, along with the Department's response to those comments.

### III. Final Regulatory Provisions

The Department finalizes its proposals to update the regulations in parts 778 and 548 to clarify the Department's interpretation in light of modern compensation and benefits practices. The sections below discuss, in turn, each category of excludable compensation that the Department has addressed in this final rule.

#### A. Excludable Compensation Under Section 7(e)(2)

Many of the Department's regulatory updates in this final rule clarify the type

<sup>52</sup> See Fluctuating Workweek Method of Computing Overtime, Notice of Proposed Rulemaking, 84 FR 59590 (Nov. 5, 2019).

of compensation that is excludable from the regular rate under FLSA section 7(e)(2). Section 7(e)(2) permits an employer to exclude from the regular rate three distinct categories of payment: First, "payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause"; second, "reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer"; and third, "other similar payments to an employee which are not made as compensation for his hours of employment."<sup>53</sup> In this Preamble, these clauses are referred to as: The "occasional periods when no work is performed" clause; the "reimbursable expenses" clause; and the "other similar payments" clause. The Department's regulations interpreting section 7(e)(2) are contained in §§ 778.216 through 778.224.

#### 1. Pay for Forgoing Holidays or Leave

The initial clause of section 7(e)(2) of the FLSA permits an employer to exclude "payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar causes" from the regular rate.<sup>54</sup> Section 778.218 addresses this statutory provision and provides that payments for such time that "are in amounts approximately equivalent to the employee's normal earnings" are not compensation for hours of employment and are therefore excludable from the regular rate.<sup>55</sup>

Section 778.219 addresses a related issue: The exclusion of payments for working on a holiday or forgoing vacation leave, as distinct from the exclusion of payments for using leave.<sup>56</sup> It explains that if an employee who is entitled to "a certain sum as holiday or vacation pay, whether he works or not," receives additional pay for each hour worked on a holiday or vacation day, the sum allocable as the holiday or vacation pay is excluded from the

<sup>53</sup> 29 U.S.C. 207(e)(2).

<sup>54</sup> See *id.*

<sup>55</sup> 29 CFR 778.218; see FOH 32d03g ("Payment for absences charged against leave under a bona fide plan granting the employee a specified amount of annual, vacation, or sick leave with pay need not be included in the regular rate of pay, if the sum paid is the approximate equivalent of the employee's normal earnings for a similar period of working time. Payments for such absences may be excluded regardless of when or how the leave is taken.").

<sup>56</sup> See 29 CFR 778.219.

regular rate.<sup>57</sup> In other words, when an employee works instead of taking a holiday or using vacation leave, and receives pay for both the hours of work performed as well as the holiday or vacation leave that he or she did not take, the amount paid for the forgone holiday or vacation leave may be excluded from the regular rate. In its current form, § 778.219 addresses only pay for forgoing holidays and vacation leave but does not address sums paid for forgoing the use of other forms of leave, such as leave for illness. As explained in the NPRM, WHD has addressed payments for forgoing sick leave in its Field Operations Handbook (FOH). The FOH states that the same rules governing exclusion of payments for unused vacation leave also apply to payments for unused sick leave.<sup>58</sup> Therefore, when "the sum paid for unused sick leave is the approximate equivalent of the employee's normal earnings for a similar period of working time," such payments are excludable from the regular rate.<sup>59</sup>

To clarify and modernize the regulations, the Department proposed to update § 778.219 to address payments for forgoing both holidays and other forms of leave. The Department noted in the NPRM that it is aware that many employers no longer provide separate categories of leave based on an employee's reason for taking leave—such as sick leave and vacation leave. Instead, employers provide one category of leave, which is commonly called paid time off. The Department explained that it saw no reason to distinguish between the types of leave when determining whether payment for forgoing use of the leave is excludable from the regular rate. Rather, the central issues are whether the amount paid is approximately equivalent to the employee's normal earnings for a similar period of time, and whether the payment is in addition to the employee's normal compensation for hours worked.

Accordingly, the Department proposed to clarify that occasional payments for forgoing the use of leave are treated the same regardless of the type of leave. The Department therefore proposed to revise the title of § 778.219, clarify in § 778.219(a) that payments for all forms of unused leave are treated the same for purposes of determining whether they may be excluded from the regular rate, and add an example concerning payment for forgoing the use of paid time off. The NPRM noted that the proposed changes reflected the

<sup>57</sup> 29 CFR 778.219(a).

<sup>58</sup> See FOH 32d03e(b).

<sup>59</sup> *Id.*

Department's longstanding practice of applying the same principles to payments of unused holiday, vacation, and sick leave.<sup>60</sup> The NPRM stated that the proposed changes would ensure the consistent application of the same principles across differing leave arrangements.<sup>61</sup> The Department also proposed to clarify that payments for forgoing the use of leave are excludable from the regular rate regardless of whether they are paid during the same pay period in which the previously scheduled leave is forgone or during a subsequent pay period as a lump sum.

A number of commenters representing both employers and employees addressed this proposal. *See, e.g.*, Center for Workplace Compliance (CWC); International Municipal Lawyers Association (IMLA); Wood Floor Covering Association (WFCA); National Public Labor Employer Relations Association (NPELRA); Chamber; National Employment Law Project (NELP); Association of Firefighters; the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO). Many supported the changes as proposed. *See, e.g.*, Associated Builders and Contractors; Seyfarth Shaw (Seyfarth); PPWO; Society for Human Resource Management (SHRM); National Automobile Dealers Association (NADA); Society of Independent Gasoline Marketers of America (SIGMA); NDA. SHRM stated that the proposal harmonizes the regulation "with the realities of the modern workplace" by treating all forms of leave in the same manner. NPELRA commented that the proposal "makes common sense." NELP expressed general agreement with the proposal.

WFCA asked that the regulation specify that the payout of unused leave is still excludable from the regular rate even if the amount of leave accrued is based on the number of hours worked. Rather than accruing leave on a periodic

basis (*e.g.*, per pay-period), WFCA noted that many employees accrue leave based on the number of hours worked and that some states require the calculation of leave to be based on hours worked. In response to this comment, the Department notes that neither WHD in its guidance, nor the courts that have addressed this issue, have determined that pay for forgoing leave is excludable or not excludable on the basis of how the paid leave was accrued. Additionally, the Department recognizes that employers may use a variety of bases for determining leave amounts, such as hours or days worked or length of service. Therefore, the Department has concluded that the proposed regulatory language need not be modified as suggested. The method of computation or accrual of paid leave is not determinative. Under the language in the regulation finalized in this rule, the fact that paid leave may be accrued on an hourly basis would not disqualify pay for forgoing such leave from being excludable from the regular rate.

NELP, while generally agreeing with the Department's proposed amendments to § 778.219, requested clarification that regardless of the type of leave, it still must comply with the statutory requirements that it be "occasional" and "similar to vacation, holiday or illness" in order to be excluded from the regular rate. The Department acknowledges NELP's concern but does not believe that any modification to the proposed regulatory text in § 778.219 is necessary. Given the statutory language in section 7(e)(2) that, to be excludable, this form of payment must be made "for occasional periods when no work is performed due to vacation, holiday, illness, . . . or other similar cause,"<sup>62</sup> the Department believes that this is already clear and therefore further clarification in the regulation is unnecessary.

CWC suggested that the Department add an example illustrating the difference between attendance-based incentive bonuses, which must be included in the regular rate, and valid payments for forgoing leave, which can be excluded. The Department declines to modify the regulatory text as suggested. As discussed in the NPRM, in some situations, employers may make payments to encourage attendance at work rather than compensating employees for forgoing the use of leave. Attendance bonuses are typically non-discretionary bonuses that must be included in the regular rate because they are made "pursuant to [a] contract, agreement, or promise causing the

employee to expect such payments[.]"<sup>63</sup> An important distinction between an excludable leave buy-back payment and a non-excludable attendance bonus is that an excludable buy-back payment results in the employee no longer having that leave available to use, *i.e.*, the employee's leave balance is diminished by the amount of leave "bought back." In contrast, where an employee receives an additional payment that does not affect his or her leave balance, or the payment is otherwise tied to factors that are not related to the holiday, vacation, or illness period, such payment may be an attendance bonus that is not excludable from the regular rate. As CWC noted in its comment, the distinction between an excludable payment for forgoing leave and an attendance bonus is usually very fact specific.<sup>64</sup> Because this issue is more appropriately addressed through subregulatory guidance, the Department declines to amend the regulation as suggested. The Department notes, however, that § 778.219(a), as adopted in this final rule, does not affect § 778.211(c), which addresses the exclusion of discretionary bonuses from the regular rate pursuant to FLSA section 7(e)(3)(a).<sup>65</sup>

A few commenters addressed the requirement that the pay for forgoing the leave be approximately equivalent to the employee's normal earnings. *See* Chamber; NPELRA; Association of Firefighters. The Chamber asserted that there was no statutory basis for requiring that the payment for the forgone leave be approximately equivalent to the employee's normal earnings for the amount of time covered by the forgone leave and therefore argued that this requirement be removed entirely. NPELRA requested that the proposed regulatory language in § 778.219 be modified to permit exclusion of a payment for an employee's unused leave where that

<sup>63</sup> 29 U.S.C. 207(e)(3); *see* 29 CFR 778.211(c); *see also* 84 FR 11888, 11892 n. 57.

<sup>64</sup> *See* WHD Opinion Letter FLSA2009-19, 2009 WL 649021 at \*4 (Jan. 16, 2009) (concluding that vacation buy-back payments were excludable, but stipends for nonuse of sick leave encouraged employees not to use or abuse sick leave and therefore were a form of attendance bonus that was not excludable); WHD Opinion Letter FLSA2006-18NA, 2006 WL 4512960, at \*2 (July 24, 2006) (holiday payments made to employees when they forgo holidays need not be included in the regular rate because the employees continued to receive compensation at their customary rate for hours worked in addition to receiving holiday pay); WHD Opinion Letter FLSA2004-2NA (April 5, 2004) (cash-out accrued vacation time need not be included in the regular rate because such payments were made at employees' applicable hourly rate and in addition to receiving their customary payment for hours worked).

<sup>65</sup> *See* 29 U.S.C. 207(e)(3)(a); 29 CFR 778.211(c).

<sup>60</sup> *See* FOH 32d03e.

<sup>61</sup> *See, e.g., Balesrieri v. Menlo Park Fire Prot. Dist.*, 800 F.3d 1094, 1103-04 (9th Cir. 2015) (holding that annual leave comprised of both sick and vacation leave need not be included in the regular rate under section 7(e)(2)). The NPRM explained that such payments need not be included in the regular rate under section 7(e)(2) for the same reason that payments for unused vacations or holidays need not be included; it makes no difference that payments for unused annual leave or paid time off may include unused sick leave. *See also* WHD Opinion Letter FLSA2006-18NA, 2006 WL 4512960 (July 24, 2006) (holiday payments made to employees when they forgo holidays need not be included in the regular rate pursuant to section 7(e)(2)); WHD Opinion Letter FLSA2004-2NA, 2004 WL 5303030 (Apr. 5, 2004) (cash-out accrued vacation time need not be included in regular rate pursuant to section 7(e)(2)).

<sup>62</sup> 29 U.S.C. 207(e)(2); *see also* 29 CFR 778.218.

payment is a percentage of the amount that would normally be paid to the employee when using the leave. NPELRA stated that instead of paying 100 cents on the dollar, employers should be permitted to pay a percentage of accrued leave, which is often based on a calculation negotiated with union representatives and takes into account time-in-service and the total amount of sick leave that an employee has accrued. NPELRA provided an example in which an employee with 20 or more years of service would be paid out for his or her unused sick leave at 20 percent if the employee had accrued between 1 and 125 hours of leave, 40 percent for 126 to 255 hours, 60 percent for 256–380 hours, and 80 percent for 381–607 hours. By contrast, Association of Firefighters commented that the Department did not provide any definition of what constitutes an “approximate equivalent” amount and expressed concern that buy-back payments at “sub-premium” rates will now be permitted.

The Department declines to modify the language in proposed § 778.219 to either remove the requirement that payments be made in amounts “approximate[ly] equivalent” or to provide a formulaic definition as to what constitutes an “approximate equivalent.” As an initial matter, the Department notes that this requirement is currently required under § 778.218, which addresses the statutory provision providing for exclusion of payments for occasional periods when no work is performed due to vacation, holiday, and illness. Section 778.218 has long provided that payments for such time that “are in amounts approximately equivalent to the employee’s normal earnings,” are not compensation for hours of employment and are therefore excludable from the regular rate.<sup>66</sup> Given that § 778.219’s exclusion of pay for forgoing leave is derived from § 778.218, the well-established inclusion of this requirement in the latter warrants its inclusion in the former. Additionally, requiring excludable payments for forgoing leave to be approximately equivalent to the employee’s normal earnings helps ensure that the payments are true leave buy-back payments rather than

attendance bonuses, which are generally considered to be non-discretionary bonuses that must be included in the regular rate. The example provided by NPELRA, which results in buying back sick leave in amounts that are not approximately equivalent to the employee’s normal earnings for a similar period of working time, illustrates why this requirement is necessary. In that example, some of the forgone sick leave is “bought back” at only 20 percent of the dollar value of that leave. For these reasons, the Department has decided to adopt § 778.219 as proposed.

Association of Firefighters and the AFL–CIO contended that the Department’s proposal to permit the exclusion of pay for forgoing sick leave is contrary to two appellate cases.<sup>67</sup> First, the court in *Chavez* relied on § 778.219—and in particular, its explicit reference to pay for vacation leave but lack of reference to pay for sick leave—to conclude that vacation-leave buy-back payments were excludable, but that sick-leave buy-back payments must be included in the regular rate.<sup>68</sup> In characterizing the Department’s position on this issue, however, the court did not acknowledge WHD’s statement in the FOH that the same rules governing exclusion of payments for unused vacation leave also apply to payments for unused sick leave.<sup>69</sup> Moreover, in citing a 2009 WHD opinion letter,<sup>70</sup> the court did not consider the fact-specific nature of the buy-back program at issue there, which, as discussed above, functioned as an attendance bonus. Nothing in the current language in § 778.219 or the 2009 opinion letter state that a sick-leave buy-back payment can never be excluded from the regular rate. In the second case, *Acton*, the court neither cited nor discussed the language in section 7(e)(2) that permits exclusion of payments for occasional periods when no work is performed due to vacation, holiday, or illness, or § 778.219, which interprets this statutory provision. Instead, the court mistakenly applied § 778.223 to determine whether buy-back payments were similar to call-back pay, and ultimately concluded that the sick-leave buy back must be included in the regular rate as it constitutes compensation for the general work duty of regular attendance over a significant

period of an employee’s work tenure.<sup>71</sup> Thus, the court’s decision in *Acton* does not inform the proper interpretation of the statutory exclusion of payments for occasional periods when no work is performed due to vacation, holiday, or illness contained in section 7(e)(2) and explained in § 778.219.<sup>72</sup> Contrary to these two cases, the Department agrees with both the conclusion and underlying reasoning in *Balestrieri v. Menlo Park Fire Protection District*.<sup>73</sup> There, the court held that buy back payments for annual leave, which included both sick and vacation leave, need not be included in the regular rate. While acknowledging that some sick-leave buy-back programs, such as the one at issue in the 2009 WHD opinion letter, could function like an attendance bonus and therefore require their inclusion in the regular rate, the annual leave that was bought back in *Balestrieri* did not differentiate between sick leave and vacation leave. As a result, any portion of the annual leave that could be attributed to sick leave did not function as an attendance bonus.<sup>74</sup>

Lastly, IMLA requested that the Department provide an additional example to § 778.219(a) concerning the excludability of “holiday-in-lieu” pay from the regular rate. IMLA notes that some employees, particularly public sector emergency response personnel, work a set schedule without regard to holidays. Due to the nature of their work, such employees may be called upon to forgo a recognized holiday if their schedule requires them to work that day or if an emergency arises. IMLA states that the current regulations permit the excludability of such payments, but that several courts have nevertheless held that similar forms of “holiday-in-lieu” payments must be included in the regular rate.<sup>75</sup>

Current Department regulations support excluding holiday-in-lieu pay from the regular rate. Under 29 CFR 778.219, where an employee forgoes his

<sup>71</sup> See 436 F.3d at 977.

<sup>72</sup> See 29 U.S.C. 207(e)(2); 29 CFR 778.219.

<sup>73</sup> See 800 F.3d 1094, 1103 (9th Cir. 2015).

<sup>74</sup> See 800 F.3d at 1102–04.

<sup>75</sup> See *Hart v. City of Alameda*, No. C–07–5845MMC, 2009 WL 1705612, at \*3 (N.D. Cal. June 17, 2009) (holiday pay received by city police officers every pay period must be included in the regular rate); *Lewis v. County of Colusa*, No. 2:16–cv–01745–VC, 2018 WL 1605754, at \*3 (E.D. Cal. Apr. 3, 2018) (defendant did not meet burden to show that biannual lump-sum holiday in-lieu payments to safety officers and dispatchers fall squarely within section 7(e)(2)); *McKinnon v. City of Merced*, No. 118CV01124LJOSAB, 2018 WL 6601900, at \*5–8 (E.D. Cal. Dec. 17, 2018) (finding that payments are not excludable where it was “not apparent that Plaintiffs are in fact entitled to paid time off at the holidays which they are able to forego”).

<sup>66</sup> 29 CFR 778.218; see FOH 32d03g (“Payment for absences charged against leave under a bona fide plan granting the employee a specified amount of annual, vacation, or sick leave with pay need not be included in the regular rate of pay, if the sum paid is the approximate equivalent of the employee’s normal earnings for a similar period of working time. Payments for such absences may be excluded regardless of when or how the leave is taken.”).

<sup>67</sup> See *Chavez v. City of Albuquerque*, 630 F.3d 1300, 1309 (10th Cir. 2011); *Acton v. City of Columbia*, 436 F.3d 969, 977–78 (8th Cir. 2006).

<sup>68</sup> See 630 F.3d at 1308–09.

<sup>69</sup> See FOH 32d03e.

<sup>70</sup> WHD Opinion Letter FLSA2009–19, 2009 WL 649021 (Jan. 16, 2009).

or her holiday and works, and is paid for his or her normal work plus an additional amount for the holiday, the additional amount paid for working the holiday is not included in the regular rate. The Department applied this principle in a 2006 opinion letter concluding that holiday-in-lieu pay could be excluded from the regular rate where the employer provided nine “recognized” holidays and two “floating” holidays paid in a lump sum, and on occasion when employees forgo a holiday and work they received both pay for the hours worked and holiday pay.<sup>76</sup> The Department notes that it does not matter whether the employee voluntarily forgoes the holiday to work or is required to work the holiday by the schedule set for the employee. Nothing in this regulation makes the excludability of such payments dependent on the employee having the option to work or not work on the holiday. All that is required for the holiday-in-lieu pay to be excludable is that the employee is paid an amount for the holiday, in addition to being paid for his hours worked on the holiday.<sup>77</sup> In response to IMLA’s comments, the Department has added an additional example to § 778.219(a) involving employees who work a set schedule irrespective of holidays to clarify the regulation.

## 2. Exclusion of Compensation for Bona Fide Meal Periods

Section 778.218 addresses the clause of FLSA section 7(e)(2) concerning payments made for occasional periods when no work is performed and provides that when payments for such time “are in amounts approximately equivalent to the employee’s normal earnings,” they are not compensation for hours of employment and may be excluded from the regular rate.<sup>78</sup> Section 778.218(b) states that this clause “deals with the type of absences which are infrequent or sporadic or unpredictable” and “has no relation to regular ‘absences’ such as lunch periods nor to regularly scheduled days of rest.”<sup>79</sup>

Section 778.320 addresses “[h]ours that would not be hours worked if not paid for,” and identifies “time spent in eating meals between working hours” as an example.<sup>80</sup> Section 778.320(b) further states that even when such time is compensated, the parties may agree that the time will not be counted as hours worked.

The Department proposed to remove the reference to “lunch periods” in § 778.218(b) to eliminate any uncertainty about its relation to § 778.320 concerning the excludability of payments for bona fide meal periods from the regular rate. As one court noted, the existing regulations in §§ 778.218 and 778.320 “appear somewhat inconsistent” on the excludability from the regular rate of compensation for bona fide meal periods.<sup>81</sup> In 1986, WHD acknowledged in an opinion letter “that the reference to meal periods in section 778.218(b) of Part 778 may not be compatible with the position which is contained in section 778.320(b),” and indicated that the issue was under review.<sup>82</sup> The Department subsequently clarified in a 1996 opinion letter that pay provided for a bona fide meal period is excludable from the regular rate under § 778.320(b).<sup>83</sup> As explained in the NPRM, while the Department clarified its position in an opinion letter more than 20 years ago, it is nonetheless concerned that the language in § 778.218(b) may cause confusion concerning the excludability of pay for bona fide meal periods. Thus, to remove any ambiguity and to codify its interpretation in regulation, the Department proposed to delete the reference to “lunch periods” from § 778.218(b).

Bona fide meal periods are not considered “hours worked” for purposes of the FLSA’s minimum wage or overtime requirements, and employers are not required to pay for such time.<sup>84</sup> The Department proposed changing § 778.320 to clarify that the payment of compensation for bona fide meal periods alone does not convert such time to hours worked unless agreement or actual course of conduct

establish that the parties have treated the time as hours worked. The Department explained in the NPRM that, in the Department’s enforcement experience, the treatment of bona fide meal breaks is frequently not subject to formal agreement and is often established by informal policy or course of conduct. Payments for such periods need only be included in the regular rate when it appears from all the pertinent facts that the parties have treated compensated bona fide meal periods as hours worked. The NPRM noted that the proposal would clarify the existing requirements and not substantively change either the calculation of the regular rate or the determination of hours worked.

The Department received many comments supporting these changes and no comments opposed to the changes. *See, e.g.,* NDA; Associated Builders and Contractors; NADA; CWC; SHRM; PPWO. Accordingly, the Department adopts the changes to §§ 778.218(b) and 778.320 as proposed.

## 3. Additional Examples of “Other Similar Causes”

As noted above, § 778.218 addresses the clause of FLSA section 7(e)(2) that permits employers to exclude certain payments for occasional periods when no work is performed “due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause.”<sup>85</sup> Section 778.218(d) lists examples that qualify as “other similar causes,” including “absences due to jury service, reporting to a draft board, attending a funeral of a family member, [and] inability to reach the workplace because of weather condition.”

The Chamber requested that the Department “add paid family medical leave as an example in § 778.218(d), and paid leave for military service; voting; attending child custody or adoption hearings; attending school activities; donating organs, bone marrow, or blood; voluntarily serving as a first responder; and any other paid leave required under state or local laws.” Upon review, the Department believes these are all examples of non-routine absences that fall within the meaning of “other similar causes” in FLSA section 7(e)(2). Accordingly, the Department is adding these causes for absences in the list of examples of “other similar causes.” The Department further believes that attending any funeral, not just the funeral of a family member, is an “other similar cause” under FLSA section 7(e)(2). Therefore, the Department is

<sup>76</sup> FLSA2006–18NA, 2006 WL 4512960 (July 24, 2006). *Cf.* WHD Opinion Letter FLSA, 1999 WL 1788163, at \*2 (Sept. 30, 1999) (payments received by employees were required to be included in the regular rate where employees were not entitled to take leave on holidays and instead received an additional 5 percent of base pay each pay period as “in lieu of holiday pay.”).

<sup>77</sup> Thus, the Department disagrees with the *McKinnon* court’s reliance on the word “forgo” in § 778.219 to mean that the employee must have the option of not working on the holiday for the holiday-in-lieu pay to be excludable. *See McKinnon*, 2018 WL 6601900 at \*5.

<sup>78</sup> 29 CFR 778.218; *see* 29 U.S.C. 207(e)(2).

<sup>79</sup> 29 CFR 778.218(b).

<sup>80</sup> *See* 29 CFR 778.320.

<sup>81</sup> *Smiley v. E.I. Dupont De Nemours & Co.*, 839 F.3d 325, 331 n.5 (3d Cir. 2016).

<sup>82</sup> WHD Opinion Letter FLSA–937 (July 22, 1986).

<sup>83</sup> *See* WHD Opinion Letter FLSA, 1996 WL 1031805 (Dec. 3, 1996); *see also Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 909 (9th Cir. 2004) (holding that pay for a bona fide lunch period was “properly excluded from the calculation of the regular rate under 29 U.S.C. 207(e)(2) as interpreted by revised § 778.320”); WHD Opinion Letter FLSA, 1997 WL 998021 (July 21, 1997) (stating that pay for bona fide meal periods need not be included in the regular rate).

<sup>84</sup> *See* 29 CFR 785.19.

<sup>85</sup> 29 CFR 778.218; *see* 29 U.S.C. 207(e)(2).

deleting “of a family member” from the text of § 778.218(d).

#### 4. Reimbursable Expenses

The second clause of section 7(e)(2) excludes from the regular rate “reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer’s interests and properly reimbursable by the employer[.]”<sup>86</sup> Section 778.217 currently states that “[w]here an employee incurs expenses on his employer’s behalf or where he is required to expend sums solely by reason of action taken for the convenience of his employer, section 7(e)(2) is applicable to reimbursement for such expenses.”<sup>87</sup> The Department promulgated this section in February 1950.<sup>88</sup>

While § 778.217, in its current form, limits reimbursable expenses to those “solely” in the interest of the employer, the statutory language does not include this limitation. Instead, the FLSA simply excludes all expenses incurred “in the furtherance of [the] employer’s interests[.]”<sup>89</sup> and, as explained further below, neither the Department nor the courts have since restricted excludable expenses to only those that “solely” benefit the employer. As explained in the NPRM, the Department is concerned that this single use of the word “solely” in § 778.217 may be interpreted as more restrictive than what the FLSA actually requires. The Department therefore proposed to remove the word “solely” from § 778.217(a) to clarify its interpretation of the reimbursable expenses clause of section 7(e)(2). The Department noted that this proposed clarification was consistent with the other subsections of § 778.217, as well as court rulings and the Department’s opinion letters—which have not required that excludable expenses solely benefit the employer.

Section 778.217(d) also discusses expenses that are excludable from the regular rate. The Department explained in the NPRM that this paragraph emphasizes only whether such payments benefit the employer or the employee; it does not require them to “solely” benefit one party or the other. Thus, payments for expenses that are “incurred by the employee on the employer’s behalf or for his benefit or convenience” merit exclusion from the regular rate, but reimbursements for expenses “incurred by the employee for his own benefit,” such as “expenses in

traveling to and from work, buying lunch, paying rent, and the like,” are not excluded from the regular rate under the “reimbursable expenses” clause of section 7(e)(2).<sup>90</sup>

Similarly, as the NPRM explained, the Department’s opinion letters do not analyze whether an expense is incurred solely for the employer’s convenience when discussing whether it may be excluded from the regular rate. Instead, the opinion letters analyze simply whether expenses benefit the employer.<sup>91</sup> Furthermore, since 1955, the Department’s policy in WHD’s FOH has mirrored the statutory requirement that “expenses incurred by an employee in furtherance of his/her employer’s interests” may be excluded from the regular rate, regardless of whether they “solely” benefit one party or the other.<sup>92</sup>

In the NPRM, the Department pointed out that, consistent with the Department’s practice and guidance, courts have not analyzed whether the expenses at issue were incurred solely for the employer’s convenience when determining whether they are excludable from the regular rate. Instead, courts have emphasized the statutory requirement that the expenses need only benefit the employer.<sup>93</sup>

<sup>90</sup> 29 CFR 778.217(d). The NPRM noted that this is consistent with the illustrative examples in § 778.217(b) of reimbursable expenses that may be excluded from the regular rate, which include “purchasing supplies, tools, materials, or equipment on behalf of his employer,” travel expenses, including living expenses away from home, incurred while traveling for work for the employer’s benefit, and the cost of “supper money” to an employee in a situation where “he or she would ordinarily leave work in time to have supper at home, but instead must remain to work additional hours for the employer’s benefit.” See 29 CFR 778.217(b)(1), (2), (4).

<sup>91</sup> For example, the cost of food for eating meals during travel out of town for work is for the employer’s benefit; therefore, such reimbursement may be excluded from the regular rate. See WHD Opinion Letter FLSA2004–3, 2004 WL 2146923 (May 13, 2004); see also WHD Opinion Letter FLSA–828 (July 19, 1976) (“[r]eimbursement to an employee for expenses incurred on behalf of an employer” would not become part of the regular rate); WHD Opinion Letter FLSA–940 (Mar. 9, 1977) (regular rate shall not include “reimbursement for expenses where an employee incurs out of pocket expenses on the employer’s behalf”); WHD Opinion Letter FLSA, 1985 WL 1087356, at \*2 (July 12, 1985) (reimbursement must be for “expenses incurred by the employee on the employer’s behalf or convenience”).

<sup>92</sup> FOH 32d05a(a).

<sup>93</sup> See, e.g., *Berry v. Excel Grp., Inc.*, 288 F.3d 252, 253–54 (5th Cir. 2002) (concluding that reimbursements of travel expenses were primarily for the employer’s benefit; therefore, such expenses were excluded from the regular rate); see also *Sharp v. CGG Land, Inc.*, 840 F.3d 1211, 1215 (10th Cir. 2016) (“[T]he proper focus under § 778.217(b)(3) is whether the \$35 payments are for reimbursement of travel expenses incurred in furtherance of the employer’s interests . . . .”); *Brennan v. Padre Drilling Co., Inc.*, 359 F. Supp. 462, 465 (S.D. Tex. 1973) (per diem for traveling expenses is “expended

All of the comments regarding this proposal were supportive and agreed that the limitation imposed by the word “solely” in the current regulation could be overly restrictive and is not required by the FLSA. See Associated Builders and Contractors; CWC; Chamber; Fisher Phillips; NADA; PPWO; Seyfarth; SHRM; SIGMA. Two of these commenters also asked that the Department add a new sentence explicitly stating that “business expenses need not be solely or primarily incurred for the employer’s benefit.” See Associated Builders and Contractors; Chamber.

The Department has decided to finalize its proposal to remove the word “solely” from § 778.217(a) to better align the regulations with the FLSA. As explained above, the FLSA does not impose a limitation on the proportion of benefit to the employer in order for reimbursed expenses to be excludable. The Department does not believe it is necessary to further add a sentence stating that business expenses need not be “solely or primarily incurred for the employer’s benefit” in order to be excludable. The removal of the term “solely” adequately aligns the regulations with the statute.

The Department also proposed to clarify section 7(e)(2)’s requirement that only “reasonable” and “properly reimbursable” expenses may be excluded from the regular rate when reimbursed. Current § 778.217(b)(3) permits employers to exclude from the regular rate “[t]he actual or reasonably approximate amount expended by an employee who is traveling ‘over the road’ on his employer’s business, for transportation . . . and living expenses away from home, [or] other [such] travel expenses[.]” Section 778.217(c) cautions that “only the actual or reasonably approximate amount of the expense is excludable from the regular rate. If the amount paid as ‘reimbursement’ is disproportionately large, the excess amount will be included in the regular rate.”

Two commenters asked the Department to clarify that specific reimbursable expenses are excludable from the regular rate. See NADA; AHLA. These requests included “cell phone reimbursement,” “non-mandatory credentialing exam fees,” “organization membership dues,” and reimbursements for the cost of tools. These are clearly not compensation for hours of employment, but instead are expenses taken on by employees for the employer’s convenience or benefit.

by the employee in the furtherance of his employer’s interest”).

<sup>86</sup> 29 U.S.C. 207(e)(2).

<sup>87</sup> 29 CFR 778.217(a).

<sup>88</sup> See 15 FR 623.

<sup>89</sup> 29 U.S.C. 207(e)(2).

Because “[t]he actual amount expended by an employee in purchasing . . . tools” is already included in the regulation’s illustrations of excludable reimbursements, the Department believes sufficient guidance is available regarding tool reimbursements.<sup>94</sup> However, to provide additional clarity regarding cell phone reimbursement, exam fees, and membership dues, the Department has decided to revise the language of the illustration provided at § 778.217(b)(1) to make clear that these too are excludable reimbursements.

The NPRM proposed additional explanation of what is “reasonable”—and thus not “disproportionately large”—by referring to the Federal Travel Regulation. The Department explained that it believes that the amounts set in the Federal Travel Regulation are not excessive and are easily ascertained, given its “two principal purposes” of “balanc[ing] the need to assure that official travel is conducted in a responsible manner with the need to minimize administrative costs” and “communicat[ing] the resulting policies in a clear manner to Federal agencies and employees.”<sup>95</sup> The Department thus proposed to add regulatory text explaining that a payment for an employee traveling on his or her employer’s business is per se reasonable if it is at or beneath the maximum amounts reimbursable or allowed for the same type of expense under the Federal Travel Regulation and meets § 778.217’s other requirements. Those other requirements include that the reimbursement be for the “actual or reasonably approximate amount”<sup>96</sup> of the expense, that the expense be incurred on the employer’s behalf, and that the expense not vary with hours worked.<sup>97</sup> The proposed regulatory text also clarified that a reimbursement for an employee traveling on his or her employer’s business exceeding the Federal Travel Regulation limits is not

necessarily unreasonable. As the NPRM explained, a payment may be more than that required “to minimize administrative costs” yet still within the realm of reasonable business and industry norms.

A number of commenters supported the Department’s proposal to state in the regulatory text that reimbursements for travel expenses are per se reasonable if they do not exceed the rates in the Federal Travel Regulation. *See, e.g.,* NDA; PPWO; SIGMA; SHRM; Chamber. Several commenters noted that the Federal Travel Regulation rates are below market rate, and that in many cases expenses exceeding that amount may still be reasonable. To address this issue, some commenters recommended that the Department finalize proposed paragraph (c)(3) stating that costs exceeding the Federal Travel Regulation may still be reasonable, and two recommended that the Department develop additional guidance about the Federal Travel Regulations after issuance of the final rule. *See* AHLA; CWC; Chamber; SIGMA; SHRM. Two commenters noted that many employers use Internal Revenue Service (IRS) guidelines for reimbursement of employee travel expenses, and suggested that the final rule also state that expenses not exceeding the IRS’s guidelines for reimbursement of employee travel expenses are per se reasonable. *See* NDA; PPWO.

The Department has decided to modify the language in proposed § 778.217(c)(2) to state that payments equal to or less than the Federal Travel Regulation rates or the substantiation amounts for travel expenses permitted by the IRS under 26 CFR 1.274–5(g) and (j) are per se reasonable and not disproportionately large.<sup>98</sup> The Department has also decided to finalize the regulatory language in proposed § 778.217(c)(3) noting that § 778.217(c)(2) does not create an inference that amounts in excess of the Federal Travel Regulation rates or the

rates set by the IRS on travel expenses are per se unreasonable.<sup>99</sup>

##### 5. Other Similar Payments

Section 7(e) requires “all remuneration for employment” be included in the regular rate, subject to that section’s eight listed exclusions. Section 7(e)(2) consists of three clauses, each of which address a distinct category of excludable compensation. As discussed above, the first excludes “payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause.” The second excludes “reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer’s interests and properly reimbursable by the employer.” The third clause of section 7(e)(2) excludes from the regular rate “other similar payments to an employee which are not made as compensation for his hours of employment.”

As explained in the NPRM, “[o]ther . . . payments” are “similar” to those in the first two clauses of section 7(e)(2) because they are “not made as compensation for [an employee’s] hours of employment.” The first two clauses share the essential characteristic of having no connection to the quantity or quality of work performed. The “other similar payments” clause thus excludes payments not tied to an employee’s hours worked, services rendered, job performance, or other criteria linked to the quality or quantity of the employee’s work.<sup>100</sup>

The NPRM explained that, in a sense, every benefit or payment that an employer gives an employee is

<sup>99</sup> *See id.*

<sup>100</sup> *See Reich v. Interstate Brands Corp.*, 57 F.3d 574, 578 (7th Cir. 1995) (“The word ‘similar’ then refers to other payments that do not depend at all on when or how much work is performed.”); *Minizza v. Stone Container Corp.*, 842 F.2d 1456, 1461 (3d Cir. 1988) (“[W]e interpret the phrase ‘other similar payments’ by reading each clause of section 207(e)(2) separately. The phrase ‘other similar payments . . . not made as compensation for hours of employment’ does not mean just other payment for idle hours or reimbursements, the two types of payments set forth in the two preceding clauses of the section, but payments not tied to hours of compensation, of which payments for idle hours and reimbursements are only two examples.”). *But see Flores v. City of San Gabriel*, 824 F.3d 890, 899 (9th Cir. 2016) (“the ‘key point’” for exclusion under the third clause “is whether the payment is ‘compensation for work’” (quoting *Local 246 Utility Workers Union of Am. v. S. Cal. Edison Co.*, 83 F.3d 292, 295 (9th Cir. 1996)); *Acton*, 436 F.3d at 976 (“Section 207(e)(2), properly understood, operates not as a separate basis for exclusion, but instead clarifies the types of payments that do not constitute remuneration for employment for purposes of section 207.”).

<sup>94</sup> *See* 29 CFR 778.217(b)(1).

<sup>95</sup> 41 CFR 300–1.2. Those amounts are published online annually by the General Services Administration. *See Plan and Book*, GSA, [www.gsa.gov/travel/plan-and-book](http://www.gsa.gov/travel/plan-and-book) (last visited Aug. 23, 2019).

<sup>96</sup> *Gagnon v. United Technisource, Inc.*, 607 F.3d 1036, 1041–42 (5th Cir. 2010), provides a helpful contrast to a properly excludable reimbursement. There, multiple facts indicated that the employee’s purported “per diem” was simply a scheme to avoid paying overtime. Those facts included the per diem’s rise over time without any clear connection to travel or other expenses, its variance by the hour, its cap at 40 hours per week, and its payment in combination with a well-below-market wage.

<sup>97</sup> *See, e.g., Baouch v. Werner Enters., Inc.*, 908 F.3d 1107, 1116 (8th Cir. 2018) (“Per diem payments that vary with the amount of work performed are part of the regular rate.”), *petition for cert. filed*, (U.S. June 13, 2019) (No. 18–1541).

<sup>98</sup> Under the authority of 26 U.S.C. 274(d), 26 CFR 1.274–5(g) and 26 CFR 1.274–5(j), the IRS Commissioner has prescribed special per diem methods under which a taxpayer may use a specified amount in lieu of substantiating the actual costs of certain travel while away from home. IRS guidelines regarding special per diem and meals and incidental expenses (M&IE) methods are set forth in Revenue Procedure 2011–47, 2011–42 I.R.B. 520, 2011 WL 4503974 (Oct. 17, 2011). The IRS publishes the special per diem rates in an annual notice. *See* Notice 2019–55 (2019–42 IRB 937) (or successor), available at: <https://www.irs.gov/pub/irs-drop/n-19-55.pdf>. Revenue Procedure 2011–47 provides optional substantiation methods (for example, meal and incidental expenses only per diem allowance, special rules for the transportation industry, and the high-low substantiation method).

“remuneration for employment.”<sup>101</sup> Certainly benefits like paid vacation or sick leave are seen as such by many employers and employees. But the section 7(e)(2) exclusions make clear that whether or not they are remuneration, they are “not made as compensation for [the employee’s] hours of employment” because they have no relationship to the employee’s hours worked or services rendered. This interpretation gives meaning to the third clause. It allows employers to provide benefits unconnected to the quality or quantity of work, even if those benefits are remuneration of a sort.

The NPRM further explained that interpreting the third clause as simply a restatement of the “remuneration” requirement would contravene basic principles of statutory interpretation. Such an interpretation would equate the unique phrases “all remuneration for employment” and “compensation for [the employee’s] hours of employment,” even though Congress used different words and thus, presumably, meant different things. This is especially so when considering that one phrase uses the word “employment” when the other uses the term “hours of employment.” Such an interpretation would also render the third clause redundant, another disfavored result. And it would be difficult to reconcile with the first clause of section 7(e)(2), in which the payments are clearly remuneration yet excludable from the regular rate.

The NPRM also explained that payments to employees are not excludable under the “other similar payments” clause merely because the payments are not specifically tied to an employee’s hours of work.<sup>102</sup> “Other

similar payments” cannot be simply wages in another guise. When a payment is a wage supplement, even if not tied directly to employee performance or hours worked, it is still compensation for “hours of employment.” For example, payments such as production bonuses,<sup>103</sup> and the cost of furnished board, lodging, or facilities,<sup>104</sup> which “though not directly attributable to any particular hours of work are, nevertheless, clearly understood to be compensation for services”<sup>105</sup> are not excludable under this provision. Similarly, payments that differ only in form from regular wages by, for instance, being paid in a monthly lump sum or as hardship premiums, are better characterized as wages or bonuses than as “other similar payments” excludable from the regular rate. The other similar payments clause cannot be interpreted so broadly as to “obliterate[] the qualifications and limitations” placed on excludable payments specifically addressed in section 7(e)’s various other sections, which could render such limits “superfluous.”<sup>106</sup>

The NPRM stated that the Department’s interpretation has considerable support in the case law, citing multiple decisions. First, the Third Circuit held in *Minizza v. Stone Container Corp.* that two lump sums paid to select employees to induce them to agree to a collective-bargaining agreement were excludable as an “other similar payment” because they were not compensation for hours worked or services rendered.<sup>107</sup> The court interpreted the clause to exclude “payments not tied to hours of compensation, of which payments for idle hours and reimbursements are only two examples.”<sup>108</sup> The court’s decision that these payments were not compensation for employment rested in part on the fact that the “eligibility requirements were not meant to serve as compensation for service, but rather to reduce the employers’ costs,” but also in part on the fact that “the eligibility terms themselves [for the lump sums] [did] not require specific service”—it did “not matter how many hours an employee worked during that period, nor how many hours he might work in the future.”<sup>109</sup>

possibly exclude every payment that is not measured by the number of hours spent at work.”).

<sup>103</sup> See 29 CFR 778.211(c).

<sup>104</sup> See 29 CFR 778.116.

<sup>105</sup> 29 CFR 778.224(a).

<sup>106</sup> *Reich*, 57 F.3d at 578.

<sup>107</sup> *Minizza*, 842 F.2d at 1461–62.

<sup>108</sup> *Id.* at 1461.

<sup>109</sup> *Id.* at 1460–61; see also *id.* at 1462 (“If the payments were made as compensation for hours worked or services provided, the payments would

Second, the Seventh Circuit espoused a similar understanding in *Reich v. Interstate Brands Corp.*<sup>110</sup> There, the court held that regular, planned \$12 payments to bakers who worked weeks without two consecutive days off could not be excluded from the regular rate under section 7(e)(2). The court reasoned that the payments were materially no different from a higher base rate to compensate the bakers for taking on an unpleasant schedule.<sup>111</sup> “Other similar payments” are different, wrote the court. “The word ‘similar’ . . . refers to other payments that do not depend at all on when or how much work is performed.”<sup>112</sup>

Similarly, the Sixth Circuit has held that pay differentials based on employees’ education level, shift differentials, and hazardous pay are compensation for services rendered, unlike payments that “are unrelated to [employees’] compensation for services and hours of service.”<sup>113</sup> Some circuit courts have interpreted the “other similar payments” not to exclude payments that are “compensation for work.”<sup>114</sup> The Department concurs with these courts to the extent that they have used these or similar phrases to capture the idea that the regular rate includes payments tied to work performance or that function as a wage supplement. But insofar as these courts have equated “compensation for work” with “remuneration for employment,”<sup>115</sup> that is difficult to reconcile with the text of the FLSA. As explained above, the FLSA uses two different phrases, “remuneration for employment” and “compensation for hours of employment,” each of which should be given distinct content. And just as importantly, the first clause of section 7(e)(2) excludes vacation and sick leave, which is clearly remunerative; “other similar payments” to employees can be remunerative too.

Accordingly, the NPRM explained, the proposed clarifications would promote a clear yet flexible standard for employers and employees to order their affairs. Payments are “other similar payments” when they do not function as formulaic wage supplements and are not tied to hours worked, services

have been conditioned on a certain number of hours worked or on an amount of services provided.”).

<sup>110</sup> 57 F.3d 574.

<sup>111</sup> See *id.* at 578–79.

<sup>112</sup> *Id.* at 578.

<sup>113</sup> *Featsent*, 70 F.3d at 904–06.

<sup>114</sup> See, e.g., *Flores*, 824 F.3d at 899.

<sup>115</sup> See *Acton*, 436 F.3d at 976 (“the language ‘not made as compensation for [the employee’s] hours of employment’ posited in § 207(e)(2) is but a mere re-articulation of the ‘remuneration for employment’ requirement set forth in the preambulatory language of § 207(e)’”).

<sup>101</sup> Cf. *Minizza*, 842 F.2d at 1460 (“Employers have a finite amount to spend for the labor component of their product or service. This sum can be allocated solely as compensation on an hourly basis (in which event the payment would be fully includable in the ‘regular rate’), or it can assume any number of other forms . . . (in which case the payments may or may not be includable), in any ratio the parties care to set.”); *Sec’y U.S. Dep’t of Labor v. Bristol Excavating, Inc.*, No. 17–3663, 2019 WL 3926937, at \*3 (3d Cir. Aug. 20, 2019) (clarifying that not all payments relating to employment, regardless of source, qualify as remuneration for employment and that, in the context of third-party payments, a “payment qualifies as remuneration for employment only when the employer and employee have effectively agreed it will.”).

<sup>102</sup> See *Local 246*, 83 F.3d at 295 n.2 (“Even if payments to employees are not measured by the number of hours spent at work, that fact alone does not qualify them for exclusion under section 207(e)(2).”); *Featsent v. City of Youngstown*, 70 F.3d 900, 904 (6th Cir. 1995) (“7(e)(2) does not exclude every payment not measured by hours of employment from the regular rate.”); *Reich*, 57 F.3d at 577 (“We cannot read § 7(e)(2) in isolation . . . . It is one among many exemptions, and a glance at a few of the others shows that § 7(e)(2) cannot

rendered, job performance, or other criteria linked to the quality or quantity of the employee's work, but are conditioned merely on one being an employee. Conditions not tied to the quality or quantity of work performed, such as a reasonable waiting period for eligibility<sup>116</sup> or the requirement to repay benefits as a remedy for employee misconduct, are permitted. This standard also clarifies that there is space for a variety of creative benefits offerings, and encourages their provision to wide groups of employees instead of reserving them only for FLSA-exempt employees.

Section 778.224 addresses miscellaneous items that are excludable from an employee's regular rate under the "other similar payments" clause of section 7(e)(2) because they are "not made as compensation for . . . hours of employment[.]"<sup>117</sup> Section 778.224(b) currently provides a brief, nonexhaustive set of examples of "other similar payments" excludable from an employee's regular rate: "(1) Sums paid to an employee for the rental of his truck or car[;] (2) Loans or advances made by the employer to the employee[;] [and] (3) The cost to the employer of conveniences furnished to the employee such as parking space, restrooms, lockers, on-the-job medical care and recreational facilities."<sup>118</sup> The NPRM noted that the Department added this set of examples to the part 778 regulations in 1950,<sup>119</sup> and has not substantively amended them since. The regulation makes clear that "it was not considered feasible" to provide an exhaustive list of excludable "other similar payments" given the "variety of miscellaneous payments [that] are paid by an employer to an employee under peculiar circumstances."<sup>120</sup>

The Department explained in the NPRM that it continues to believe that providing a comprehensive list of all "other similar payments" excludable under section 7(e)(2)'s third clause is infeasible. Nonetheless, the Department recognized that an updated list would further help employers understand their legal obligations by addressing some of the innovative changes in compensation practices and workplace environments that have occurred since the Department

added this set of examples in 1950. Therefore, the Department proposed clarifying in § 778.224(b) that the following items may be excluded from an employee's regular rate under the "other similar payments" clause of section 7(e)(2).

a. Specialist Treatment Provided Onsite; Gym Access, Gym Memberships, and Fitness Classes; Wellness Programs; Discounts on Retail Goods and Services

The Department proposed clarifying in § 778.224(b)(3) that employers may exclude from the regular rate the cost of providing onsite treatment from specialists such as chiropractors, massage therapists, personal trainers, counselors, Employment Assistance Programs, or physical therapists.<sup>121</sup> As explained in the NPRM, such specialist treatment resembles "on-the-job medical care," which § 778.224(b)(3) already identifies as an excludable "convenience furnished to the employee."<sup>122</sup> Employers that provide onsite specialist treatment do so for a variety of reasons, including to raise workplace morale, promote employee health, and reduce healthcare costs.

The Department also proposed clarifying in § 778.224(b)(3) that the cost of providing employees with gym access, gym memberships, and fitness classes, whether onsite or offsite, is excludable from the regular rate.<sup>123</sup> These fitness benefits, the Department explained, resemble "recreational facilities," which § 778.224(b)(3) already identifies as an excludable convenience provided to employees. According to one survey, a substantial number of employers provided fitness benefits.<sup>124</sup> Employers may provide such conveniences for many reasons, including to raise workplace morale, promote employee health, and reduce healthcare costs.

The Department proposed adding an example in § 778.224(b)(4) to clarify that employers may exclude from the regular

rate the cost of providing certain health promotion and disease prevention activities, often known as wellness programs. The NPRM noted that examples of some common wellness programs include health risk assessments, biometric screenings, vaccination clinics (including annual flu vaccinations), nutrition classes, weight loss programs, smoking cessation programs, stress reduction programs, exercise programs, and coaching to help employees meet health goals.<sup>125</sup> Wellness programs are often provided to employees enrolled in an employer-sponsored health insurance plan, but some employers offer wellness programs to employees regardless of their health insurance coverage. The NPRM stated that workplace wellness programs are similar to "on-the-job medical care" and "recreational facilities," conveniences that the regulations already specify are excludable from an employee's regular rate.<sup>126</sup> Employers may provide such programs to, for example, reduce health care costs, reduce health-related absenteeism, and improve employee health and morale.

The Department also proposed adding an example in § 778.224(b)(5) to confirm that discounts on retail goods and services may be excluded from the regular rate of pay as long as they are not tied to an employee's hours worked or services rendered. The NPRM cited a survey that indicated that many employers provide employees with an option to purchase these types of goods or services at a discounted price relative to their full retail value.<sup>127</sup> Such discounts are commonly available to employees regardless of their quality or quantity of work, and it is solely the employees' choice whether to purchase anything under the discount. When these discounts are available to employees regardless of their hours worked or services rendered, and are not tied to any duties performed, they qualify as "other similar payments"

<sup>121</sup> This proposal is not intended to affect the circumstances under which receiving medical attention at the direction of the employer is considered to be hours worked. See 29 CFR 785.43.

<sup>122</sup> 29 CFR 778.224(b)(3).

<sup>123</sup> In circumstances where maintaining a certain level of physical fitness is a requirement of the employee's job, the cost to the employer of providing exercise opportunities is a facility furnished "primarily for the benefit or convenience of the employer," as described in § 531.3(d). Facilities furnished for the employer's benefit do not qualify as wages or remuneration for employment and thus need not be included in the regular rate.

<sup>124</sup> See Soc'y for Human Res. Mgmt., 2018 *Employee Benefits: The Evolution of Benefits 23* (2018), available at <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/2018%20Employee%20Benefits%20Report.pdf>.

<sup>125</sup> See, e.g., Soc'y for Human Res. Mgmt., "How to Establish and Design a Wellness Program," <https://www.shrm.org/resourcesandtools/hr-topics/pages/howtoestablishanddesignawellnessprogram.aspx> (last accessed Aug. 26, 2019).

<sup>126</sup> 29 CFR 778.224(b)(3).

<sup>127</sup> See Soc'y for Human Res. Mgmt., "2018 Employee Benefits: The Evolution of Benefits," at 31 (June 2018), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/2018%20Employee%20Benefits%20Report.pdf> (from 2014 to 2018, employers offering an employee discount on company services ranged from 31 percent to 34 percent, and employers offering employer-sponsored personal shopping (e.g., retail) discounts ranged from 11 percent to 19 percent).

<sup>116</sup> See *Minizza*, 842 F.2d at 1460 ("A review of the eligibility terms reflects a requirement only that a payee achieve the status of an active employee for a specified period of time prior to receipt. It does not matter how many hours an employee worked during that period, nor how many hours he might work in the future.").

<sup>117</sup> 29 U.S.C. 207(e)(2).

<sup>118</sup> 29 CFR 778.224(b).

<sup>119</sup> See 15 FR 623 (1950) (codified at 29 CFR 778.7(g); relocated in 1968 to 29 CFR 778.224(b)).

<sup>120</sup> 29 CFR 778.224(a).

under section 7(e)(2).<sup>128</sup> The NPRM pointed out that more than 50 years ago, the Department stated that such employee discounts are not included in the regular rate of pay. In a 1962 opinion letter, the Department found that the value of “concessions granted to employees . . . on charges for telephone service” was “not part of wages includible in the regular rate of pay”—in part because “[s]uch concessions appear to be similar to discounts on merchandise offered by many retail establishments to their employees which [the Department] do[es] not regard as wages.”<sup>129</sup> The NPRM explained that discounts like these are not fungible cash but merely a lower price on the employer’s offerings. They appeal only to the employees who want to use them and are limited to the offered selection of goods or services. Employees must expend their own funds to avail themselves of the discounts. The discounts are presumably limited in their value, since employers likely do not offer discounts that would materially harm their business. And employers may also place conditions on the discounts to protect their interests by, for instance, requiring that discounted restaurant meals be eaten on the premises to prevent abuse.

The Department received numerous comments in support of these clarifications, with many commenters noting that the additional clarity provided by the additional examples in § 778.224(b) will allow employers to provide these types of benefits to employees more frequently. *See, e.g.*, Chamber; National Association of Health Underwriters (NAHU); HR Policy Association (HR Policy); SHRM; Seyfarth; NFIB. By contrast, a few commenters expressed concerns with this proposed clarification. *See, e.g.*, National Employment Lawyers Association (NELA); NELP. NELA opposed this proposed clarification, suggesting that the Department instead state that such payments “may be excluded from the regular rate only after a case by case analysis using applicable principles.” NELP similarly expressed concern that the added examples created per se categorical exclusions of types of benefits.

The Chamber asked the Department to add the following language to

§ 778.224(a): “Payments are ‘similar’ when the amount of the payment is not dependent on hours worked, production, or efficiency and when the amount of the payment is unaffected by the quantity or quality of work performed.” The Department agrees that such a statement would provide further clarity and notes that the NPRM defined “other similar payments” in a comparable manner as “payments not tied to an employee’s hours worked, services rendered, job performance, credentials, or other criteria linked to the quality or quantity of the employee’s work.”<sup>130</sup> Three items in the NPRM’s list of criteria not linked to the quality or quantity of work—“hours worked, services rendered, [and] job performance”—closely correspond with “hours worked, production, or efficiency” from the Chamber’s proposal. The NPRM also listed “credentials.” But upon further reflection, the Department believes that, unlike the other listed criteria, credentials are not necessarily linked to the quality or quantity of an employee’s work.

Additional pay for education credentials is generally connected with work quality or quantity, and therefore not excludable under § 778.224, as “education advancement . . . enhances the quality of an employee’s job performance.”<sup>131</sup> However, because the connection between an employee’s education credentials and his or her quality or quantity of work may vary, the Department declines to include “credentials” in the regulatory text as an example of a criterion inextricably linked to the quality or quantity of the employee’s work.<sup>132</sup> In contrast, hours worked, services rendered, and job performance are necessarily linked to work quality or quantity, and therefore, these are appropriate examples for the regulatory text. Accordingly, the Department has revised § 778.224(a) using language adapted from the NPRM to clarify that “other similar payments” are “payments that do not depend on hours worked, services rendered, job performance, or other criteria that depend on the quality or quantity of the employee’s work.” The Department has also revised § 778.224(b)(5) to remove language similar to that added in

§ 778.224(a) so as to avoid duplicative text.

To provide additional clarity, the Department is adding to § 778.224(a) two examples of conditions identified in the NPRM as being unconnected to the quality or quantity of work performed: “reasonable waiting period for eligibility” and “the requirement to repay benefits as a remedy for employee misconduct.”<sup>133</sup> The Department is also adding an additional example of a condition that is unconnected to the quality or quantity of work to § 778.224(a): “limiting eligibility on the basis of geographic location or job position.” Payments that depends on location—for instance, offering benefits for employees in certain states or cities—are not related to work quality or quantity. Nor do payments that depend on an employee’s job position—for instance, offering a signing bonus to engineers but not salespersons.

Relatedly, in response to NELA’s and NELP’s comments, the Department believes that the addition of the above language to § 778.224(a) makes clear that the proposed examples in § 778.224(b) do not change the existing statutory analysis that the Department uses for determining whether a payment is properly excluded, but instead simply add examples of categories of payments that may be excluded as “other similar payments.” The Department will still look to see if a benefit plan labeled a “wellness plan,” for example, meets the statutory requirements of section 7(e)(2) and corresponding regulatory requirements to determine whether the benefit is tied to hours worked, services rendered, job performance, or other criteria linked to the quality or quantity of the employee’s work. The benefit must be conditioned only on being an employee, although conditions unconnected to the quality or quantity of work, such as a reasonable waiting period for eligibility, are permissible. Furthermore, as explained in the NPRM, the benefit cannot be simply wages in another guise. When a payment is a wage supplement, even if not tied directly to employee performance or hours, it is still compensation for “hours of employment.” The additional examples that the Department has added to § 778.224(b) do not change these requirements or the Department’s analysis regarding the appropriate treatment of these benefits.

Commenters also identified numerous commonly provided employee perks and asked the Department to clarify whether these items would be excludable under section 7(e)(2). The

<sup>128</sup> *See Reich*, 57 F.3d at 578 (payments under section 7(e)(2) are those “that do not depend at all on when or how much work is performed”); *Minizza*, 842 F.2d at 1462 (payments under section 7(e)(2) all “share the essential characteristic . . . of not being compensation for hours worked or services rendered”).

<sup>129</sup> WHD Opinion Letter FLSA, 1962 DOLWH LEXIS 217 (Oct. 31, 1962).

<sup>130</sup> 84 FR 11894.

<sup>131</sup> *See Featsent v. City of Youngstown*, 70 F.3d 900, 904 (6th Cir. 1995) (additional pay for education degrees was not excludable under § 778.224).

<sup>132</sup> *See, e.g., Duplesse v. City of Los Angeles*, 714 F. Supp. 2d 1045, 1053–54 (C.D. Cal. 2010) (additional pay for credentials were excludable from the regular rate for firefighters who were not regularly assigned to positions involving those credentials).

<sup>133</sup> 84 FR 11895.

Department believes several of the items raised would be excludable and are consistent with the Department's proposal. These include discounts on employer-provided hotel rooms and travel, and non-mandatory credentialing classes. *See* AHLA; NADA.

AHLA asked the Department to clarify that beverage discounts, food discounts, hotel room discounts, and travel discounts are excludable from the regular rate as an "other similar payment." In the NPRM, the Department proposed that discounts on employer-provided goods and services are excludable from the regular rate as "other similar payments." As noted in the NPRM, such discounts are not fungible cash—they offer a lower price on certain offerings and are typically non-transferable. Further, employees have discretion as to whether or not to purchase anything under a discount, thereby receiving the benefit. Provided these beverage discounts, food discounts, hotel room discounts, and travel discounts are not tied to an employee's hours worked, services rendered, or other conditions related to the quality or quantity of work performed, they are excludable from the regular rate under the proposed language in § 778.224(b)(5). NADA asked the Department to clarify that the cost to the employer of paying for non-mandatory credentialing classes for employees is excludable from the regular rate under section 7(e)(2). To be excludable as an "other similar payment" under section 7(e)(2), these non-mandatory credentialing classes may not be compensation for hours worked, services rendered, or other conditions related to the quality or quantity of work performed. The Department believes the language proposed in the NPRM sufficiently addresses this issue, and as a result does not modify its proposal. As such, no further changes to § 778.224 have been made to address these comments.

However, the Department found that modifications would be helpful to add clarity with regards to the exclusion of other items raised by the commenters. For example, some commenters asked the Department to clarify in the final rule that the cost to employers of providing mental health wellness programs and financial wellness programs are excludable along with the cost of providing physical wellness programs. *See* ERIC; HR Policy. As ERIC noted in its comment, "many employers . . . offer mental health and financial wellness plans as an integrated package with physical wellness plans." Further, HR Policy's comment stated that such benefits "assist the employee in

managing work-life balance . . . and are to the mutual benefit of both the employer and the employee." The NPRM explained that workplace wellness programs are similar to "on-the-job medical care" and "recreational facilities," conveniences that the regulations already specify are excludable from an employee's regular rate. The Department finds no meaningful difference between mental health and financial wellness programs and the wellness programs included in the NPRM. Accordingly, the Department clarifies in the final rule that the cost of providing such mental health and financial wellness programs are excludable from the regular rate as an "other similar payment."

AHLA asked the Department to clarify that parking benefits, in addition to the parking spaces explicitly listed under § 778.224(b)(3)(i), are excludable from the regular rate. Parking benefits provide parking spaces for employees near the business premises of their employer. As explained under § 778.224(a), section 7(e)(2) of the FLSA does not "permit the exclusion from the regular rate of payments such as . . . the furnishing of facilities like board and lodging . . . ." The Department interprets facilities to include certain "transportation furnished employees between their home and work."<sup>134</sup> Accordingly, the Department has long acknowledged that employer-provided parking spaces are excludable from the regular rate but commuter subsidies are not. It is the Department's view that parking benefits are analogous to an employer-provided parking space, and distinguishable from commuter subsidies. Parking benefits are conveniences provided by an employer so that the employee may have a parking spot near the business premises of the employer. The employee still bears the cost of the actual transportation between their home and work—purchasing and maintaining a vehicle, insurance, and gasoline, etc. To remove ambiguity, the Department modifies its proposal to clarify in the final rule that parking benefits, like parking spaces, are excludable from the regular rate.

Some of the items identified by commenters fit within statutory exclusions other than section 7(e)(2). First, a few commenters asked the Department to clarify whether adoption or surrogacy assistance benefits are excludable from the regular rate. *See* Chamber; SHRM; Seyfarth; PPWO. The term "adoption assistance" encompasses a wide variety of benefits.

<sup>134</sup> 29 CFR 531.32(a).

These benefits might include financial assistance, legal services, information and referral services, and paid or unpaid leave. Adoption assistance takes many forms, some of which are excludable under other statutory exceptions. Legal services are excludable under section 7(e)(4) to the extent they meet the requirements of § 778.215, and paid leave is excludable under section 7(e)(2) as "occasional periods when no work is performed." Additionally, the costs of providing adoption assistance in the form of information and referral services or financial assistance for non-legal services may be excluded under section 7(e)(2)'s "other similar payments" clause. These benefits are not tied to an employee's hours worked, services rendered, or other criteria linked to the quality or quantity of work performed. The Department amends its final rule to include this clarification. Unlike adoption assistance, surrogacy assistance tends to consist solely of payment of or reimbursement for medical expenses, typically outside of a medical plan. Such payments may therefore be considered a wage under section 3(m) of the FLSA, which is not excludable from the regular rate.

Some commenters asked the Department to clarify that the cost of providing "snacks," "office coffee," "meals," or "pantry services" are excludable from the regular rate. *See* HR Policy; National Automatic Merchandising Association (NAMA); Chamber. While commenters suggested these costs are excludable under section 7(e)(2)'s "other similar payments" clause, Department practice and case law already supports exclusion of many of these costs from the regular rate as gifts under section 7(e)(1).

Section 7(e)(1) excludes "sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency." As the Department explained in the NPRM, because the first clause, "sums paid as gifts," is separated from the second clause by a semicolon, the first clause addresses a separate set of excludable benefits from that in the second clause.<sup>135</sup> There may be some overlap between "sums paid as gifts" and "payments in the nature of gifts made at Christmas time, on special occasions, or as a reward for services," but the categories are not coextensive.

<sup>135</sup> *See Harris v. Best Buy Stores, L.P.*, No. 15-CV-00657-HSG, 2016 WL 4073327, at \*6 (N.D. Cal. Aug. 1, 2016).

Specifically, sums under the first clause are those “paid as gifts”—that is, paid with the express understanding that they are a gift—as opposed to sums under the second clause, which are not expressly given as a gift, but are nevertheless “in the nature of gifts” because of their timing. The second clause in 7(e)(1) therefore expands the universe of excludable gifts from sums that are obviously “paid as gifts” to include those that are also “in the nature of gifts,” but limits the latter category to those made at Christmas time, on special occasions, or as rewards for service. In either case, however, the payments must not be measured by or dependent on hours worked, production, or efficiency.<sup>136</sup>

The FLSA defines “wage” as “the reasonable cost . . . [of] board, lodging, or other facilities” and thus the cost of providing meals is included in the regular rate.<sup>137</sup> However, if snacks or other food are provided as a gift, or in the nature of a gift, and are “not measured by hours worked, production, or efficiency,” they may be excluded from the regular rate.<sup>138</sup> Courts have specifically found the cost to an employer of providing food items to employees, aside from regularly provided meals, to be excludable from the regular rate as gifts under section 7(e)(1).<sup>139</sup>

When an employer provides snacks or food to employees as a gift, the cost of providing such snacks or food is properly excludable from the regular rate under the first clause of section 7(e)(1). This commonly arises in situations where an employer provides employees with office coffee and snacks, the value of which is minimal. These are provided without regard to hours worked, production, or efficiency, and the cost of such provision is excludable from the regular rate.

Unlike snacks, meals furnished by an employer are generally considered to be

wages.<sup>140</sup> However, when a meal is provided by an employer to employees on a special occasion, such as a celebratory pizza lunch, the cost to the employer of providing such food is properly excludable from the regular rate under the second clause of section 7(e)(1). The Department adds language to § 778.212(c) to clarify this in the final rule.<sup>141</sup>

Some commenters also requested clarification that prizes, such as coffee cups and t-shirts, provided in connection with contests or raffles are excludable from the regular rate as “other similar payments” under section 7(e)(2). See SHRM; PPWO; Seyfarth. As with snacks and special occasion meals, the Department believes that the gift provision in section 7(e)(1) already provides for their exclusion from the regular rate as sums “paid as gifts”—that is, paid with the express understanding that they are a gift—the amounts of which are not measured by or dependent on hours worked, production, or efficiency.<sup>142</sup> Because “the subsections of § 7(e) are not mutually exclusive,”<sup>143</sup> there may be areas of overlap between payments that are excludable under section 7(e)(1) and those excludable under section 7(e)(2). Thus, in addition to being excludable as gifts under section 7(e)(1), small items such as coffee mugs or t-shirts provided to an employee may also be properly excludable as an “other similar payment” under section 7(e)(2), so long as its provision does not depend on hours worked, services rendered, job performance, or other criteria that depend on the quality or quantity of the employee’s work.

Similarly, several commenters asked the Department to provide guidance on the excludability of sign-on bonuses, suggesting they might be excludable under section 7(e)(2) as an “other similar payment” or under 7(e)(3) as a discretionary bonus. See ERIC; AHLA; Associated Builders and Contractors; NADA; Seyfarth; SHRM; PPWO. Most of these commenters suggested that such payments are excludable under 7(e)(3)

as a discretionary bonus. Such comments are addressed in that section of the preamble. ERIC suggested that sign-on bonuses, notwithstanding the inclusion of a clawback provision, are properly excludable under section 7(e)(2)’s “other similar payments” clause and following the Third Circuit’s reasoning in *Minizza*.<sup>144</sup> See also NADA. In that case, the court found that lump sum payments to employees to induce ratification of a collective bargaining agreement were excludable as an “other similar payment” because such payments were unrelated to hours of employment or service.<sup>145</sup> Since a sign-on bonus with no clawback provision is granted before any work is performed, such payment is unrelated to hours worked or services provided and may be excluded under section 7(e)(2).

While still labeled a sign-on bonus, a sign-on bonus with a clawback provision is substantively different from a sign-on bonus that is paid free and clear. As explained by the Sixth Circuit in *Featsent v. City of Youngstown*, longevity bonuses are dependent on length of service and therefore do not fall within the section 7(e)(2) exception.<sup>146</sup> Since a sign-on bonus with a clawback provision is essentially a longevity bonus, these may not be excluded under section 7(e)(2). However, case law already supports exclusion of certain longevity bonuses under section 7(e)(1) as a gift provided as a reward for future service. The Department’s regulations permit exclusion of such bonuses provided that the requirements of § 778.212 are satisfied. A sign-on bonus with no clawback provision is clearly provided on a special occasion as a reward for future service, and is not measured by or dependent on hours worked,

<sup>144</sup> *Minizza*, 842 F.2d at 1458–62.

<sup>145</sup> See *id.* at 1462.

<sup>146</sup> 70 F.3d 900, 905 (6th Cir. 1995); see WHD Opinion Letter WH-527, 1986 WL 383427, at \*2 (Apr. 21, 1986) (“[W]here an employee must be on the payroll in order to receive a future bonus payment, . . . such a condition [is] an inducement for an employee to continue in employment until the time the payment is to be made” and therefore the payment is not an excludable “other similar payment.”). But eligibility requirements that are “not meant to serve as compensation for service” and “do not require specific service” do not preclude payments from being excludable under section 7(e)(2). *Minizza*, 842 F.2d at 1460–61. Courts and the Department have also concluded that longevity bonuses are not excludable discretionary bonuses under section 7(e)(3) when made pursuant to a collective bargaining agreement or city ordinance. See *O’Brien v. Town of Agawam*, 350 F.3d 279, 295 (1st Cir. 2003) (longevity pay paid pursuant to a collective bargaining agreement does not qualify as an excludable discretionary bonus and therefore must be included in the regular rate); WHD Opinion Letter, 1986 WL 1171142, at \*2 (Aug. 26, 1986) (same); WHD Opinion Letter (Nov. 8, 1985) (same).

<sup>136</sup> 29 CFR 778.212.

<sup>137</sup> 29 U.S.C. 203(m); 29 CFR 778.116; 29 CFR 531.29 and 531.32.

<sup>138</sup> WHD Opinion Letter FLSA, 1999 WL 1002365 (Feb. 12, 1999).

<sup>139</sup> *Rau v. Darling’s Drug Store, Inc.*, 388 F. Supp. 877, 879 (W.D. Pa. 1975). See also *Lemus v. Denny’s Inc.*, No. 10CV2061–CAB (WVG), 2015 WL 13740136, at \*11 (S.D. Cal. July 31, 2015) (finding employer-offered food discounts to be gifts since employees are entitled to receive the discount as soon as they begin working and the employer does not dictate whether or how the employee may use the discount); *Rodriguez v. Taco Bell Corp.*, No. 1:13–CV–01498–SAB, 2013 WL 5877788, at \*5–6 (E.D. Cal. Oct. 30, 2013) (finding meal provided through discount meal policy not excludable from the regular rate, but noting that a similar meal policy may qualify as a gift if available to all employees at any time without restrictions based upon the number of hours worked).

<sup>140</sup> 29 U.S.C. 203(m); 29 CFR 531.29 and 531.32.

<sup>141</sup> The provision of meals by an employer using an authorized basic rate under section 7(g)(3) of the FLSA to compute overtime rather than a regular rate is discussed *infra*.

<sup>142</sup> Prizes that are not paid as gifts, but are awards for activities not normally part of an employee’s job, may be excludable from the regular rate under 29 CFR 778.332.

<sup>143</sup> *Reich*, 57 F.3d at 578. The *Reich* court cautioned, however, that “we hesitate to read § 7(e)(2) as a catch-all, one that obliterates the qualifications and limitations on the other subsections and establishes a principle that all lump-sum payments fall outside the ‘regular rate,’ for then most of the remaining subsections become superfluous.” *Id.*

production, or efficiency. A clawback provision that makes such a bonus dependent on length of employment does not necessarily impact its excludability under section 7(e)(1). As courts have noted, longevity payments are properly excludable from the regular rate under 7(e)(1) when employees receive these payments as a reward for tenure, and the payments are not, for example, made pursuant to a city ordinance or policy, or collective bargaining agreement.<sup>147</sup> The Department's existing regulation at § 778.212(c) supports this interpretation, stating that gift payments may "vary with the amount of the salary or regular hourly rate of such employees or according to their length of service with the firm so long as the amounts are not measured by or directly dependent upon hours worked, production, or efficiency."<sup>148</sup> It follows that "length of service" is not necessarily "directly dependent on hours worked." As such, the Department does not amend its final rule because it believes this interpretation is already clear. In brief, sign-on bonuses with no clawback provision are excludable from the regular rate; sign-on bonuses with a clawback provision pursuant to collective bargaining agreement (CBA), or city ordinance or policy are included in the regular rate; and sign-on bonuses with a clawback provision not pursuant to a CBA, city ordinance or policy, or other similar document that complies with § 778.212, are excludable from the regular rate.

Several commenters asked the Department to clarify that childcare services or subsidies are excludable from the regular rate. *See, e.g.,* Chamber; Associated Builders and Contractors; HR Policy; CWC. Employer-provided childcare services and subsidies are

<sup>147</sup> *See Moreau v. Klevenhagen*, 956 F.2d 516, 521 (5th Cir. 1992), *aff'd*, 508 U.S. 22 (1993); *Shiferaw v. Sunrise Senior Living Mgmt., Inc.*, 2016 WL 6571270, at \*26 (C.D. Cal. Mar. 21, 2016) (finding an employer's tenure-based "Long Term Service Award" paid every five years to be excludable under 7(e)(1)); *White v. Publix Super Markets, Inc.*, 2015 WL 4949837, at \*4 (M.D. Tenn. Aug. 19, 2015) (finding a holiday bonus based on length of employment to be excludable under 7(e)(1)); *Local 359 Gary Firefighters, AFL-CIO v. City of Gary*, 1995 WL 934175, \*7 (N.D. Ind. Aug. 17, 1995) (longevity pay was not excludable under section 7(e)(1) because it was "a fixed amount given pursuant to city policy" that was "based on the scale promulgated by the City"); WHD Opinion Letter WH-332, 1975 WL 40955 (May 1, 1975) ("It would appear that an employee who satisfied the eligibility requirement for [payments provided for in personnel rules] would have a contractual right to [longevity] payments."); *see also* 29 CFR 778.212(b) (explaining that if a bonus is "consider[ed] . . . a part of the wages" or if "paid pursuant to a contract," it is not in the nature of a gift).

<sup>148</sup> 29 CFR 778.212(c).

generally unrelated to the quality or quantity of work performed. However, in the past, the Department has taken a broad view of what is considered to be a "wage" under 3(m) of the FLSA and as such, some payments for childcare services or subsidies may be considered a wage. Payments for childcare services or subsidies are excludable from the regular rate under (e)(2)'s "other similar payments" clause to the extent such payments are not wages under section 3(m).<sup>149</sup> For instance, routinely-provided childcare qualifies as an in-kind reimbursement for "expenses normally incurred by the employee for his own benefit," which are wages that must be included in the regular rate.<sup>150</sup> However, emergency childcare services provided by employers as an important component of their work-life support packages do not meet this test and may be excluded from the regular rate, if such services are not provided as compensation for hours of employment. Emergency care is provided in the case of unforeseen circumstances, such as when schools or daycares are closed for bad weather or when a child is sick. If these payments are not tied to the quality or quantity of work performed, they are properly excluded from the regular rate under section 7(e)(2)'s "other similar payments" clause.

Finally, some of the items raised by commenters were outside the scope of the Department's proposal, and better addressed in a separate rulemaking. These include meals, relocation stipends,<sup>151</sup> commissions, and programs that issue points redeemable for merchandise. *See* PPWO; Hancock Estabrook, LLP; SHRM; Seyfarth; Chamber.

#### b. Tuition

The Department proposed adding an example in § 778.224(b)(5) clarifying that certain tuition programs offered by employers may be excludable from the regular rate. The NPRM noted that some employers today offer discounts for online courses, continuing-education programs, modest tuition-reimbursement programs, programs for

<sup>149</sup> *See* Opinion Letter FLSA-642 (Jan. 23, 1983) (deductions from employees' wages for childcare payments and reimbursement for childcare expenses are wages under section 3(m) and must be included in employees' regular rates); *see also* Opinion Letter (Apr. 1, 1992) (employer payments that employees may redesignate for child care benefits must be included in the regular rate of pay).

<sup>150</sup> 29 CFR 778.217(d); *see* 29 CFR 531.37(b).

<sup>151</sup> Pursuant to guidance in its Field Operations Handbook, the Department generally considers sums "paid as an incentive to attract employees to an isolated or otherwise undesirable job site" to be includable in the regular rate. FOH 32c00(b)(6).

repaying educational debt, and the like. Unlike wage supplements, the Department explained, these tuition programs are not fungible, any-purpose cash, but must be directed toward particular educational and training opportunities. These programs are also optional, appeal only to those employees who want to use them, and are directed toward educational and training pursuits outside the employer's workplace. Such tuition programs do not meet the basic necessities of life, such as food, clothing, or shelter. While the educational benefit may result in employees better able to accomplish the employer's objectives, these programs are not directly connected to the employees' day-to-day duties for the employer. The NPRM stated that as long as tuition programs are available to employees regardless of their hours worked or services rendered, and are instead contingent merely on one's being an employee, these programs would qualify as "other similar payments" under section 7(e)(2).<sup>152</sup>

The Department noted in the NPRM that this clarification, permitting tuition programs to be excluded from the regular rate, would not affect the Department's regulations at § 531.32 referencing "meals, dormitory rooms, and tuition furnished by a college to its student employees" as an "other facility."<sup>153</sup> The college environment is a unique context in which learning, work, and daily living are inextricably connected, tightly knit, and often all provided by the same entity, that being the college.

The Department received numerous comments in support of this clarification. *See, e.g.,* PPWO; NPELRA; SHRM; Associated Builders and Contractors; Chamber; SIGMA. The Department also received a few comments opposed to this clarification as proposed and that suggested modifications to the regulatory language in this section. *See, e.g.,* NELP; NELA; Economic Policy Institute (EPI).

Several commenters requested additional guidance on the types of tuition benefits encompassed by the proposed rule. *See* ERIC; American Benefits Council; Chamber; CWC; HR Policy; PPWO. Payments for an employee's current coursework, payments for an employee's online coursework, payment for an employee's

<sup>152</sup> *See Reich*, 57 F.3d at 578 (payments under section 7(e)(2) are those "that do not depend at all on when or how much work is performed"); *Minizza*, 842 F.2d at 1462 (payments under section 7(e)(2) all "share the essential characteristic . . . of not being compensation for hours worked or services rendered").

<sup>153</sup> 29 CFR 531.32(a).

family members' tuition, and student loan repayment programs each fit within the exclusion so long as they are not tied to hours worked, services rendered, or other conditions related to quality or quantity of work performed (except for conditions as stated in the rule). Of course, tuition benefits for coursework directly related to the employee's job are excludable under the reimbursements clause of section 7(e)(2).<sup>154</sup>

Some commenters asked the Department to clarify what eligibility limits an employer may place on excludable tuition benefits. See CWC; Seyfarth. For example, Seyfarth commented that many of their clients "employ workers who work for very short periods of time, or very infrequently" and they believe that "a minimum employment requirement is a 'basic commonsense condition'" for some benefits. As explained in the NPRM and proposed regulatory text, while "other similar payments," such as tuition benefits, must generally not be tied to hours worked, services rendered, job performance, or other criteria linked to the quality or quantity of the employee's work, employers may place "conditions, such as a reasonable waiting period for eligibility" on tuition benefits.<sup>155</sup> Minimum employment requirements would be a permissible condition that would not affect the excludability of the tuition benefit from the regular rate.

Additionally, several commenters asked the Department to clarify whether a tuition benefit payment must be made to the employee, directly to the education or training provider, or through a bona-fide third party service provider, in order to be excludable from the regular rate. See, e.g., CWC; PPWO. So long as the employee is receiving a tuition benefit that is not based on hours worked or services rendered, or other conditions related to the quality or quantity of work performed, it makes no difference whether that benefit is a direct payment to the education provider, to the employee, or through a third-party provider. To make this clear, the Department adds the phrase "whether paid to an employee, an

education provider, or a student loan program" to its final rule.

Many commenters asked the Department to clarify that student loan repayment programs are excludable from the regular rate under section 7(e)(2). See ERIC; Chamber; NADA; American Benefits Council; CWC; Seyfarth; SHRM; PPWO; HR Policy. As noted by these commenters, student loan repayment programs take many forms, but the excludability of each plan depends on the facts of that particular plan. As with tuition benefits, student loan repayment plans may be excludable as an "other similar payment" to the extent the payments are not compensation for hours worked or services rendered, or other conditions related to the quality or quantity of work performed.

Some commenters asked the Department to clarify that tuition programs may only be excluded from the regular rate after a case-by-case analysis of whether the tuition program is compensation for work.<sup>156</sup> See NELA; NELP; EPI. As discussed above, the other similar payments clause permits employers to exclude from the regular rate payments to an employee that are "not made as compensation for his hours of employment."<sup>157</sup> Accordingly, as proposed in the NPRM, the final regulatory text provides that tuition programs may only be excluded from the regular rate provided they are not tied to an employee's hours worked, services rendered, or other conditions related to the quality or quantity of work performed. Because the determination of whether individual tuition programs meet the requirements of section 7(e)(2) and § 778.224 will be based on the specific facts and circumstances of each program, the Department concludes there is no need to revise the proposed regulatory text.

#### 6. Show-Up Pay, Call-Back Pay, and Payments Similar to Call-Back Pay

Section 778.220 excludes from the regular rate "show-up" or "reporting" pay, which is defined as compensation for a specified minimum number of hours at the applicable straight-time or overtime rate on "infrequent or sporadic" occasions in which an employee is not provided with the

expected amount of work after reporting as scheduled.<sup>158</sup> Payments for hours actually worked are included in the regular rate; amounts beyond what the employee would receive for the hours worked are excludable.

Section 778.221 addresses "call-back" pay. Call-back pay is additional compensation for calling an employee back to work without prearrangement to perform extra work after the employee's scheduled hours have ended. It is typically paid for a specified number of hours at the applicable straight-time or overtime rate.<sup>159</sup> Call-back pay is treated the same as show-up pay under § 778.220.

Section 778.222 addresses "other payments similar to 'call-back' pay," which are "extra payments made to employees on infrequent and sporadic occasions, for failure to give the employee sufficient notice to report for work on regular days of rest or during hours outside of his regular work schedule," and "extra payments made, on infrequent and sporadic occasions, solely because the employee has been called back to work before the expiration of a specified number of hours between shifts or tours of duty, sometimes referred to as a 'rest period.'" <sup>160</sup> Such time is treated the same as show-up pay under § 778.220 and call-back pay under § 778.221. Sections 778.220, 778.221, and 778.222 all currently require that the payments be "infrequent and sporadic" to be excludable from the regular rate.

Show-up or reporting pay is paid when the employee is scheduled to work but the employer fails to provide the expected amount of work.<sup>161</sup> Show-up pay is therefore excludable under the first clause of section 7(e)(2), which excludes payments made for "occasional periods" when no work is performed due to the "failure of the employer to provide sufficient work."<sup>162</sup> Section 778.220 accordingly limits exclusion of such payments to when they are made "on infrequent and sporadic occasions."<sup>163</sup>

In contrast, call-back pay and other payments similar to call-back pay are not made for periods when the employer fails to provide sufficient

<sup>154</sup> See 29 CFR 778.217; see also *White v. Publix Super Markets, Inc.*, No. 3:14-CV-1189, 2015 WL 4949837 (M.D. Tenn. Aug. 19, 2015) (finding tuition reimbursement payments to be excludable from the regular rate because they constituted reimbursements for an expense incurred in furtherance of the employer's interest and were not tied to hours worked).

<sup>155</sup> 84 FR 11911; see also *Minizza*, 842 F.2d at 1461 ("eligibility terms [that] do not require specific service . . . do not lend support to the conclusion that the payments are compensation for employment").

<sup>156</sup> These commenters also requested that the Department include a discussion of whether tuition programs primarily benefit the employee or the employer. The Department typically conducts such an analysis when evaluating whether a payment is a wage under section 3(m) of the FLSA. 29 U.S.C. 203(m); see also 29 CFR 531.32. However, tuition programs are only excludable from the regular rate under section 7(e)(2) to the extent they are not a wage under section 3(m).

<sup>157</sup> 29 U.S.C. 207(e)(2).

<sup>158</sup> See 29 CFR 778.220.

<sup>159</sup> See 29 CFR 778.221(a).

<sup>160</sup> 29 CFR 778.222.

<sup>161</sup> Since 1940, the Department's position has been that show-up pay that exceeded pay due for hours worked was meant to compensate the employee for the consumption of his time and discourage employers from calling in employees for only a fraction of a day. Interpretive Bulletin No. 4 ¶ 70(8).

<sup>162</sup> 29 U.S.C. 207(e)(2).

<sup>163</sup> 29 CFR 778.220.

work, but are instead additional payments made to compensate the employee when the employer provides unanticipated work.<sup>164</sup> As such, as explained in the NPRM, these payments do not fall under the first clause of section 7(e)(2). The Department has stated that call-back pay described in § 778.221 and the other payments described in § 778.222 instead fall under the “other similar payments” clause of section 7(e)(2)—which Congress did not restrict to “occasional periods” (unlike the first clause of section 7(e)(2)).<sup>165</sup> The NPRM noted that the FLSA does not require that payments under §§ 778.221 and 778.222 be only “occasional” to be excluded from the regular rate. Accordingly, the Department proposed removing the regulatory restriction that requires the payments discussed in §§ 778.221 and 778.222 to be “infrequent and sporadic.”<sup>166</sup>

Although the Department proposed removing the words “infrequent and sporadic” from §§ 778.221 and 778.222, the Department proposed to include in § 778.222 language that has long been in § 778.221 explaining that payments excluded under these provisions must still be “without prearrangement” in order to be excludable from the regular rate.<sup>167</sup> The proposed rule provided an example of payments made without prearrangement by describing an employer retailer who called in an employee to help clean up the store for 3 hours after an unexpected roof leak, and then again 3 weeks later for 2 hours to cover for a coworker who left work for a family emergency. The proposed rule stated that payments for those instances would be without prearrangement and any call-back pay that exceeded the amount the employee would receive for the hours worked would be excludable. The proposed rule also clarified that when payments under §§ 778.221 and 778.222 are so regular that they, in effect, are prearranged, they are compensation for work and should be included in the regular rate. The

proposed rule provided an example of an employer restaurant calling in an employee server for two hours of supposedly emergency help during the busiest part of Saturday evening for 6 weeks out of 2 months in a row, and explained that those payments would essentially be prearranged and all of the call-back pay would be included in the regular rate. The Department further proposed to clarify that the regulations apply regardless of whether the compensation is pursuant to established practice, an employment agreement, or state or local law.

Several commenters supported the Department’s proposal to remove the phrase “infrequent and sporadic” from §§ 778.221 and 778.222. *See, e.g.,* CWC; NADA; Chamber. Some of these commenters, however, were concerned that the proposed regulatory text about regularity of payments and prearrangement could create confusion. *See* PPWO; Seyfarth; SHRM; Chamber. Seyfarth expressed concern that it was unclear “how regularly a payment can be made before it is ‘essentially prearranged.’” Other commenters expressed concern that the proposed §§ 778.221 and 778.222 would create confusion about when call-back pay and similar types of payments are frequent enough to be included in the regular rate calculation, and they urged the Department to retain the “infrequent and sporadic” language. *See* AFL–CIO; EPI; NELA; NELP.

The Department has decided to finalize its proposal to remove the term “infrequent and sporadic” from §§ 778.221 and 778.222. The Department believes that removing the “infrequent and sporadic” language from these sections better aligns the regulations with the third clause of section 7(e)(2) of the FLSA, which does not require that these excludable “other similar payments” be occasional. The Department has also decided to finalize the proposal to add language to § 778.222 stating that payments similar to call-back pay must be made without prearrangement in order to be excludable from the regular rate, which is consistent with long-standing language currently in § 778.221. The Department has decided, however, to clarify in §§ 778.221 and 778.222 that the regularity of payments, alone, does not necessarily establish that such payments are prearranged.

Call-back pay compensates the employee for unanticipated work. A prearranged payment, however, constitutes compensation for work that was anticipated, and so is not excludable call back pay. The key “prearrangement” inquiry is whether

the work was anticipated and therefore reasonably could have been scheduled. This is necessarily a fact specific inquiry that must consider a range of circumstantial factors, in addition to regularity. While substantial regularity of call-back pay may be a factor indicating that work was anticipated, regularity does not by itself necessarily establish anticipation regardless of surrounding facts. For instance, the NPRM included an example of prearrangement in which a restaurant employer calls in a server for the busiest part of Saturday evening for six weeks in a two month period. Upon review, the Department believes that such regularity may suggest prearrangement, but consideration of other facts is necessary to draw a conclusion regarding prearrangement. For instance, if the restaurant called in the employee in response to unanticipated emergencies—for instance, the unexpected absence of scheduled servers—on each of the Saturday evenings worked, regularity would not indicate prearrangement.

The NPRM’s example also stated that “all the call-back pay would be included in the regular rate.” But regularity over a two month period does not, by itself, establish that the first or second call backs were because there was no regularity in the early portion of that period. Again, consideration of other facts is needed. For instance, call backs in the early portion of the two-month period could have been in response to the unanticipated surge in Saturday evening business, in which cases they would not have been prearranged. But if the facts show that at some point in time the restaurant anticipated that such new business had become the norm, then the subsequent call backs would have been prearranged.

The Department is further concerned that the NPRM’s example could be read to imply that prearrangement depends on the same employee being regularly called back. It does not. The key issue is whether the work—*i.e.*, need for an additional server on certain Saturday evenings—was anticipated. If the restaurant had anticipated additional work each evening yet scheduled fewer servers than needed, it would not matter if it had called back a different employee on each of the six evenings to perform the anticipated work. Call back pay would have been prearranged for all six employees.

At bottom, regularity is neither a necessary nor sufficient condition for prearrangement: Frequent call backs over a period of time are not necessarily prearranged, while a single call back could be prearranged. The Department

<sup>164</sup> 29 CFR 778.221 through 778.222.

<sup>165</sup> *See* WHD Opinion Letter FLSA–574 (Nov. 18, 1964) (“turn around” payments excludable under third clause); WHD Opinion Letter FLSA–933 (July 20, 1964) (payment for failure to provide rest period excludable under third clause); WHD Opinion Letter FLSA (Jan. 1, 1964) (stating that extra payments “made for recall to work outside of regular working hours and for shortened ‘rest periods’ between shifts . . . may be excludable from the regular rate under the third clause” of section 7(e)(2)).

<sup>166</sup> The Department also proposed to update the reference to § 778.222 that appears in § 778.203(d).

<sup>167</sup> 29 CFR 778.221; *see also* *Stewart v. San Luis Ambulance Inc.*, No. CV 13–09458–BRO (SSX), 2015 WL 13684710, at \*8 (C.D. Cal. Oct. 6, 2015) (call-back payments must be “without prearrangement”).

is concerned that the proposed language regarding regularity in the NPRM might encourage employers and employees to use regularity as a substitute for prearrangement, without adequate regard for other relevant circumstances. Accordingly, the Department is not including that language in §§ 778.221 and 778.222. And the example in § 778.221(a) has been revised to make clear that the “without prearrangement” inquiry should focus on whether the call back work was anticipated.

The preamble to the NPRM also noted that certain states and localities regulate scheduling practices and impose a monetary penalty on employers (which is paid to employees) in situations analogous to those discussed in §§ 778.220, 778.221, and 778.222.<sup>168</sup> These state and local laws include certain penalties that potentially affect regular rate calculations. These include: (1) “reporting pay” for employees who are unable to work their scheduled hours because the employer subtracted hours from a regular shift before or after the employee reports for duty;<sup>169</sup> (2) “clopening” or “right to rest” pay for employees who work the end of one day’s shift and the start of the next day’s shift with fewer than 10 or 11 hours between the shifts, or who work during a rest period;<sup>170</sup> (3) “predictability pay” for employees who do not receive the requisite notice of a schedule change;<sup>171</sup> and (4) “on-call pay” for employees with a scheduled on-call shift but who are not called in to work.<sup>172</sup> In light of

these recent trends in state and local scheduling laws, the Department proposed to clarify the treatment of these penalty payments under the regulations.

The preamble of the NPRM explained that, in the Department’s view, reporting pay pursuant to state or local scheduling laws should be analyzed similar to show-up pay under § 778.220 because it is payment for an employer’s failure to provide expected work.<sup>173</sup> Compensation for any hours actually worked are included in the regular rate; compensation beyond that may be excluded from the regular rate as payment to compensate the employee for time spent reporting to work and to prevent loss of pay from the employer’s failure to provide expected work during regular hours.

“Clopening” or “right to rest” pay under state or local scheduling laws would, the Department explained, be analyzed under § 778.222 (“other payments similar to ‘call-back’ pay”) and would therefore generally be excludable from the regular rate as long as the payments are not regular. The Department would also analyze “predictability pay” penalties under § 778.222, as they are analogous to payments for failure to give an employee sufficient notice to report for work outside of his or her regular work schedule. As with reporting and call-back pay, compensation “over and above the employee’s earnings for the hours actually worked at his applicable rate (straight-time or overtime, as the case may be), is considered as a payment that is not made for hours worked,” and is therefore excludable from the regular rate.<sup>174</sup>

Finally, the Department explained that “on-call pay” scheduling penalties would be analyzed under § 778.223, which is entitled “[p]ay for non-productive hours distinguished.”<sup>175</sup> Under this regulation, the Department may require payment for “on-call” time to be included in the regular rate when such payments are “compensation for performing a duty involved in the employee’s job.”<sup>176</sup>

Several commenters agreed with the Department’s explanation of the proper treatment of state and local scheduling laws under §§ 778.220, 778.222, and 778.223. *See, e.g.,* Bloomin’ Brands; SHRM; NADA; CWC; Seyfarth. CWC agreed with the Department’s discussion analyzing common state and local

scheduling laws under §§ 778.220, 778.221, and 778.222, but suggested that they be discussed in the regulatory text instead of only in the preamble, or that the Department issue subregulatory guidance, such as a Fact Sheet, on this topic.

The Department has accepted the suggestion to add language about certain types of state and local scheduling laws to the regulatory text in §§ 778.220, 778.222, and 778.223. Specifically, the Department has added paragraph (c) to § 778.220 explaining that an employer may exclude payments mandated by state or local scheduling laws for occasions when the employee reports to work but is not provided with the expected amount of work if such payments are not for hours worked and are paid on an infrequent or sporadic basis. As in current paragraph (a), new paragraph (c) makes clear that such payments cannot be credited toward statutory overtime compensation due. The Department is also updating paragraph (b) of § 778.220 in a non-substantive way by raising the wage of the employee in the example from \$5 an hour—which is below the current minimum wage—to \$12 an hour.

Specifically, the Department has further added a sentence to § 778.222 generally defining the types of excludable payments that may be considered “similar to ‘call-back’ pay,” and noted that such similar payments may include those made pursuant to state and local scheduling laws. The Department also added to § 778.222 examples of “clopening” or “right to rest” pay and “predictability pay” mandated by state or local law as payments similar to call-back pay. Finally, the Department is revising § 778.223 to explain that the principle that “on call” pay is “compensation for performing a duty involved in the employee’s job and is not a type of excludable pay under section 7(e)(2),” applies with respect to “on call” pay mandated by state or local law.

#### *B. Discretionary Bonuses Under Section 7(e)(3)*

Section 7(e)(3)(a) of the FLSA excludes from the regular rate “sums paid in recognition of services performed” if “both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing employees to expect such payments regularly.”<sup>177</sup> Section 778.211 of the

<sup>168</sup> A number of state and local jurisdictions have introduced laws regulating scheduling practices in recent legislative sessions. *See, e.g.,* H.B. 2467, 53rd Reg. Sess. (Ariz. 2018); S.B. 321, 2018 Reg. Sess. (Conn. 2018); H.B. 5046, 100th Gen. Assemb. (Ill. 2018); S.B. 1000, 190th Leg. (Mass. 2017–18); H.B. 1614, S.B. 1116, 2017 Reg. Sess. (Md. 2017); S109, 218th Leg. (N.J. 2018); H.B. 741, 2015 Sess. (N.C. 2015); H.B. 7515, 7634, Jan. Sess. A.D. 2016 (R.I. 2016); Chi., Ill., Mun. Ordinance O2017–4947 (introduced June 28, 2017); Employee Scheduling (Call-in Pay), N.Y. St. Reg. LAB. 47–17–00011–P (proposed Nov. 11, 2017); S.B. 828, 79th Leg. Assemb., 2017 Reg. Sess. (Or. 2017); H.B. 1436 (Penn. 2019); L.A., Ca., Fair Work Week LA (introduced Mar. 1, 2019); Bos., Mass., Docket No. 0137 (2019).

<sup>169</sup> *See, e.g.,* Seattle, Wash., Mun. Code ch. 14.22.050 (2017).

<sup>170</sup> *See, e.g.,* N.Y.C., N.Y., Admin. Code 20–1231 (2017); Seattle, Wash., Mun. Code 14.22.035 (2017); Emeryville, Cal. Mun. Code 5–39.06 (2017); Chi., Ill., Fair Workweek Ordinance (July 24, 2019) (effective July 1, 2020); Phila., Pa., Code ch. 9–4600 (2018) (effective Jan. 1, 2020).

<sup>171</sup> *See, e.g.,* S.F., Cal., Police Code art. 33G (2015); Emeryville, Cal., Mun. Code 5–39.01 (2017); N.Y.C., N.Y., Admin. Code § 20–1222 (2017); Seattle, Wash., Mun. Code ch. 14.22.050 (2017); Chi., Ill., Fair Workweek Ordinance (July 24, 2019) (effective July 1, 2020); Phila., Pa., Code ch. 9–4600 (2018) (effective Jan. 1, 2020).

<sup>172</sup> *See, e.g.,* S.F., Cal., Police Code art. 3300G.4(d) (2015); Seattle, Wash., Mun. Code ch. 14.22.050 (2017).

<sup>173</sup> *See, e.g.,* Seattle, Wash., Mun. Code ch.

14.22.050 (2017).

<sup>174</sup> 29 CFR 778.222.

<sup>175</sup> *Id.* § 778.223.

<sup>176</sup> *Id.*

<sup>177</sup> 29 U.S.C. 207(e)(3).

regulations implements this exclusion and provides additional details concerning the types of bonuses that qualify for this exclusion. In the NPRM, the Department proposed to elaborate on the types of bonuses that are and that are not discretionary in § 778.211 to add clarity for employers and employees.

The Department proposed modifying language in § 778.211(c) and adding a new paragraph (d) to clarify that, under longstanding principles, neither the label assigned to a bonus nor the reason it was paid conclusively determine whether it is discretionary under section 7(e)(3).<sup>178</sup> The Department explained in the NPRM that, while attendance, production, work quality, and longevity bonuses, as those terms are commonly used, are usually paid pursuant to a prior contract, agreement, or promise causing the employee to expect such payments regularly, and therefore are non-discretionary bonuses that must be included in the regular rate, there may be instances when a bonus that is labelled as one of these types of bonuses is not in fact promised in advance and instead the employer retains discretion as to the fact and amount of the bonus until at or near the end of the period to which the bonus corresponds. The proposed rule modified language in § 778.211(c) and added a new paragraph (d) to § 778.211 to clarify that the label assigned to a bonus is not determinative. Instead, the Department explained, the terms of the statute and the facts specific to the bonus at issue determine whether a bonus is an excludable discretionary bonus. Under section 7(e)(3), a bonus is discretionary and therefore excludable, regardless of what it is labelled or called, if both the fact that the bonus is to be paid and the amount are determined at the sole discretion of the employer at or near the end of the period to which the bonus corresponds and the bonus is not paid pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly.

Additionally, the Department proposed to include in new § 778.211(d)

examples of bonuses that may be discretionary to supplement the examples of bonuses that commonly are non-discretionary discussed in current § 778.211(c). The NPRM explained that such bonuses may include, for example, employee-of-the-month bonuses, bonuses to employees who made unique or extraordinary efforts which are not awarded according to pre-established criteria, severance bonuses, bonuses for overcoming stressful or difficult challenges, and other similar bonuses for which the fact and amount of payment is in the sole discretion of the employer until at or near the end of the periods to which the bonuses correspond and that are not paid “pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly.”<sup>179</sup> The Department explained that it recognized that employers offer many differing types of bonuses to their employees, and that compensation practices will continue to evolve going forward. Finally, the Department invited comments from the public regarding other common types of bonuses that may be discretionary and that should be addressed in § 778.211.

The majority of the commenters supported the proposal’s clarification that labels are not determinative. *See, e.g.,* SIGMA; IBC; NADA; Cavanagh Law Firm; HR Policy. IBC commented that the proposal’s “focus on the circumstances of the actual payment versus what the payment is called better reflects the reality of business operations as well as the purpose and spirit of the FLSA.” The PPWO and CWC noted that this change is consistent with the Department’s longstanding position. HR Policy approved of this proposal because “the proper analysis” is the statutory requirements, not the label applied to the bonus. Other commenters addressed what they perceived as an inconsistency between stating that labels are not determinative and providing examples of bonuses that are excludable discretionary bonuses. PPWO commented that the proposal to include additional examples of discretionary bonuses was inconsistent with the proposal to make clear that labels are not determinative. CWC similarly

commented that “the addition of examples that ‘may be discretionary’ is not particularly helpful as it may give a false impression that the types of bonuses listed are usually excludable.” CWC added that more guidance is needed which describes facts that make a bonus more or less likely to be discretionary. By contrast, several commenters requested that the Department include additional examples of excludable discretionary bonuses, such as referral bonuses, and sign-on bonuses. *See* Cavanagh Law Firm; Chamber; HR Policy; AHLA; Seyfarth, SHRM; Associated Builders and Contractors; PPWO; ERIC; World Floor Covering Association.

After reviewing the comments, the Department adopts the changes to paragraph (c) of § 778.211 and the proposed addition of paragraph (d), with the addition of referral bonuses for employees not primarily engaged in recruiting activities as an example of a bonus that may be discretionary, as suggested by the commenters.

In reviewing the comments, the Department agrees that there is a need for more guidance regarding the facts that may make a bonus discretionary or nondiscretionary. The statute requires *all* of the following facts to be present for a bonus to be discretionary: (1) The employer has the sole discretion, until at or near the end of the period that corresponds to the bonus, to determine whether to pay the bonus; (2) the employer has the sole discretion, until at or near the end of the period that corresponds to the bonus, to determine the amount of the bonus; and (3) the payment is not made pursuant to any prior contract, agreement, or promise causing employees to expect such payments. In response to comments regarding referral bonuses, sign-on bonuses, and other examples, the Department has addressed each of these below.

Five commenters asked the Department to include employee referral bonuses in the list of bonuses that may be discretionary, finding that such examples “[provide] some clarity to employers” and “[encourage] employers to offer these incentives to their workforce.” *See* AHLA; HR Policy; Associated Builders and Contractors; Cavanagh Law Firm; Chamber. Cavanagh Law Firm noted that payment of a referral bonus is “not related to the hours worked by the employee, their productivity, etc.” Such payments are excludable from the regular rate where recruiting activities are not part of the receiving employees’ job duties and other conditions are met. Specifically, the Department does not

<sup>178</sup> *See* 29 U.S.C. 207(e)(3); *Minizza*, 842 F.2d at 1462 n.9 (observing that “what the payments are termed is not important”); *Walling v. Harnischfeger Corp.*, 325 U.S. 427, 430 (1945) (“To discover [the regular] rate . . . we look not to contract nomenclature but to the actual payments.”); *Donohue v. Francis Servs., Inc.*, No. Civ.A.04-170, 2005 WL 1155860, at \*1 (E.D. La. May 11, 2005) (denying an employer’s summary judgment motion over “amounts described as ‘discretionary bonuses’”). The NPRM noted that this principle comports with longstanding interpretation of other FLSA provisions; *see, e.g.,* 29 CFR 541.2 (cautioning that “[a] job title alone is insufficient to establish the exempt status of an employee” under section 13(a)(1) of the Act).

<sup>179</sup> *See* 29 U.S.C. 207(e)(3); *see also Alanzo v. Maximus, Inc.*, 832 F. Supp. 2d 1122, 1133 (C.D. Cal. 2011) (holding that bonuses to employees who “made unique or extraordinary efforts and were not awarded according to pre-established criteria or pre-established rates” were excludable) (internal quotation marks omitted); WHD Opinion Letter FLSA2008-12, 2008 WL 5483051 (Dec. 1, 2008) (bonuses paid without prior promise or agreement to 911 dispatchers in recognition of high stress level of their job are excludable discretionary bonuses).

consider sums “paid to an employee who recruits another to join his employer’s work force” to be “part of an employee’s remuneration for employment which must be included in [the] regular rate” if (1) participation in the activity is strictly voluntary, (2) the employee’s efforts in connection with the activity do not involve significant amounts of time, and (3) the activity is limited to after-hours solicitation among friends, relatives, neighbors, and acquaintances as part of the employee’s social affairs.<sup>180</sup> Because it is consistent with the Department’s long-standing position, and because it would provide clarity to employers and encourage employers to offer bonuses of this type to employees, the Department includes “referral bonuses for employees not primarily engaged in recruiting activities” as a type of bonus that may be discretionary, so long as it satisfies the statutory test, in its final rule.

Several commenters requested that the Department clarify that sign-on bonuses are excludable as discretionary bonuses. See AHLA; Associated Builders and Contractors; Seyfarth; SHRM; PPWO. ERIC and NADA requested the Department recognize that sign-on bonuses are excludable under 7(e)(2) of the FLSA as an “other similar payment,” which the Department addresses separately in this Preamble. As emphasized by the Department’s addition of § 778.211(d), labels are not dispositive in determining whether a bonus is discretionary. Therefore, as with all bonuses, the discretionary nature of a sign-on bonus will be decided by assessing whether it meets the statutory test.

Several commenters requested that the Department address whether other common types of bonuses are excludable as a discretionary bonus. These include year-end bonuses based on company performance where the company retains discretion on whether to pay the bonus until at or near the end of the performance period, bonuses to induce ratification of union agreements, preannounced bonuses, incentive bonuses, safety bonuses, spot bonuses, and quarterly bonuses. See HR Policy; World Floor Covering Association; AHLA; Associated Builders and Contractors; Cavanagh Law Firm. In each of these cases, the Department believes that its finalized regulation provides sufficient clarity by emphasizing that labels are not determinative. Instead, the facts specific

to a bonus must be considered against the statutory terms expounded in the final regulation.

Lastly, the Department does not address in this final rule comments concerning bonuses that are outside the scope of this rulemaking, such as a request to modify the regulation on percentage bonuses at § 778.110, or industry-specific bonuses, such as bonuses given to front-desk associates for upselling hotel rooms. See Chamber; AHLA.

#### C. Excludable Benefits Under Section 7(e)(4)

Section 7(e)(4) of the FLSA excludes from the regular rate “contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees.”<sup>181</sup> Section 778.215(a)(2) explains that, among other things, “[t]he primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, and the like.” The NPRM proposed to add examples of benefits on account of “accident, unemployment, and legal services” to § 778.215(a)(2).

The Department noted in the NPRM that the addition of “accident” is derived directly from section 7(e)(4), which expressly uses the term (even though the current regulations do not). The Department noted that the addition of benefits for unemployment and legal services reflected the Department’s conclusion that, although employers may not have commonly offered these benefits when Congress enacted the FLSA in 1938,<sup>182</sup> they are “similar benefits” to those expressly listed in section 7(e)(4). The Department explained that, first, like other specifically enumerated types of benefit plans under section 7(e)(4), these benefit plans typically provide monetary benefits that are “specified or definitely determinable on an actuarial basis.”<sup>183</sup> Second, benefit plans for unemployment or legal services protect

employees from events that are rare but statistically predictable and that could otherwise cause significant financial hardship, just as is the case with life insurance, accident insurance, and the catastrophic-protection provisions of life insurance. Third, benefit plans for unemployment or legal services offer financial help when an employee’s earnings are (unemployment) or may be (legal services) materially affected, as is the case with the other benefit plans. Employees who retire, reach an older age, or suffer an accident or health issue may be unable to work, or have their ability to work affected.

The Department noted that other characteristics of the various types of plans excludable under section 7(e)(4) may differ, but they still remain “similar” for purposes of the statute. Under the plain text of the statute, excludable plans need not be related to physical health. Retirement benefits are excludable, for instance, even though an employee may choose to retire for reasons wholly unrelated to health. And excludable plans also need not be limited to benefits for rare or even uncommon events. Health insurance, for instance, often pays for everyday medical expenses, and retirement is an event typically planned years in advance. Moreover, the benefits listed in the statute may be subject to various forms of payment. Retirement benefits are often a recurring payment, while accident and health benefits can fluctuate, and a life insurance death benefit can be paid in a lump sum. Therefore, insofar as the proposed additional examples differ among themselves or among other expressly listed benefits by not all being related to physical health, or not all being for rare events, or not all being paid out the same way, those differences do not make the proposed examples not “similar” under the statute. Indeed, such differences are encompassed in the statutory examples themselves.

The Department further explained that these proposed examples, like the examples already provided in regulation and statute, would have to satisfy the other various requirements outlined in § 778.215.<sup>184</sup> The Department noted that these additions would simply help clarify that such plans are not categorically barred from qualifying for exclusion under section 7(e)(4). The Department solicited comments and data on the prevalence and nature of these types of programs and on whether

<sup>180</sup> See WHD Opinion Letter FLSA (Jan. 27, 1969) (concluding that an employee referral bonus is excludable from the regular rate of pay under the FLSA).

<sup>181</sup> 29 U.S.C. 207(e)(4). The Department acknowledges that contributions to a plan made by an *employee* through elective salary reduction are generally treated as *employer* contributions under the Internal Revenue Code. See, e.g., 26 U.S.C. 402(e)(3). But employees’ elective contributions are not “contributions irrevocably made by an employer” under section 7(e)(4) of the FLSA, and so are not excludable from the regular rate as employer contributions to a bona fide plan.

<sup>182</sup> See Bureau of Labor Statistics, *An Overview of Employee Benefits*, supra note 2, at 20.

<sup>183</sup> 29 CFR 778.215(a)(3)(i).

<sup>184</sup> Section 778.215(a) contains five conditions all of which must be met in order for employer contributions to be excluded from the regular rate under 7(e)(4). 29 CFR 778.215(a)(1)–(5).

there are other similar benefit plans that should be expressly included as examples.

The Department received several comments supporting the proposed changes to § 778.215(a)(2) and no comments opposed to the changes. *See, e.g.*, SHRM; Associated General Contractors of America (AGC); PPWO; Seyfarth; NADA. Some of these commenters requested that the Department consider including additional examples of benefits. NADA, for instance, stated that it “supports an expansion of the non-exclusive list but urges the DOL to indicate that cash payments in lieu of plan participation also may be excluded.” The American Benefits Council suggested the Department add that employer-provided “programs for repaying educational debt” may be excludable under section 7(e)(4). *See also* ERIC. Upon review, the Department does not believe it would be appropriate to further expand the list of example benefits in § 778.215(a)(2) to include repaying an employee’s accumulated educational debt or cash payments in lieu of plan participation.

An employee benefit plan satisfies the “primary purpose” requirement under § 778.215(a)(2) if it provides a “similar benefit” to the expressly listed benefits in FLSA section 7(e)(4)—*i.e.*, “old-age, retirement, life, accident, or health insurance.” The expressly listed benefits are similar to one another in that they all provide assistance in preparation for a future expense. As explained in the NPRM, such “similar benefits” include providing accident, unemployment, and legal services<sup>185</sup> that protect employees from rare but statistically predictable events that could otherwise cause significant financial hardship or expense.<sup>186</sup> “Similar benefits” also include assistance in preparation for common and predictable events—*e.g.*, retirement. Or even inevitable events—*e.g.*, old age. But a common thread remains: the benefit must help the employee prepare for an event that may result in significant *future* financial hardship or expense. By contrast, accumulated educational debt represents an expense that an employee would have incurred in the past. As such, repayment of past debt is not similar to the future-oriented benefits expressly listed in section 7(e)(4). Nor are cash payments in lieu of plan participation, as cash is not limited

to paying for future expenses.<sup>187</sup> To provide further clarification on this matter, the Department is revising § 778.215(a)(2) to codify the future-expense requirement on “similar benefits.” Specifically, the Department is replacing “or the like” with “or other events that could cause significant future financial hardship or expense.”

The NPRM also proposed to revise § 778.215(b), which currently provides that where the benefit plan or trust has been approved by the Bureau of Internal Revenue as satisfying the requirements of section 401(a) of the Internal Revenue Code in the absence of evidence to the contrary, the plan or trust will be considered to meet the conditions specified in § 778.215(a)(1), (4), and (5). In particular, the NPRM proposed to modernize this provision by replacing “Bureau of Internal Revenue”—a term that has not been used since 1953—with “Internal Revenue Service.”<sup>188</sup>

Commenters suggested several additional ways for the Department to modernize § 778.215(b). Some commenters informed the Department that the recent elimination of significant aspects of the IRS’s determination letter program results in fewer “approvals” from the IRS. American Benefits Council; Chamber. The American Benefits Council suggested that the Department replace “approved by the Internal Revenue Service as satisfying the requirements of section 401(a)” with “designed to meet the requirements of section 401(a).”

Commenters also requested that the Department expand the coverage of § 778.215(b) to presume that more benefit plans meet the requirements of § 778.215(a). The American Benefits Council, for instance, suggested that the Department deem section 401(a) plans to meet all five conditions required under § 778.215(a), rather than just the conditions in paragraphs (a)(1), (4), and (5). The American Benefits Council further requested that the Department “expand . . . § 778.215(b) to other common types of retirement plans, namely [Internal Revenue] Code section 403(a), 403(b), 408(k), 408(p), and governmental 457(b) plans.” Other commenters requested that the Department “amend 29 CFR 778.215(b) to provide an exemption for all . . . employee welfare benefit and employee

pension benefit plans governed by ERISA[.]” Chamber, *see also* ERIC. Some commenters who supported the proposed changes also suggested the Department clarify that certain types of ERISA employee benefit plans are excludable under section 7(e)(4) of the Act. For example, WageWorks requested that the Department clarify that “amounts that an employer contributes to an employee’s HRA are to be excluded . . . just like the benefits provided under any other employer provided health plan.” And the Associated Builders and Contractors and NAM requested the Department clarify that employer contributions to multiple employer plans, *e.g.*, Association Retirement Plans or Association Health Plans (AHPs), are excludable.

After careful consideration, the Department has concluded that it would be appropriate to expand the scope of § 778.215(b) in three ways. First, the Department agrees with commenters that § 778.215(b) should be revised in light of the IRS’s recent decision to change its determination letter procedures. The IRS maintains a program under which plan sponsors can obtain a determination letter that approves a plan as complying with requirements under section 401(a) or 403(a) of the Internal Revenue Code. In addition, the IRS issues approval letters for pre-approved plans, which can be relied upon by plan sponsors, that a plan meets the requirements of section 401(a) or 403(b) of the Internal Revenue Code. But, as of 2017, sponsors of individually designed plans generally may request a determination letter only for initial qualification or upon plan termination.<sup>189</sup> This change may prevent some sponsors that amend an existing plan from receiving a determination letter approving the amended plan. Thus, under the current § 778.215(b), some sponsors that amend a qualified plan are unable to obtain a determination letter that the plan, as amended, satisfies the requirements of section 401(a) of the Internal Revenue Code. In order to reflect these changes to the IRS’s determination letter program, the Department is revising the provision to state that, absent evidence to the contrary, a plan “maintained pursuant to a written document that the plan sponsor reasonably believes satisfies the requirements” of section 401(a) of the Internal Revenue Code will

<sup>185</sup> The Department has taken the position that legal services plans qualify for exclusion under FLSA section 7(e)(4) since at least 1978. *See* WHD Opinion Letter FLSA (Feb. 7, 1978)

<sup>186</sup> 84 FR 11899.

<sup>187</sup> Moreover, § 778.215(a)(5) specifically restricts payments of “cash instead of the benefits under the plan” to be “an incidental part . . . and not inconsistent with the general purpose of the plan to provide benefits described in section 7(e)(4) of the Act.” By necessary implication, cash in lieu of a benefit under a plan must be different from that benefit.

<sup>188</sup> 84 FR 11909.

<sup>189</sup> *See* Revenue Procedure 2016–37, available at [https://www.irs.gov/irb/2016-29\\_IRB\\_for\\_approval\\_letters\\_procedures\\_for\\_qualified\\_plans](https://www.irs.gov/irb/2016-29_IRB_for_approval_letters_procedures_for_qualified_plans). *See also* Revenue Procedure 2013–22, available at [https://www.irs.gov/irb/2013-18\\_IRB\\_for\\_approval\\_letters\\_procedures\\_for\\_section\\_403\(b\)\\_plans](https://www.irs.gov/irb/2013-18_IRB_for_approval_letters_procedures_for_section_403(b)_plans).

be considered to meet certain requirements of § 778.215(a).

Second, the Department agrees with commenters that plans meeting the requirements of section 401(a) of the Internal Revenue Code should be deemed to comply with § 778.215(a)(2). A section 401(a) plan is an employer-sponsored tax-advantaged plan in which the employer, the employee, or both may contribute funds for use in retirement. Treasury regulations state that a section 401(a) pension plan must provide “for the payment of definitely determinable benefits to [an employer’s] employees over a period of years, usually for life, after retirement.”<sup>190</sup> In addition, a retirement plan that is a profit-sharing plan must provide “for distributing the funds accumulated under the plan after a fixed number of years, the attainment of a stated age, or upon the prior occurrence of some event such as layoff, illness, disability, retirement, death, or severance of employment.”<sup>191</sup> The Internal Revenue Code further generally subjects early distributions to a 10 percent additional tax unless the plan participant has reached age 59½, dies, becomes disabled, or meets certain other exceptions.<sup>192</sup> The Treasury regulations’ definition of pension plan, the conditions on distributions from profit-sharing plans, and the additional 10 percent tax on early distributions ensure plan assets are used for retirement or another permitted benefit under § 778.215(a)(2). The Department is therefore revising § 778.215(b) to state that a section 401(a) plan may be presumed to satisfy § 778.215(a)(2), in addition to § 778.215(a)(1), (4), and (5). The Department notes that section 401(k) plans, which came into existence in 1978 and have become popular among private employers, are a type of section 401(a) plan that uses a qualified cash or deferred arrangement to provide retirement funds.<sup>193</sup> Accordingly, a section 401(k) plan is a section 401(a) plan and therefore enjoys the same presumptions as a section 401(a) plan.

However, the Department does not believe section 401(a) profit-sharing plans should be presumed to satisfy the requirement in § 778.215(a)(3) that either benefits must be definitely

determinable on an actuarial basis or there must be a definite formula to determine both the employer’s contribution amount and the benefits for each employee participating in the plan. Although Treasury regulations provide that benefits under a pension plan must be definitely determinable,<sup>194</sup> Treasury regulations require that section 401(a) profit-sharing and stock bonus plans have “a definite predetermined formula to allocating the contributions made to the plan *among the participants*.”<sup>195</sup> For section 401(a) profit-sharing and stock bonus plans, there is no requirement that there be a definite formula to determining the amount to be contributed by the employer, as required by § 778.215(a)(3).<sup>196</sup> Thus, a section 401(a) profit-sharing or stock bonus plan may grant an employer complete discretion regarding the amount of contributions. The Department’s opinion letter dated August 17, 1970, explained that such a plan would not satisfy § 778.215(a)(3).<sup>197</sup> But contributions to such a plan may still be excludable under FLSA section 7(e)(3) as “payments . . . to a bona fide profit-sharing plan or trust.”<sup>198</sup> As the Southern District of California recently explained, a plan need only meet the requirements of a profit-sharing plan under section 7(e)(3) or a bona fide employee benefit plan under section 7(e)(4), but not both, in order for contributions thereto to be excludable.<sup>199</sup>

Third, the Department is extending the presumption of satisfaction under § 778.215(b) to plans that meet the requirements of section 403(a), 403(b), 408(k) or 408(p) of the Internal Revenue Code and to governmental plans that

satisfy the requirements of section 457(b) of the Internal Revenue Code (governmental section 457(b) plans). In contrast to section 401(a) plans, section 403(a) plans are employer-sponsored retirement plans that are funded through annuity contracts rather than trusts,<sup>200</sup> and section 403(b) plans are funded through annuity contracts or custodial accounts.<sup>201</sup> Section 408(k) plans—also called Simplified Employee Pension (SEP) plans—are employer-sponsored retirement plans that allow employers to make tax-favored contributions to an employee’s Individual Retirement Account or Annuity (IRA).<sup>202</sup> Section 408(p) plans—also called SIMPLE (Savings Incentive Match Plan for Employees) IRA plans—are plans established and maintained by a small business on behalf of its employees.<sup>203</sup> The employer generally is required to contribute to each eligible employee’s SIMPLE IRA every year, while employees may also contribute. Finally, governmental section 457(b) plans are tax-advantaged retirement saving accounts available to employees of state and local governments.<sup>204</sup>

Sections 403(a), 403(b), 408(k), and 408(p) plans and governmental section 457(b) plans are all established and maintained by an employer and therefore satisfy the “adopted by the employer” requirement of § 778.215(a)(1). All five types of plans are designed to provide retirement and advanced age benefits by offering tax-favored treatment of plan contributions. Thus, these plans satisfy § 778.215(a)(2). A section 403(a) plan’s assets must be placed in an annuity contract provided through a third-party insurer,<sup>205</sup> and a section 403(b) plan’s assets must be placed in such an annuity contract or in a custodial account invested in regulated investment company stock (mutual fund).<sup>206</sup> Employer

<sup>194</sup> 26 CFR 1.401–1(b)(1)(i).

<sup>195</sup> 26 CFR 1.401–1(b)(1)(ii), (iii) (emphasis added).

<sup>196</sup> 29 CFR 778.215(a)(3) permits plans to, in the alternative, have benefits that are specified or definitely determinable on an actuarial basis or to have a formula for determining the amount to be contributed by the employer and a provision for determining the individual benefits by a method which is consistent with the purposes of the plan or trust under section 7(e)(4) of the Act.

<sup>197</sup> WHD Opinion Letter FLSA, 1970 WL 26444, at \*1 (Aug. 17, 1970) (“The plan fails to meet the formula requirements of § 778.215(a)(3) of Part 778, in that it does not contain a definite formula for determining the amount to be contributed by the employer.”). However, a profit sharing plan that permits discretionary contributions but uses a definite formula to determine the amount of such contributions *does* satisfy § 778.215(a)(3). See *Russell v. Gov’t Employees Ins. Co.*, No. 17–CV–672 JLS (WVG), 2018 WL 1210763, at \*8 (S.D. Cal. Mar. 8, 2018).

<sup>198</sup> The requirements of a bona fide profit sharing plan or trust are set forth in part 549 of the Department’s regulations. See 29 CFR part 549.

<sup>199</sup> *Russell*, 2018 WL 1210763, at \*6.

<sup>200</sup> See 26 U.S.C. 403(a); 26 CFR 1.403(a)–1.

<sup>201</sup> See 26 U.S.C. 403(b); 26 CFR 1.403(b)–8.

<sup>202</sup> 26 U.S.C. 408(k); see also IRS, Establishing a SEP, <https://www.irs.gov/retirement-plans/establishing-a-sep>.

<sup>203</sup> 26 U.S.C. 408(p); see also IRS, Establishing a SIMPLE IRA Plan, <https://www.irs.gov/retirement-plans/establishing-a-simple-ira-plan>.

<sup>204</sup> See 26 U.S.C. 457(b); see also IRS, IRC 457(b) Deferred Compensation Plans, <https://www.irs.gov/retirement-plans/irc-457b-deferred-compensation-plans>.

<sup>205</sup> 26 U.S.C. 403(a)(1)

<sup>206</sup> U.S. Department of Labor, Employee Benefits Security Administration, Field Assistance Bulletin No. 2007–02, ERISA Coverage Of IRC Section 403(b) Tax-Sheltered Annuity Programs (July 24, 2007) (“Under a 403(b) plan, employers may purchase for their eligible employees annuity contracts or establish custodial accounts invested only in mutual funds for the purpose of providing retirement income. Annuity contracts must be

<sup>190</sup> 26 CFR 1.401–1(b)(1)(i).

<sup>191</sup> 26 CFR 1.401–1(b)(1)(ii). Section 1.401–1(b)(1)(iii) provides that a stock bonus plan is a plan established and maintained by an employer to provide benefits similar to those of a profit-sharing plan with certain exceptions.

<sup>192</sup> See 26 U.S.C. 72(t).

<sup>193</sup> See 26 U.S.C. 401(k)(1) (a “plan shall not be considered as not satisfying the requirements of subsection (a) merely because the plan includes a qualified cash or deferred arrangement.”).

contributions made under SEP and SIMPLE IRA plans must be paid into each eligible employee's IRA, which is maintained by a financial institution that serves as the trustee of the employee's retirement assets.<sup>207</sup> And "[g]overnmental 457(b) plans must be funded, with assets held in trust for the benefit of employees."<sup>208</sup> Thus, all five types of plans also satisfy the § 778.215(a)(4) requirement that "[t]he employer's contributions must be paid irrevocably to a trustee or third person pursuant to an insurance agreement, trust or other funded arrangement."

Section 778.215(a)(5) requires that employer contributions to a plan be used in furtherance of a benefit under FLSA section 7(e)(4), except that incidental cash distributions for other purposes are permitted. Section 403(a) plans are subject to a 10 percent additional tax on early distributions and the minimum distribution requirements under section 401(a)(9) of the Internal Revenue Code. A section 403(b) plan generally permits an employee to withdraw funds only if he or she (1) reaches age 59½, (2) separates from employment, (3) becomes disabled, (4) dies, (5) encounters a financial hardship, or (6) is called up to active duty military service.<sup>209</sup> The first four conditions correspond to benefits listed in § 778.215(a)(2)—*i.e.*, advanced age, retirement, disability, and death—and therefore distributions under these conditions are consistent with § 778.215(a)(5). The remaining conditions permitting distribution—financial hardship and active duty service—are narrow. A hardship distribution is permitted only if the participant faces an immediate and heavy financial need that cannot be met with available financial resources, and the distribution amount must be limited to that need (increased by the amount of tax reasonably anticipated to result from the distribution).<sup>210</sup> And an active duty

purchased from a state licensed insurance company, and the custodial accounts must be held by a custodian bank or IRS approved non-bank trustee/custodian."').

<sup>207</sup> IRS, Establishing a SEP, <https://www.irs.gov/retirement-plans/establishing-a-sep>; IRS, Establishing a SIMPLE IRA Plan, <https://www.irs.gov/retirement-plans/establishing-a-simple-ira-plan>.

<sup>208</sup> IRS, Government Retirement Plans Toolkit, <https://www.irs.gov/government-entities/federal-state-local-governments/government-retirement-plans-toolkit>.

<sup>209</sup> IRS Publication 571, Tax-Sheltered Annuity Plans (403(b) Plans) (January 2019), <https://www.irs.gov/publications/p571>. The plan may, but is not required to, permit participants to receive a cash distribution in response to financial hardship.

<sup>210</sup> See 26 CFR 1.401(k)-1(d)(3). Hardship distributions are generally subject to a 10 percent tax penalty. See 26 U.S.C. 72(t).

distribution is available only where a reservist or national guardsman is called up for at least 180 days of active duty military service.<sup>211</sup> The Department believes that financial hardship and active duty distributions are consistent with the incidental-payment requirements of § 778.215(a)(5). Indeed, such distributions are also permitted under certain section 401(a) plans, which currently are presumed to satisfy § 778.215(a)(5). Accordingly, section 403(a) and section 403(b) plans may be presumed to satisfy § 778.215(a)(5).

Section 457(d)(1)(A) of the Internal Revenue Code permits early distribution from a 457(b) plan only if the participant "attains age 70½," "has a severance from employment," or "is faced with an unforeseeable emergency." Thus, the only type of 457(b) distribution that does not serve as an FLSA section 7(e)(4) benefit is an unforeseeable emergency distribution. Treasury regulations define unforeseeable emergency as a severe financial hardship resulting from illness, accident, loss of home, or other similar extraordinary and unforeseeable circumstances.<sup>212</sup> An unforeseeable emergency distribution is not permitted unless the participant's other financial assets are insufficient, and the amount of such distribution must be limited to the needs of the emergency (increased by the amount of tax reasonably anticipated to result from the distribution).<sup>213</sup> The Department believes these restrictions ensure unforeseeable emergency distributions are consistent with the incidental-payment requirements of § 778.215(a)(5) and therefore governmental section 457(b) plans may be presumed to satisfy § 778.215(a)(5).

The funding vehicles for SEP and SIMPLE IRA plans are IRAs, which do not prohibit employees from receiving distributions before reaching retirement age. But to discourage the use of plan funds for purposes other than retirement, the Internal Revenue Code generally imposes an additional 10 percent tax on SEP and SIMPLE IRA distributions before the employee reaches age 59½ unless the employee dies, becomes disabled, or meets certain other specified exceptions.<sup>214</sup> The

<sup>211</sup> IRS Publication 571, Tax-Sheltered Annuity Plans (403(b) Plans) (January 2019), <https://www.irs.gov/publications/p571>.

<sup>212</sup> 26 CFR 1.457-6(c)(2); see also Rev. Rul. 2010-27, [https://www.irs.gov/irb/2010-45\\_IRB#RR-2010-27](https://www.irs.gov/irb/2010-45_IRB#RR-2010-27) (providing guidance on what constitutes an unforeseeable emergency distribution).

<sup>213</sup> *Id.*

<sup>214</sup> 26 U.S.C. 72(t). For example, the 10 percent additional tax does not apply to early distributions that are used to pay for certain medical expenses.

Department believes the additional 10 percent tax ensures that early distributions are incidental to retirement benefits, and so these types of plans should be presumed to satisfy the incidental-payment requirement under § 778.215(a)(5).<sup>215</sup>

Based on the above discussion, the Department believes that a retirement plan satisfying section 403(a), 403(b), 408(k), or 408(p) of the Internal Revenue Code, or a governmental section 457(b) plan, should be presumed to satisfy § 778.215(a)(1), (2), (4), and (5). Accordingly, the Department is revising § 778.215(b) to extend that presumption to any plan "maintained pursuant to a written document that the plan sponsor reasonably believes satisfies the requirements of section 401(a), 403(a), 403(b), 408(k), or 408(p) of the Internal Revenue Code, or is sponsored by a government employer that reasonably believes the plan satisfies the requirements of section 457(b) of the Internal Revenue Code." The Department believes this clarifying revision will make it easier for employers to determine whether employer contributions to an employee retirement plan are excludable from the regular rate under FLSA section 7(e)(4) and would serve "the policy of the Federal Government to expand access to workplace retirement plans for American workers."<sup>216</sup>

The Department is declining to create a new presumption for employee benefit plans governed by and in compliance with ERISA, as requested by some commenters. See ERIC; Chamber. ERISA requirements appear to overlap with some of the requirements of a bona fide

See 26 U.S.C. 72(t)(2)(B). Nor does the tax apply to early distribution from SEP and SIMPLE IRA plans that pay for certain expenses relating to qualified higher education, first-time home ownership, and being called to active duty military service. See 26 U.S.C. 72(t)(2)(E)-(G). For a list of the exceptions to the 10 percent additional tax under section 72(t) of the Code, see IRS, Retirement Topics—Exceptions to Tax on Early Distributions, <https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-tax-on-early-distributions>. Early distributions from a SIMPLE IRA plan "incur a 25% additional tax instead of 10% if made within the first 2 years of participation." *Id.*

<sup>215</sup> As the Department articulated in an opinion letter dated July 2, 2003, a plan that distributes over 20 percent of the employer's total contributions to the plan for purposes other than a FLSA section 7(e)(4) benefit does not satisfy § 778.215(a)(5) because such distributions would not be incidental. WHD Opinion Letter FLSA2003-4, 2003 WL 23374600, at \*2 (July 2, 2003). Thus, while the Department believes it is appropriate to presume a SEP and SIMPLE IRA plan satisfies § 778.215(a)(5), the early withdrawal of over 20 percent of total employer contributions may constitute "evidence to the contrary" that would rebut such a presumption.

<sup>216</sup> Exec. Order No. 13847, Strengthening Retirement Security in America, 83 FR 45321 (Aug. 31, 2018).

plan detailed in § 778.215(a)(1)–(5). But compliance with ERISA does not address all requirements for excludability under FLSA section 7(e)(4) and § 778.215(a). For example, ERISA does not require all covered employee benefit plans to have benefits that are determined on an actuarial basis or by a definite formula that sets the employer's contribution amount, as required under § 778.215(a)(3); an ERISA-covered profit-sharing plan may grant the employer complete discretion regarding the amount of contributions.<sup>217</sup> Such a plan would not meet the requirements of § 778.215(a)(3).<sup>218</sup>

Additionally, contributions to an employee benefit plan are excludable under FLSA section 7(e)(4) only if they are “irrevocably made by an employer to a trustee or third person” and § 778.215(a)(4) accordingly requires employer contributions to be “paid irrevocably to a trustee or third person pursuant to an insurance agreement, trust or other funded arrangement.” But ERISA does not uniformly require employers to fund all types of ERISA plans through a trustee or third party. While some ERISA plans are funded through a trust or an insurer, ERISA permits employers to establish self-funded plans that pay benefits out of the employer's general assets, which would not satisfy the requirement of FLSA section 7(e)(4) and § 778.215(a)(4).

For example, a Health Reimbursement Arrangement (HRA) is a group health plan that enables employers to reimburse employees' medical expenses in a tax-favored manner. An HRA may be funded through a trust, in which case it would satisfy the irrevocable-contribution requirement of FLSA section 7(e)(4) and § 778.215(a)(4). But an employer may also structure an HRA using a notional account through which reimbursements are paid out of the employer's general assets. In this type of self-funded HRA, there are no irrevocable contributions to a trust or third party, and therefore, reimbursements by such a plan would not be excludable under FLSA section 7(e)(4).<sup>219</sup> However, the Department believes that benefits from self-funded employee benefit plans—including self-funded HRAs—could be excludable

<sup>217</sup> See e.g., 26 U.S.C. 412(a) and (e)(2) (requiring minimum funding of certain plans but exempting profit sharing plans from this requirement).

<sup>218</sup> See e.g., WHD Opinion Letter FLSA, 1970 WL 26444, at \*1. A profit sharing plan that permits discretionary contributions but uses a definite formula to determine the amount of such contributions does satisfy 778.215(a)(3). See *Russell*, 2018 WL 1210763, at \*8.

<sup>219</sup> See *Gilbertson v. City of Sheboygan*, 165 F. Supp. 3d 742, 750 (E.D. Wis. Feb. 5, 2016).

under the “other similar payments” clause of section 7(e)(2) if the availability and amount of benefits do not depend on hours worked, services rendered, or any other criteria that depend on the quality or quantity of an employee's work.<sup>220</sup> Because compliance with ERISA is not a substitute for statutory and regulatory prerequisites for excludability from the regular rate under FLSA section 7(e)(4), the Department does not believe it would be appropriate to create a presumption that employer contributions to ERISA employee benefit plans are excludable. Employers should assess the plan's compliance with the elements set forth in § 778.215(a)(1)–(5) to determine excludability, rather than rely on the plan's compliance with ERISA.

The above principle applies equally with respect to a multiple employer plan.<sup>221</sup> One common type of a multiple employer plan is an Association Retirement Plan—which provides group retirement benefits. A multiple employer plan is treated the same for purposes of this regulation as if it were a single plan: If the plan satisfies the conditions set forth in § 778.215(a)(1)–(5), then employer contributions to the plan would be excludable under FLSA section 7(e)(4).<sup>222</sup>

<sup>220</sup> See *Minizza*, 842 F.2d 14562 (payments under section 7(e)(2) all “share the essential characteristic . . . of not being compensation for hours worked or services rendered”). The *Gilbertson* court held that HRA reimbursement payments were not excludable under section 7(e)(2)'s reimbursement clause because such reimbursements benefited the employee, not the employer. 165 F. Supp. 3d. at 750–51. But the court did not analyze the excludability of HRA reimbursements under the “other similar payments” clause of section 7(e)(2).

<sup>221</sup> For general information on ERISA-covered multiple employer plans, see generally, the Department's recently promulgated final rule that expands access to affordable quality retirement saving options by clarifying the circumstances under which an employer group or association or a professional employer organization may sponsor a multiple employer workplace retirement plan under title I of ERISA. Definition of “Employer” Under section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans, 84 FR 37508 (July 31, 2019).

<sup>222</sup> In a typical Association Retirement Plan, multiple employers participate in a single retirement plan—such as a section 401(k) plan—and each employer may choose among eligibility, contribution, vesting, and distribution options provided by the plan document. Under revised § 778.215(b), the section 401(k) plan in the above example may be presumed to satisfy § 778.215(a)(1), (2), (4) and (5). An employer's contributions to that Association Retirement Plan would be excludable so long as the contribution and benefits provisions in the plan document and the employer's participation agreement satisfy the requirements of § 778.215(a)(3). See *Laughlin v. Jim Fischer, Inc.*, 2019 WL 1440406, at \*7 (E.D. Wisc. March 31, 2019) (section 401(k) contributions excluded from regular rate where “there is no room for discretion in [employer]'s plan for the amount to be contributed.”).

Some commenters who supported the proposed changes also suggested the Department clarify that other specific benefit plans are excludable under section 7(e)(4) of the Act. For example, ERIC requested that the Department clarify that contributions to Health Saving Accounts (HSA) and Individual Retirement Accounts (IRA) are excludable, and the American Benefits Council asked the Department to clarify that discretionary contributions to retirement plans are excludable. Other commenters asked the same regarding cash payments to employees made in lieu of receiving health insurance provided through contributions to a cafeteria plan. See *IMLA*; *NADA*; *Seyfarth*; *NPELRA*. The Department discusses the excludability of each of these types of benefit plan contributions below.

A cafeteria plan is an employer-sponsored plan established under section 125 of the Internal Revenue Code. A cafeteria plan allows employees to choose between using employer contributions to pay for an employer-provided qualified benefit, including premiums for health coverage or contributions to an HSA, or to receive cash payments (or some other taxable benefits).<sup>223</sup> As an employer-sponsored plan that provides for “payment of benefits to employees on account of . . . medical expenses,” a cafeteria plan would generally meet the requirements of § 778.215(a)(1) and (2). And § 778.215(a)(3) and (4) likely are satisfied if employer contributions are determinable or based on a formula, and are irrevocably made to a trust or third party.<sup>224</sup> The key issue is whether a cafeteria plan satisfies § 778.215(a)(5)'s requirement that cash payments to employees must be incidental to the plan's benefits.

The Department's opinion letter dated July 2, 2003, explained that § 778.215(a)(5) recognizes that “[a] bona fide plan may allow incidental cash payments to employees.”<sup>225</sup> Incidental payments must be consistent with the plan's purpose of providing qualifying benefits. And cash payments in excess

<sup>223</sup> 26 U.S.C. 125(d)(1)(B) (“participants may choose among 2 or more benefits consisting of cash and qualified benefits”). If an employee chooses to use employer contributions for a qualified benefit, then the value of that benefit is excluded from income for tax purposes, notwithstanding the ability of the employee to receive taxable cash in lieu of the benefit.

<sup>224</sup> Self-insured cafeteria plans, for instance, health flexible saving arrangements, are not funded through a trust or a third party. Accordingly, employer contributions to such plans would not satisfy § 778.215(a)(4).

<sup>225</sup> WHD Opinion Letter FLSA2003–4, 2003 WL 23374600, at \*2.

of 20 percent of plan contributions are not incidental to the plan's purpose, unless such payments are used for benefits that are the same or similar as those listed in FLSA section 7(e)(4).<sup>226</sup> Notably, this 20 percent limit is not applied on an employee-by-employee basis, but plan-wide. As the 2003 opinion letter explained, a plan-wide limit "is more consistent with the regulatory language which allows 'all or a part of the amount' standing to an employee's credit to be paid in cash. . . ." <sup>227</sup> Thus, "a cafeteria plan may qualify as a bona fide benefits plan for purposes of section 7(e)(4) if: (1) No more than 20% of the employer's contribution is paid out in cash; and (2) the cash is paid under circumstances that are consistent with the plan's overall primary purpose of providing benefits." <sup>228</sup>

However, the Department disagrees with commenters requesting that cash payments in-lieu of plan participation also may be excluded from the regular rate under section 7(e)(4). See NADA; Seyfarth; NPELRA; IMLA. This is because such cash payments are made directly to the employee, and so fail to satisfy the requirement under FLSA section 7(e)(4) that contributions be "made by an employer to a trustee or third person." <sup>229</sup> Nor are cash-in-lieu of medical benefits generally excludable under the "other similar payments" clause of section 7(e)(2), as the International Municipal Lawyers Association suggests. As explained above, "other similar payments" cannot be wages in another guise. Cash payments in lieu of medical benefits in many cases function essentially as wage supplements. Even though they are not directly tied to hours worked or service rendered, they are typically paid frequently, regularly, and as fungible cash. And it would make little sense for Congress to require employers to provide a bona fide plan to exclude health care benefits under section 7(e)(4) if employers could simply pay cash toward the same purpose and claim exclusion under section 7(e)(2). As the Seventh Circuit has noted, "we hesitate to read § 7(e)(2) as a catch-all, one that obliterates the qualifications and limitations on the other subsections and establishes a principle that all lump-sum payments fall outside the 'regular rate,' for then most of the

remaining subsections become superfluous." <sup>230</sup>

IRAs and HSAs are tax-favored savings accounts that provide, respectively, retirement and health benefits. Employer contributions to an IRA or HSA may satisfy § 778.215(a)(1) if they are made pursuant to an arrangement where the employer makes contributions for employees that is communicated to employees. As explained in the above discussion concerning SIMPLE and SEP plans, an IRA encourages retirement savings.<sup>231</sup> And HSA contributions may be distributed on a tax-free basis to pay for certain qualified medical expenses.<sup>232</sup> Thus, employer contributions to IRAs and HSAs satisfy § 778.215(a)(2). If the plan requires the benefits be specified or definitely determinable based on an actuarial basis, or based on a definite formula for determining the amount to be contributed by the employer and for determining the benefits for each of the employees participating in the plan, or based on a formula for determining the amount to be contributed by the employer and the individual benefits which is consistent with the purposes of the plan or trust, then § 778.215(a)(3) is satisfied as well. IRA and HSA accounts must be with a trustee or custodian, and so employer contributions would also satisfy § 778.215(a)(4)'s requirement that employer contributions must be "paid irrevocably to a trustee or third person pursuant to an insurance agreement, trust, or other funded arrangement." Finally, IRAs and HSAs permit participants to withdraw cash for purposes unrelated to retirement or medical benefits, but participants must pay an additional tax on those withdrawals.<sup>233</sup> The additional tax ensures that any cash payments are incidental to retirement and/or health benefits, and so both types of accounts satisfy the incidental-payment requirement of § 778.215(a)(5). Accordingly, the Department believes employer contributions to an IRA or HSA under these circumstances would be excludable from the regular rate.

Discretionary employer contributions to a retirement plan may also be

excludable, provided that the retirement plan otherwise satisfies § 778.215(a)(1), (2), (4), and (5). Many retirement plans, such as section 401(k) profit-sharing plans, grant employers discretion to make additional contributions at the end of a plan year. The Department's opinion letter dated August 17, 1970, explained that § 778.215(a)(3) requires the amounts of such discretionary contributions to be based on a definite formula.<sup>234</sup> A plan that simply provides that "[t]he Board of Directors of the company at its discretion may make a greater or lesser contribution for any plan year" would fall short.<sup>235</sup> But a plan that enables employers to make discretionary contributions based on a formula that "quantifies each variable" and "describes those variables' relation to each other" would satisfy the definite formula requirement.<sup>236</sup>

#### D. Overtime Premiums Under Sections 7(e)(5)–(7)

FLSA sections 7(e)(5), (6), and (7) permit employers to exclude from the regular rate certain overtime premium payments made for hours of work on special days or in excess or outside of specified daily or weekly standard work periods.<sup>237</sup> More specifically, section 7(e)(5) permits exclusion of premiums for "hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee [under section 7(a)] or in excess of the employee's normal working hours or regular working hours, as the case may be[.]" <sup>238</sup> Section 7(e)(6) permits exclusion of premiums "for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days[.]" <sup>239</sup> Section 7(e)(7) permits exclusion of premiums in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such

<sup>230</sup> *Reich*, 57 F.3d at 578; see also *Flores*, 824 F.3d at 900–01.

<sup>231</sup> Most employer-funded IRAs are SIMPLE and SEP plans that, as explained above, may be presumed to satisfy the requirements of § 778.215(a)(1), (2), (4), and (5). Employer contributions to other IRAs that are described in Internal Revenue Code section 219(f)(5) fall outside this presumption and those contributions must be analyzed in accordance with all five elements of § 778.215(a).

<sup>232</sup> 26 U.S.C. 223.

<sup>233</sup> The additional tax is 10 percent for an early withdrawal from an IRA and 20 percent for an HSA.

<sup>234</sup> WHD Opinion Letter FLSA, 1970 WL 26444, at \*1 ("The plan fails to meet the formula requirements of § 778.215(a)(3) of Part 778, in that it does not contain a definite formula for determining the amount to be contributed by the employer.").

<sup>235</sup> *Id.*

<sup>236</sup> *Russell*, 2018 WL 1210763, at \*8; see also *Laughlin*, 2019 WL 1440406, at \*7.

<sup>237</sup> 29 U.S.C. 207(e)(5)–(7).

<sup>238</sup> 29 U.S.C. 207(e)(5).

<sup>239</sup> 29 U.S.C. 207(e)(6).

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at \*2 (emphasis added).

<sup>228</sup> *Id.*

<sup>229</sup> See *Local 246 Util. Workers Union of Am. v. S. California Edison Co.*, 83 F.3d 292, 296 (9th Cir. 1996) ("Section 207(e)(4) deals with contributions by the employer [to a trust or third person], not payments to the employee.").

employee under subsection 7(a), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.<sup>240</sup> Additionally, section 7(h)(2) provides that extra compensation of the types described in sections 7(e)(5), (6), and (7) is creditable toward overtime compensation owed under section 7(a).<sup>241</sup> These are the only types of compensation excludable from the regular rate that are also creditable toward overtime compensation.<sup>242</sup>

Sections 778.202, 778.203, 778.205, and 778.207 explain the requirements for excluding from the regular rate the overtime premiums described in sections 7(e)(5) and (6).<sup>243</sup> Sections 778.202 and 778.202(e) refer to extra premium payments paid pursuant to contracts.<sup>244</sup> Similarly, § 778.205 uses an example of an extra premium payment paid pursuant to an employment “agreement,”<sup>245</sup> and § 778.207(a) refers to “contract premium rates[.]”<sup>246</sup>

The Department proposed amending §§ 778.202 and 778.205 to remove references to employment agreements and contracts in those sections to eliminate any confusion that the overtime premiums described in sections 7(e)(5) and (6) may be excluded only under written contracts or agreements. The NPRM explained that these proposed regulatory clarifications were consistent with sections 7(e)(5) and (6) of the FLSA, neither of which requires that the overtime premiums be paid pursuant to a formal employment contract or collective bargaining agreement. Those statutory exclusions contrast with section 7(e)(7), which explicitly requires “an employment contract or collective-bargaining agreement” to exclude premiums “for work outside of the hours established in good faith by the contract or work agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek[.]”<sup>247</sup> Exclusion of premium payments under sections 7(e)(5) and (6) turns on deviation from the employee’s normal work schedule. The NPRM further explained that the proposed removal of the word “contract” from the regulations did not change the fact that, while there need

not be a formal contract or agreement under sections 7(e)(5) or (6), there must be a discernable schedule of hours and days worked from which the excess or nonregular hours for which the overtime premiums are paid are distinguishable.<sup>248</sup> Relatedly, the Department also proposed to amend § 778.207 to refer to the “premium payments” instead of “contract premium rates.” The NPRM noted that the proposed change was consistent with the description of the overtime premiums found in § 778.201 and removes any implication that all of the overtime premium payments must be paid pursuant to a formal contract.

The Department noted in the NPRM that, while the regulations at §§ 778.202, 778.205, and 778.207 have, since 1950, referred to employment contracts and agreements when describing the types of overtime premiums excludable under sections 7(e)(5) and (6),<sup>249</sup> the Department has not interpreted the use of the words “contract” or “agreement” to limit excludable overtime premium payments to only those paid pursuant to a formal contract or collective bargaining agreement.<sup>250</sup> The Department has historically evaluated the actual practice of the parties to determine if extra payments are true overtime premiums that are excludable from the regular rate.<sup>251</sup> In the initial publication of part 778 in 1948, for example, the Department emphasized the primacy of “actual practice” over any contractual terms when assessing whether extra payments were true overtime premiums that could be excluded from the regular rate.<sup>252</sup>

<sup>248</sup> Section 7(e)(5) allows exclusion of premiums for hours “in excess of the employee’s normal working hours or regular working hours” and sections 7(e)(6) permits exclusion of premiums for work on regular days of rest or on the sixth or seventh day of the workweek. Thus, exclusion under these provisions requires a discernable schedule.

<sup>249</sup> See 15 FR 623–02 (the precursor to §§ 778.202, 778.205, and 778.207 was located in § 778.5 in the 1950 version of the regulations).

<sup>250</sup> The FOH sections discussing sections 7(e)(5) and (6) overtime premiums make no reference to the need for a contract, and instead instruct investigators to look to the employee’s normal hours or days of work “as established by agreement or practice.” FOH 32e01; see also *id.* 32e04 (describing criteria for 207(e)(6) overtime premium for work on special days without any reference to a requirement that the compensation be paid pursuant to contract).

<sup>251</sup> See 13 FR 4534–01 (Aug. 6, 1948) (codified at 29 CFR 778.2 (1948)).

<sup>252</sup> *Id.* Those regulations stated that “[t]he mere fact that a contract calls for premium payments for work on Saturdays, Sundays, holidays or at night would not necessarily prove that the higher rate is [a non-excludable shift differential] paid merely because of undesirable working hours if, as a matter of fact, the actual practice of the parties shows that the payments are made because the employees have

The NPRM further noted that, consistent with the Department’s practice, most courts have not required employers using the exclusions in sections 7(e)(5) and (6) to establish the existence of any formal contract or agreement with employees.<sup>253</sup> Even apart from sections 7(e)(5) and (6), courts interpreting the FLSA do not generally require that contracts be in writing (unless specifically required by statute), and they likewise emphasize the importance of the employer’s actual practices in determining whether a pay practice complies with the FLSA.<sup>254</sup>

A few commenters addressed these proposals. See Fisher Phillips; CWC; Seyfarth; SHRM; NELA; NELP; EPI. While employers and their representatives were generally supportive of the proposed revisions, three employee groups disagreed with the proposal to remove the word “contract” from §§ 778.202 and 778.205. NELP and EPI suggested that instead of eliminating the word “contract,” the Department should instead consider adding additional terms such as “contract, handbook, policy, or explicit agreement or understanding.” Similarly, NELA suggested that the Department replace the word “contract” with the phrase “contract, agreement or understanding.”

In response to the comments received, the Department has adopted the

previously worked a specified number of hours or days, according to a bona fide standard.”

<sup>253</sup> See *Fulmer v. City of St. Albans, W. Va.*, 125 Fed. App’x 459, 461 (4th Cir. Jan. 7, 2005) (holding that city properly excluded overtime premiums from regular rate under 207(e)(5) even though the premiums were not included in employment contract and were mentioned only during the employment interview); *Hesseltine v. Goodyear Tire & Rubber Co.*, 391 F. Supp. 2d 509, 522 (E.D. Tex. 2005) (“If an employer voluntarily pays an employee a premium rate contingent upon his working more than eight hours in one day, then such payment may be excluded from the employee’s regular rate and credited toward unpaid overtime.”); *Laboy v. Alex Displays, Inc.*, No. 02 C 8721, 2003 WL 21209854, at \*4 (N.D. Ill. May 21, 2003) (“The court need not determine whether the parties had an agreement for purposes of [section] 7(e)(7) because the payments must be excluded from the regular rate under [section] 7(e)(5).”).

<sup>254</sup> See *Bay Ridge*, 334 U.S. at 464 (“As the regular rate cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee, it must be drawn from what happens under the employment contract.”); *Singer v. City of Waco, Tex.*, 324 F.3d 813, 824 (5th Cir. 2003) (same); see also *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199, 204 (1947) (“[I]n testing the validity of a wage agreement under the Act the courts are required to look beyond that which the parties have purported to do.”) (citing *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424–25 (1945) (“Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary ‘regular rate’ in the wage contracts.”)).

<sup>240</sup> 29 U.S.C. 207(e)(7).

<sup>241</sup> 29 U.S.C. 207(h)(2).

<sup>242</sup> 29 CFR 778.201(c).

<sup>243</sup> See *id.* § 778.202, 778.203, 778.205, 778.207.

<sup>244</sup> See *id.* § 778.202(a), (b), (e).

<sup>245</sup> *Id.* § 778.205.

<sup>246</sup> *Id.* § 778.207(a).

<sup>247</sup> 29 U.S.C. 207(e)(7).

suggestion to replace the term “employment contracts” in § 778.202 and “agreement of employment” in § 778.205 with “written or unwritten employment contract, agreement, understanding, handbook, policy, or practice.” This language achieves the original objective of clarifying that overtime premiums do not need to be made pursuant to a written contract or agreement to be excluded under these sections, while also recognizing that they must still be paid pursuant to some form of legitimate agreement or understanding.

#### *E. Clarification That Examples in Part 778 Are Not Exclusive*

As explained in the NPRM, the Department recognizes that compensation practices can vary significantly and will continue to evolve. In general, the FLSA does not restrict the forms of “remuneration” that an employer may pay—which may include an hourly rate, salary, commission, piece rate, a combination thereof, or any other method—as long as the regular rate is equal to at least the applicable minimum wage and non-exempt employees are paid any overtime owed at one and one-half times the regular rate. While the eight categories of excludable payments enumerated in section 7(e)(1)–(8) are exhaustive,<sup>255</sup> the NPRM proposed to confirm in § 778.1 that, unless otherwise indicated, part 778 does not contain an exhaustive list of permissible or impermissible compensation practices. Rather, it provides examples of regular rate and overtime calculations that, by their terms, may or may not comply with the FLSA, and the types of compensation excludable from regular rate calculations under section 7(e). Because it is impossible to address all of the various compensation and benefits arrangements that may exist between employers and employees, both now and in the future, the NPRM proposed to specify in § 778.1 that the examples set forth in part 778 of the types of payments that are excludable under section 7(e)(1)–(8) are not exhaustive; there may be other types of payments not discussed or used as examples in part 778 that nonetheless qualify as excludable payments under section 7(e)(1)–(8).

The Department received a number of comments on this clarification, all in support. *See, e.g.,* Associated Builders and Contractors; AHLA; Chamber. Two of these commenters requested that the

Department clarify that employers may pay via any method without changing the regular rate calculation and asked the Department to identify alternatives to the examples provided in the regulations. *See* PPWO; SHRM. The Department believes that the proposed language of § 778.1 accomplishes this, stating specifically that “the FLSA does not restrict the forms of ‘remuneration’ that an employer may pay . . . as long as the regular rate is equal to at least the applicable minimum wage and compensation for overtime hours worked is paid at the rate of at least one and one-half times the regular rate.” Furthermore, while the NPRM proposed to update and add examples in part 778, the proposed language of § 778.1(b) makes clear that it is not feasible to address all of the various types of compensation practices that may exist. Proposed § 778.1(b) accordingly clarifies that the examples in part 778 are not an exhaustive list of permissible or impermissible compensation practices under section 7(e) of the Act unless otherwise clearly indicated. Therefore, the Department adopts the changes to § 778.1 as proposed. Additionally, the Department changes the title of § 778.1 and makes non-substantive edits to modernize the introductory statement.

#### *F. Basic Rate Calculations Under Section 7(g)(3)*

Section 7(g) of the FLSA identifies three circumstances in which an employer may calculate overtime compensation using a basic rate rather than the regular rate, provided that the basic rate is established by an agreement or understanding between the employer and employee, reached before the performance of the work.<sup>256</sup> The third of these, identified in section 7(g)(3), allows for the establishment of a basic rate of pay when the rate is “authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time[.]”<sup>257</sup> Part 548 addresses the requirements for

using such basic rates to compute overtime pay under section 7(g)(3).<sup>258</sup>

Section 548.2 provides ten requirements for using a basic rate when calculating overtime compensation.<sup>259</sup> Section 548.3 discusses six different authorized basic rates that may be used if the criteria in § 548.2 are met.<sup>260</sup> Section 548.300 explains that these basic rates “have been found in use in industry and the Administrator has determined that they are substantially equivalent to the straight-time average hourly earnings of the employee over a representative period of time.”<sup>261</sup> As relevant to this rulemaking, the current regulation at § 548.3 authorizes a basic rate that excludes “additional payments in cash or in kind which, if included in the computation of overtime under the Act, would not increase the total compensation of the employee by more than 50 cents a week on the average for all overtime weeks . . . in the period for which such additional payments are made.”<sup>262</sup> Section 548.305(b) explains that, under § 548.3(e), upon agreement or understanding between an employer and employee, the basic rate may exclude from the computation of overtime “certain incidental payments which have a trivial effect on the overtime compensation due.”<sup>263</sup> This section provides a nonexhaustive list of examples of payments that have such a trivial effect on the overtime compensation due and therefore may be excluded from the basic rate, including “modest housing,” “bonuses or prizes of various sorts,” and compensation “for soliciting or obtaining new business.”<sup>264</sup> Section 548.305 also provides examples with specific amounts of additional payments to illustrate the application of § 548.3(e).<sup>265</sup> The \$0.50 amount is also referenced in § 548.400(b). The Department last updated these regulations more than 50 years ago, in 1966.<sup>266</sup>

The Department proposed to update the \$0.50 amount in §§ 548.3, 548.305, and 548.400. Rather than provide a specific dollar or cent amount, however, the Department proposed to replace the \$0.50 language in these regulations with “40 percent of the applicable hourly minimum wage under section 6(a) of the Act.” The Department explained that

<sup>256</sup> *See* 29 U.S.C. 207(g).

<sup>257</sup> *Id.* 207(g)(3). By contrast, section 7(g)(1) allows for a basic rate to be established for employees employed at piece rates, and section 7(g)(2) allows for a basic rate to be established for employees performing two or more kinds of work for which different hourly or piece rates apply. *Id.* 207(g)(1)–(2). Only the basic rate provided by section 7(g)(1) is limited to employees paid on a piece rate basis. The Department proposed to clarify the cross reference in § 548.1 to the regulations for sections 7(g)(1) and (2), which are at 29 CFR 778.415 through 778.421. No comments addressed this proposal. Therefore, the final rule adopts § 548.1 as proposed.

<sup>258</sup> *See* 29 CFR 548.1; *see also id.* §§ 778.400 through 778.401.

<sup>259</sup> *See id.* § 548.2.

<sup>260</sup> *See id.* § 548.3.

<sup>261</sup> *Id.* § 548.300.

<sup>262</sup> *Id.* § 548.3(e).

<sup>263</sup> *Id.* § 548.305(b).

<sup>264</sup> *Id.* § 548.305(b).

<sup>265</sup> *See id.* § 548.305(c), (d), (f).

<sup>266</sup> *See* 31 FR 6769.

<sup>255</sup> *See, e.g.,* *Smiley*, 839 F.2d at 330; *Caraballo v. City of Chicago*, 969 F. Supp. 2d 1008, 1015 (N.D. Ill. 2013); *see also* 29 CFR 778.200(c).

this is the same methodology that the Department used in the past to update the threshold. In 1955, the Department set the threshold for excludable amounts in § 548.3(e) at \$0.30—which, at the time, was 40 percent of the hourly minimum wage required under the FLSA (\$0.75 per hour).<sup>267</sup> Similarly, in 1966, after the minimum wage increased to \$1.25 per hour, the Department correspondingly increased the threshold amount in § 548.3(e) to \$0.50—which, again, was 40 percent of the hourly minimum wage at the time.<sup>268</sup> The current minimum wage is \$7.25 per hour, and 40 percent of \$7.25 is \$2.90. To avoid the need for future rulemaking in response to any further minimum wage increases, however, the Department proposed to replace the current \$0.50 references in §§ 548.3(e), 548.305, and 548.400(b) with “40 percent of the applicable minimum hourly wage under section 6(a) of the Act.” Relatedly, the Department also proposed to update the examples provided in § 548.305(c), (d), and (f) with updated dollar amounts, and to fix a typographical error in § 548.305(e) by changing the phrase “would not exceed” to “would exceed.” The Department specifically invited comment as to (1) whether the additional payments that are excludable if they would not increase total overtime compensation should be tied to a percentage of the applicable minimum wage under the FLSA, or a percentage of the applicable minimum wage under state or Federal law; and (2) whether 40 percent of the applicable minimum wage is an appropriate threshold, or if this proposed percentage should be increased or decreased.

A few commenters addressed these basic rate proposals. *See* Chamber; PPWO; SHRM; NPELRA. The Chamber noted with approval that the proposal modernized certain aspects of this regulation while “hewing closely to the Department’s historical approach.” It also commented that the proposal to use a percentage of the applicable minimum wage rather than a fixed dollar amount “makes sense.” While generally supportive of the proposal to update this regulation, PPWO and SHRM commented that the 40 percent amount was too low and suggested that the amount be raised to ten dollars or more per week. In response to the Department’s question regarding tying the percentage of the applicable minimum wage under the FLSA or under state or Federal law, the Chamber suggested that the final rule reference

state law as well as Federal law, commenting that “[w]hether payments count as trivial will rise with the employee’s minimum compensation.” NPELRA appreciated the proposal, but noted that very few public employers use section 7(g)(3)’s basic rate calculations and asked that the regulations implementing 7(g)(3) be further amended to take account of the unique work schedules for law enforcement and fire protection personnel and the partial overtime exemption for such personnel in 29 U.S.C. 207(k) of the FLSA. No comments were received that opposed the proposed changes.

In response to the comments received, the Department has finalized the regulations in part 548 as proposed, with a modification to the regulatory text to reference the minimum wage under either the FLSA or state or local law applicable in the jurisdiction in which the employee is employed, whichever is higher. The Department agrees with the Chamber that the proper measure of whether these additional payments may be excluded from the basic rate calculation should be based on the higher state or local minimum wage. While the Chamber did not specifically reference local minimum wage laws, the rationale for including state laws setting a higher minimum wage is equally applicable to local laws setting a minimum wage higher than the FLSA minimum wage. Therefore, the final rule references the minimum wage under either the FLSA or state or local law applicable in the jurisdiction in which the employee is employed, whichever is higher. The Department continues to believe that 40 percent of the applicable minimum wage, the ratio that the Department has historically used for this regulation, is the proper threshold for exclusion of incidental payments from the basic rate and therefore declines to adopt the suggestion to raise the amount to ten dollars or more per week. The Department also declines to modify these regulations to account for the partial overtime exemption for employees engaged in law enforcement and fire protection because such a request is outside of the scope of the Department’s proposal.

Several commenters asked the Department for clearer guidance regarding treatment of furnished meals under the regular rate. *See* PPWO; HR Policy Association; Chamber. While the cost of meals provided by an employer must be included in the regular rate,<sup>269</sup>

where an employer is paying its employees pursuant to an authorized basic rate under section 7(g)(3) of the FLSA and that section’s implementing regulations in part 548, the cost of a single meal per workday provided by an employer need not be included in the basic rate.<sup>270</sup> Nonetheless, the Department recognizes there is an apparent tension between its authorized basic rate regulations, which allow for the exclusion from overtime calculations of a customarily furnished employer-provided single daily meal,<sup>271</sup> and section 3(m), which indicates that employer-provided meals are wages that must be included in overtime calculations.<sup>272</sup> As stated in the basic rate regulations published in 1956 after notice and comment, an employer may, when calculating overtime compensation due, exclude from the basic rate the cost of providing one free daily meal to employees upon agreement between the employer and said employees. The regulations explain this authorization is based on “the Administrator’s experience that the amount of additional overtime compensation involved in such cases is trivial and does not justify the bookkeeping required in computing it.”<sup>273</sup> This remains true today. While there may be tension between section 3(m) and the part 548 authorized basic rate regulations with regards to exclusion of meals from overtime calculations upon agreement of the employer and employees, part 531 is outside the scope of this rulemaking and thus no changes will be made at this time.

#### IV. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency’s need for its information collections and their practical utility, the impact of paperwork and other information collection burdens imposed

531.32 (noting examples of meals furnished under certain circumstances are wages under section 3(m)); 29 CFR 778.116 (“Where payments are made to employees in the form of goods or facilities which are regarded as part of wages, the reasonable cost to the employer or the fair value of such goods or of furnishing such facilities must be included in the regular rate.”); 29 CFR 778.224 (“It is clear that the [other similar payments] clause was not intended to permit the exclusion from the regular rate of payments such as . . . the furnishing of facilities like board and lodging which, though not directly attributable to any particular hours of work are, nevertheless, clearly understood to be compensation for services.”).

<sup>270</sup> *See* 29 CFR 548.3(d), 548.304.

<sup>271</sup> 29 CFR 548.3(d); 29 CFR 548.304.

<sup>272</sup> 29 CFR 531.32; 29 CFR 778.116.

<sup>273</sup> 29 CFR 548.304(b).

<sup>267</sup> *See* 20 FR 5679.

<sup>268</sup> *See* 31 FR 4149 (Mar. 9, 1966); 31 FR 6769.

<sup>269</sup> *See* 29 U.S.C. 203(m) (defining wage to include, among other things, “board”); 29 CFR

on the public, and how to minimize those burdens. This final rule does not require a collection of information subject to approval by the Office of Management and Budget (OMB) under the PRA, or affect any existing collections of information. The Department did not receive any comments on this determination.

## V. Executive Order 12866, Regulatory Planning and Review; and Executive Order 13563, Improved Regulation and Regulatory Review

### A. Introduction

Under E.O. 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and OMB review.<sup>274</sup> Section 3(f) of E.O. 12866 defines a "significant regulatory action" as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of \$100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. OIRA has determined that this rule is significant under section 3(f) of E.O. 12866.

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected the approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

### B. Economic Analysis

This economic analysis provides a quantitative analysis of regulatory familiarization costs attributable to the final rule and a qualitative analysis of other potential benefits, cost savings, and transfers. This includes a discussion of benefits resulting from reduced litigation. As described above, this rule clarifies existing regulations for employees and employers in the 21st-century workplace with modern forms of compensation and benefits. The Department believes that these updates will provide clarity and flexibility for employers interested in providing such benefits to their employees.

#### 1. Overview of Changes

This final rule makes several changes to the existing regulatory language in 29 CFR part 778 to update and clarify the FLSA's regular rate requirements, and makes a change to 29 CFR part 548 addressing a "basic rate" that can be used to calculate overtime compensation under section 7(g)(3) of the FLSA when specific conditions are met. Specifically, this final rule includes the following:

- Clarification in § 778.219 that payments for unused paid leave, including paid sick leave, may be excluded from an employee's regular rate of pay;
- Clarification in §§ 778.218(b) and 778.320 that pay for time that would not otherwise qualify as "hours worked," including bona fide meal periods, may be excluded from an employee's regular rate unless an agreement or established practice indicates that the parties have treated the time as hours worked;
- Clarification in § 778.217 that reimbursed expenses need not be incurred "solely" for the employer's benefit for the reimbursements to be excludable from an employee's regular rate;
- Clarification in § 778.217 that certain reimbursements are per se reasonable and excludable from the regular rate;
- Elimination of the restriction in §§ 778.221 and 778.222 that "call-back" pay and other payments similar to call-back pay must be "infrequent and sporadic" to be excludable from an employee's regular rate, while maintaining that such payments must not be prearranged;
- Addition of regulatory text in §§ 778.220, 778.222, and 778.223 addressing exclusion from the regular rate of payments to employees pursuant to state and local scheduling laws;
- Inclusion of additional examples in § 778.224 of employer provided perks or

benefits that may be excluded from an employee's regular rate of pay as "other similar payments";

- Clarification in § 778.215 of the types of benefit plans that are excludable as "similar benefits for employees" under section 7(e)(4) and other additions;
  - Clarification in §§ 778.202, 778.203, 778.205, and 778.207 that employers do not need a prior contract or agreement with the employee(s) to exclude certain overtime premiums described in sections 7(e)(5) and (6) of the FLSA;
  - Clarification and examples in § 778.211 of discretionary bonuses that are excludable from an employee's regular rate of pay under section 7(e)(3) of the FLSA;
  - Adoption of the interpretation that some longevity and sign-on bonuses, when certain requirements are met, qualify as gifts under § 778.212 and may be excludable from the regular rate;
  - Clarification in § 778.1 that the examples of compensation discussed in part 778 of the types of excludable payments under section 7(e)(1)–(8) are not exhaustive; and
  - An increase from \$0.50 to a weekly amount equivalent to 40 percent of the applicable hourly minimum wage under the FLSA (currently \$2.90, or 40 percent of \$7.25) or the state or local law applicable in the jurisdiction in which the employee is employed, whichever is higher, the amount by which total compensation would not be affected by the exclusion of certain additional payments when using the "basic rate" to compute overtime provided by § 548.3(e).
- To measure potential costs, cost savings, benefits, and transfers relative to a baseline of current practice, the Department has attempted to distinguish between specific components that will change existing requirements, and those that will merely clarify existing requirements. Here, the Department believes that only two of the components listed above constitute changes to existing regulatory requirements: (1) Increasing the threshold for exclusion of certain payments when using the "basic rate" to compute overtime under § 548.3(e), from \$0.50 to a weekly amount equivalent to 40 percent of the hourly minimum wage under the FLSA (currently \$2.90, or 40 percent of \$7.25) or the state or local law applicable in the jurisdiction in which the employee is employed, whichever is higher; and (2) eliminating the restriction in §§ 778.221 and 778.222 that call-back pay and similar payments must be "infrequent and sporadic" to be excludable from the regular rate, while

<sup>274</sup> See 58 FR 51735 (Sept. 30, 1993).

maintaining that such payments must not be prearranged. Both of these changes are deregulatory in nature.

The Department believes that all of the remaining changes clarify existing requirements. Thus, none of the changes in this final rule will impose any new regulatory requirements, or require any regulated entity (*i.e.*, any employer) to change its conduct to remain in compliance with the law.

## 2. Potential Costs

The only potential costs attributable to this final rule are regulatory familiarization costs. Familiarization costs represent direct costs to businesses associated with reviewing any changes to regulatory requirements caused by a final rule. Familiarization costs do not include recurring compliance costs that regulated entities would incur with or without a rulemaking.<sup>275</sup> The Department calculated regulatory familiarization costs by multiplying the estimated number of firms likely to review the final rule by the estimated time to review the rule and the average hourly compensation of a Compensation, Benefits, and Job Analysis Specialist.

To calculate the cost associated with reviewing the rule, the Department first estimated the number of firms likely to review the final rule.<sup>276</sup> According to the data from the U.S. Census Bureau's Statistics of U.S. Businesses (SUSB), there are a total of 5,954,684 firms in the United States.<sup>277</sup> The SUSB data shows that 3,665,182 firms have four or fewer employees.<sup>278</sup> These small-sized firms are less likely than larger firms to offer perks or benefits similar to those addressed in this rulemaking (*e.g.*, wellness programs, on-site medical or

specialty treatment, and so forth) and are typically exempt from legislation mandating paid sick leave or scheduling-related premium pay.<sup>279</sup> Thus, the Department believes that firms with fewer than five employees are unlikely to review this final rule. For the purposes of estimating familiarization costs across all firms, the Department believes that the 2,289,502 firms with five or more employees—approximately 38 percent of all 6.0 million firms—represent a reasonable proxy estimate of the total number of interested firms expected to dedicate time learning about the final rule.

Next, the Department estimated the time interested firms will likely take to review the rule. Because the majority of the changes are merely clarifications of existing regulatory requirements, the Department estimates that it will take an *average* of approximately 15 minutes for each interested firm to review and understand the changes in the rule. Some firms might spend more than 15 minutes reviewing the final rule, while others might take less time; the Department believes that 15 minutes is a reasonable estimated average for all interested firms.

Finally, the Department estimated the hourly compensation of the employees who will likely review the final rule. The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (Standard Occupation Classification 13–1141), or an employee of similar status and comparable pay, will review the rule at each firm. The mean hourly wage of a Compensation, Benefits, and Job Analysis Specialist is \$32.65.<sup>280</sup> The Department adjusted this base wage rate to reflect fringe benefits such as health

insurance and retirement benefits, as well as overhead costs such as rent, utilities, and office equipment. The Department used a fringe benefits rate of 46 percent of the base rate and an overhead rate of 17 percent of the base rate, resulting in a fully loaded hourly compensation rate for Compensation, Benefits, and Job Analysis Specialists of \$53.22 (= \$32.65 + (\$32.65 × 46%) + (\$32.65 × 17%)).<sup>281</sup> The Department notes that employers have compliance responsibilities under existing regular rate standards, and any changes in responsibilities associated with this final rule may, therefore, be absorbed by existing staff. Consistent with other WHD rulemakings, the Department has used a 17 percent overhead rate in this calculation.

Therefore, regulatory familiarization costs in Year 1 for interested firms are estimated to be \$30,461,538 (= 2,289,502 firms × 0.25 hours of review time × \$53.22 per hour), which amounts to a 10-year annualized cost of \$3,571,022 at a discount rate of 3 percent (which is \$1.56 per firm) or \$4,337,038 at a discount rate of 7 percent (which is \$1.89 per firm).

This final rule will not impose any new requirements on employers or require any affirmative measures for regulated entities to come into compliance; therefore, there are no other costs attributable to this final rule.

## 3. Potential Cost Savings

The Department believes that this final rule could lead to potential cost savings. The clarifications and updated examples included in this final rule may reduce the amount of time employers spend attempting to understand their obligations under the law. For example, employers interested in providing an employee discount program, a wellness program, or onsite exercise opportunities will know immediately from the language included in § 778.224 that the cost of providing such programs may be excluded from the regular rate, thereby avoiding the need for further research on the issue. In addition, the two updates that constitute changes to the regulations will also achieve cost savings. For example, the Department expects that the changes to the basic rate regulations will permit employers that use a basic rate plan to give employees additional incidental payments without concern about the impact on their overtime obligations. Increasing the amount by which total compensation would not be affected by the exclusion of certain additional payments when using the “basic rate” to compute

<sup>275</sup> For example, time and resources spent on an annual basis to train staff on FLSA compliance are not familiarization costs attributable to any particular rulemaking, because an employer incurs these kinds of recurring costs regardless of whether specific parts of the regulations have been recently amended. To the extent that this rule would make certain regulatory requirements easier to understand, the rule may achieve a reduction in these recurring compliance costs.

<sup>276</sup> The Department assumes that familiarization for this rulemaking will generally occur at the headquarters of each interested firm, rather than at the establishment level. According to a recent survey, just eight percent of surveyed employers reported that their benefits are administered locally at different “locations.” See Soc’y for Human Res. Mgmt., 2017 Employee Benefits: Remaining Competitive in a Challenging Talent Marketplace, <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/2017%20Employee%20Benefits%20Report.pdf>.

<sup>277</sup> U.S. Census Bureau, 2016 Statistics of U.S. Businesses (SUSB) Annual Data Tables by Establishment Industry, <https://www.census.gov/data/tables/2016/econ/susb/2016-susb-annual.html>.

<sup>278</sup> *Id.*

<sup>279</sup> For example, none of the predictable scheduling ordinances passed in Chicago, New York City, Philadelphia, San Francisco, and Seattle apply to employers with fewer than 20 employees. See, *e.g.*, Chi., Ill., Fair Workweek Ordinance (July 24, 2019) (effective July 1, 2020); N.Y.C., N.Y., Admin. Code 20–1222 (2017) (applying to retail employers with at least 20 employees and fast food employers with at least 30 affiliated enterprise or franchise establishments); Phila., Pa., Code ch. 9–4600 (2018) (effective Jan. 1, 2020); S.F., Cal., Police Code art. 33G, 3300G.3 (2015) (applying to retail employers with at least 20 employees); Seattle, Wash., Mun. Code 14.22.050 (2017) (applying to retail, food service, and full-service restaurant employers with at least 500 employees). Similar coverage thresholds apply to employers under state paid sick leave laws in Maryland (15 employees), Oregon (10 employees with smaller employers required to provide equivalent unpaid sick leave), and Rhode Island (18 employees with smaller employers required to provide equivalent unpaid sick leave). See Md. Code, Labor & Emp’t sec. 3–1304 (West 2019); Or. Rev. Stat. sec. 653.606; R.I. Gen. Laws sec. 28–57–4(c).

<sup>280</sup> Estimate based on the BLS’s May 2018 Occupational Employment Statistics, <https://www.bls.gov/oes/current/oes131141.htm>.

<sup>281</sup> Rounded to the nearest whole cent.

overtime will both eliminate avoidable litigation and expand the circumstances in which employers that meet the requirements to use a basic rate may exclude “certain incidental payments which have a trivial effect on the overtime compensation due.”

The Department expects that these cost savings will outweigh regulatory familiarization costs. Unlike familiarization costs, the potential cost savings described in this section will continue into the future, saving employers valuable time and resources.

The Department is unable to provide quantitative estimates for cost savings and other potential effects of the final rule due to a lack of data and uncertainty regarding employer responses to the changes. Employers are not generally required to report to the Department their use of these regulatory provisions, and to the Department’s knowledge, there is no publicly available data on items such as employers’ use of basic rate calculations to calculate overtime due.

The Department is unable to provide quantitative estimates for other potential effects of the final rule due to a lack of data and uncertainty regarding employer responses. The Department did not receive any public comments providing data or information to quantify cost savings.

#### 4. Potential Benefits

This section analyzes the potential benefits of the rule. The Department is unable to provide quantitative estimates for these potential benefits due to a lack of data and uncertainty regarding potential employer responses to the final rule. The Department does not know, for example, how many employers will begin offering wellness programs or other benefits to their employees as a result of this rule. The Department did not receive any public comments providing data or information to quantify benefits.

Distinct from the potential cost savings described above, the rule will likely yield benefits. The Department expects that the added clarity that this rule provides will encourage some employers to start providing benefits that they may presently refrain from providing due to apprehension about potential overtime consequences. These newly provided benefits might have a positive impact on workplace morale, employee health, employee compensation, and employee retention.

For example, the Department has added “the cost to the employer of providing wellness programs, such as health risk assessments, biometric screenings, vaccination clinics

(including annual flu vaccinations), nutrition classes, weight loss programs, smoking cessation programs, stress reduction programs, exercise programs, and coaching to help employees meet health goals” to the list of miscellaneous payments excludable from the regular rate provided in § 778.224(b). If employers know they can offer wellness programs without the threat of potentially protracted class or collective action litigation and without potentially having to track employee participation in these activities for purposes of calculating the regular rate, employers might feel more encouraged to offer such programs. An increase in the provision of wellness programs similar to those described in this rule (e.g., smoking cessation programs, vaccine clinics, and so forth) may improve worker health and reduce healthcare costs.<sup>282</sup> Such improvements benefit both the worker and the employer with added value to each.

The final rule will also provide employers greater flexibility and incentivizes greater creativity in their employee-benefits practices. This room to innovate may help workers and increase retention and productivity by allowing employers the chance to provide unique benefits that their employees want and that improve workers’ physical and mental health, work environment, and morale. As noted earlier in this final rule, the Department cannot feasibly list every permissible benefit that employers may provide employers, and employers may create new and desirable benefits in the future. But the Department believes that the changes made here will foster that innovation.

In addition, the Department believes that clarifying the regulations will prevent many avoidable “regular rate” disputes. For example, the omission of unused sick leave in the current version of § 778.219 could be responsible for disputes over whether payments for unused sick leave should be included in the regular rate. Although the Department’s amendment to § 778.219 simply reflects the Department’s current guidance, the added clarity provided by changing the text of the regulations might prevent future expenses

<sup>282</sup> According to a recent survey, 88 percent of employers with a wellness program rated their initiatives as somewhat or very effective in improving employee health, while 77 percent indicated their wellness program was somewhat or very effective in reducing health care costs. See Soc. for Human Res. Mgmt., 2017 Employee Benefits: Remaining Competitive in a Challenging Talent Marketplace, <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/2017%20Employee%20Benefits%20Report.pdf>.

stemming from avoidable workplace disputes. Due to uncertainty regarding the costs and prevalence of FLSA-related settlement agreements, arbitration actions, and state court filings, the Department has only estimated cost savings attributable to an expected reduction in Federal FLSA regular rate lawsuits—which may represent only a fraction of all regular rate litigation.

To estimate the number of Federal lawsuits that the final rule may prevent, the Department first attempted to determine the percentage of FLSA lawsuits that predominantly or exclusively feature a “regular rate” dispute. Here, the Department studied two sets of data. First, the Department examined a randomly selected sample of Federal FLSA court filings from 2014 taken from the U.S. Court’s Public Access to Court Electronic Records (PACER). After reviewing each of the 500 FLSA cases in this sample for relevant information, the Department found that 6.8 percent of the cases (34 out of 500) primarily featured a regular rate dispute.<sup>283</sup> To corroborate the PACER data, the Department separately reviewed a sample of 258 Federal court decisions from 2017 involving FLSA collective action certification claims,<sup>284</sup> and found that 3.9 percent of these cases primarily centered around a regular rate dispute (10 out of 258). Considering these two different percentages, the Department takes an approximate average and conservatively assumes that approximately five percent of all FLSA cases primarily or exclusively involve a regular rate dispute.

According to the Transactional Records Access Clearinghouse, 25,605 Federal FLSA lawsuits were filed in Fiscal Years 2015, 2016, and 2017, averaging 8,535 lawsuits per year.<sup>285</sup> Assuming there are approximately 8,535 FLSA lawsuits per year, the Department estimates that about 427 cases, or 5 percent of 8,535, primarily or exclusively involve a regular rate

<sup>283</sup> The Department downloaded data on 521 cases; however, 21 of these provided no information because they were administratively closed, voluntarily dismissed, closed due to deficiencies, or a notice of removal was filed. This left a sample of 500 usable cases.

<sup>284</sup> Seyfarth Shaw LLP, 14th Annual Workplace Class Action Litigation Report 127–270 (2018), [https://www.seyfarth.com/dir\\_docs/publications/2018\\_workplace\\_class\\_action\\_report.pdf](https://www.seyfarth.com/dir_docs/publications/2018_workplace_class_action_report.pdf).

<sup>285</sup> TRAC at Syracuse University uses the Freedom of Information Act (FOIA) to obtain data about government enforcement and regulatory activities. According to TRAC Reports, the following numbers of FLSA lawsuits were filed in Fiscal Years 2015, 2016, and 2017: 8917, 8830, and 7858. See TRAC Reports, Fair Labor Standards Act Lawsuits Down from 2015 Peak (2018), <http://trac.syr.edu/tracreports/civil/498/>.

dispute. Given data limitations, if the Department assumes for purposes of this analysis that this final rule will prevent approximately 10 percent of FLSA cases primarily or exclusively featuring a regular rate dispute then this rule will prevent approximately 43 FLSA regular rate lawsuits per year.<sup>286</sup>

To quantify the expected reduction in FLSA lawsuits, the Department must estimate the average cost of an FLSA lawsuit. Here, the Department examined a selection of 56 FLSA cases concluded between 2012 and 2015 that contained litigation cost information.<sup>287</sup> To calculate average litigation costs associated with these cases, the Department first examined records of court filings in the Westlaw Case Evaluator tool and on PACER to ascertain how much plaintiffs in these cases received for attorney fees, administrative fees, and/or other costs, apart from any monetary damages attributable to the alleged FLSA violations. (The FLSA provides for successful plaintiffs to be awarded reasonable attorney's fees and costs, so this data is available in some FLSA cases.) After determining the plaintiff's total litigation costs for each case, the Department then doubled the figures to account for litigation costs that the defendant employers incurred.<sup>288</sup> According to this analysis, the average litigation cost for FLSA cases concluded between 2012 and 2015 was \$654,182 per case.<sup>289</sup> Applying this figure to approximately 43 Federal regular rate cases that this final rule could prevent, the Department estimated that avoided litigation costs resulting from the rule will total approximately \$28.1 million per year. Once again, the Department believes this total may underestimate total litigation costs because some FLSA regular rate cases are heard in state

<sup>286</sup> The Department rounds up to 43 cases for purpose of estimating (10 percent of 427 cases equals 42.7 cases).

<sup>287</sup> The 56 cases used for this analysis were retrieved from Westlaw's Case Evaluator database using a keyword search for case summaries between 2012 and 2015 mentioning the terms "FLSA" and "fees." Although the initial search yielded 64 responsive cases, the Department excluded one duplicate case, one case resolving litigation costs through a confidential settlement agreement, and six cases where the defendant employer(s) ultimately prevailed. Because the FLSA only entitles prevailing plaintiffs to litigation cost awards, information about litigation costs was only available for the remaining 56 FLSA cases that ended in settlement agreements or court verdicts favoring the plaintiff employees.

<sup>288</sup> This is likely a conservative approach to estimate the total litigation costs for each FLSA lawsuit, as defendant employers tend to incur greater litigation costs than plaintiff employees because of, among other things, typically higher discovery costs.

<sup>289</sup> The median cost was \$111,835 per lawsuit.

court and thus were not captured by PACER; some FLSA regular rate matters are resolved before litigation or by alternative dispute resolution; and some attorneys representing FLSA regular rate plaintiffs may take a contingency fee atop their statutorily awarded fees and costs.

#### 5. Potential Transfers

Transfer payments occur when income is redistributed from one party to another. The Department has identified two possible transfer payments between employers and employees that could occur due to this final rule, flowing in opposite directions. On the one hand, income might transfer from employers to employees if some employers respond to the new clarity that particular benefits are excludable from the regular rate calculation by newly providing certain payments or benefits they did not previously provide. On the other hand, income might transfer from employees to employers if some employers respond to this rule's new clarity that a particular benefit currently provided is excludable from the regular rate calculation by newly excluding certain payments from their employees' regular rates without changing any other compensation practices. As discussed above, the Department is unable to quantify an estimated net transfer amount to employers or employees due to a lack of data on the kinds of payments employers presently provide, and the inherent uncertainty in predicting how employers will respond to this rule.

#### Summary

The Department estimates that this rule will result in one-time regulatory familiarization costs of \$30.5 million, which will result in a 10-year annualized cost of \$3,571,022 at a discount rate of 3 percent or \$4,337,038 at a discount rate of 7 percent.

This final rule is an Executive Order (E.O.) 13771 deregulatory action. Although benefits and cost savings could not be quantified, they are expected to exceed costs. In perpetuity, the annualized costs are estimated to be \$913,846 using a 3 percent discount rate and \$2,132,308 using a 7 percent discount rate.

### VI. Regulatory Flexibility Analysis

In accordance with the Regulatory Flexibility Act,<sup>290</sup> the Department examined the regulatory requirements of the rule to determine whether they will have a significant economic impact on

a substantial number of small entities. The Department believes that this final rule will achieve long-term cost savings that outweigh initial regulatory familiarization costs.<sup>291</sup> For example, the Department believes that removing ambiguous language and adding updated examples to the FLSA's regular rate regulations should reduce compliance costs and litigation risks that small business entities would otherwise continue to bear.

The Department received one comment from a private citizen pertaining to the economic analysis. The commenter suggested that the regulation may negatively impact job growth by making it difficult for small or new employers to attract and retain talent in a competitive labor market. The commenter therefore requested the Department limit the scope of the regulation to apply only to certain businesses. The Department notes that the final rule is intended to provide clarity and promote compliance with the Act and encourage employers to provide additional innovative benefits without fear of costly litigation. Further, the Act generally requires that covered, nonexempt employees receive overtime pay of at least one and one-half times their regular rate of pay for time worked in excess of 40 hours per week. Coverage criteria of the Act are designated by statute, and therefore outside of the scope of this rulemaking.

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (as amended), WHD examined the regulatory requirements of the rule to determine if they will have a significant economic impact on a substantial number of small entities. The final rule is expected to add no regulatory burden for employers, whether large or small. Accordingly, the Agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities. The factual basis for this certification is described in the following paragraph.

As discussed above, the Department used data from the U.S. Census Bureau's Statistics of U.S. Businesses (SUSB) to calculate the number of firms likely to review the final rule. The SUSB data show that there are 5,954,684 firms in the U.S., 3,665,182 of which have four or fewer employees.<sup>292</sup> Also, as

<sup>291</sup> This rule does not impose any new requirements on employers or require any affirmative measures for regulated entities to come into compliance. Therefore, there are no other costs attributable to this deregulatory rule.

<sup>292</sup> U.S. Census Bureau, 2016 Statistics of U.S. Businesses (SUSB) Annual Data Tables by Establishment Industry, <https://www.census.gov/data/tables/2016/econ/susb/2016-susb-annual.html>.

<sup>290</sup> See 5 U.S.C. 601 *et seq.* (as amended).

discussed above, the Department believes that firms with fewer than five employees are unlikely to review this rule, because these small-sized firms are less likely than larger firms to offer perks or benefits similar to those addressed in this rulemaking (e.g., wellness programs, on-site medical or specialty treatment, and so forth) and are typically exempt from legislation mandating paid sick leave or scheduling-related premium pay.<sup>293</sup> Familiarization costs will therefore be zero for small businesses with fewer than five employees. The Department estimated familiarization costs across all 2,289,502 firms with five or more employees, and found that the estimated annualized familiarization cost per firm is \$1.56 annually over ten years at a discount rate of 3 percent and \$1.89 annually at a discount rate of 7 percent. This comprises less than 0.002 percent of gross annual revenues for a small business earning \$100,000 per year.

#### VII. Unfunded Mandates Reform Act Analysis

The Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1532, requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, for any Federal mandate that may result in excess of \$100 million (adjusted annually for inflation) in expenditures in any one year by state, local, and tribal governments in the aggregate, or by the private sector. While this rulemaking would affect employers in the public and private sectors, it is not expected to result in expenditures greater than \$100 million in any one year. Please see Section V for an assessment of anticipated costs and benefits to the private sector.

#### VIII. Executive Order 13132, Federalism

The Department has reviewed this final rule in accordance with Executive

<sup>293</sup> For example, none of the predictable scheduling ordinances passed in New York City, San Francisco, and Seattle apply to employers with fewer than 20 employees. See, e.g., S.F., Cal., Police Code art. 33G, 3300G.3 (2015) (applying to retail employers with at least 20 employees); N.Y.C., N.Y., Admin. Code 20–1222 (2017) (applying to retail employers with at least 20 employees and fast food employers with at least 30 affiliated enterprise or franchise establishments); Seattle, Wash., Mun. Code ch. 14.22.050 (2017) (applying to retail, food service, and full-service restaurant employers with at least 500 employees). See also, e.g., Md. Code, Labor & Emp't sec. 3–1304 (West 2019) (coverage threshold of 15 employees); Or. Rev. Stat. sec. 653.606 (coverage threshold of 10 employees with smaller employers required to provide equivalent unpaid sick leave); R.I. Gen. Laws sec. 28–57–4(c) (coverage threshold of 18 employees with smaller employers required to provide equivalent unpaid sick leave).

Order 13132 regarding federalism and determined that it does not have federalism implications. The final 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.

#### IX. Executive Order 13175, Indian Tribal Governments

This final rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

#### List of Subjects in 29 CFR Parts 548 and 778

Wages.

Signed at Washington, DC, this 2nd day of December, 2019.

**Cheryl M. Stanton,**

*Administrator, Wage and Hour Division.*

For the reasons set out in the preamble, the Department of Labor amends title 29 of the Code of Federal Regulations parts 548 and 778 as follows:

#### PART 548—AUTHORIZATION OF ESTABLISHED BASIC RATES FOR COMPUTING OVERTIME PAY

■ 1. The authority citation for part 548 continues to read as follows:

**Authority:** Sec. 7. 52 Stat. 1063, as amended; 29 U.S.C. 207, unless otherwise noted.

■ 2. Amend § 548.1 by revising the first sentence to read as follows:

##### § 548.1 Scope and effect of regulations.

The regulations for computing overtime pay under sections 7(g)(1) and 7(g)(2) of the Fair Labor Standards Act of 1938, as amended (“the Act” or “FLSA”), for employees paid on the basis of a piece rate, or at a variety of hourly rates or piece rates, or a combination thereof, are set forth in §§ 778.415 through 778.421. \* \* \*

■ 3. Amend § 548.3 by revising paragraph (e) and removing the parenthetical authority citation at the end of the section to read as follows:

##### § 548.3 Authorized basic rates.

\* \* \* \* \*

(e) The rate or rates (not less than the rates required by section 6(a) and (b) of the Act) which may be used under the Act to compute overtime compensation of the employee but excluding additional payments in cash or in kind

which, if included in the computation of overtime under the Act, would not increase the total compensation of the employee by more than 40 percent of the applicable hourly minimum wage under either section 6(a) of the Act or the state or local law applicable in the jurisdiction in which the employee is employed, whichever is higher, per week on the average for all overtime weeks (in excess of the number of hours applicable under section 7(a) of the Act) in the period for which such additional payments are made.

\* \* \* \* \*

■ 4. Amend § 548.305 by revising paragraphs (a), (c), (d), (e), and (f) to read as follows:

##### § 548.305 Excluding certain additions to wages.

(a) See § 548.3(e) for authorized established basic rates.

\* \* \* \* \*

(c) The exclusion of one or more additional payments under § 548.3(e) must not affect the overtime compensation of the employee by more than 40 percent of the applicable hourly minimum wage under either section 6(a) of the Act or the state or local law applicable in the jurisdiction in which the employee is employed, whichever is higher, per week on the average for the overtime weeks.

(1) *Example.* An employee, who normally would come within the 40-hour provision of section 7(a) of the Act, is paid a cost-of-living bonus of \$1300 each calendar quarter, or \$100 per week. The employee works overtime in only 2 weeks in the 13-week period, and in each of these overtime weeks he works 50 hours. He is therefore entitled to \$10 as overtime compensation on the bonus for each week in which overtime was worked (i.e., \$100 bonus divided by 50 hours equals \$2 an hour; 10 overtime hours, times one-half, times \$2 an hour, equals \$10 per week). Forty percent of the minimum wage of \$7.25 is \$2.90 (this example assumes the employee works in a state or locality that does not have a minimum wage that is higher than the minimum wage under the FLSA). Since the overtime on the bonus is more than \$2.90 on the average for the 2 overtime weeks, this cost-of-living bonus would be included in the overtime computation under § 548.3(e).

(2) [Reserved]

(d) It is not always necessary to make elaborate computations to determine whether the effect of the exclusion of a bonus or other incidental payment on the employee's total compensation will exceed 40 percent of the applicable hourly minimum wage under either

section 6(a) of the Act or the state or local law applicable in the jurisdiction in which the employee is employed, whichever is higher, per week on the average. Frequently the addition to regular wages is so small or the number of overtime hours is so limited that under any conceivable circumstances exclusion of the additional payments from the rate used to compute the employee's overtime compensation would not affect the employee's total earnings by more than 40 percent of the applicable hourly minimum wage under either section 6(a) of the Act or the state or local law applicable in the jurisdiction in which the employee is employed, whichever is higher, per week. The determination that this is so may be made by inspection of the payroll records or knowledge of the normal working hours.

(1) *Example.* An employer has a policy of giving employees who have a perfect attendance record during a 4-week period a bonus of \$50. The employee never works more than 50 hours a week. Exclusion of this attendance bonus from the rate of pay used to compute overtime compensation could not affect the employee's total earnings by more than \$2.90 per week (*i.e.*, 40 percent of the minimum wage of \$7.25, assuming the employee works in a state or locality that does not have a minimum wage that is higher than the minimum wage under the FLSA).<sup>14</sup>

<sup>14</sup> For a 50-hour week, an employee's bonus would have to exceed \$29 a week to affect his overtime compensation by more than \$2.90 (*i.e.*, 40 percent of the minimum wage of \$7.25). ( $\$30 \div 50 \text{ hours worked} \times 10 \text{ overtime hours} \times 0.5$ ).

(2) [Reserved]

(e) There are many situations in which the employer and employee cannot predict with any degree of certainty the amount of bonus to be paid at the end of the bonus period. They may not be able to anticipate with any degree of certainty the number of hours an employee might work each week during the bonus period. In such situations, the employer and employee may agree prior to the performance of the work that a bonus will be disregarded in the computation of overtime pay if the employee's total earnings are not affected by more than 40 percent of the applicable hourly minimum wage under either section 6(a) of the Act or the state or local law applicable in the jurisdiction in which the employee is employed, whichever is higher, per week on the average for all overtime weeks during the bonus period. If it turns out at the end of the bonus period that the effect on the

employee's total compensation would exceed 40 percent of the applicable minimum wage under either section 6(a) of the Act or the state or local law applicable in the jurisdiction in which the employee is employed, whichever is higher, per week on the average, then additional overtime compensation must be paid on the bonus. (See § 778.209 of this chapter, for an explanation of how to compute overtime on the bonus).

(f) In order to determine whether the exclusion of a bonus or other incidental payment would affect the total compensation of the employee by not more than 40 percent of the applicable hourly minimum wage under either section 6(a) of the Act or the state or local law applicable in the jurisdiction in which the employee is employed, whichever is higher, per week on the average, a comparison is made between his total compensation computed under the employment agreement and his total compensation computed in accordance with the applicable overtime provisions of the Act.

(1) *Example.* An employee, who normally would come within the 40-hour provision of section 7(a) of the Act, is paid at piece rates and at one and one-half times the applicable piece rates for work performed during hours in excess of 40 in the workweek. The employee is also paid a bonus, which when apportioned over the bonus period, amounts to \$10 a week. He never works more than 50 hours a week. The piece rates could be established as basic rates under the employment agreement and no additional overtime compensation paid on the bonus. The employee's total compensation computed in accordance with the applicable overtime provision of the Act, section 7(g)(1)<sup>15</sup> would be affected by not more than \$1 in any week by not paying overtime compensation on the bonus.<sup>16</sup>

<sup>15</sup> Section 7(g)(1) of the Act provides that overtime compensation may be paid at one and one-half times the applicable piece rate but extra overtime compensation must be properly computed and paid on additional pay required to be included in computing the regular rate.

<sup>16</sup> Bonus of \$10 divided by fifty hours equals 20 cents an hour. Half of this hourly rate multiplied by ten overtime hours equals \$1.

(2) [Reserved]

\* \* \* \* \*

■ 5. Amend § 548.400 by revising paragraph (b) and removing the parenthetical authority citation at the end of the section to read as follows:

**§ 548.400 Procedures.**

\* \* \* \* \*

(b) Prior approval of the Administrator is also required if the employer desires to use a basic rate or basic rates which come within the scope of a combination of two or more of the paragraphs in § 548.3 unless the basic rate or rates sought to be adopted meet the requirements of a single paragraph in § 548.3. For instance, an employee may receive free lunches, the cost of which, by agreement or understanding, is not to be included in the rate used to compute overtime compensation.<sup>17</sup> In addition, the employee may receive an attendance bonus which, by agreement or understanding, is to be excluded from the rate used to compute overtime compensation.<sup>18</sup> Since these exclusions involve two paragraphs of § 548.3, prior approval of the Administrator would be necessary unless the exclusion of the cost of the free lunches together with the attendance bonus do not affect the employee's overtime compensation by more than 40 percent of the applicable hourly minimum wage under either section 6(a) of the Act or the state or local law applicable in the jurisdiction in which the employee is employed, whichever is higher, per week on the average, in which case the employer and the employee may treat the situation as one falling within § 548.3(e).

<sup>17</sup> See § 548.304.

<sup>18</sup> See § 548.305.

**PART 778—OVERTIME COMPENSATION**

■ 6. The authority citation for part 778 continues to read as follows:

**Authority:** 52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.* Section 778.200 also issued under Pub. L. 106-202, 114 Stat. 308 (29 U.S.C. 207(e) and (h)).

■ 7. Revise § 778.1 to read as follows:

**§ 778.1 Introductory statement.**

(a) This part contains the Department of Labor's general interpretations with respect to the meaning and application of the maximum hours and overtime pay requirements contained in section 7 of the Fair Labor Standards Act of 1938, as amended ("the Act" or "FLSA"). The Administrator of the Wage and Hour Division will use these interpretations to guide the performance of his or her duties under the Act, and intends the interpretations to be used by employers, employees, and courts to understand employers' obligations and employees' rights under the Act. These official interpretations are issued by the Administrator on the advice of the Solicitor of Labor, as authorized by the Secretary (Reorg. Pl. 6 of 1950, 64 Stat. 1263; Gen. Ord. 45A, published in the **Federal Register** on May 24, 1950).

(b) The Department recognizes that compensation practices can vary significantly and will continue to evolve in the future. The Department also recognizes that it is not feasible to address all of the various compensation and benefits arrangements that may exist between employers and employees, both currently and in the future. In general, the FLSA does not restrict the forms of “remuneration” that an employer may pay—which may include an hourly rate, salary, commission, piece rate, a combination thereof, or any other method—as long as the regular rate is equal to at least the applicable minimum wage and compensation for overtime hours worked is paid at the rate of at least one and one-half times the regular rate. While the eight categories of payments in section 7(e)(1)–(8) are the exhaustive list of payments excludable from the regular rate, this part does not contain an exhaustive list of permissible or impermissible compensation practices under section 7(e), unless otherwise indicated. Rather, it provides examples of regular rate and overtime calculations under the FLSA and the types of compensation that may be excluded from regular rate calculations under section 7(e) of the FLSA.

■ 8. Amend § 778.202 by revising paragraphs (a), (b), (c), and (e) to read as follows:

**§ 778.202 Premium pay for hours in excess of a daily or weekly standard.**

(a) *Hours in excess of 8 per day or statutory weekly standard.* A written or unwritten employment contract, agreement, understanding, handbook, policy, or practice may provide for the payment of overtime compensation for hours worked in excess of 8 per day or 40 per week. If the payment of such overtime compensation is in fact contingent upon the employee’s having worked in excess of 8 hours in a day or in excess of the number of hours in the workweek specified in section 7(a) of the Act as the weekly maximum and such hours are reflected in an agreement or by established practice, the extra premium compensation paid for the excess hours is excludable from the regular rate under section 7(e)(5) of the Act and may be credited toward statutory overtime payments pursuant to section 7(h) of the Act. In applying the rules in this paragraph (a) to situations where it is the custom to pay employees for hours during which no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause, as these terms are explained in §§ 778.216 through 778.224, it is

permissible (but not required) to count these hours as hours worked in determining the amount of overtime premium pay, due for hours in excess of 8 per day or the applicable maximum hours standard, which may be excluded from the regular rate and credited toward the statutory overtime compensation.

(b) *Hours in excess of normal or regular working hours.* Similarly, where the employee’s normal or regular daily or weekly working hours are greater or fewer than 8 hours and 40 hours respectively and such hours are reflected in an agreement or by established practice, and the employee receives payment of premium rates for work in excess of such normal or regular hours of work for the day or week (such as 7 in a day or 35 in a week), the extra compensation provided by such premium rates, paid for excessive hours, is a true overtime premium to be excluded from the regular rate and it may be credited toward overtime compensation due under the Act.

(c) *Premiums for excessive daily hours.* If an employee whose maximum hours standard is 40 hours is hired at the rate of \$12 an hour and receives, as overtime compensation under his contract, \$12.50 per hour for each hour actually worked in excess of 8 per day (or in excess of his normal or regular daily working hours), his employer may exclude the premium portion of the overtime rate from the employee’s regular rate and credit the total of the extra 50-cent payments thus made for daily overtime hours against the overtime compensation which is due under the statute for hours in excess of 40 in that workweek. If the same contract further provided for the payment of \$13 for hours in excess of 12 per day, the extra \$1 payments could likewise be credited toward overtime compensation due under the Act. To qualify as overtime premiums under section 7(e)(5) of the Act, the daily overtime premium payments must be made for hours in excess of 8 hours per day or the employee’s normal or regular working hours. If the normal workday is artificially divided into a “straight time” period to which one rate is assigned, followed by a so-called “overtime” period for which a higher “rate” is specified, the arrangement will be regarded as a device to contravene the statutory purposes and the premiums will be considered part of the regular rate. For a fuller discussion of this problem, see § 778.501.

\* \* \* \* \*

(e) *Premium pay for sixth or seventh day worked.* Under sections 7(e)(6) and

7(h), extra premium compensation paid for work on the sixth or seventh day worked in the workweek (where the workweek schedule is reflected in an agreement or by established practice) is regarded in the same light as premiums paid for work in excess of the applicable maximum hours standard or the employee’s normal or regular workweek.

■ 9. Amend § 778.203 by revising paragraph (d) to read as follows:

**§ 778.203 Premium pay for work on Saturdays, Sundays, and other “special days”.**

\* \* \* \* \*

(d) Payment of premiums for work performed on the “special day”: To qualify as an overtime premium under section 7(e)(6), the premium must be paid because work is performed on the days specified and not for some other reason which would not qualify the premium as an overtime premium under sections 7(e)(5), (6), or (7) of the Act. (For examples distinguishing pay for work on a holiday from idle holiday pay, see § 778.219.) Thus a premium rate paid to an employee only when he received less than 24 hours’ notice that he is required to report for work on his regular day of rest is not a premium paid for work on one of the specified days; it is a premium imposed as a penalty upon the employer for failure to give adequate notice to compensate the employee for the inconvenience of disarranging his private life. The extra compensation is not an overtime premium. It is part of his regular rate of pay unless such extra compensation is paid the employee so as to qualify for exclusion under section 7(e)(2) of the Act in which event it need not be included in computing his regular rate of pay, as explained in § 778.222.

■ 10. Revise § 778.205 to read as follows:

**§ 778.205 Premiums for weekend and holiday work—example.**

The application of section 7(e)(6) of the Act may be illustrated by the following example: Suppose, based on a written or unwritten employment contract, agreement, understanding, handbook, policy, or practice, an employee earns \$18 an hour for all hours worked on a holiday or on Sunday in the operation of machines by operators whose maximum hours standard is 40 hours and who are paid a bona fide hourly rate of \$12 for like work performed during nonovertime hours on other days. Suppose further that the workweek of such an employee begins at 12:01 a.m. Sunday, and in a particular week he works a schedule of

8 hours on Sunday and on each day from Monday through Saturday, making a total of 56 hours worked in the workweek. Tuesday is a holiday. The payment of \$768 to which the employee is entitled will satisfy the requirements of the Act since the employer may properly exclude from the regular rate the extra \$48 paid for work on Sunday and the extra \$48 paid for holiday work and credit himself with such amount against the statutory overtime premium required to be paid for the 16 hours worked over 40.

■ 11. Amend § 778.207 by revising paragraph (a) to read as follows:

**§ 778.207 Other types of contract premium pay distinguished.**

(a) *Overtime premiums are those defined by the statute.* The various types of premium payments which provide extra compensation qualifying as overtime premiums to be excluded from the regular rate (under sections 7(e)(5), (6), and (7) and credited toward statutory overtime pay requirements (under section 7(h)) have been described in §§ 778.201 through 778.206. The plain wording of the statute makes it clear that extra compensation provided by premium rates other than those described in the statute cannot be treated as overtime premiums. When such other premiums are paid, they must be included in the employee's regular rate before statutory overtime compensation is computed; no part of such premiums may be credited toward statutory overtime pay.

\* \* \* \* \*

■ 12. Amend § 778.211 by revising paragraph (c) and adding paragraph (d) to read as follows:

**§ 778.211 Discretionary bonuses.**

\* \* \* \* \*

(c) *Promised bonuses not excluded.* The bonus, to be excluded under section 7(e)(3)(a), must not be paid pursuant to any prior contract, agreement, or promise. For example, any bonus which is promised to employees upon hiring or which is the result of collective bargaining would not be excluded from the regular rate under this provision of the Act. Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay. Most attendance bonuses, individual or group production bonuses, bonuses for quality and accuracy of work, bonuses contingent upon the employee's continuing in employment until the time the payment is to be made and the like are in this category; in such

circumstances they must be included in the regular rate of pay.

(d) *Labels are not determinative.* The label assigned to a bonus does not conclusively determine whether a bonus is discretionary under section 7(e)(3). Instead, the terms of the statute and the facts specific to the bonus at issue determine whether bonuses are excludable discretionary bonuses. Thus, regardless of the label or name assigned to bonuses, bonuses are discretionary and excludable if both the fact that the bonuses are to be paid and the amounts are determined at the sole discretion of the employer at or near the end of the periods to which the bonuses correspond and they are not paid pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly. Examples of bonuses that may be discretionary include bonuses to employees who made unique or extraordinary efforts which are not awarded according to pre-established criteria, severance bonuses, referral bonuses for employees not primarily engaged in recruiting activities, bonuses for overcoming challenging or stressful situations, employee-of-the-month bonuses, and other similar compensation. Such bonuses are usually not promised in advance and the fact and amount of payment is in the sole discretion of the employer until at or near the end of the period to which the bonus corresponds.

■ 13. Amend § 778.212 by revising paragraph (c) to read as follows:

**§ 778.212 Gifts, Christmas and special occasion bonuses.**

\* \* \* \* \*

(c) *Application of exclusion.* If the bonus paid at Christmas or on other special occasion is a gift or in the nature of a gift, it may be excluded from the regular rate under section 7(e)(1) even though it is paid with regularity so that the employees are led to expect it and even though the amounts paid to different employees or groups of employees vary with the amount of the salary or regular hourly rate of such employees or according to their length of service with the firm so long as the amounts are not measured by or directly dependent upon hours worked, production, or efficiency. A Christmas bonus paid (not pursuant to contract) in the amount of two weeks' salary to all employees and an equal additional amount for each 5 years of service with the firm, for example, would be excludable from the regular rate under this category. Employers may also provide gifts with more regularity throughout the year, as long as they are

provided with the understanding that they are gifts. Office coffee and snacks provided to employees, for example, would also be excludable from the regular rate under this category.

■ 14. Amend § 778.215 by revising paragraphs (a)(2) and (b) to read as follows:

**§ 778.215 Conditions for exclusion of benefit-plan contributions under section 7(e)(4).**

(a) \* \* \*

(2) The primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, accident, unemployment, legal services, or other events that could cause significant future financial hardship or expense.

\* \* \* \* \*

(b) *Plans under sections of the Internal Revenue Code.* In the absence of evidence to the contrary, where the benefit plan or trust has been approved by the Internal Revenue Service as satisfying the requirements of section 401(a), 403(a), or 403(b) of the Internal Revenue Code, is otherwise maintained pursuant to a written document that the plan sponsor reasonably believes satisfies the requirements of section 401(a), 403(a), 403(b), 408(k) or 408(p) of the Internal Revenue Code, or is sponsored by a government employer that reasonably believes the plan satisfies the requirements of section 457(b) of the Internal Revenue Code, the plan or trust will be considered to meet the conditions specified in paragraphs (a)(1), (2), (4), and (5) of this section.

■ 15. Amend § 778.217 by revising paragraphs (a), (b)(1), and (c) to read as follows:

**§ 778.217 Reimbursement for expenses.**

(a) *General rule.* Where an employee incurs expenses on his employer's behalf or where he is required to expend sums by reason of action taken for the convenience of his employer, section 7(e)(2) is applicable to reimbursement for such expenses. Payments made by the employer to cover such expenses are not included in the employee's regular rate (if the amount of the reimbursement reasonably approximates the expense incurred). Such payment is not compensation for services rendered by the employees during any hours worked in the workweek.

(b) \* \* \*

(1) The actual amount expended by an employee in purchasing supplies, tools, materials, cell phone plans, or equipment on behalf of his employer or in paying organization membership

dues or credentialing exam fees where relevant to the employer's business.

\* \* \* \* \*

(c) *Payments excluding expenses.* (1) It should be noted that only the actual or reasonably approximate amount of the expense is excludable from the regular rate. If the amount paid as "reimbursement" is disproportionately large, the excess amount will be included in the regular rate.

(2) A reimbursement amount for an employee traveling on his or her employer's business is per se reasonable, and not disproportionately large, if it:

(i) Is the same or less than the maximum reimbursement payment or per diem allowance permitted for the same type of expense under 41 CFR subtitle F (the Federal Travel Regulation System) or IRS guidance issued under 26 CFR 1.274-5(g) or (j); and

(ii) Otherwise meets the requirements of this section.

(3) Paragraph (c)(2) of this section creates no inference that a reimbursement for an employee traveling on his or her employer's business exceeding the amount permitted under 41 CFR subtitle F (the Federal Travel Regulation System) or IRS guidance issued under 26 CFR 1.274-5(g) or (j) is unreasonable for purposes of this section.

\* \* \* \* \*

■ 16. Amend § 778.218 by revising paragraphs (b) and (d) to read as follows:

**§ 778.218 Pay for certain idle hours.**

\* \* \* \* \*

(b) *Limitations on exclusion.* The provision of section 7(e)(2) of the Act deals with the type of absences which are infrequent or sporadic or unpredictable. It has no relation to regular "absences" such as regularly scheduled days of rest. Sundays may not be workdays in a particular establishment, but this does not make them either "holidays" or "vacations," or days on which the employee is absent because of the failure of the employer to provide sufficient work. The term holiday is read in its ordinary usage to refer to those days customarily observed in the community in celebration of some historical or religious occasion; it does not refer to days of rest given to employees in lieu of or as an addition to compensation for working on other days.

\* \* \* \* \*

(d) *Other similar cause.* The term "other similar cause" refers to payments made for periods of absence due to factors like holidays, vacations,

sickness, and failure of the employer to provide work. Examples of "similar causes" are absences due to jury service, reporting to a draft board, attending a funeral, inability to reach the workplace because of weather conditions, attending adoption or child custody hearings, attending school activities, donating organs or blood, voting, volunteering as a first responder, military leave, family medical leave, and nonroutine paid leave required under state or local laws. Only absences of a non-routine character which are infrequent or sporadic or unpredictable are included in the "other similar cause" category.

■ 17. Revise § 778.219 to read as follows:

**§ 778.219 Pay for forgoing holidays and unused leave.**

(a) *Sums payable whether employee works or not.* As explained in § 778.218, certain payments made to an employee for periods during which he performs no work because of a holiday, vacation, or illness are not required to be included in the regular rate because they are not regarded as compensation for working. When an employee who is entitled to such paid leave forgoes the use of leave and instead receives a payment that is the approximate equivalent to the employees' normal earnings for a similar period of working time, and is in addition to the employee's normal compensation for hours worked, the sum allocable to the forgone leave may be excluded from the regular rate. Such payments may be excluded whether paid out during the pay period in which the holiday or prescheduled leave is forgone or as a lump sum at a later point in time. Since it is not compensation for work, pay for unused leave may not be credited toward overtime compensation due under the Act. Four examples in which the maximum hours standard is 40 hours may serve to illustrate this principle:

(1) An employee whose rate of pay is \$12 an hour and who usually works a 6-day, 48-hour week is entitled, under his employment contract, to a week's paid vacation in the amount of his usual straight-time earnings—\$576. He forgoes his vacation and works 50 hours in the week in question. He is owed \$600 as his total straight-time earnings for the week, and \$576 in addition as his vacation pay. Under the statute he is owed an additional \$60 as overtime premium (additional half-time) for the 10 hours in excess of 40. His regular rate of \$12 per hour has not been increased by virtue of the payment of \$576 vacation pay, but no part of the \$576

may be offset against the statutory overtime compensation which is due. (Nothing in this example is intended to imply that the employee has a statutory right to \$576 or any other sum as vacation pay. This is a matter of private contract between the parties who may agree that vacation pay will be measured by straight-time earnings for any agreed number of hours or days, or by total normal or expected take-home pay for the period, or that no vacation pay at all will be paid. The example merely illustrates the proper method of computing overtime for an employee whose employment contract provides \$576 vacation pay.)

(2) An employee who is entitled under his employment contract to 8 hours' pay at his rate of \$12 an hour for the Christmas holiday, forgoes his holiday and works 9 hours on that day. During the entire week, he works a total of 50 hours. He is paid under his contract \$600 as straight-time compensation for 50 hours plus \$96 as idle holiday pay. He is owed, under the statute, an additional \$60 as overtime premium (additional half-time) for the 10 hours in excess of 40. His regular rate of \$12 per hour has not been increased by virtue of the holiday pay but no part of the \$96 holiday pay may be credited toward statutory overtime compensation due.

(3) An employee whose rate of pay is \$12 an hour and who usually works a 40-hour week is entitled to two weeks of paid time off per year per his or her employer's policies. The employee takes one week of paid time off during the year and is paid \$480 pursuant to employer policy for the one week of unused paid time off at the end of the year. The leave payout may be excluded from the employee's regular rate of pay, but no part of the payout may be credited toward statutory overtime compensation due.

(4) An employee is scheduled to work a set schedule of two 24-hour shifts on duty, followed by four 24-hour shifts off duty. This cycle repeats every six days. The employer recognizes ten holidays per year and provides employees with holiday pay for these days at amounts approximately equivalent to their normal earnings for a similar period of working time. Due to the cycle of the schedule, employees may be on duty during some recognized holidays and off duty during others, and due to the nature of their work, employees may be required to forgo a holiday if an emergency arises. In recognition of this fact, the employer provides the employees holiday pay regardless of whether the employee works on the holiday. If the employee works on the

holiday, the employee will receive his or her regular salary in addition to the holiday pay. In these circumstances, the sum allocable to the holiday pay may be excluded from the regular rate.

(b) *Premiums for holiday work distinguished.* The example in paragraph (a)(2) of this section should be distinguished from a situation in which an employee is entitled to idle holiday pay under the employment agreement only when he is actually idle on the holiday, and who, if he forgoes his holiday also, under his contract, forgoes his idle holiday pay.

(1) The typical situation is one in which an employee is entitled by contract to 8 hours' pay at his rate of \$12 an hour for certain named holidays when no work is performed. If, however, he is required to work on such days, he does not receive his idle holiday pay. Instead he receives a premium rate of \$18 (time and one-half) for each hour worked on the holiday. If he worked 9 hours on the holiday and a total of 50 hours for the week, he would be owed, under his contract, \$162 (9 × \$18) for the holiday work and \$492 for the other 41 hours worked in the week, a total of \$654. Under the statute (which does not require premium pay for a holiday) he is owed \$660 for a workweek of 50 hours at a rate of \$12 an hour. Since the holiday premium is one and one-half times the established rate for nonholiday work, it does not increase the regular rate because it qualifies as an overtime premium under section 7(e)(6), and the employer may credit it toward statutory overtime compensation due and need pay the employee only the additional sum of \$6 to meet the statutory requirements. (For a discussion of holiday premiums see § 778.203.)

(2) If all other conditions remained the same but the contract called for the payment of \$24 (double time) for each hour worked on the holiday, the employee would receive, under his contract \$216 (9 × \$24) for the holiday work in addition to \$492 for the other 41 hours worked, a total of \$708. Since this holiday premium is also an overtime premium under section 7(e)(6), it is excludable from the regular rate and the employer may credit it toward statutory overtime compensation due. Because the total thus paid exceeds the statutory requirements, no additional compensation is due under the Act. In distinguishing this situation from that in the example in paragraph (a)(2) of this section, it should be noted that the contract provisions in the two situations are different and result in the payment of different amounts. In the example in paragraph (a)(2) of this section, the

employee received a total of \$204 attributable to the holiday: 8 hours' idle holiday pay at \$12 an hour (8 × \$12), due him whether he worked or not, and \$108 pay at the nonholiday rate for 9 hours' work on the holiday. In the situation discussed in this paragraph (b)(2), the employee received \$216 pay for working on the holiday—double time for 9 hours of work. All of the pay in this situation is paid for and directly related to the number of hours worked on the holiday.

■ 18. Amend § 778.220 by revising paragraph (b) and adding paragraph (c) to read as follows:

**§ 778.220 “Show-up” or “reporting” pay.**

\* \* \* \* \*

(b) *Application illustrated.* To illustrate, assume that an employee entitled to overtime pay after 40 hours a week whose workweek begins on Monday and who is paid \$12 an hour reports for work on Monday according to schedule and is sent home after being given only 2 hours of work. He then works 8 hours each day on Tuesday through Saturday, inclusive, making a total of 42 hours for the week. The employment agreement covering the employees in the plant, who normally work 8 hours a day, Monday through Friday, provides that an employee reporting for scheduled work on any day will receive a minimum of 4 hours' work or pay. The employee thus receives not only the \$24 earned in the 2 hours of work on Monday but an extra 2 hours' “show-up” pay, or \$24 by reason of this agreement. However, since this \$24 in “show-up” pay is not regarded as compensation for hours worked, the employee's regular rate remains \$12 and the overtime requirements of the Act are satisfied if he receives, in addition to the \$504 straight-time pay for 42 hours and the \$24 “show-up” payment, the sum of \$12 as extra compensation for the 2 hours of overtime work on Saturday.

(c) *Show-up or reporting pay mandated by law.* State and local laws may mandate payments or penalties paid to an employee when, before or after reporting to work as scheduled, the employee is not provided with the expected amount of work. All such payments or penalties paid to employees that are mandated by such laws and that are not payments for hours worked by the employee are excludable from the regular rate if such penalties are paid or payments made on an infrequent or sporadic basis. They cannot be credited toward statutory overtime compensation due.

■ 19. Revise § 778.221 to read as follows:

**§ 778.221 “Call-back” pay.**

(a) *General.* Typically, “call-back” or “call-out” payments are made pursuant to agreement or established practice and consist of a specified number of hours' pay at the applicable straight time or overtime rates received by an employee on occasions when, after his scheduled hours of work have ended and without prearrangement, he responds to a call from his employer to perform extra work. The amount by which the specified number of hours' pay exceeds the compensation for hours actually worked is considered as a payment that is not made for hours worked. As such, it may be excluded from the computation of the employee's regular rate and cannot be credited toward statutory overtime compensation due the employee. Payments that are prearranged, however, may not be excluded from the regular rate. For example, if an employer retailer called in an employee to help clean up the store for 3 hours after an unexpected roof leak, and then again 3 weeks later for 2 hours to cover for a coworker who left work for a family emergency, payments for those instances would be without prearrangement and any call-back pay that exceeded the amount the employee would receive for the hours worked would be excludable. However, when payments under §§ 778.221 and 778.222 are prearranged, they are compensation for work. The key inquiry for determining prearrangement is whether the extra work was anticipated and therefore reasonably could have been scheduled. For example, if an employer restaurant anticipates needing extra servers for two hours during the busiest part of each Saturday evening and calls in employees to meet that need instead of scheduling additional servers, that would be prearrangement and any call-back pay would be included in the regular rate.

(b) *Application illustrated.* The application of the principles in paragraph (a) of this section to call-back payments may be illustrated as follows: An employment agreement provides a minimum of 3 hours' pay at time and one-half for any employee called back to work outside his scheduled hours. The employees covered by the agreement, who are entitled to overtime pay after 40 hours a week, normally work 8 hours each day, Monday through Friday, inclusive, in a workweek beginning on Monday, and are paid overtime compensation at time and one-half for all hours worked in excess of 8 in any day or 40 in any workweek. Assume

that an employee covered by this agreement and paid at the rate of \$12 an hour works 1 hour overtime or a total of 9 hours on Monday, and works 8 hours each on Tuesday through Friday, inclusive. After he has gone home on Friday evening, he is called back to perform an emergency job. His hours worked on the call total 2 hours and he receives 3 hours' pay at time and one-half, or \$54, under the call-back provision, in addition to \$480 for working his regular schedule and \$18 for overtime worked on Monday evening. In computing overtime compensation due this employee under the Act, the 43 actual hours (not 44) are counted as working time during the week. In addition to \$516 pay at the \$12 rate for all these hours, he has received under the agreement a premium of \$6 for the 1 overtime hour on Monday and of \$12 for the 2 hours of overtime work on the call, plus an extra sum of \$18 paid by reason of the provision for minimum call-back pay. For purposes of the Act, the extra premiums paid for actual hours of overtime work on Monday and on the Friday call (a total of \$18) may be excluded as true overtime premiums in computing his regular rate for the week and may be credited toward compensation due under the Act, but the extra \$18 received under the call-back provision is not regarded as paid for hours worked; thus, it may be excluded from the regular rate, but it cannot be credited toward overtime compensation due under the Act. The regular rate of the employee, therefore, remains \$12, and he has received an overtime premium of \$6 an hour for 3 overtime hours of work. This satisfies the requirements of section 7 of the Act. The same would be true, of course, if in the foregoing example, the employee was called back outside his scheduled hours for the 2-hour emergency job on another night of the week or on Saturday or Sunday, instead of on Friday night.

■ 20. Revise § 778.222 to read as follows:

**§ 778.222 Other payments similar to "call-back" pay.**

The principles discussed in § 778.221 are also applied with respect to certain types of extra payments which are similar to call-back pay. Payments are similar to call-back pay if they are extra payments, including payments made pursuant to state or local scheduling laws, to compensate an employee for working unanticipated or insufficiently scheduled hours or shifts. The extra payment, over and above the employee's earnings for the hours actually worked

at his applicable rate (straight time or overtime, as the case may be), is considered as a payment that is not made for hours worked. Payments that are prearranged, however, may not be excluded from the regular rate. Examples of payments similar to excludable call-back pay include:

(a) Extra payments made to employees for failure to give the employee sufficient notice to report for work on regular days of rest or during hours outside of his regular work schedule;

(b) Extra payments made solely because the employee has been called back to work before the expiration of a specified number of hours between shifts or tours of duty, sometimes referred to as a "rest period;"

(c) Pay mandated by state or local law for employees who are scheduled to work the end of one day's shift and the start of the next day's shift with fewer than the legally required number of hours between the shifts; and

(d) "Predictability pay" mandated by state or local law for employees who do not receive requisite notice of a schedule change.

■ 21. Revise § 778.223 to read as follows:

**§ 778.223 Pay for non-productive hours distinguished.**

(a) Under the Act an employee must be compensated for all hours worked. As a general rule the term "hours worked" will include:

(1) All time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed workplace; and

(2) All time during which an employee is suffered or permitted to work whether or not he is required to do so.

(b) Thus, working time is not limited to the hours spent in active productive labor, but includes time given by the employee to the employer even though part of the time may be spent in idleness. Some of the hours spent by employees, under certain

circumstances, in such activities as waiting for work, remaining "on call", traveling on the employer's business or to and from workplaces, and in meal periods and rest periods are regarded as working time and some are not. The governing principles are discussed in part 785 of this chapter (interpretative bulletin on "hours worked") and part 790 of this chapter (statement of effect of Portal-to-Portal Act of 1947). To the extent that these hours are regarded as working time, payment made as compensation for these hours obviously cannot be characterized as "payments not for hours worked." Such

compensation is treated in the same manner as compensation for any other working time and is, of course, included in the regular rate of pay. Where payment is ostensibly made as compensation for such of these hours as are not regarded as working time under the Act, the payment is nevertheless included in the regular rate of pay unless it qualifies for exclusion from the regular rate as one of a type of "payments made for occasional periods when no work is performed due to failure of the employer to provide sufficient work, or other similar cause" as discussed in § 778.218 or is excludable on some other basis under section 7(e)(2). For example, an employment contract may provide that employees who are assigned to take calls for specific periods will receive a payment of \$5 for each 8-hour period during which they are "on call" in addition to pay at their regular (or overtime) rate for hours actually spent in making calls. If the employees who are thus on call are not confined to their homes or to any particular place, but may come and go as they please, provided that they leave word where they may be reached, the hours spent "on call" are not considered as hours worked. Although the payment received by such employees for such "on call" time is, therefore, not allocable to any specific hours of work, it is clearly paid as compensation for performing a duty involved in the employee's job and is not of a type excludable under section 7(e)(2). The payment must therefore be included in the employee's regular rate in the same manner as any payment for services, such as an attendance bonus, which is not related to any specific hours of work. The principle in this paragraph (b) also applies when such "on call" pay is mandated by state or local law.

■ 21. Revise § 778.224 to read as follows:

**§ 778.224 "Other similar payments".**

(a) *General.* Sections 778.216 through 778.223 have enumerated and discussed the basic types of payments for which exclusion from the regular rate is specifically provided under section 7(e)(2) because they are not made as compensation for hours of work. Section 7(e)(2) also authorizes exclusion from the regular rate of other similar payments to an employee which are not made as compensation for his hours of employment. Such payments do not depend on hours worked, services rendered, job performance, or other criteria that depend on the quality or quantity of the employee's work. Conditions not dependent on the quality

or quality of work include a reasonable waiting period for eligibility, the requirement to repay benefits as a remedy for employee misconduct, and limiting eligibility on the basis of geographic location or job position. Since a variety of miscellaneous payments are paid by an employer to an employee under peculiar circumstances, it was not considered feasible to attempt to list them. They must, however, be “similar” in character to the payments specifically described in section 7(e)(2). It is clear that the clause was not intended to permit the exclusion from the regular rate of payments such as most bonuses or the furnishing of facilities like board and lodging which, though not directly attributable to any particular hours of work are, nevertheless, clearly understood to be compensation for services.

(b) *Examples of other excludable payments.* A few examples may serve to illustrate some of the types of payments intended to be excluded as “other similar payments”.

(1) Sums paid to an employee for the rental of his truck or car.

(2) Loans or advances made by the employer to the employee.

(3) The cost to the employer of conveniences furnished to the employee such as:

(i) Parking spaces and parking benefits;

(ii) Restrooms and lockers;

(iii) On-the-job medical care;

(iv) Treatment provided on-site from specialists such as chiropractors, massage therapists, physical therapists, personal trainers, counselors, or Employee Assistance Programs; or

(v) Gym access, gym memberships, fitness classes, and recreational facilities.

(4) The cost to the employer of providing wellness programs, such as health risk assessments, biometric

screenings, vaccination clinics (including annual flu vaccinations), nutrition classes, weight loss programs, smoking cessation programs, stress reduction programs, exercise programs, coaching to help employees meet health goals, financial wellness programs or financial counseling, and mental health wellness programs.

(5) Discounts on employer-provided retail goods and services, and tuition benefits (whether paid to an employee, an education provider, or a student loan program).

(6) Adoption assistance (including financial assistance, legal services, or information and referral services).

■ 22. Revise § 778.320 to read as follows:

**§ 778.320 Hours that would not be hours worked if not paid for.**

In some cases an agreement or established practice provides for compensation for hours spent in certain types of activities which would not be regarded as working time under the Act if no compensation were provided. Preliminary and postliminary activities and time spent in eating meals between working hours fall in this category. Compensation for such hours does not convert them into hours worked unless it appears from all the pertinent facts that the parties have treated such time as hours worked. Except for certain activity governed by the Portal-to-Portal Act (see paragraph (b) of this section), the agreement or established practice of the parties will be respected, if reasonable.

(a) *Time treated as hours worked.* Where the parties have reasonably agreed to include as hours worked time devoted to activities of the type described in the introductory text of this section, payments for such hours will not have the mathematical effect of increasing or decreasing the regular rate

of an employee if the hours are compensated at the same rate as other working hours. The requirements of section 7(a) of the Act will be considered to be met where overtime compensation at one and one-half times such rate is paid for the hours so compensated in the workweek which are in excess of the statutory maximum.

(b) *Time not treated as hours worked.* Under the principles set forth in § 778.319, where the payments are made for time spent in an activity which, if compensable under contract, custom, or practice, is required to be counted as hours worked under the Act by virtue of section 4 of the Portal-to-Portal Act of 1947 (see parts 785 and 790 of this chapter), no agreement by the parties to exclude such compensable time from hours worked would be valid. On the other hand, in the case of time spent in an activity which would not be hours worked under the Act if not compensated and would not become hours worked under the Portal-to-Portal Act even if made compensable by contract, custom, or practice, such time will not be counted as hours worked unless agreement or established practice indicates that the parties have treated the time as hours worked. Such time includes bona fide meal periods, see § 785.19. Unless it appears from all the pertinent facts that the parties have treated such activities as hours worked, payments for such time will be regarded as qualifying for exclusion from the regular rate under the provisions of section 7(e)(2), as explained in §§ 778.216 through 778.224. The payments for such hours cannot, of course, qualify as overtime premiums creditable toward overtime compensation under section 7(h) of the Act.

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Part IV

The President

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Executive Order 13899—Combating Anti-Semitism



# Presidential Documents

## Title 3—

## Executive Order 13899 of December 11, 2019

### The President

### Combating Anti-Semitism

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

**Section 1. Policy.** My Administration is committed to combating the rise of anti-Semitism and anti-Semitic incidents in the United States and around the world. Anti-Semitic incidents have increased since 2013, and students, in particular, continue to face anti-Semitic harassment in schools and on university and college campuses.

Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. 2000d *et seq.*, prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving Federal financial assistance. While Title VI does not cover discrimination based on religion, individuals who face discrimination on the basis of race, color, or national origin do not lose protection under Title VI for also being a member of a group that shares common religious practices. Discrimination against Jews may give rise to a Title VI violation when the discrimination is based on an individual's race, color, or national origin.

It shall be the policy of the executive branch to enforce Title VI against prohibited forms of discrimination rooted in anti-Semitism as vigorously as against all other forms of discrimination prohibited by Title VI.

**Sec. 2. Ensuring Robust Enforcement of Title VI.** (a) In enforcing Title VI, and identifying evidence of discrimination based on race, color, or national origin, all executive departments and agencies (agencies) charged with enforcing Title VI shall consider the following:

(i) the non-legally binding working definition of anti-Semitism adopted on May 26, 2016, by the International Holocaust Remembrance Alliance (IHRA), which states, “Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities”; and

(ii) the “Contemporary Examples of Anti-Semitism” identified by the IHRA, to the extent that any examples might be useful as evidence of discriminatory intent.

(b) In considering the materials described in subsections (a)(i) and (a)(ii) of this section, agencies shall not diminish or infringe upon any right protected under Federal law or under the First Amendment. As with all other Title VI complaints, the inquiry into whether a particular act constitutes discrimination prohibited by Title VI will require a detailed analysis of the allegations.

**Sec. 3. Additional Authorities Prohibiting Anti-Semitic Discrimination.** Within 120 days of the date of this order, the head of each agency charged with enforcing Title VI shall submit a report to the President, through the Assistant to the President for Domestic Policy, identifying additional nondiscrimination authorities within its enforcement authority with respect to which the IHRA definition of anti-Semitism could be considered.

**Sec. 4. Rule of Construction.** Nothing in this order shall be construed to alter the evidentiary requirements pursuant to which an agency makes a determination that conduct, including harassment, amounts to actionable

discrimination, or to diminish or infringe upon the rights protected under any other provision of law.

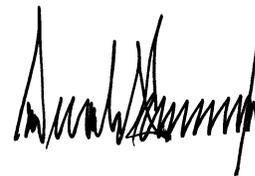
**Sec. 5. General Provisions.** (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

A handwritten signature in black ink, appearing to be Donald Trump, located on the right side of the page.

THE WHITE HOUSE,  
*December 11, 2019.*

# Reader Aids

Federal Register

Vol. 84, No. 241

Monday, December 16, 2019

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